TEXAS REGISTER

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Annaliese M. Fisher

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.

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Open Meetings

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

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

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

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

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

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

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

Additional information about state government may be found here:
http://www.state.tx.us/

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

THE GOVERNOR

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

Appointments

Appointments for October 8, 2008

Appointed to the Texas Lottery Commission for a term to expire February 1, 2011, Mary Ann Williamson of Weatherford (replacing Fernando Reyes of San Antonio who resigned).

Appointed to the Texas Ethics Commission for a term to expire November 19, 2011, Raymond R. "Tripp" Davenport, III of Southlake (Mr. Davenport is being reappointed).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2009, Sarah E. Kirksey of Beaumont (Ms. Kirksey is being reappointed).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2009, Brian L. Padden of Austin (Mr. Padden is being reappointed).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2010, Susan R. Johnson of Austin (Ms. Johnson is being reappointed).

Appointed to the On-Site Wastewater Treatment Research Council for a term to expire September 1, 2010, Janet R. Boone of North Zulch (Ms. Boone is being reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2009, Larry D. Kokel of Walburg (Mr. Kokel is being reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2009, James B. Ratliff of Garland (Mr. Ratliff is being reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2009, Donna L. Walz of Lubbock (replacing Malcolm Deason of Lufkin whose term expired).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2010, Bill F. Schneider of Austin (replacing Elroy Carson of Lubbock whose term expired).

Appointments for October 10, 2008

Appointed to the Manufactured Housing Board for a term to expire January 31, 2013, Donnie W. Wisenbaker of Sulphur Springs (replacing Carlos Amaral of Plano whose term expired).

Rick Perry, Governor

TRD-200805429

♦ ♦ ♦

Proclamation 41-3166

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, did issue an Emergency Disaster Proclamation on September 8, 2008, as Hurricane Ike posed a threat of imminent disaster along the Texas Coast and in specified counties in Texas.

WHEREAS, Hurricane Ike struck the State of Texas on September 13, 2008, causing substantial destruction in South and East Texas;

WHEREAS, Hurricane Ike continues to create a state of disaster for the people in the State of Texas.

WHEREAS, the state of disaster includes the counties of Anderson, Angelina, Aransas, Archer, Austin, Bell, Bexar, Bowie, Brazoria, Brazos, Burleson, Calhoun, Cass, Chambers, Cherokee, Collin, Colorado, Comal, Coryell, Dallas, Denton, Ellis, El Paso, Fort Bend, Franklin, Freestone, Galveston, Grayson, Gregg, Grimes, Hardin, Harris, Harrison, Henderson, Hill, Hopkins, Houston, Hunt, Jackson, Jasper, Jefferson, Johnson, Kaufman, Lamar, Lavaca, Leon, Liberty, Limestone, Lubbock, Madison, Marion, Matagorda, McLennan, Milam, Montgomery, Nacogdoches, Navarro, Newton, Nueces, Orange, Panola, Parker, Polk, Potter, Randall, Robertson, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Tarrant, Titus, Tom Green, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Waller, Walker, Washington, Webb, Wharton, Williamson, Wise and Wood.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation and direct that all necessary measures, both public and private as authorized under Section 418.017 of the code, be implemented to meet that disaster.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the incident.

The renewal of the disaster proclamation becomes effective on October 8, 2008, and shall remain in effect until November 6, 2008, unless renewed or terminated.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 7th day of October, 2008.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-200805430

♦ ♦ ♦

THE ATTORNEY GENERAL

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

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

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

Opinions

Opinion No. GA-0669

The Honorable Jeff Wentworth

Chair, Committee on Jurisprudence

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether the "radio station" exception to section 552.275, Government Code, applies to a person who holds an amateur radio license issued by the Federal Communications Commission (RQ-0698-GA)

S U M M A R Y

The "radio station" exception to section 552.275 of the Government Code encompasses a person who holds an amateur radio station license issued by the Federal Communications Commission.

Opinion No. GA-0670

The Honorable Richard J. Miller

Bell County Attorney

Post Office Box 1127

Belton, Texas 76513

Re: Constitutionality of sections 143.088 and 143.1041, Local Government Code (RQ-0699-GA)

S U M M A R Y

Though article III, section 56, Texas Constitution, prohibits the Legislature from passing any local or special law regulating the affairs of cities, the Legislature nonetheless has broad powers to make classifications for legislative purposes and to enact laws pertaining to the classification. The primary consideration under article III, section 56, is whether there is a reasonable basis for the classification made by the law related to the purpose of the law.

Sections 143.088 and 143.1041, which pertain to civil service exam requirements and limitations on civil service retirement, respectively, apply only to municipalities with a population of 1.5 million or more, currently the City of Houston. Such a population classification is not unconstitutional where there is a basis for the population bracket that is reasonably related to the object of the statute.

Given the presumption of constitutionality of statutes as well as the presumption that a state of facts exists to justify a legislative classification, we cannot conclude as a matter of law that these two provisions are local or special laws prohibited by article III, section 56.

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

TRD-200805449
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: October 15, 2008

♦ ♦ ♦

TEXAS ETHICS COMMISSION

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

Ethics Advisory Opinion

EAO-482. The Texas Ethics Commission has been asked to consider whether the expenditure restrictions for transportation and lodging in Chapter 305 of the Government Code apply in a situation in which prepayment is made for the transportation and lodging. (AOR-545)

SUMMARY

The provision of transportation and lodging does not constitute an expenditure for purposes of Chapter 305 of the Government Code if prepayment in full is made by the recipient to the person providing the transportation and lodging. The fair market value is the standard for determining the amount of prepayment and any reasonable method for determining the fair market value must factor in the value of equivalent transportation and lodging in an arm's length transaction.

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

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

TRD-200805426
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: October 14, 2008

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER P. DIAPREPES ROOT WEEVIL QUARANTINE

4 TAC §19.161

The Texas Department of Agriculture (the department) adopts on an emergency basis, an amendment to §19.161 in order to expand the quarantined area for the Diaprepes root weevil, *Diaprepes abbreviatus* (L). An observant grove care manager alerted the Texas A&M University Kingsville Citrus Center scientists about declining citrus trees in a 3-acre grapefruit grove near Bayview, Texas. During September 31, 2008 - October 1, 2008, the scientists discovered seven larvae and four adults of the Diaprepes root weevil during examination of the citrus trees at this grove. In addition, one Diaprepes root weevil adult was discovered on October 2, in a trap deployed in the adjoining 4-acre grapefruit grove. Since detection of the Diaprepes root weevil in 2001 at McAllen, Texas, the department has established a quarantine surrounding the detection to prevent spread of this pest to other areas of Texas and facilitate eradication. The Bayview detection is approximately 46 miles from the initial detection at McAllen and the origin of the former infestation remains unknown. The amended section is adopted on an emergency basis to prevent further spread of the Diaprepes root weevil and facilitate its eradication.

The department believes that it is necessary to take this immediate action to prevent the spread of the Diaprepes root weevil into the nearby citrus groves and nurseries and in other citrus and nursery growing areas of Texas, and that the adoption of this amended section on an emergency basis is both necessary and appropriate. There is an imminent peril to the citrus and nursery industries because without this emergency amendment and treatment of the infestation, other states will most likely quarantine Texas. As a result, Texas could lose important export markets and would require regulatory treatments to export nursery stock, resulting in increased production costs to producers. In addition, citrus producers will be faced with the added control cost and the losses caused by this pest. The amended section enhances chances for a successful eradication since it prevents artificial spread of the quarantined pest and provides for its elimination, thus protecting the industry.

Amended §19.161 expands the quarantined area in correspondence with the detection of the Diaprepes root weevils outside the current quarantined area. The department may propose adoption of this rule amendment on a permanent basis in a separate submission.

The amended section is adopted on an emergency basis under the Texas Agriculture Code, §71.004, which provides the Texas Department of Agriculture with the authority to establish emergency quarantines; §71.007 which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances; and the Texas Government Code, §2001.034, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§19.161. Quarantined Areas.

The quarantined areas are:

(1) Within Texas:

(A) the citrus grove located in Hidalgo County, McAllen, Texas, 0.20 miles West of the intersection of Hobbs Drive and North 2nd Street and the area within approximately 300 yards surrounding the grove in all directions; the property located at 9601 N. 10th Street, Unit 1-11, Hidalgo County, McAllen, Texas and the surrounding area within approximately 300 yards in all directions, including the citrus grove, comprised of approximately 20 acres, located south of the Timberhill Mobile Park; [~~and~~] the property located at 3539 Plaza del Lagos, Hidaldo County, Edinburg, Texas and the surrounding area within approximately 300 yards in all directions; and the two adjoining citrus groves located south of the intersection of the Calle Conejo and Chachalaca Drive in Cameron County, Bayview, Texas, and the area within approximately 300 yards surrounding the groves in all directions; and

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

(2) (No change.)

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805396
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective Date: October 13, 2008
Expiration Date: February 9, 2009
For further information, please call: (512) 463-4075

♦ ♦ ♦

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 §15.19

The General Land Office (GLO) adopts, on an emergency basis, new §15.19, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures in Response to Hurricane Ike Relating to Utilities and Ground Level Enclosures. Hurricane Ike hit the upper Texas coast on September 13, 2008, as a strong Category 2 hurricane, preceded by extremely high water, including storm surge and battering waves. The wind and water impacts of Ike on coastal Brazoria County, Galveston Island, and Bolivar Peninsula were catastrophic. The General Land Office recognizes that all jurisdictions within Nueces, Matagorda, Brazoria, and Galveston Counties with Dune Protection and Beach Access Plans may have areas where residential structures and public infrastructure need emergency stabilization and repair and where emergency hazard mitigation measures are needed to reestablish the protective barrier provided by the beach and natural dunes damaged or destroyed by storm tidal surges in order to prevent imminent peril to the public health, safety, and welfare. The storm's widespread impact has created an extraordinary amount of debris both on land and in the coastal waters. The post-storm recovery has just begun, and the GLO has determined that issues relating to the imminent health, safety, and welfare of the local residents require the issuance of this new §15.19. The destruction of infrastructure has made public utilities unavailable to many areas with restoration of services expected to take months. Moreover, the reconnection of residential structures to utilities is a matter that should be handled at the sole discretion of the local government and utility providers. In addition, the urgent need for property owners to be able to store items of value on the ground level of damaged houses creates an imminent peril to the safety and security of personal property and the need for this new §15.19 to permit enclosing areas below houses in certain instances.

In anticipation of imminent landfall of Hurricane Ike, on September 12, 2008 the GLO issued new §15.17, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures, and new §15.18, concerning Emergency Measures for Dune Restoration and Existing Shore Protection Projects. Those emergency rules addressed the need of emergency stabilization and repair to protect property and the need for emergency hazard mitigation measures to reestablish the protective barrier provided by the beach and natural dunes damaged or destroyed by storm tidal surges in order to prevent imminent peril to the public health, safety, and welfare.

The City of Galveston, one of the local areas most heavily damaged by Hurricane Ike, has recently begun to consider permit applications for repairs under emergency §15.17 and §15.18. The post-storm situation is dire because of the extensive damage to houses and infrastructure, steep losses in elevation, and the enormous debris fields all over the island. The City has become concerned that property owners may mistakenly believe that emergency §15.17 creates an obligation for the local government to provide public utilities without regard to the location or condition of the house or the ability of the community to provide such services. In this emergency new §15.19, the GLO modifies the provisions of emergency §15.17 to provide that the phrase "emergency stabilization and repair" does not include reconnection to utilities. The City of Galveston has also recognized an urgent need for property owners to enclose areas below the house with breakaway walls to protect and secure personal property. The GLO has determined that this construction is permissible under these circumstances because of the difficult recovery situation in the affected jurisdictions after Hurricane Ike.

Emergency §15.19 provides that "emergency stabilization and repair" does not include reconnection to utilities. It also provides that "emergency stabilization and repair" does include enclosing an area below the house if the house's foundation is intact. The section shall be effective for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare. Section 15.19(c) authorizes the local jurisdiction to issue permits for emergency stabilization and repair and to determine the appropriate procedures for such permitting to the extent necessary to eliminate health, safety, and welfare hazards. Section 15.19(d) provides the "emergency stabilization and repair" does not include reconnecting a house to utilities. Section 15.19(d) also provides that reconnection to utilities may be made as permitted under other applicable law or local ordinances. Section 15.19(e) provides that "emergency stabilization and repair" does include construction or repair of an enclosed space under the house in accordance with local requirements if the house's foundation is intact. Section 15.19(f) provides that all other provisions of emergency §15.17, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures apply to authorizations issued under this section, except as modified by subsections (d) and (e) pertaining to utilities and enclosures.

The General Land Office has determined that a takings impact assessment, pursuant to §2007.043 of the Texas Government Code, is not required for the adoption of this emergency rule because the rule is adopted in response to a real and substantial threat to public health, safety, and welfare.

The new section is adopted on an emergency basis under the Texas Natural Resources Code §§63.121, 61.011, and 61.015(b), which provide the GLO with the authority to: identify and protect critical dune areas; preserve and enhance the public's right to use and have access to and from Texas' public beaches; protect the public easement from erosion or reduction caused by development or other activities on adjacent land; and other measures needed to mitigate for adverse effects on access to public beaches and the beach/dune system. The new section is also adopted on an emergency basis pursuant to the Texas Natural Resources Code §33.602, which provides the GLO with the authority to adopt rules on erosion, and the Texas Water Code §16.321, which provides the GLO with the authority to adopt rules on coastal flood protection. Finally, the new section is adopted on an emergency basis pursuant to Texas Government Code §2001.034, which authorizes the adoption of a rule on an emergency basis without prior notice and comment based upon a determination of imminent peril to the public health, safety or welfare.

§15.19. Emergency Provisions for Stabilization and Repair of Damaged Residential Structures in Response to Hurricane Ike Relating to Utilities and Ground Level Enclosures.

(a) Purpose. The purpose of this section is to allow the local governments to which this rule applies to grant to a property owner the ability to undertake emergency stabilization and repair of a residential structure damaged as the result of Hurricane Ike.

(b) Applicability. This section applies only to structures located in all local jurisdictions with local dune protection and beach access plans within the Counties of Nueces, Matagorda, Brazoria, and Galveston. This section shall be in effect for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare.

(c) Local government authorization. The local government may, in accordance with this section, authorize emergency stabilization and repair of a residential structure damaged by Hurricane Ike. All authorizations issued under this section must otherwise be in accordance with applicable state and local law. The local government is responsible for assessing damage to such structures, determining whether the structures are eligible for approval of emergency stabilization and repair, and determining appropriate emergency stabilization and repair procedures. Under this section, the local government may only authorize emergency stabilization and repair as necessary to eliminate the danger and threat to public health, safety, and welfare. Except as provided in subsections (d) and (e) of this section, any proposed stabilization and repair method or technique must comply with the standards provided in the emergency rule issued September 12, 2008, §15.17 of this title (relating to Emergency Provisions for Stabilization and Repair of Damaged Residential Structures) and §15.6(e) and (f) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards) or §15.11 of this title (relating to Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach).

(d) "Emergency stabilization and repair" does not include reconnecting the house to utilities such as sewer, water, and electricity. Reconnection to such utilities may be made in accordance with other applicable law or local ordinances.

(e) "Emergency stabilization and repair" does include construction or repair of an enclosed space with breakaway or louvered walls at ground level that is consistent with the local dune protection and beach access plan and National Flood Insurance Program, provided that the foundation of the structure is intact.

(f) Except as provided in subsections (d) and (e) of this section, all other provisions of §15.17 of this title apply to authorizations issued under this section.

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

Filed with the Office of the Secretary of State on October 7, 2008.

TRD-200805321
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective Date: October 7, 2008
Expiration Date: February 3, 2009
For further information, please call: (512) 475-1859

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31 TAC §15.20

The General Land Office (GLO) adopts, on an emergency basis, new §15.20, concerning Emergency Provision for Stabilization and Repair of Damaged Residential Structures and to Protect Public Infrastructure in Response to Hurricane Ike Relating to the Use of Clay Fill. Hurricane Ike hit the upper Texas coast on September 13, 2008, as a strong Category 2 hurricane, preceded by extremely high water, including storm surge and battering waves. The wind and water impacts of Ike on coastal Brazoria County, Galveston Island, and Bolivar Peninsula were catastrophic. The GLO recognizes that all jurisdictions within Nueces, Matagorda, Brazoria, and Galveston Counties with Dune Protection and Beach Access Plans may have areas where residential structures and public infrastructure need emergency stabilization and repair.

The tidal surge associated with Ike washed away sand that supported pilings for residential structures. The lack of sand under the residential structures may destabilize them and create an imminent danger that the houses may pose a threat to public safety. The tidal surge also created voids and gullies that pose physical hazards to the community and threaten the stability of certain public infrastructure. Property owners and local governments have an urgent need to fill the areas where sand was washed away. Beach quality sand is normally required for filling activities on the beach. But beach quality sand in critically short supply in the areas affected by Hurricane Ike. Therefore, allowing the limited use of clay or sandy clay fill is necessary to address an imminent threat to public health, welfare, and safety.

In anticipation of imminent landfall of Hurricane Ike, on September 12, 2008 the GLO issued emergency new §15.17, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures, and emergency new §15.18, concerning Emergency Measures for Beach and Dune Restoration and Existing Shore Protection Projects. Those emergency rules addressed the need of emergency stabilization and repair to protect property and the need for emergency hazard mitigation measures to reestablish the protective barrier provided by the beach and natural dunes damaged or destroyed by storm tidal surges in order to prevent imminent peril to the public health, safety, and welfare.

On October 7, 2008, the GLO issued new §15.19, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures in Response to Hurricane Ike Relating to Utilities and Ground Level Enclosures. That emergency measure provided that connection to utilities is not an emergency repair and that ground level enclosures could be repaired with breakaway or louvered walls. Both provisions were necessary to prevent an imminent threat to public health, safety and welfare in light of the extraordinary amount of damage and debris left in Ike's wake.

Emergency new §15.20 provides that local governments can authorize as "emergency stabilization and repair" the use of clay or sandy clay fill under the footprint of a residential structure. It also provides that clay or sandy clay fill may be used outside the footprint to restore a natural angle of repose with the fill under the house, but such fill must not extend more than five feet beyond the footprint of the structure. Beach quality sand must be used for additional fill outside the footprint of the structure and the perimeter area up to five feet. It also provides that local governments may authorize the use of clay or sandy clay fill to protect public infrastructure. In the case of residential structures and public infrastructure, any clay or sandy clay used must be covered with beach quality sand, where practicable, to a depth of at least 12 inches. The section shall be effective for 120 days from the date of filing with the Office of the Secretary of State

and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare. Section 15.20(c) authorizes the local jurisdiction to issue permits for emergency stabilization and repair and to determine the appropriate procedures for such permitting to the extent necessary to eliminate health, safety, and welfare hazards. Section 15.20(d) provides the "emergency stabilization and repair" does include the use of clay or sandy clay material to fill voids under within the footprint of a residential structure and outside the footprint to restore a natural angle of repose, but not more than five feet beyond the footprint. Such fill must be covered by beach quality sand, where practicable, to a depth of at least 12 inches. Section 15.20(e) gives the local government the authority to permit the use of clay or sandy clay material to fill voids to protect public infrastructure. Such fill must be covered by beach quality sand, where practicable, to a depth of at least 12 inches. Section 15.20(f) provides that all other provisions of emergency §15.17, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures apply to authorizations issued under this section, except as modified by subsections (d) and (e) pertaining to the use of clay fill.

The GLO has determined that a takings impact assessment, pursuant to §2007.043 of the Texas Government Code, is not required for the adoption of this emergency rule because the rule is adopted in response to a real and substantial threat to public health, safety, and welfare.

The new section is adopted on an emergency basis under the Texas Natural Resources Code §§63.121, 61.011, and 61.015(b), which provide the GLO with the authority to: identify and protect critical dune areas; preserve and enhance the public's right to use and have access to and from Texas's public beaches; protect the public easement from erosion or reduction caused by development or other activities on adjacent land; and other measures needed to mitigate for adverse effects on access to public beaches and the beach/dune system. The new section is also adopted on an emergency basis pursuant to the Texas Natural Resources Code §33.602, which provides the GLO with the authority to adopt rules on erosion, and the Texas Water Code §16.321, which provides the GLO with the authority to adopt rules on coastal flood protection. Finally, the new section is adopted on an emergency basis pursuant to Texas Government Code §2001.034, which authorizes the adoption of a rule on an emergency basis without prior notice and comment based upon a determination of imminent peril to the public health, safety or welfare.

§15.20. Emergency Provision for Stabilization and Repair of Damaged Residential Structures and to Protect Public Infrastructure in Response to Hurricane Ike Relating to the Use of Clay Fill.

(a) Purpose. The purpose of this section is to provide guidelines for the local governments under which they may authorize a property owner to utilize clay or sandy clay for the purpose of emergency stabilization and repair of a residential structure or to authorize such fill to protect public infrastructure damaged as the result of Hurricane Ike.

(b) Applicability. This section applies only to structures and public infrastructure located in all local jurisdictions with local dune protection and beach access plans within the Counties of Nueces, Matagorda, Brazoria, and Galveston. This section shall be in effect for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare.

(c) Local government authorization. The local government may, in accordance with this section, authorize emergency stabilization and repair of a residential structure and to protect public infrastructure damaged by Hurricane Ike. All authorizations issued under this section must otherwise be in accordance with applicable state and local law. The local government is responsible for assessing damage to residential structures, determining whether the structures are eligible for approval of emergency stabilization and repair, and determining appropriate emergency stabilization and repair procedures. Under this section, the local government may only authorize emergency stabilization and repair as necessary to eliminate the danger and threat to public health, safety, and welfare. Except as provided in subsections (d) and (e) of this section, any proposed stabilization and repair method or technique must comply with the standards provided in the emergency rule issued September 12, 2008, §15.17 of this title (relating to Emergency Provisions for Stabilization and Repair of Damaged Residential Structures), or October 7, 2008, §15.19 of this title (relating to Emergency Provisions for Stabilization and Repair of Damaged Residential Structures in Response to Hurricane Ike Relating to Utilities and Ground Level Enclosures), or §15.11(f) of this title (relating to Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach).

(d) "Emergency stabilization and repair" does include the use of clay or sandy clay to fill voids under the footprint of a residential structure seaward of the line of vegetation and beyond the footprint to the extent necessary to restore a natural angle of repose up to a distance of not more than five feet from the structure's footprint; provided, however, that clay or sandy clay used for this purpose must be covered with beach quality sand, where practicable, to a depth of at least 12 inches.

(e) Local governments may authorize the use of clay or sandy clay to fill voids in order to protect public infrastructure; provided, however, that clay or sandy clay sand used for this purpose must be covered with beach quality sand, where practicable, to a depth of at least 12 inches.

(f) Except as provided in subsections (d) and (e) of this section, all other provisions of §15.17 of this title, apply to authorizations issued under this section.

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

Filed with the Office of the Secretary of State on October 8, 2008.

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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective Date: October 8, 2008
Expiration Date: February 4, 2009
For further information, please call: (512) 475-1859

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PROPOSED RULES

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 355. REIMBURSEMENT RATES

SUBCHAPTER E. COMMUNITY CARE FOR AGED AND DISABLED

1 TAC §355.509

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.509, Reimbursement Methodology for Residential Care Program, under Title 1, Part 15, Chapter 355, Subchapter E.

Background and Justification

This rule establishes the reimbursement methodology for the Residential Care (RC) program. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule to add a condition under which a provider may be excused from submitting a cost report. The proposed amendment revises §355.509(b)(3) to excuse a RC provider from submitting a cost report if the provider's total number of Residential Care billable days of service is 366 or fewer during the provider's fiscal year. This new condition will mirror a condition currently included in the Community Based Alternatives Assisted Living/Residential Care (CBA AL/RC) Reimbursement Methodology rules.

Many providers hold both RC and CBA AL/RC contracts and submit their cost information on a combined RC and CBA AL/RC cost report. Currently providers of CBA AL/RC services are excused from submitting a cost report to HHSC Rate Analysis if the provider's total number of CBA AL/RC billable days serving residents is 366 or fewer during the provider's fiscal year. Providers of RC services in similar circumstances are not excused. This inconsistency causes confusion among providers holding both RC and CBA AL/RC contracts. The amendment will eliminate this confusion by standardizing cost reporting requirements across both programs.

Section-by-Section Summary

The amendment revises §355.509(b)(3) to indicate that an RC provider may be excused from submitting a cost report if the provider's total number of days serving Residential Care residents is 366 or fewer during the provider's fiscal year.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that there will not be a fiscal impact to state government during the first five-year period the amended rule is in effect. The proposed rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-Business Impact Analysis

HHSC has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of the proposed rule amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the expected public benefit is that providers holding both RC and CBA AL/RC contracts will have a clearer understanding of their cost report submission requirements.

Takings Impact Assessment

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

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 risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Written comments on the proposal may be submitted to Luis Morales in the Rate Analysis Division, Texas Health and Human Services Commission, by facsimile at (512) 491-1998, by e-mail at luis.morales@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of

HHSC to adopt rules necessary to carry out the commission's duties; and Texas Government Code §531.055, which authorizes the executive commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.509. Reimbursement Methodology for Residential Care.

(a) (No change.)

(b) Cost reporting.

(1) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) All contracted providers must submit a cost report unless the number of days between the date the first client received services and the provider's fiscal year end is 30 days or fewer.

(3) The provider may be excused from submitting a cost report if circumstances beyond the control of the provider make cost report completion impossible, such as the loss of records due to natural disasters or removal of records from the provider's custody by any regulatory agency. A Residential Care provider may also be excused from submitting a cost report if the provider's total number of Residential Care billable days of service is 366 or fewer in the provider's fiscal year. Requests to be excused from submitting a cost report must be received by the Texas Health and Human Services Commission's (HHSC) Rate Analysis department before the due date of the cost report.

(c) - (g) (No change.)

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805387
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 424-6900

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SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8052

The Texas Health and Human Services Commission (HHSC) proposes an amendment to 1 TAC §355.8052, to make implementation of the fiscal year 2009 rebased payment division standard dollar amounts (PDSDAs) contingent on the availability of state funds for that purpose and federal approval of the Medicaid reform waiver.

Background and Justification

During the 80th Legislative Session, HHSC received guidance from state leadership that the implementation of the rebasing initiative described in the General Appropriations Act for the 2008-2009 Biennium, Article II, Special Provisions Relating to All Health and Human Services Agencies, §57(c), would be contingent on the approval of the Medicaid reform waiver authorized in Senate Bill 10 (80th Legislature, Regular Session, Chapter 268, §7 (2007). HHSC submitted the Medicaid reform waiver request to the Centers for Medicare and Medicaid Services (CMS) in April 2008.

When HHSC adopted new §355.8052 in the August 8, 2008, *Texas Register* (33 TexReg 6362), HHSC anticipated receiving guidance from CMS in the near future in relation to the Medicaid reform waiver request. Based on preliminary information from CMS, however, the final decision on federal approval of the Medicaid reform waiver may not be made before the current rebasing project is finished.

Therefore, HHSC is amending §355.8052 to add contingency language to stop the current hospital rebasing project if HHSC does not receive federal approval of the Medicaid reform waiver or HHSC does not implement the waiver. If the Medicaid reform waiver is not approved or implemented or funds are not available for rebasing, hospitals will continue to be paid based on the rates in effect on August 31, 2008.

Section-by-Section Summary

Revised §355.8052(a) deletes the reference to rebased rates for payments beginning in Fiscal Year (FY) 2009.

Revised §355.8052(d) adds language that makes the rebasing of hospital PDSDAs for payments beginning in FY 2009 contingent on the availability of funds for that purpose and HHSC's receipt of federal approval of the Medicaid reform waiver. If the Medicaid reform waiver is denied, if HHSC does not implement the waiver, or if HHSC receives waiver approval from CMS after the end of state fiscal year 2009 (August 31, 2009), the implementation of the PDSDA rebasing will be contingent on new legislative appropriations for FY 2010 and FY 2011 for the purpose of rebasing inpatient hospital rates.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed rule is in effect there will be a fiscal impact to state government of $0 for state fiscal year (SFY) 2009; $0 for SFY 2010; $0 for SFY 2011; $0 for SFY 2012; and $0 for SFY 2013. The fiscal impact of the rebasing initiative was published in the original adoption of §355.8052 and is reflected in the August 8, 2008, issue of the *Texas Register* (33 TexReg 6362). The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro businesses to comply with the proposal, as they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each year of the first five years the proposed rule is in effect, the public will benefit from the adoption of the amendment. The anticipated public benefit, as a result of enforcing the amendment, will be to provide a more accurate description of the agency's actions surrounding the rebasing initiative.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Chris Dockal, Rate Analyst in the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax (512) 491-1983 or by e-mail at mail to: Chris.Dockal@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed rule affects Human Resources Code, Chapter 32, and Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8052. Inpatient Hospital Reimbursement.

(a) Application and general reimbursement method.

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

(3) HHSC will send a hospital an initial notification letter describing the hospital-specific and payment division standard dollar amounts, determined in subsection (d) of this section. HHSC will send a hospital a final notification letter reporting the payment division standard dollar amount, adjusted as described in subsection (d)(2) of this section, to be used in calculating the hospital's reimbursements [~~to be paid for admissions beginning in FY 2009~~].

(4) (No change.)

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

(d) Payment Division Standard Dollar Amount (PDSDA).

(1) Recalculation of PDSDAs.

(A) HHSC will recalculate PDSDAs for payments in FY 2009 unless:

(i) HHSC's application for the Medicaid reform waiver authorized under Senate Bill 10 (80th Legislature, Regular Session, Chapter 268, §7 (2007) does not receive federal approval;

(ii) HHSC does not implement the Medicaid reform waiver authorized under Senate Bill 10 (80th Legislature, Regular Session, Chapter 268, §7 (2007); or,

(iii) Funds are not available for the purpose of recalculating PDSDAs.

(B) [~~(i)~~] HHSC recalculates PDSDAs for payments in FY 2009 using FY 2006 base year claims. HHSC will not include claims that are adjudicated and approved for payment after the base year and subsequent six-month grace period. The six-month grace period is intended to allow inclusion of as many base year claims as possible, given practical time constraints.

(2) Adjustment of PDSDAs.

(A) (No change.)

(B) If HHSC recalculates PDSDAs for payments in FY 2009 [~~For rates taking effect on September 1, 2008~~], HHSC will:

(i) Adjust PDSDAs pro rata among hospitals to available funds;

(ii) Exempt a hospital from the adjustment in clause (i) of this subparagraph if such adjustment would result in a lower rate than the hospital received as of August 31, 2008, in order to preserve the Medicaid provider base, ensure access to Medicaid hospital services, and minimize the effects of PDSDA decreases;

(iii) Apply a rate in place of the PDSDA, for a hospital that is exempted under clause (ii) of this subparagraph, that is the lesser of:

(I) the rate the hospital received as of August 31, 2008; or

(II) the fully rebased PDSDA before applying the adjustment described in clause (i) of this subparagraph;

(iv) Apply the PDSDA described in clause (i) of this subparagraph for all hospitals that are not exempted under clause (ii) of this subparagraph, without any recalculation within the payment divisions; and

(v) Not apply to any hospital a rate lower than the minimum PDSDA described in paragraph (7) of this subsection.

(3) - (11) (No change.)

(e) - (i) (No change.)

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805391
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 424-6900

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 113. REGISTRATION OF SECURITIES

7 TAC §§113.14 - 113.25

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

The Texas State Securities Board proposes the repeal of §§113.14 - 113.25, concerning registration of securities. Specifically, these provisions concern corporate securities definitions; impoundment of proceeds; loans and other material affiliated transactions; options and warrants; preferred stock; promoter's equity investment; promotional shares; specificity in use of proceeds; underwriting expenses, underwriter's warrants, selling expenses, and selling security holders; unsound financial condition; unequal voting rights; and debt securities. The sections proposed for repeal would be replaced by new §113.14, which is being concurrently proposed. New §113.14 adopts by reference the provisions proposed for repeal by naming the North American Securities Administrators Association ("NASAA") Statements of Policy ("SOPs") instead of reproducing the full text of the NASAA SOPs within the Board's rules.

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

Mr. Northcutt also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that an issuer of securities can more easily determine that the NASAA SOPs apply to their registration in Texas. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The repeals would affect Texas Civil Statutes, Article 581-7.

§113.14. Corporate Securities Definitions.

§113.15. Impoundment of Proceeds.

§113.16. Loans and Other Material Affiliated Transactions.

§113.17. Options and Warrants.

§113.18. Preferred Stock.

§113.19. Promoter's Equity Investment.

§113.20. Promotional Shares.

§113.21. Specificity in Use of Proceeds.

§113.22. Underwriting Expenses, Underwriter's Warrants, Selling Expenses, and Selling Security Holders.

§113.23. Unsound Financial Condition.

§113.24. Unequal Voting Rights.

§113.25. Debt Securities.

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

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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8303

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7 TAC §113.14

The Texas State Securities Board proposes new §113.14, concerning statements of policy. The proposal would replace certain current securities registration guidelines by reference to the North American Securities Administrators Association ("NASAA") Statements of Policy ("SOPs") in nineteen areas. The new approach of adoption by reference will direct the reader to the NASAA web page and the Agency web page where the full text of each SOP is available. Additionally, print copies would be made available by writing or telephoning the Agency. Many of these NASAA SOPs were recently updated and the proposal would operate to make the most recent version of these SOPs applicable to securities offerings being registered in Texas. The NASAA SOPs for Mortgage Programs and the Omnibus Guidelines are not currently reproduced in the Board rules and the proposal would add them to the list of SOPs that may be applicable to securities registrations. The text of the nineteen SOPs that are proposed to be adopted by reference is available on the NASAA web site (www.nasaa.org) or by contacting the Agency at (512) 305-8300. The text will also appear under "Proposals" on the "Recent Changes to Board Rules" page of the Agency's web site (www.ssb.state.tx.us). In related rulemaking, where the full text of NASAA SOPs named in this proposal appear in the existing rules, those existing rules are being concurrently proposed for repeal.

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

Mr. Northcutt also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to increase uniformity with other states participating in the NASAA Coordinated State

Review (CR-Equity) and NASAA Coordinated State Review for Direct Participation Programs (CR-DPP), which both regulators and issuers favor. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The proposal would affect Texas Civil Statutes, Article 581-7.

§113.14. Statements of Policy.

(a) The Securities Commissioner, where applicable, will utilize the criteria contained in the North American Securities Administrators Association, Inc. ("NASAA") Statements of Policy set forth in subsection (b) of this section for offerings registering pursuant to the Texas Securities Act, §7. While applications not conforming to a statement of policy shall be looked upon with disfavor, where good cause is shown or to protect investors, certain provisions may be modified or waived by the Commissioner.

(b) In order to promote uniform regulation, the following NASAA Statements of Policy shall apply to the registration of securities:

(1) Corporate Securities Definitions, as amended by NASAA on March 31, 2008;

(2) Impoundment of Proceeds, as amended by NASAA on March 31, 2008;

(3) Loans and Other Material Affiliated Transactions, as amended by NASAA on March 31, 2008;

(4) Options and Warrants, as amended by NASAA on March 31, 2008;

(5) Preferred Stock, as amended by NASAA on March 31, 2008;

(6) Promoter's Equity Investment, as amended by NASAA on March 31, 2008;

(7) Promotional Shares, as amended by NASAA on March 31, 2008;

(8) Specificity in Use of Proceeds, as amended by NASAA on March 31, 2008;

(9) Underwriting Expenses, Underwriter's Warrants, Selling Expenses, and Selling Security Holders, as amended by NASAA on March 31, 2008;

(10) Unsound Financial Condition, as amended by NASAA on March 31, 2008;

(11) Unequal Voting Rights, as amended by NASAA on March 31, 2008;

(12) Debt Securities, as amended by NASAA on April 25, 1993;

(13) Real Estate Programs, as amended by NASAA on May 7, 2007;

(14) Oil and Gas Programs, as amended by NASAA on May 7, 2007;

(15) Asset-backed Securities, as amended by NASAA on May 7, 2007;

(16) Equipment Programs, as amended by NASAA on May 7, 2007;

(17) Real Estate Investment Trusts, as amended by NASAA on May 7, 2007;

(18) Mortgage Programs, as amended by NASAA on May 7, 2007; and

(19) Omnibus Guidelines, as amended by NASAA on May 7, 2007.

(c) Copies of the NASAA Statements of Policy are available online at the NASAA web site (www.nasaa.org) and the Texas State Securities Board web site (www.ssb.state.tx.us). Print copies may be obtained by contacting the Texas State Securities Board, P.O. Box 13167, Austin, Texas 78711, or by calling (512) 305-8300.

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

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Denise Voigt Crawford
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CHAPTER 117. ADMINISTRATIVE GUIDELINES FOR REGISTRATION OF REAL ESTATE PROGRAMS

7 TAC §§117.1 - 117.9

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

The Texas State Securities Board proposes the repeal of Chapter 117, consisting of §§117.1 - 117.9, concerning administrative guidelines for registration of real estate programs. The sections proposed for repeal would be replaced by new §113.14, which is being concurrently proposed. New §113.14 adopts by reference the provisions proposed for repeal by naming the North American Securities Administrators Association ("NASAA") Statement of Policy ("SOP") for real estate programs instead of reproducing the full text of it within the Board's rules.

Micheal Northcutt, Director, Registration Division, has determined that for the first five-year period the repeals are in effect

there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Northcutt also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that an issuer of real estate program securities can more easily determine that the NASAA SOP for real estate programs applies to their registration in Texas. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The repeals would affect Texas Civil Statutes, Article 581-7.

§117.1. Introduction.

§117.2. Requirements of Sponsors.

§117.3. Suitability of Participants.

§117.4. Fees, Compensation, and Expenses.

§117.5. Conflicts of Interest and Investment Restrictions.

§117.6. Non-specified Property Programs.

§117.7. Rights and Obligations of Participants.

§117.8. Disclosure and Marketing Requirements.

§117.9. Miscellaneous Provisions.

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

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CHAPTER 121. ADMINISTRATIVE GUIDELINES FOR REGISTRATION OF OIL AND GAS PROGRAMS

7 TAC §§121.1 - 121.10

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

The Texas State Securities Board proposes the repeal of Chapter 121, consisting of §§121.1 - 121.10, concerning administrative guidelines for registration of oil and gas programs. The sections proposed for repeal would be replaced by new §113.14, which is being concurrently proposed. New §113.14 adopts by reference the provisions proposed for repeal by naming the North American Securities Administrators Association ("NASAA") Statement of Policy ("SOP") for oil and gas programs instead of reproducing the full text of it within the Board's rules.

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

Mr. Northcutt also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that an issuer of oil and gas program securities can more easily determine that the NASAA SOP for oil and gas programs applies to their registration in Texas. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The repeals would affect Texas Civil Statutes, Article 581-7.

§121.1. Introduction.

§121.2. Requirements of Sponsor.

§121.3. Selling of Units and Sales Material.

§121.4. Suitability of Participants.

§121.5. Fees, Compensation, and Expenses.

§121.6. Property Transactions with Affiliates and Other Restricted Activities.

§121.7. Farmouts, Special Disclosure Requirements.

§121.8. Rights and Obligations of Participants.

§121.9. Miscellaneous Provisions.

§121.10. Prospectus Disclosure.

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

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CHAPTER 129. ADMINISTRATIVE GUIDELINES FOR REGISTRATION OF ASSET-BACKED SECURITIES

7 TAC §§129.1 - 129.9

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

The Texas State Securities Board proposes the repeal of Chapter 129, consisting of §§129.1 - 129.9, concerning administrative guidelines for registration of asset-backed securities. The sections proposed for repeal would be replaced by new §113.14, which is being concurrently proposed. New §113.14 adopts by reference the provisions proposed for repeal by naming the North American Securities Administrators Association ("NASAA") Statement of Policy ("SOP") for asset-backed securities instead of reproducing the full text of it within the Board's rules.

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

Mr. Northcutt also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that an issuer of asset-backed securities can more easily determine that the NASAA SOP for asset-backed securities applies to their registration in Texas. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The repeals would affect Texas Civil Statutes, Article 581-7.

§129.1. Introduction.

§129.2. Requirements of Sponsor.

§129.3. Requirements of Issuer.

§129.4. Requirements of Servicer.

§129.5. Requirements of Trustee.

§129.6. Suitability of Security Holders.

§129.7. Fees, Compensation, and Expenses.

§129.8. Conflicts of Interest.

§129.9. Disclosure and Marketing.

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

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CHAPTER 133. FORMS

7 TAC §133.31, §133.32

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

The Texas State Securities Board proposes the repeal of §133.31 and §133.32, forms concerning real estate guidelines cross reference sheet and REIT guidelines cross reference sheet. The sections proposed for repeal would be replaced by new §113.14, which is being concurrently proposed. New §113.14 adopts by reference the provisions proposed for repeal by naming the North American Securities Administrators Association ("NASAA") Statements of Policy ("SOPs") for real estate programs and REITs instead of reproducing the full text of it within the Board's rules. Both forms are contained within the NASAA SOPs.

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

Mr. Northcutt also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that an issuer of real estate program or REIT securities can more easily locate the NASAA SOP applicable to their registration in Texas. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The repeals are proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority

to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The repeals would affect Texas Civil Statutes, Article 581-7.

§133.31. Real Estate Guidelines Cross Reference Sheet.

§133.32. REIT Guidelines Cross Reference Sheet.

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

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CHAPTER 141. ADMINISTRATIVE GUIDELINES FOR REGISTRATION OF EQUIPMENT PROGRAMS

7 TAC §§141.1 - 141.8

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

The Texas State Securities Board proposes the repeal of Chapter 141, consisting of §§141.1 - 141.8, concerning administrative guidelines for registration of equipment programs. The sections proposed for repeal would be replaced by new §113.14, which is being concurrently proposed. New §113.14 adopts by reference the provisions proposed for repeal by naming the North American Securities Administrators Association ("NASAA") Statement of Policy ("SOP") for equipment programs instead of reproducing the full text of it within the Board's rules.

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

Mr. Northcutt also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that an issuer of equipment program securities can more easily determine that the NASAA SOP for equipment programs applies to their registration in Texas. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The repeals would affect Texas Civil Statutes, Article 581-7.

§141.1. Introduction.

§141.2. Requirements of Sponsors.

§141.3. Suitability of Participants.

§141.4. Compensation and Expenses.

§141.5. Conflicts of Interest and Investment Restrictions.

§141.6. Rights and Obligations of Participants.

§141.7. Disclosure and Marketing Requirements.

§141.8. Miscellaneous Provisions.

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

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CHAPTER 143. ADMINISTRATIVE GUIDELINES FOR REGISTRATION OF REAL ESTATE INVESTMENT TRUSTS

7 TAC §§143.1 - 143.8

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

The Texas State Securities Board proposes the repeal of Chapter 143, consisting of §§143.1 - 143.8, concerning administrative guidelines for registration of real estate investment trusts ("REITs"). The sections proposed for repeal would be replaced by new §113.14, which is being concurrently proposed. New §113.14 adopts by reference the provisions proposed for repeal by naming the North American Securities Administrators Association ("NASAA") Statement of Policy ("SOP") for REITs instead of reproducing the full text of it within the Board's rules.

Micheal Northcutt, Director, Registration Division, has determined that for the first five-year period the repeals are in effect

there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Northcutt also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be that an issuer of REIT securities can more easily determine that the NASAA SOP for REITS applies to their registration in Texas. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeals in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

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

The repeals would affect Texas Civil Statutes, Article 581-7.

§143.1. Introduction.

§143.2. Requirements of Sponsor, Adviser, Trustees and Any Affiliate.

§143.3. Suitability of Shareholders.

§143.4. Fees, Compensation, and Expenses.

§143.5. Conflicts of Interest and Investment Restrictions.

§143.6. Rights and Obligations of Shareholders.

§143.7. Disclosure and Marketing.

§143.8. Miscellaneous.

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

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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 313. STATE-SPONSORED INSPECTION AND DISPUTE RESOLUTION PROCESS (SIRP)

10 TAC §313.16, §313.20

The Texas Residential Construction Commission proposes amendments to 10 Texas Administrative Code §313.16 and §313.20 regarding the State-Sponsored Inspection and Dispute Resolution Process (SIRP). The amendments are proposed to streamline the SIRP and appeal processes in an effort to reduce the time it takes to complete the process from filing to final report.

Ms. Susan K. Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amendments are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the section.

Ms. Durso has also determined that for the first five years the amendments are in effect the public will benefit from having a quicker more efficient SIRP process. There is no anticipated economic cost to small businesses or persons who are required to comply with the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no adverse economic effect on small businesses. Accordingly, no regulatory flexibility analysis is necessary.

Comments on the proposed amendments may be submitted to Susan K. Durso, General Counsel, Texas Residential Construction Commission, 311 E. 14th Street, Austin, Texas 78701 or by fax to (512) 475-2453. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Chapter 313" in the subject line. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed rule in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration. Comments submitted after the deadline for submittal, submitted to a different address, or submitted electronically without "Chapter 313" in the subject line, may not be accepted.

These amendments are proposed under Property Code §408.001, which provides the commission general rulemaking authority, and Subtitle D, Title 16 of the Property Code, specifically, Chapters 428 and 429, which describe the state inspection process, the third-party inspector's report and the appeal of that report.

No other statutes, articles, or codes are affected by the proposed section.

§313.16. Third-Party Inspector's Report.

(a) The third-party inspector [~~inspector's report~~] shall submit its report [~~be submitted~~] to the commission on the commission's Third-Party Inspection Form or in a format substantially similar to the commission's form, so long as the report includes all of the information required by the commission's form.

(b) A third-party inspector shall submit a report under this chapter to the commission in a timely manner pursuant to the provisions of §313.13(i) and (j) of this chapter as applicable.

(c) A third-party inspector will be reimbursed allowable travel expenses incurred in conducting an inspection assignment within 30 days of the date the third-party inspector's report and travel invoice is received by the commission, in accordance with Property Code §426.004(d).

(d) Within thirty days of issuance of a final report not subject to further administrative appeal, the commission will pay a third-party inspector the applicable inspection fee as adopted by the commission in accordance with §300.6 of this title for inspection reports completed and submitted in a timely fashion, except as otherwise provided under this section.

(e) Unless a written request for extension of time to file a report has been submitted and approved by the Executive Director, for each day that a third-party inspector fails to submit a report in accordance with §313.13(i) and (j) of this chapter as applicable, the commission will deduct $50 from the applicable inspection fee to be finally paid for the inspection.

(f) [~~(b)~~] The commission shall return any third-party inspector's report that fails to provide the required information or that includes findings, conclusions, comments or other information outside the scope of the third-party inspector's duties to the assigned third-party inspector for revision.

(g) The third-party inspector must return all of the documents, photographs, videos, and other materials provided to the third-party inspector by the commission or either party for the third-party inspector to use in making findings and recommendations. Failure to return all the materials made available for the third-party inspector's use in preparing the inspection report will be considered in determining whether a third-party inspector shall be subject to disciplinary action under Chapter 305 of this title for failure to comply with a commission rule.

(h) [~~(c)~~] If a third-party inspector fails to revise a report returned for revision within five [~~ten business~~] days after notification of the need for revision, the commission will reduce the inspection fee to be finally paid by $50 for each day the completed revised report is not returned.

(i) If a third-party inspector fails to revise a report returned for revision within five days after notification of the need for revision or repeatedly fails to timely submit a report, the commission may consider that failure in making a determination whether the third-party inspector has fulfilled his duties and is thus eligible for future assignments, should be subjected to disciplinary action under Chapter 305 of this title or whether [~~for payment and in making a determination as to whether to assign the third-party inspector to future SIRP requests or to renew~~] the third-party inspector's registration under Chapter 303 of this title should be renewed.

(j) [~~(d)~~] The third-party inspector shall submit his completed report to the commission and the commission shall promptly transmit the completed report, or revised report if required, to the homeowner and the builder.

§313.20. Appeal Process.

(a) A homeowner or builder/remodeler that submits an [~~builder may~~] appeal must submit the appeal on a commission-prescribed appeal form, and must identify the inspected item that is the subject of the appeal with the stated ground for appeal [~~the standards applied to support findings or the reasonableness of the repair recommendations in a third-party inspector's report~~].

(b) A builder or remodeler submitting an appeal to a third-party inspector's report that did not make a good faith offer of repair to a homeowner prior to the filing of the request for inspection must submit a payment of $150 with the appeal form, as a deposit for the cost of the inspection.

(1) A builder or remodeler's appeal received without payment or without evidence that an offer of repair as required under this subsection was made to the homeowner prior to the filing of the inspection request will not be considered timely filed, unless the payment or evidence of offer is received before the fifteenth day after the date of the commission's letter notifying the parties of their right to appeal.

(2) If the builder or remodeler's stated grounds for appeal are substantially affirmed in their entirety by the appeal panel, the $150 fee paid will be deducted from any amount due by the builder or remodeler for reimbursement of the inspection fee pursuant to §313.18 of this chapter, or if none of the allegedly defective items subject to inspection are finally determined by a final non-appealable report issued by the commission to be construction defects, the $150 fee will be refunded.

(c) A builder or remodeler that asserts on appeal that the third-party inspector applied the wrong performance standard in determining whether the allegedly defective item was conforming must state in its appeal the standard that the builder or remodeler asserts is correct. Failure to assert the applicable standard under this subsection will invalidate the appeal on that ground for the item appealed.

(d) A builder or remodeler that asserts on appeal that the third-party inspector's recommendation for repair for an item found to be defective is unreasonable must state the method of repair that the builder or remodeler asserts is reasonable. Failure to state the method of repair that the builder or remodeler asserts is reasonable under this subsection will invalidate the appeal on that ground for the item appealed.

(e) [~~(b)~~] Upon receipt of an appeal from either party, the commission shall refer the appeal to a three-person panel of state inspectors. If the request includes a structural matter, one of the panel members shall be a licensed professional engineer.

(f) [~~(c)~~] The appellate panel shall conduct a review of the third-party inspector's report and recommendations for compliance with the Act and the written documents and tangible things considered by the third-party inspector in making the findings and recommendations, including but not limited to materials submitted with the request, any information or data gathered by the third-party inspector and documentation or tangible things provided to the third-party inspector by one of the parties during the SIRP and prior to the issuance of the report.

(g) [~~(d)~~] Information submitted with the appeal by either party that was not provided to the third-party inspector for his consideration when preparing his report or that is not readily available to the appeal panel from a public source, such as a manufacturer's website or published authority, will not be provided to or considered by the appellate panel.

(h) [~~(e)~~] The appellate panel shall make written findings of fact and shall affirm, reverse or modify [~~recommend approval, reversal or modifications to~~] the findings regarding the applicable warranties and performance standards and recommendations of repair of the third-party inspector or shall recommend that the matter be remanded to the third-party inspector for further action as directed by the appellate panel.

(i) [~~(f)~~] The appellate panel shall file a written report of its findings and recommendations with the commission not later than the

25th day after the expiration of the time to appeal the third-party inspection report under §313.19 of this chapter.

(j) [~~(g)~~] The commission shall transmit the appellate panel's rulings to the parties to the appeal not later than the fifth day after receipt of the appellate panel's rulings.

(k) [~~(h)~~] The commission shall return the report to the appointed third-party inspector for a response to any issue remanded by the appellate panel. The third-party inspector will issue a report on any remanded items and return the report to the appellate panel in accordance with §313.17 of this chapter [~~title~~].

(l) [~~(i)~~] A ruling by an appellate panel under this section is a final agency decision not subject to further administrative appeal.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805390
Susan K. Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 463-3926

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 59. CONTINUING EDUCATION REQUIREMENTS

16 TAC §59.3

The Texas Department of Licensing and Regulation ("Department") proposes an amendment to 16 Texas Administrative Code §59.3, regarding continuing education for towing operators.

Texas Occupations Code, §51.405 requires the Texas Commission of Licensing and Regulation ("Commission") to recognize, prepare, or administer continuing education programs for license holders. In response to this statutory directive, the Commission has adopted rules at 16 Texas Administrative Code ("TAC") Chapter 59 to establish general requirements for continuing education providers and courses. The chapter contains rules of general applicability that currently apply to the Department programs listed in §59.3. The proposed amendment to §59.3 adds towing operators to that list. The effect of the amendment is to make the provisions of Chapter 59 apply to continuing education providers and courses for towing operators. The amendment is necessary to implement Texas Occupations Code, §2308.157, which requires the Commission by rule to recognize, prepare, or administer continuing education programs for license holders in the towing program.

The amendment will allow continuing education providers for this program to begin registering with the Department and, once a specific continuing education rule is in place for the towing program, to obtain approval for courses. A new rule at 16 TAC §86.250, which will contain specific continuing education requirements related to the towing program, is being proposed simultaneously with publication of this amendment.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the amendment is in effect there will be some additional costs to the state in enforcing or administering the amended rule. The Department will have additional responsibilities to register continuing education providers and evaluate course materials for approval in the vehicle towing program. Additionally, the Department will incur costs in maintaining the electronic system through which providers will report licensees' continuing education hours to the Department. The Department estimates that the total cost of administering and enforcing the amended rule will be $45,000 annually for the first five years the rule is in effect. These costs, however, are expected to be offset by additional revenue.

Under Chapter 59 each provider will pay a $250 annual registration fee and a $100 annual fee for approval of each course. In addition, under proposed 16 TAC §86.250 a provider will be required to pay a $5 record fee for each course completed by a licensee for continuing education credit. The Department estimates that the revenue from all of these fees will be $45,000 annually for the first five years the amended rule is in effect, sufficient to offset the additional costs.

Public colleges, universities, and community colleges that wish to offer an 18-hour course to incident management towing operators for continuing education credit under 16 TAC §86.250 may also be affected. Like any other continuing education provider, they will have to pay registration, course approval, and record fees to the Department as described below. However, the Department anticipates that any fiscal impact to public colleges, universities, and community colleges will not be significant because of increased revenue from tuition and fees that the institution may charge to licensees.

There will be no impact to costs or revenues of local government as a result of enforcing or administering the amended rule.

Mr. Kuntz also has determined that for each year of the first five-year period the amendment is in effect, the public benefit will be that providers and courses for towing operator continuing education will be subject to minimum standards. The public will benefit from standards that serve to increase or maintain the skills and competence of license holders, who in turn provide services to the public.

Mr. Kuntz also has determined that for each year of the first five-year period the amendment is in effect, the probable economic costs to persons required to comply with the proposed amendment will be the following. A provider will be required to pay a $250 fee annually to register with the Department as a continuing education provider. For each course, the provider will be required to pay $100 annually to obtain Department approval. The total cost to a particular provider will depend on the number of courses offered. A provider also will be charged $25 in the event that the provider needs to obtain a revised or duplicate registration. Additionally, a provider may incur some costs in furnishing copies of course materials to the Department as part of the course approval application. This cost will depend on the amount and dollar value of materials involved, which will vary by course, and so the Department is unable to provide an estimate.

Mr. Kuntz has determined that there will be no adverse economic effect on small or micro-businesses as a result of the pro-

posed amendment; therefore, preparation of an Economic Impact Statement or a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not necessary. The Department is of the opinion that the overall economic effect of the rule on providers, including any small and micro-businesses, will be positive. This is because the primary effect of the rule change, in conjunction with the statute, is to open up a new business opportunity for these companies, i.e. offering continuing education to towing operators.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §51.405, which requires the Commission to recognize, prepare, or administer continuing education programs for license holders, and §2308.157, which requires the Commission to recognize, prepare, or administer continuing education programs for license holders in the towing program. Texas Occupations Code, Chapter 51 authorizes the Commission 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 proposal are those set forth in Texas Occupations Code, Chapters 51 and 2308, in particular §51.405 and §2308.157. No other statutes, articles, or codes are affected by the proposal.

§59.3. Purpose and Applicability.

These rules are promulgated to establish continuing education provider and course requirements for the following occupations regulated by the Department of Licensing and Regulation:

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

(8) Towing operators, as provided by Texas Occupations Code, Chapter 2308. Additional continuing education requirements relating to towing operators may be found in Chapter 86 of this title.

(9) [~~(8)~~] Water well drillers, pump installers and apprentices, as provided by Texas Occupations Code, Chapters 1901 and 1902. Additional continuing education requirements relating to water well drillers, pump installers, and apprentices may be found in Chapter 76 of this title.

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

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Brian E. Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
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CHAPTER 86. VEHICLE TOWING

16 TAC §86.250

The Texas Department of Licensing and Regulation ("Department") proposes a new rule at 16 TAC §86.250, regarding continuing education for towing operators.

Texas Occupations Code, §2308.157(a) requires the Texas Commission of Licensing and Regulation ("Commission") by rule to recognize, prepare, or administer continuing education programs for licensed towing operators. The statute requires that, with the exception of incident management towing operators renewing their licenses for the first time, each licensed towing operator must complete a continuing education program before the operator may renew a license. The new rule implements this statutory requirement. The rule will work in conjunction with the Commission's rules at 16 TAC Chapter 59, which contain the general provisions for continuing education providers and courses. That chapter requires providers to be registered with the Department and courses to be approved by the Department. Simultaneously with the publication of this proposed rule, the Department is proposing an amendment to Chapter 59 to add towing operators to the list of Department licensees covered by that chapter. The Towing and Storage Advisory Board recommended the substance of this new rule at its meeting on July 8, 2008.

The proposed rule requires a licensed towing operator to complete four hours of continuing education in Department-approved courses to renew the towing operator's license. The continuing education hours must include one hour of roadway safety, and the remaining three hours may include any of the topics specified in the rule, including additional roadway safety. The continuing education hours must be completed during the term of the current license or, in the case of a late renewal, within the one-year period prior to the date of renewal. A licensee may not receive credit for attending the same course more than once. A licensee is required to retain a copy of the certificate of completion for two years after the date of completion of the course.

Under the proposed rule, courses must be approved by the Department under procedures prescribed by the Department. To be approved by the Department, a provider's course must be dedicated to instruction in one or more of the topics listed in subsection (g). A course may be offered until the expiration of the course approval, which is one year, or until the provider ceases holding an active provider registration, whichever occurs first. The provider must pay a $5 record fee to the Department for each licensee who completes a course for continuing education credit.

Texas Occupations Code, §2308.157(c) requires that to renew an incident management towing operator's license the first time, the licensee must complete a professional development course related to towing that is licensed or certified by the National Safety Council or *another course* approved and administered by the Department under this section. Subsection (j) of the new rule implements this statutory provision. The Department understands that the National Safety Council does not actually offer such a course; however, the rule specifies another course that the Department will approve for this purpose. The specific requirements listed are intended to be consistent with the content of courses that are currently being offered.

The course must be 18 hours, consisting of 12 hours of classroom training and 6 hours of live demonstration and hands-on training. The rule specifies the topics that must be covered. Finally, the course must be offered by or through a community college, college, or university.

The new rule applies to licensees, providers, and courses upon the effective date of the rule.

Subsection (l) relates to the 18-hour course required under subsection (j) and allows a licensed incident management towing operator to receive credit for such a course that was completed prior to the effective date of the rule. In that situation, the provider would not have to have been registered with the Department and the course would not have to have been approved by the Department for the licensee to receive credit. This provision is necessary because incident management towing operators may have already completed such a course prior to the effective date of the rule. To receive credit, the licensee must furnish a certificate of completion or other evidence satisfactory to the Department of completion of the course. Beginning on the effective date of the rule, however, providers will need to register with the Department and have the course approved by the Department in order for licensees to receive continuing education credit.

This rule is necessary to implement Texas Occupations Code, §2308.157, which requires the Commission by rule to recognize, prepare, or administer continuing education programs for licensed towing operators.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the new rule is in effect there will be some additional costs to the State in enforcing or administering the rule. The Department will have additional responsibilities to register continuing education providers and evaluate course materials for approval in the vehicle towing program. Additionally, the Department will incur costs in maintaining the electronic system through which providers will report licensees' continuing education hours to the Department. The Department estimates that the total cost of administering and enforcing the rule will be $45,000 annually for the first five years the rule is in effect. These costs, however, are expected to be offset by additional revenue.

The rule requires a provider to pay a $5 record fee for each course completed by a licensee for continuing education credit. In addition, under 16 TAC Chapter 59, each provider will pay a $250 annual registration fee and a $100 annual fee for approval of each course. The Department estimates that the revenue from all of these fees will be $45,000 annually for the first five years the rule is in effect, sufficient to offset the additional costs.

Public colleges, universities, and community colleges may also be affected because they will have to pay registration, course approval, and record fees to offer an 18-hour course to incident management towing operators for continuing education credit. However, the Department anticipates that any fiscal impact to public colleges, universities, and community colleges will not be significant because of increased revenue from tuition and fees that the institution may charge to licensees.

There will be no impact to costs or revenues of local government as a result of enforcing or administering the new rule.

Mr. Kuntz also has determined that for each year of the first five-year period the new rule is in effect, the public benefit will be increased protection of public safety. Towing operators will be subject to continuing education requirements that include roadway safety and other topics that will further the safe operation of tow trucks.

Mr. Kuntz has determined that for each year of the first five-year period the new rule is in effect, the anticipated economic costs to persons who are required to comply with the rule are as follows. The rule requires a provider to pay a $5 fee for each course completed by a licensee for continuing education credit. The amount paid by a provider will depend on the number of licensees who take the provider's courses. In addition, under 16 TAC Chapter 59, each provider will pay a $250 annual registration fee and a $100 annual fee for approval of each course. The amount of course approval fees paid by a provider will depend on the number of courses offered by the provider. The Department believes that the overall economic effect of the rule on providers will be beneficial, not adverse. This is because the rule, in implementing the statutory continuing education requirement, has the effect of creating for continuing education providers a business opportunity that did not previously exist. The Department anticipates that providers will typically charge a fee to licensees for taking a course. Licensees will bear some cost because they may have to pay the provider for taking the course. The amount of this cost will be determined by each provider and is not known at this time. However, because the statute requires continuing education for licensed towing operators, it is the statute, rather than the rule, that ultimately imposes this cost on licensees.

Mr. Kuntz has determined that there will be no adverse economic effect on small or micro-businesses as a result of the proposed rule. As discussed above, the Department believes that there will be no adverse economic effect on continuing education providers. Furthermore, towing operators are individuals who are licensed to engage in an occupation; they are not business entities. It may be that a towing operator also owns or operates a towing company, which could be a small or micro-business; however, towing companies are entities that are licensed separately under Texas Occupations Code, Chapter 2308. This rule does not impose any costs directly on towing companies. Any direct costs are imposed on individual licensees, not on small or micro-businesses. Additionally, it is ultimately the statute rather than the rule that imposes the continuing education requirement and therefore the cost on licensees. For these reasons, it is not necessary to prepare an Economic Impact Statement or a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The new rule is proposed under Texas Occupations Code, Chapter 2308, in particular §2308.157, and Texas Occupations Code, Chapter 51. These chapters 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 proposal are those set forth in Texas Occupations Code, Chapter 2308, in particular §2308.157, and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the proposal.

§86.250. License Requirements--Towing Operator Continuing Education.

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title, unless the context indicates otherwise.

(b) To renew a towing operator license, a licensee must complete a total of 4 hours of continuing education through Department-approved courses. The continuing education hours must include the following:

(1) 1 hour in roadway safety; and

(2) 3 hours in any topic listed in subsection (g), including subsection (g)(2).

(c) For a timely renewal, the continuing education hours must have been completed within the term of the current license. For a late renewal, the continuing education hours must have been completed within the one-year period immediately prior to the date of renewal.

(d) A licensee will not receive continuing education hours for attending the same course more than once.

(e) A licensee will receive continuing education hours for only those courses that are approved by the Department, under procedures prescribed by the Department.

(f) A licensee must retain a copy of the certificate of completion for a course for two years after the date of completion. In conducting any inspection or investigation of the licensee, the Department may examine the licensee's records to determine compliance with this subsection.

(g) To be approved by the Department under Chapter 59 of this title, a provider's course must be dedicated to instruction in one or more of the following topics:

(1) Texas law and rules that regulate the conduct of towing operators;

(2) roadway safety;

(3) driver safety;

(4) towing techniques;

(5) equipment operation and safety; and

(6) customer service and documentation.

(h) A Department-approved course may be offered until the expiration of the course approval or until the provider ceases to hold an active provider registration, whichever occurs first.

(i) A provider shall pay to the Department a continuing education record fee of $5 for each licensee who completes a course for continuing education credit. A provider's failure to pay the record fee for courses completed may result in disciplinary action against the provider, up to and including revocation of the provider's registration under §59.90 of this title.

(j) To renew an incident management towing operator's license the first time, a licensee must complete, in lieu of the requirements stated in subsections (b), (c), and (g), an 18-hour course relating to towing that:

(1) consists of 12 hours of classroom training;

(2) consists of 6 hours of live demonstration and hands-on training;

(3) is dedicated to instruction in the following topics:

(A) how light-duty tow trucks work;

(B) towing with a wheel lift;

(C) towing with a tow sling;

(D) using tow dollies;

(E) car carrier operation;

(F) vehicle recovery;

(G) light-duty tow trucks;

(H) field procedures;

(I) vehicle maintenance; and

(J) safety; and

(4) is offered by or through a community college, college, or university.

(k) This section shall apply to licensees, providers, and courses upon the effective date of this section.

(l) Notwithstanding any other provision of this section or Chapter 59 of this title, a licensee may receive credit under subsection (j) for a course that the licensee completed before the effective date of this section if:

(1) the course satisfies the requirements of subsection (j); and

(2) the licensee furnishes to the Department a certificate of completion or other evidence satisfactory to the Department of completion of the course.

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

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Brian E. Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 34. STATE FIRE MARSHAL
SUBCHAPTER L. FIRE STANDARD COMPLIANT CIGARETTES

28 TAC §§34.1201 - 34.1214

The Texas Department of Insurance proposes new Subchapter L, §§34.1201 - 34.1214, concerning fire standard compliant (FSC) cigarettes. These rules are proposed pursuant to the Health and Safety Code Chapter 796. Chapter 796 was enacted by House Bill (HB) 2935, 80th Legislature, Regular Session, effective January 1, 2009. HB 2935 prescribes standards relating to FSC cigarettes. FSC cigarettes are cigarettes which have a reduced propensity to continue burning when left unattended. In enacting HB 2935, the Legislature found that cigarettes are the leading cause of home fire fatalities in the United States, killing 700 to 900 people, smokers and nonsmokers alike, per year. According to the HB 2935 Senate bill analysis, many victims of smoking-material fire fatalities are not the smokers whose cigarettes started the fire: 34 percent are children of the smokers; 25 percent are neighbors or friends; 14 percent are spouses or partners; and 13 percent are parents. The Legislature found that there is technology available to produce a cigarette that

has a reduced propensity to burn when left unattended. (Texas House Health & Human Services Committee, Bill Analysis (Senate Committee Report), HB 2935, 80th Legislature, Regular Session (June 15, 2007)). The purpose of HB 2935 is to reduce the number of fatalities resulting from fires caused by unattended cigarettes. All individuals and entities that sell or offer to sell a cigarette in Texas after January 1, 2009, will be subject to Chapter 796 of the Health and Safety Code and the rules adopted to implement Chapter 796. Section 796.008 of the Health and Safety Code authorizes the State Fire Marshal to adopt rules to administer Chapter 796. The new subchapter is proposed to administer the provisions of HB 2935. The proposal addresses (i) the purpose, applicability, and citing of the subchapter; (ii) definitions of terms used in the subchapter; (iii) cigarette manufacturers' general submission requirements of certification forms, marking applications, and requests for an alternative test method and performance standard; (iv) existing cigarette inventories; (v) requirements relating to cigarette testing and alternative testing methods and performance standards; (vi) certification and changes to a certified cigarette; (vii) records maintenance; (viii) package marking; (ix) required fees and forms; (x) penalties; and (xi) forfeiture of cigarettes.

Proposed §34.1201 sets forth the purpose, applicability and citing of the proposed new rules. The purpose is to implement the Health and Safety Code Chapter 796, regulating the testing, certification, marking, and sale of fire standard compliant cigarettes. Proposed §34.1201 specifies that the proposed new rules apply to all persons subject to the Health and Safety Code Chapter 796. The proposed section specifies that pursuant to the Health and Safety Code §796.001, entities that sell or offer to sell cigarettes in Texas are subject to the Health and Safety Code Chapter 796 and the rules in Subchapter L, Chapter 34, 28 Texas Administrative Code. The new rules may be cited as "The Texas Fire Standard Compliant Cigarette Rules." Proposed §34.1202 provides definitions for terms used in the proposed new rules, including manufacturer; marking, testing laboratory; and variety. The proposal defines manufacturer to mean a person that manufactures or otherwise produces cigarettes for sale in this state, including cigarettes intended to be sold through an importer; or the first purchaser that intends to resell in this state cigarettes manufactured anywhere that the original manufacturer does not intend to be sold in this state. The term marking is defined in the proposal to mean a manufacturer's designation on the package that is permanently stamped, engraved, embossed, or printed and that identifies the package as containing fire standard compliant cigarettes that meet the requirements of the Health and Safety Code §796.006 and §34.1210 of this subchapter (relating to Marking of Package) that has been approved by the State Fire Marshal's Office (SFMO). The proposal defines testing laboratory to mean a laboratory meeting the accreditation standards specified in the Health and Safety Code §796.003 that performs the fire standard cigarette compliance test. The testing laboratory may be owned or controlled by the cigarette manufacturer. The Department is proposing to define the term variety as a type of cigarette marketed by the manufacturer as being distinct from other types of cigarettes on the basis of the characteristics listed in the Health and Safety Code §796.005(b)(1) - (8), which include: (i) brand or trade name on the package; (ii) style, such as light or ultra light; (iii) length in millimeters; (iv) circumference in millimeters; (v) flavor, such as menthol or chocolate, if applicable; (vi) filter or non-filter; (vii) package description, such as soft pack or box; and (viii) marking approved in accordance with the Health and Safety Code §796.006. The use of the terminology variety to refer to the various types of cigarettes based on these elements is consistent with the terminology used in similar rules implementing a similar statute adopted in at least one other state (Oregon), and the approach of using these distinguishing elements to classify types of cigarettes is also used by at least one other state (New York). Under the proposal, each cigarette variety must be certified, and therefore, each certified cigarette is a cigarette variety.

Proposed §34.1203 specifies general procedural requirements regarding the submission of certification forms, marking applications, requests for an alternative test method and performance standard, and applicable fees. The proposal in §34.1203(b)(2)(B) requires that each certification form and marking application submission be complete before it will be accepted by the SFMO and that a complete submission is one that provides all the required information requested in the form. Proposed §34.1203(b)(3) specifies SFMO initial actions upon receipt of initial submissions by entities regulated under the proposal. Under the proposed subsection, if the SFMO determines that a submitted marking application is incomplete, the SFMO must provide the manufacturer with written notice stating the reasons why the submitted marking application is incomplete. The proposal in §34.1203(b)(3)(B) provides that a certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Proposed §34.1203(b)(3)(A) requires the SFMO to provide written notice to the manufacturer submitting the certification form, marking application, or request for an alternative testing method that the certification form or marking application has been accepted as complete or that the request for an alternative testing method has been approved or the submission has been disapproved. Disapproved submissions will be followed by a written explanation stating the reason for disapproval and what subsequent actions the submitter may take. Proposed §34.1203(b)(4) provides that a manufacturer has 180 days in which to correct any submission insufficiencies before a new submission with new fees is required. Proposed §34.1203(c) specifies that notice from the SFMO will be given by personal service or mailed to the manufacturer's address on record with the SFMO.

Proposed §34.1204 specifies that a wholesale dealer or retailer is not prohibited from selling in Texas the person's existing inventory of cigarettes on or after January 1, 2009, provided that the state tax stamps were affixed to the cigarettes before January 1, 2009, and the quantity is comparable to the quantity of cigarettes purchased during 2008. However, cigarettes that do not comply with the proposed new rules may not be sold in Texas after January 1, 2010.

Proposed §34.1205 specifies testing requirements for each cigarette variety. Proposed §34.1205(a) specifies that except as provided in proposed §34.1206, relating to alternative testing methods, each cigarette variety must be tested in compliance with the Health and Safety Code §796.003. Proposed §34.1205(b) provides that the manufacturer is solely responsible for ensuring that all cigarette varieties not approved for alternative testing methods under §34.1206 are tested in compliance with the Health and Safety Code §796.003. Proposed §34.1205(c) specifies that the section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and the proposed new rules and have been subsequently altered only by changes to the brand or trade name or package description. Alterations in the brand or trade name or package description

are not changes that could impact the ignition propensity of a cigarette.

Proposed §34.1206 specifies alternative testing methods. The Health and Safety Code §796.004 authorizes a cigarette manufacturer to propose an alternative test method and performance standard upon a determination by the State Fire Marshal that a cigarette cannot be tested in accordance with the Health and Safety Code §796.003. Proposed §34.1206(a) specifies the general requirements for manufacturer requests for an alternative test method and performance standard. Proposed §34.1206(b) specifies that the SFMO may initiate review of an alternative test method to make a determination based on the application of the cigarette manufacturer, the SFMO's own action, or complaints concerning the cigarette variety. The proposal in §34.1206(c) specifies that if the SFMO determines that a variety of cigarette cannot be tested in accordance with the Health and Safety Code §796.003, a cigarette manufacturer may request an alternative test method and performance standard. Proposed §34.1206(d) specifies the necessary showings that a manufacturer must provide in order for the SFMO to determine that the proposed alternative test method is sufficient. Proposed §34.1206(e) identifies the actions the manufacturer may take upon rejection of a proposal for an alternative test method.

Proposed §34.1206(f) specifies the method for SFMO notification of manufacturers of determinations under the proposed section.

Proposed §34.1207 specifies information concerning the certification process, including submission of the required certification form, payment of certification fees, and the scope of certification. Proposed §34.1207(c) specifies that a certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Under proposed §34.1207(d), the period for which the certification is valid is three years. Proposed §34.1207(d) requires that in order for a manufacturer to continue selling a certified cigarette after the expiration of the certification period, the manufacturer must submit a new certification form accompanied by all required fees.

Proposed §34.1208 specifies what changes to a certified cigarette necessitate a separate certification and what changes require a retest. The proposal in §34.1208(a) provides that if a certified cigarette variety is changed with respect to any one of more of the characteristics listed in the Health and Safety Code §796.005(b)(1) - (8), it is considered a different cigarette variety and must be certified as a new cigarette variety before it may be sold in this state. The cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8) include (i) brand or trade name on the package; (ii) style, such as light or ultra light; (iii) length in millimeters; (iv) circumference in millimeters; (v) the flavor, such as menthol or chocolate, if applicable; (vi) filter or non-filter; (vii) package description, such as soft pack or box; and (viii) marking approved in accordance with the Health and Safety Code §796.006. In certain specified circumstances, proposed §34.1208(b) prohibits a certified cigarette that is subsequently altered from being sold or offered for sale unless the manufacturer retests the cigarette in accordance with the Health and Safety Code Chapter 796 and the proposed subchapter. This prohibition applies if the alteration affected one of more the following characteristics: (i) style, such as light or ultra light; (ii) length in millimeters; (iii) circumference in millimeters; (iv) the flavor, such as menthol or chocolate, if applicable; and (v) filter or non-filter. The Health and Safety Code §796.005(f) specifies that a certified cigarette altered in a manner that may affect its ignition propensity must be retested before it may be sold in this state.

Proposed §34.1209 specifies the record and document retention requirements for each cigarette variety of manufacturers subject to the Health and Safety Code Chapter 796. The proposal in §34.1209(a) requires maintaining for a period of not less than three years after the expiration of each certification period a copy of the submitted certification form; copies of reports of tests conducted on the cigarette variety, including copies of all tests performed on the cigarette variety; and information and documents demonstrating that the laboratory that performed the test was in compliance with the Health and Safety Code §796.003 or §796.004 and the proposed subchapter for each successful cigarette variety test. Proposed §34.1209(b) specifies that for a cigarette altered with respect to a characteristic that may affect its ignition propensity, a manufacturer must maintain for a period of not less than three years after the expiration of each certification period a copy of the submitted certification form; information on the alteration(s) to the cigarette variety; copies of the reports of all tests conducted on that cigarette variety, including copies of all tests performed on the cigarette variety before and after the alteration; and information and documents demonstrating that the laboratory that performed the test was in compliance with the Health and Safety Code §796.003 or §796.004 and the proposed subchapter for each cigarette variety test.

Proposed §34.1209(c) requires that the manufacturer, not later than 60 calendar days following the date the manufacturer receives a written request from the SFMO for records and documentation, deliver the requested records and documents to the SFMO.

Proposed §34.1210 specifies requirements relating to the package marking, including general requirements in §34.1210(a); submission of the proposed marking in §34.1210(b); and in §34.1210(c), SFMO procedure concerning approval or disapproval of the proposed marking. Proposed §34.1210(c)(2), provides that if the marking is not disapproved within 10 business days after the completed application is received by the SFMO, the proposed marking is deemed approved.

Proposed §34.1211 addresses certification filing fees. Proposed §34.1211(a) requires that payment of the certification fee accompany completed submissions of the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250. Under proposed §34.1211(b), fees must be paid on a cumulative total basis for each certification filing. Proposed §34.1211(c) provides that fees are not refundable and are not transferable. Under proposed §34.1211(d) the fee for the initial certification filing is $250 per cigarette variety and the renewal fee (required every three years) is $250 per cigarette variety.

Section 34.1212 proposes to adopt by reference the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, and the Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251. The proposed section describes the contents of the forms and indicates that both forms are available at the Department's website at www.tdi.state.tx.us/forms/form18.html. Both of the proposed forms are part of this proposal and are available for public review and comment.

Proposed §34.1213 specifies that violation of the Health and Safety Code Chapter 796 or the proposed subchapter may sub-

ject a person to civil penalties as set forth in the Health and Safety Code §796.010.

Proposed §34.1214 specifies that pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture, except that before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette.

Paul Maldonado, State Fire Marshal, has determined that for each year of the first five years the proposed new rules are in effect, any fiscal implications to state government will result from the legislative enactment of HB 2935 by the 80th Legislature and are not the result of adoption and implementation of these sections. There will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposed new or amended rules. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Maldonado also has determined that for each year of the first five years the proposal is in effect, the anticipated public benefit will be the orderly administration of the Health and Safety Code Chapter 796 and the Fire Standard Compliant Cigarette program, resulting in a reduced likelihood of fires caused by unattended cigarettes. Cigarettes are the leading cause of home fire fatalities in the United States, killing 700 to 900 people per year, smokers and nonsmokers. Many of the victims of smoking-material fire fatalities are not the smokers whose cigarettes started the fire: 34 percent are children of the smokers; 25 percent are neighbors or friends; 14 percent are spouses or partners; and 13 percent are parents. The Department has also determined that the potential costs of compliance with the rule are nominal and result only from the proposed §34.1203 requirement for the submission of statutorily required information concerning certifications, marking applications, and requests for an alternative test method and performance standard. This proposal does not prevent or limit the ability of any cigarette manufacturer or wholesaler to transact business in the State of Texas in compliance with Chapter 796.

The Department's analysis of the potential costs of compliance with the proposal is based on the following factors. Proposed §34.1203 sets out the general procedure for submitting statutorily required information concerning certifications, marking applications, and requests for an alternative test method and performance standard. The proposed rule requires that the information be submitted to the SFMO, or to the extent that an electronic transmission method is determined to be acceptable by the SFMO and the Department, allows electronic submission. Therefore, because United States mail is a service that will be available to all entities regulated by the rule, the Department's cost analysis addresses the costs associated with submission by United States mail. The Department estimates that the probable cost to comply with this reporting requirement by mail will be $0.47 per certification or marking application submitted. This estimate is based on the cost for an envelope of $0.05 and first class postage of $0.42 and assumes that a submission will consist of a certification form and marking application sent together in a single envelope. It is anticipated that the number of submissions per manufacturer for the calendar year 2009 will range from 3 to 205. It is anticipated that the number of submissions per manufacturer will depend upon the size of the manufacturer; a major manufacturer such as the Altria Group or R.J. Reynolds may have several hundred submissions, whereas a smaller manufacturer may have very few submissions. The estimates relating to the number of submissions per manufacturer were collected from information provided by the Commonwealth of Massachusetts Department of Fire Services and R.J. Reynolds Tobacco Company, one of the largest of the cigarette manufacturers. Thus, the estimated total cost for a manufacturer to comply with the proposal in 2009 ranges from $1.41 to $96.35 with the highest costs incurred by the largest manufacturers. This is based on number of submissions (3 to 205) multiplied by postage and envelope costs of $0.47. These costs will increase to the extent that a manufacturer does not mail certification forms and marking applications in the same envelope. Because the certification in the proposed rule is valid for three years, no costs to manufacturers are anticipated in years 2010 and 2011. In 2012, and each subsequent third year thereafter, the 2009 estimated costs would be applicable. The cost of submitting a request for an alternative test method and performance standard will depend on whether the submission seeks initial approval in Texas or is simply reporting approval of the alternative test method and performance standard in another state. This is because a request for initial approval will consist of more pieces of paper than a report of approval in another state. Postage costs relating to these requests will vary based on the number of pages mailed to the Department, but the costs are not anticipated to exceed $1.00 per request. The Department obtained information from the states of New York, Oregon and Vermont relating to the number of requests for an alternative test method and performance standard that have been received by those states. Oregon and Vermont indicated that in the two years since their fire standard compliant cigarette rules had been adopted each had received only a single request for an alternative test method and performance standard. New York also reported receiving only a single request for an alternative test method under their fire standard compliant cigarette rules that have been in effect since June 2004. All three states reported that the request was for one particular cigarette variety. Therefore, as a result of conversations with regulatory staff in New York, Oregon, and Vermont, the Department anticipates receiving only a single request for an alternative test method and performance standard. The Department, therefore, estimates that the total cost for the submission of this request is not anticipated to exceed $1.00 in postage expenses. Once approved, a manufacturer would not incur any additional costs relating to a request for an alternative test method and performance standard. Regulated entities outside of the United States that must comply with the proposal will be able to determine their estimated costs for compliance based on the information provided for cigarette manufacturers located in the United States. Costs relating to preparing and copying documents to comply with the requirements in this proposal are not considered a cost of this proposal because the Health and Safety Code Chapter 796 as enacted in HB 2935 requires preparation and copying of the information. Any other costs incurred in order to comply with the proposed requirements result from the enactment of the Health and Safety Code Chapter 796 in HB 2935 and are not a result of the adoption, enforcement, or administration of this proposal.

The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, part-

nership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.002(f) requires a state agency to adopt provisions concerning micro businesses that are uniform with those provisions outlined in the Government Code §2006.002(b) - (d) for small businesses.

This proposal will regulate cigarettes manufacturers that sell cigarettes in Texas. Based on information from the Texas Comptroller of Public Accounts, the Department estimates that there are five cigarette manufacturers located in Texas that qualify as small businesses under the Government Code §2006.001(a)(2). The Texas Comptroller's office did not have any information on cigarette manufacturers located in Texas that qualify as micro businesses under the Government Code §2006.001(a)(1). The Department was unable to obtain information relating to the number of manufacturers that would qualify as a small business or a micro business located outside of Texas, either in other states or in other countries. All small or micro business cigarette manufacturers that market cigarettes in Texas will be required to comply with the proposed §34.1203 requirements. The cost analysis in the Public Benefit/Cost Note part of this proposal for larger businesses that do not meet the definitions of small or micro businesses under the Government Code §2006.001(a)(1) and (a)(2) is also applicable to these small and micro businesses. As explained in the Public Benefit/Cost Note analysis, the only costs to cigarette manufacturers required to comply with this proposal, regardless of the size of the manufacturer, result from proposed §34.1203. Proposed §34.1203 specifies the procedure for cigarette manufacturers to submit statutorily required information concerning certifications, marking applications, and requests for an alternative test method and performance standard. The proposed rule requires that the information be submitted to the SFMO. The rule allows for the possibility of electronic submission to the extent that the Department and SFMO determine an acceptable means of submission. The total annual estimated costs for submission of the certification form and marking application sent together in a single envelope range from $1.41 to $96.35 in 2009 and each subsequent third year thereafter. It is anticipated that the small and micro business manufacturers would likely have a lower number of submissions than a major manufacturer, and therefore, would incur costs toward the lower end of the cost range. The estimated cost to a small or micro business manufacturer relating to requests for an alternative test method and performance standard is anticipated not to exceed $1.00 in postage expenses for the reasons stated in the Public Benefit/Cost Note part of this proposal notice. This will be a one-time cost because once approved, a manufacturer will not incur any additional costs relating to a request for an alternative test method and performance standard as a result of the proposal. Small and micro businesses located outside of the United States that sell or offer to sell, as defined by this rule, a cigarette in Texas will be able to determine their estimated costs for compliance based on the information provided for small and micro businesses in the United States. Costs to small and micro business manufacturers relating to preparing and copying documents to comply with the requirements in this proposal are not considered a cost of this proposal because the Health and Safety Code Chapter 796 as enacted in HB 2935 requires preparation and copying of the information.

As required by the Government Code §2006.002(c), the Department has determined that these estimated mailing costs are nominal and will likely not have an adverse economic impact on small or micro businesses that are required to comply with this proposal. However, in the event that the proposal does have an adverse economic effect on small or micro-businesses that are required to comply with the proposal, the proposal does not require the statutorily mandated regulatory flexibility analysis specified by the Government Code §2006.002(c)(2). Section 2006.002(c)(2) requires that a state agency, before adopting a rule that may have an adverse economic effect on small businesses, prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule.

Section 2006.002(c-1) of the Government Code requires that the regulatory flexibility analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro-businesses, would not be protective of the health, safety, and environmental and economic welfare of the state. The purpose of the statute authorizing this proposal, the Health and Safety Code Chapter 796, is to decrease the number of fatalities resulting from fires caused by cigarettes. The regulatory objective of the proposed subchapter is the orderly administration of the Health and Safety Code Chapter 796 as authorized under the Health and Safety Code §796.008. The Health and Safety Code Chapter 796 requires cigarette manufacturers to submit information to the State Fire Marshal's Office related to certifications, markings, requests for an alternative test method, information related to testing, and the payment of certification fees. The proposed subchapter establishes a standard means for submitting the information and fees. In enacting HB 2935, the Legislature found that "Cigarettes are the leading cause of home fire fatalities in the United States, killing 700 to 900 people, smokers and nonsmokers alike, per year. . . . There is technology available to produce a cigarette that has been termed a fire-safe cigarette. A fire-safe cigarette has a reduced propensity to burn when left unattended. . . . If a fire-safe cigarette is left unattended, the burning tobacco will reach one of these speed bumps and self-extinguish." (Texas House Health & Human Services Committee, Bill Analysis (Senate Committee Report), HB 2935, 80th Legislature, Regular Session (June 15, 2007)). Because a fire-safe cigarette has a reduced propensity to burn when left unattended, HB 2935 requires cigarettes sold in Texas to meet testing requirements that are in accordance with the Standard Test Method for Measuring the Ignition Strength of Cigarettes, E2187-04, by the American Society of Testing and Materials and to thereby require manufacturers to produce and sell cigarettes in Texas that use the most common fire-safe technology. This means that all cigarettes sold in Texas will be required to have a reduced propensity to burn when left unattended. This is expected to result in fewer deaths, fewer fires and less property damage resulting from fires caused by cigarettes.

The purpose of this proposal is to protect the health and safety of the citizens of Texas through the establishment of effective regulatory requirements relating to fire standard compliant cigarettes and the enforcement of those standards by the State Fire Marshal's Office. In order to protect the citizens of this state, it is necessary that all cigarette manufacturers, regardless of size,

comply with the HB 2935 requirements. The requirements proposed by this subchapter are consistent with the legislative intent that the safety standards prescribed in the Health and Safety Code Chapter 796 apply to all cigarettes sold in Texas, regardless of the size of the cigarette manufacturer.

Therefore, the Department has determined in accordance with §2006.002(c-1) of the Government Code that because the purpose of this proposal and the authorizing statute, Chapter 796 of the Health and Safety Code, is to protect human lives and reduce the number of fatalities resulting from home fires caused by cigarettes, there are no regulatory alternatives to the requirements in this proposal that will sufficiently protect the health and safety of consumers in this state.

The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on Monday, November 24, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to State Fire Marshal Paul Maldonado, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221.

The Commissioner will consider the adoption of the proposed new sections in a public hearing under Docket Number 2700, at 9:30 a.m., on November 18, 2008, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas 78701. Written and oral comments presented at the hearing will be considered.

The new sections are proposed under the Health and Safety Code §796.008, the Government Code §§417.005 and 417.004, and the Insurance Code §36.001. The Health and Safety Code §796.008 specifies that the State Fire Marshal may adopt rules to administer the Health and Safety Code Chapter 796. The Government Code §417.005 specifies that the Commissioner of Insurance may, after consulting with the State Fire Marshal, adopt necessary rules to guide the State Fire Marshal in the investigation of arson, fire, and suspected arson and in the performance of other duties for the Commissioner of Insurance. The Government Code §417.004 specifies that the Commissioner of Insurance shall perform the rulemaking functions previously performed by the Texas Commission on Fire Protection. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by this proposal: §§34.1201, 34.1203, and 34.1204 - Health and Safety Code §796.008; §34.1202 - Health and Safety Code §796.001; §34.1205 - Health and Safety Code §796.003; §34.1206 - Health and Safety Code §796.004; §§34.1207, 34.1208, and 34.1211 - Health and Safety Code §796.005; §34.1209 - Health and Safety Code §796.007; §34.1210 - Health and Safety Code §796.006; §34.1212 - Health and Safety Code §§796.005 and 796.006; §34.1213 - Health and Safety Code §796.010; §34.1214 - Health and Safety Code §§796.010 and 796.011.

§34.1201. Purpose, Applicability, and Title.

(a) The purpose of this subchapter is to implement the Health and Safety Code Chapter 796, regulating the testing, certification, marking, and sale of fire standard compliant cigarettes in the State of Texas.

(b) This subchapter applies to all persons subject to the Health and Safety Code Chapter 796. Pursuant to the Health and Safety Code §796.001, entities located outside of Texas, including those located in other countries, are subject to Chapter 796 if they sell or offer to sell a cigarette in Texas.

(c) This subchapter shall be known and may be cited as "The Texas Fire Standard Compliant Cigarette Rules."

§34.1202. Definitions.

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

(1) Agent--A person licensed by the Texas Comptroller of Public Accounts' Office to purchase and affix adhesive or meter stamps on packages of cigarettes.

(2) Certification--Completion and submission by a cigarette manufacturer of Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, adopted by reference in §34.1212 of this subchapter (relating to Certification Forms and Marking Applications).

(3) Cigarette--A roll for smoking:

(A) that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco; or

(B) that is wrapped in any substance containing tobacco that, because of the roll's appearance, the type of tobacco used in the filler or the roll's packaging and labeling, is likely to be offered to or purchased by a consumer as a cigarette.

(4) Department--Texas Department of Insurance.

(5) Fire Standard Compliant Cigarette--A cigarette variety that meets the requirements of the Health and Safety Code Chapter 796 regulating the testing, certification, marking, and sale of fire standard compliant cigarettes.

(6) Manufacturer--A person that manufactures or otherwise produces cigarettes for sale in this state, including cigarettes intended to be sold through an importer; or the first purchaser that intends to resell in this state cigarettes manufactured anywhere that the original manufacturer does not intend to be sold in this state.

(7) Marking--A manufacturer's designation on the package that is permanently stamped, engraved, embossed, or printed and that identifies the package as containing fire standard compliant cigarettes that meet the requirements of the Health and Safety Code §796.006 and §34.1210 of this subchapter (relating to Marking of Package) that has been approved by the State Fire Marshal's Office (SFMO).

(8) Packaging--Cigarette soft packs, hard packs, boxes, cartons, and cases.

(9) Person--An individual or entity, including a cigarette manufacturer, wholesale dealer, or retailer.

(10) Retailer--A person, other than a wholesale dealer, engaged in selling cigarettes or tobacco products.

(11) Sale--Any transfer of title or possession or both, exchange or barter, conditional or otherwise, in any manner or by any

means or any agreement. The term includes, in addition to sales using cash or credit, the giving of a cigarette as a sample, prize, or gift and the exchange of a cigarette for any consideration other than money.

(12) Sell--To sell or to offer or agree to sell.

(13) SFMO--State Fire Marshal's Office.

(14) Testing laboratory--Laboratory meeting the accreditation standards specified in the Health and Safety Code §796.003 that performs the fire standard cigarette compliance test. The testing laboratory may be owned or controlled by the cigarette manufacturer.

(15) Variety--A type of cigarette marketed by the manufacturer as being distinct from other types of cigarettes on the basis of the characteristics listed in the Health and Safety Code §796.005(b)(1) - (8).

(16) Wholesale dealer--A person who sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, including a person who owns, operates, or maintains one or more cigarette or tobacco product vending machines in premises owned or occupied by another person.

§34.1203. General Provisions Regarding Submission of Certification Forms, Marking Applications, Requests for Alternative Test Method and Performance Standard, and Applicable Fees.

(a) Applicability. Except as otherwise provided in this subchapter, this section applies to each certification form, marking application, request for an alternative test method and performance standard, and applicable fee required to be submitted to the State Fire Marshal's Office (SFMO) under the Health and Safety Code Chapter 796 and this subchapter.

(b) Submissions.

(1) Forms for submission. The certification form and marking application form specified in §34.1212 of this subchapter (relating to Certification Forms and Marking Applications) may be obtained from the State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221 or the department's website at www.tdi.state.tx.us/forms/form18.html.

(2) Manner of submission.

(A) All certification forms, marking applications, requests for an alternative test method and performance standard, and applicable fees required to be submitted pursuant to the Health and Safety Code Chapter 796 and this subchapter must be submitted to the Fire Standard Compliant Cigarette Program Coordinator, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221, or to the extent that the SFMO and department determine an acceptable means of electronic submission, a certification form, marking application, request for an alternative test method and performance standard, or applicable fee may be submitted electronically.

(B) Each certification form and marking application required to be submitted to the SFMO must be fully completed before it will be accepted and the filing will be considered for the purpose it was submitted. A completed certification form or marking application is one that provides all required information and is accompanied by all required fees.

(3) SFMO initial actions on initial submissions.

(A) If the SFMO determines the submitted marking application is incomplete, the SFMO shall provide the manufacturer with written notice stating the reasons why the submitted marking application is incomplete. If this notification is not postmarked within 10 business days following the receipt of the marking application, the marking application is deemed approved as provided in §34.1210(c)(2) of this subchapter (relating to Marking of Package).

(B) A certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing.

(C) The SFMO will provide written as specified in subsection (c) of this section that:

(i) the certification form or marking application has been accepted as complete or that the request for an alternative testing method has been approved; or

(ii) the submission has been disapproved. Disapprovals shall state in writing the reason the submission was not approved and that the person may take action as provided under paragraph (4) of this subsection.

(4) Resubmissions. If the submission is disapproved, the person making the submission may complete or correct the submission and resubmit it.

(A) If the corrected or completed submission is resubmitted to the SFMO within 180 days of receipt by the SFMO of the initial submission, the corrected or completed submission may be submitted without payment of additional fees.

(B) If the corrected or completed submission is not submitted within the 180-day time period, the corrected or completed submission constitutes a new submission and must be submitted with an additional payment to the SFMO of all required fees as specified in §34.1211 of this subchapter (relating to Certification Filing Fees).

(C) If the person chooses not to correct and resubmit the submission, the person shall have 30 days from the date of the last disapproval notice to make a written request for hearing to the SFMO. If a hearing is requested, the hearing will be granted, and the procedures for a contested case under the Administrative Procedure Act, Government Code Chapter 2001, shall apply.

(c) Written Notice from the SFMO. Notice by the SFMO, as required by provisions of this subchapter, shall be given by personal service or mailed, postage prepaid, to the mailing address of record for the submitting entity.

§34.1204. Existing Inventory.

(a) Pursuant to §2(a) of HB 2935 enacted by the 80th Legislature and subject to subsection (b) of this section this subchapter does not prohibit a wholesale dealer or retailer from selling existing inventory of cigarettes on or after January 1, 2009, provided that the state tax stamps were affixed to the cigarettes before January 1, 2009, and the quantity is comparable to the quantity of cigarettes purchased during 2008.

(b) Pursuant to §2(b) of HB 2935, a person may not sell or offer for sale a cigarette in this state that does not comply with this subchapter after January 1, 2010.

§34.1205. Testing.

(a) Except as provided in §34.1206 of this subchapter (relating to Alternative Testing Methods), each cigarette variety must be tested in compliance with the Health and Safety Code §796.003.

(b) The manufacturer is solely responsible for ensuring that all cigarette varieties not otherwise approved for alternative testing under §34.1206 of this subchapter are tested in compliance with the Health and Safety Code §796.003.

(c) This section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and

Safety Code Chapter 796 and this subchapter and have been subsequently altered only by changes to the brand or trade name or package description.

§34.1206. Alternative Testing Methods.

(a) General Requirements.

(1) Pursuant to §796.004 of the Health and Safety Code, a cigarette manufacturer may not certify a cigarette under the Health and Safety Code Chapter 796 and this subchapter using a cigarette testing method and performance standard other than the method specified in the Health and Safety Code §796.003 without the prior written authorization of the State Fire Marshal's Office (SFMO).

(2) The manufacturer is solely responsible for ensuring that all cigarettes accepted for alternative testing under this section are tested in compliance with the alternative testing method and performance standard accepted by the SFMO for that cigarette variety.

(3) SFMO authorization to use an alternative testing method and performance standard must be granted for each specific cigarette variety that will be subject to the alternative testing method and performance standard.

(4) Accepted requests for an alternative testing method and performance standard are not transferable to other cigarette varieties and may not be used to test other cigarette varieties without the prior written authorization of the SFMO.

(b) Initiation of Review of Alternative Test Method. The SFMO may initiate a review of an alternative test method to make a determination under this subsection based on the application of the cigarette manufacturer, the SFMO's own action, or complaints concerning the cigarette variety.

(c) Request for an Alternative Test Method.

(1) If the SFMO determines that a variety of cigarette cannot be tested in accordance with the Health and Safety Code §796.003, a cigarette manufacturer may request an alternative test method and performance standard.

(2) A cigarette manufacturer may also seek authorization to use an alternative test method and performance standard approved in another state.

(3) Requests for authorization to use an alternative test method and performance standard must be submitted in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Submission of Certification Forms, Marking Applications, Requests for Alternative Test Method and Performance Standard, and Applicable Fees).

(d) SFMO Authorization.

(1) If a request is submitted under subsection (c)(1) of this section, the SFMO shall authorize the cigarette manufacturer to use the alternative test on the variety of cigarette if the cigarette manufacturer demonstrates to the satisfaction of the SFMO that the alternative test method and performance standard proposed by the manufacturer is equivalent to the performance standard under the Health and Safety Code §796.003.

(2) If a request is submitted under subsection (c)(2) of this section, unless the SFMO can demonstrate a reasonable basis why the alternative test method should not be accepted under Health and Safety Code Chapter 796, the SFMO shall authorize the cigarette manufacturer to use the alternative test on the variety of cigarette if the cigarette manufacturer demonstrates to the satisfaction of the SFMO that:

(A) another state has enacted reduced cigarette ignition propensity standards that include a test method and performance standard that are the same as those contained in the Health and Safety Code Chapter 796; and

(B) the officials responsible for implementing those requirements have approved the proposed alternative test method and performance standard for the particular cigarette variety proposed by a manufacturer as meeting the fire safety standards of that state's law or regulation under a legal provision comparable to the Health and Safety Code §796.004, including a provision that the performance standard proposed by the manufacturer is equivalent to, or greater than, the performance standard established under the Health and Safety Code §796.003.

(e) SFMO Rejection. If the requested alternative method is rejected by the SFMO, the cigarette manufacturer may proceed under §34.1203(b)(4) of this subchapter.

(f) SFMO Notice of Determination. Notice regarding the SFMO's determination concerning an alternative test method and performance standard requested pursuant to this section shall be made as described in §34.1203 of this subchapter.

§34.1207. Certification.

(a) Submission of Form and Payment of Fees. Before a cigarette variety may be sold or offered for sale in this state, the manufacturer of the cigarette variety must:

(1) complete and submit to the State Fire Marshal's Office (SFMO) the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, that is adopted by reference in §34.1212 of this subchapter (relating to Certification Forms and Marking Applications); and

(2) pay the required certification fee for each variety of cigarette being certified as specified in the Health and Safety Code §796.005(e) and §34.1211 of this subchapter (relating to Certification Filing Fees).

(b) Scope of Certification. A manufacturer may certify any number of cigarette varieties in a single filing to the extent that the cigarette varieties:

(1) were all tested at the same testing laboratory;

(2) were tested using the same testing method and performance standard; and

(3) have the same manufacturer contact information.

(c) Validity Period for Certification. A certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Notice of disapproval shall be made in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Submission of Certifications, Marking Applications, Requests for Alternative Test Method and Performance Standard, and Applicable Fees).

(d) Expiration of Certification.

(1) To continue to sell a cigarette variety that has been certified under this section the manufacturer of that cigarette variety must, within three years of the certification date, submit a new complete Certification by Manufacturer for FSCC, Form Number SF250, to the SFMO that is accompanied by all required certification renewal fees specified in §34.1211(d) of this subchapter.

(2) Each certification period shall expire at 11:59 p.m. on the third anniversary of the date the certification is filed with the SFMO.

§34.1208. Changes to Cigarette Variety and Cigarette Alteration.

(a) If a certified cigarette variety is changed with respect to any one or more of the items listed in the Health and Safety Code §796.005(b)(1) - (8), it is considered a different cigarette variety and must be certified as a new variety in conformance with §34.1207 of this subchapter (relating to Certification) before the cigarette variety may be sold in this state. Certification must meet all requirements specified in §34.1207 of this subchapter.

(b) A cigarette certified under §34.1207 of this subchapter and subsequently altered may not be sold or offered for sale in this state unless the manufacturer retests the cigarette in accordance with the Health and Safety Code Chapter 796 and this subchapter, if the alteration effected any of the following cigarette characteristics:

(1) style, such as light or ultra light;

(2) length in millimeters;

(3) circumference in millimeters;

(4) flavor, such as menthol or chocolate, if applicable; or

(5) filter or nonfilter.

§34.1209. Records Maintenance.

(a) Except as provided in subsection (b) of this section, for each cigarette variety offered for sale the manufacturer shall document and maintain for a period of not less than three years after the expiration of each certification period the following information:

(1) a copy of the submitted Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, for the cigarette variety;

(2) copies of the reports of all tests conducted on that cigarette variety, including copies of all tests performed on the cigarette variety; and

(3) information and documents demonstrating that the laboratory that performed the test was in compliance with the Health and Safety Code §796.003 or §796.004 and this subchapter for each test in which the cigarette variety was tested.

(b) For each variety of altered cigarettes under §34.1208(b) of this subchapter (relating to Changes to Cigarette Variety and Cigarette Alteration) offered for sale, the manufacturer shall document and maintain for a period of not less than three years after the expiration of each certification period the following information:

(1) a copy of the submitted Certification by Manufacturer for FSCC, Form Number SF250, for the altered variety of cigarette;

(2) the alteration(s) to the cigarette variety;

(3) copies of the reports of all tests conducted on that cigarette variety, including copies of all tests performed on the cigarette variety before alteration and all tests on the cigarette variety after alteration; and

(4) information and documents demonstrating that the laboratory that performed the test was in compliance with the Health and Safety Code §796.003 or §796.004 and this subchapter for each test in which the cigarette variety was tested.

(c) The manufacturer shall, not later than 60 calendar days after the date the manufacturer receives a written request from the SFMO, make available to the State Fire Marshal's Office (SFMO) copies of the records and documentation specified in the Health and Safety Code §796.007 and subsections (a) and (b) of this section. Except as agreed by the SFMO and the cigarette manufacturer, all copies requested to be made available under this section shall be delivered to the Fire Standard Compliant Cigarette Program Coordinator, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221.

§34.1210. Marking of Package.

(a) General Requirements.

(1) The packaging of all cigarettes varieties certified by the manufacturer to comply with the Health and Safety Code Chapter 796 shall be marked in accordance with the provisions of the Health and Safety Code §796.006.

(2) A manufacturer shall use only one marking method applied uniformly to all cigarette packaging of all varieties marketed by the manufacturer for compliance with the Health and Safety Code Chapter 796.

(b) Submission of Proposed Marking.

(1) Manufacturers must submit their proposed marking to the State Fire Marshal's Office (SFMO) along with a completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, that is adopted by reference in §34.1212 of this subchapter (relating to Certification Forms and Marking Applications).

(2) The SFMO shall not be deemed to receive an Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, on a Saturday, Sunday, or legal holiday. The day the Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 is received by the SFMO shall not be included in computing the 10-day period.

(c) SFMO Approval or Disapproval.

(1) The State Fire Marshal shall approve or disapprove the proposed marking within 10 business days after the date the completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, is received by the SFMO.

(2) Pursuant to the Health and Safety Code §796.006(b) if the marking is not disapproved within the 10 business days after the completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 is received, the proposed marking method shall be deemed approved.

(3) If the SFMO approves the proposed marking method under the requirements specified in the Health and Safety Code §796.006, the SFMO shall provide the manufacturer with written acknowledgement that the proposed marking method has been approved. Notice of approval shall be made in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Submission of Certifications, Marking Applications, Requests for Alternative Test Method and Performance Standard, and Applicable Fees).

(4) If the SFMO disapproves the proposed marking method under the requirements specified in the Health and Safety Code §796.006, the SFMO shall provide the manufacturer with written notice that the marking method may not be used by the manufacturer. Notice of disapproval shall be made in accordance with §34.1203 of this subchapter. The manufacturer may correct the application or appeal the disapproval as described in §34.1203 of this subchapter.

(d) Modification of Approved Marking. A manufacturer shall not modify an approved marking without first submitting a completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 as set forth in this section and obtaining prior approval of the proposed marking method by the SFMO.

§34.1211. Certification Filing Fees.

(a) Payment of the certification filing fee must accompany completed submissions of the Certification by Manufacturer for Fire

Standard Compliant Cigarette (FSCC), Form Number SF250. Fees must be paid by money order, check or other method accepted by the State Fire Marshal's Office (SFMO). Money orders and checks must be made payable to the Texas Department of Insurance.

(b) Fees must be paid on a cumulative total basis for each certification filing.

(c) Fees are non-refundable and non-transferable.

(d) Fees for the Fire Standard Compliant Cigarette Certification filing are as follows:

(1) initial fee--$250 per cigarette variety; and

(2) renewal fee (every three years)--$250 per cigarette variety.

§34.1212. Certification Forms and Marking Applications.

(a) The commissioner adopts by reference the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, which contains instructions for completion of the form; information regarding certification fees; requires information to be provided regarding the certification type, cigarette manufacturer, testing entity, test method, testing and quality assurance program and cigarette variety information required by the Health and Safety Code §796.005. The form is available at the department's website at www.tdi.state.tx.us/forms/form18.html.

(b) The commissioner adopts by reference the Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, which contains instructions for completion of the form and requires information to be provided regarding the cigarette manufacturer, marking approval, and a certification that the manufacturer will or has provided required information to cigarette wholesale dealers and agents. The form is available at the department's website at www.tdi.state.tx.us/forms/form18.html.

§34.1213. Penalties.

Violation of the Health and Safety Code Chapter 796 or this subchapter may subject a person to civil penalties as set forth in the Health and Safety Code §796.010.

§34.1214. Forfeiture Authority.

Pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture, except that before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805394
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 463-6327

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 2. MENTAL RETARDATION AUTHORITY RESPONSIBILITIES

SUBCHAPTER F. CONTINUITY OF SERVICES--STATE MENTAL RETARDATION FACILITIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §2.253, concerning definitions; and the repeal of and new §2.274, concerning consideration of living options for individuals residing in state mental retardation (MR) facilities in Chapter 2, Subchapter F, Continuity of Services--State Mental Retardation Facilities.

BACKGROUND AND PURPOSE

The purpose of this proposal is to implement Texas Government Code, §531.02443 (as added by Senate Bill 27, Section 1, 80th Legislature, Regular Session, 2007) which requires DADS to contract with local mental retardation authorities to implement the community living options information process (CLOIP) required by Texas Government Code, §531.02442 for a resident of a state mental retardation facility (SMRF) who is at least 22 years of age. Prior to the effective date of §531.02443, a SMRF conducted the CLOIP. The CLOIP is a process by which the resident is informed of living options and supports in the community.

The proposal describes the circumstances under which an MRA must conduct the CLOIP and the activities involved in conducting the CLOIP. In addition, the proposal describes the types of planning meetings in which living options are discussed for a resident, requirements regarding the notification by the SMRF of planning meetings, and the process and requirements by which planning meetings are conducted.

SECTION-BY-SECTION SUMMARY

The amendment to §2.253 adds the definitions for "CLOIP," "Contract MRA," and "State MR facility living options instrument."

The repeal of §2.274 deletes the current requirements for considering living options for individuals residing in state MR facilities.

Proposed new §2.274 requires a contract MRA to conduct the CLOIP for an individual 22 years of age or older residing in a state MR facility before the individual's annual planning meeting and upon request of the individual or the individual's LAR. The proposed section includes the requirements for conducting the CLOIP and for submitting the results of the CLOIP to the state MR facility. The proposed section also describes the types of planning meetings for all residents of a state MR facility and the notification and facilitation of the planning meetings. Additionally, the proposed section describes the information the state MR facility will review during a meeting when living options are discussed and the documentation requirements of the IDT at the conclusion of a meeting.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment, repeal, and new section are in effect, there are foreseeable implications relating to costs or revenues of state government. There are

no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendment, repeal, and new section are in effect is an estimated additional cost of $2,073,504 in fiscal year (FY) 2009; $3,554,578 in FY 2010; $3,554,578 in FY 2011; $3,554,578 in FY 2012; and $3,554,578 in FY 2013; and $1,481,074 in FY 2014.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment, repeal, and new section will not have an adverse economic effect on small businesses or micro-businesses, because the proposal affects only state MR facilities and MRAs, which are public agencies or organizations. A small business or micro-business is defined, in part, as a legal entity that is formed for the purpose of making a profit.

PUBLIC BENEFIT AND COSTS

Gary Jessee, DADS Assistant Commissioner for Access and Intake, has determined that, for each year of the first five years the amendment, repeal, and new section are in effect, the public benefit expected as a result of enforcing the amendment, repeal, and new section is that DADS rules will reflect state law and the new process will minimize any potential conflict of interest between a state MR facility and its residents regarding the CLOIP.

Mr. Jessee anticipates that there will not be an economic cost to persons who are required to comply with the amendment, repeal, and new section. The amendment, repeal, and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Marcia Shultz at (512) 438-3532 in DADS' Mental Retardation Authority Section of the Access and Intake Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-011, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st Street, Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 011" in the subject line.

DIVISION 1. GENERAL PROVISIONS

40 TAC §2.253

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; §531.02443, which requires DADS to contract with local mental retardation authorities to implement the community living options information process required by §531.02442; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendment implements Texas Government Code, §531.0055 and §531.02443, and Texas Human Resources Code, §161.021.

§2.253. Definitions.

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

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

(4) CLOIP--Community living options information process. The activities described in §2.274(a)(2) of this subchapter (relating to Consideration of Living Options for Individuals Residing in State MR Facilities) performed by a contract MRA to provide information and education about community living options to an individual who is 22 years of age or older residing in a state MR facility or to the individual's LAR.

(5) [~~(4)~~] Commissioner--The commissioner of DADS.

(6) [~~(5)~~] Consensus--A negotiated agreement that all parties can and will support in implementation. The negotiation process involves the open discussion of ideas with all parties encouraged to express opinions.

(7) Contract MRA--An MRA that has a contract with DADS to conduct the CLOIP.

(8) [~~(6)~~] CRCG (Community Resource Coordination Group)--A local interagency group composed of public and private agencies that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The group's role and responsibilities are described in the Memorandum of Understanding on Coordinated Services to Persons Needing Services from More Than One Agency, available on the Health and Human Services Commission website at www.hhsc.state.tx.us/crcg/crcg.htm.

(9) [~~(7)~~] DADS--The Department of Aging and Disability Services.

(10) [~~(8)~~] Dangerous behavior--Behavior exhibited by an individual who is physically aggressive, self-injurious, sexually aggressive, or seriously disruptive and requires a written behavioral intervention plan to prevent or reduce serious physical injury to the individual or others.

(11) [~~(9)~~] Department--Department of Aging and Disability Services.

(12) [~~(10)~~] Designated MRA--The MRA assigned to an individual in CARE.

(13) [~~(11)~~] Discharge--The release by DADS of an individual voluntarily admitted or committed by court order for residential mental retardation services from the custody and care of a state MR facility and termination of the individual's assignment to the state MR facility in CARE.

(14) [~~(12)~~] Emergency admission/discharge agreement--A written agreement between the state MR facility, the individual or LAR, and the designated MRA, sample copies of which are available from the Department of Aging and Disability Services, Provider Services Division, State Mental Retardation Facilities Section, P.O. Box 149030, Mail Code W-511, Austin, Texas 78714-9030, that describes:

(A) the purpose of the emergency admission, including the circumstances that precipitated the need for the admission and the expected outcomes from the admission;

(B) the responsibilities of each party regarding the care, treatment, and discharge of the individual, including how the terms of the agreement will be monitored;

(C) the length of time of the emergency admission, which is that amount of time necessary to accomplish the purpose of the admission; and

(D) the anticipated date of discharge.

(15) [~~(13)~~] Facility of record--The facility that serves the local service area(s) assigned to the individual's designated MRA.

(16) [~~(14)~~] Family-based alternative--A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(17) [~~(15)~~] Head of the facility--The superintendent or director of a state MR facility.

(18) [~~(16)~~] ICAP (Inventory for Client and Agency Planning)--A validated, standardized assessment that measures the level of supervision an individual requires and, thus, the amount and intensity of services and supports the individual needs.

(19) [~~(17)~~] ICAP service level--A designation that identifies the level of services needed by an individual as determined by the ICAP.

(20) [~~(18)~~] IDT (Interdisciplinary team)--Mental retardation professionals and paraprofessionals and other concerned persons, as appropriate, who assess an individual's treatment, training, and habilitation needs and make recommendations for services, including recommendations of whether the individual is best served in a facility or in a community setting.

(A) Team membership always includes:

(i) the individual;

(ii) the individual's LAR, if any; and

(iii) persons specified by an MRA or a state MR facility, as appropriate, who are professionally qualified and/or certified or licensed with special training and experience in the diagnosis, management, needs, and treatment of individuals with mental retardation.

(B) Other participants in IDT meetings may include:

(i) other concerned persons whose inclusion is requested by the individual or the LAR;

(ii) at the discretion of the MRA or state MR facility, persons who are directly involved in the delivery of mental retardation services to the individual; and

(iii) if the individual is school eligible, representatives of the appropriate school district.

(21) [~~(19)~~] Individual--A person who has or is believed to have mental retardation.

(22) [~~(20)~~] Interstate transfer--The admission of an individual to a state MR facility directly from a similar facility in another state.

(23) [~~(21)~~] IQ (intelligence quotient)--A score reflecting the level of an individual's intelligence as determined by the administration of a standardized intelligence test.

(24) [~~(22)~~] LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(25) [~~(23)~~] Legally adequate consent--Consent given by a person when each of the following conditions has been met:

(A) legal status: The individual giving the consent:

(i) is 18 years of age or older, or younger than 18 years of age and is or has been married or had his or her disabilities removed for general purposes by court order as described in the Texas Family Code, Chapter 31; and

(ii) has not been determined by a court to lack capacity to make decisions with regard to the matter for which consent is being sought;

(B) comprehension of information: The individual giving the consent has been informed of and comprehends the nature, purpose, consequences, risks, and benefits of and alternatives to the procedure, and the fact that withholding or withdrawal of consent shall not prejudice the future provision of care and services to the individual with mental retardation; and

(C) voluntariness: The consent has been given voluntarily and free from coercion and undue influence.

(26) [~~(24)~~] Less restrictive setting--A setting which allows the greatest opportunity for the individual to be integrated into the community.

(27) [~~(25)~~] Local service area--A geographic area composed of one or more Texas counties delimiting the population which may receive services from a local MRA.

(28) [~~(26)~~] Mental retardation--Consistent with THSC, §591.003, significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(29) [~~(27)~~] Minor--An individual under the age of 18.

(30) [~~(28)~~] MRA (mental retardation authority)--An entity to which the Health and Human Services Commission's authority and responsibility described in THSC, §531.002(11) has been delegated.

(31) [~~(29)~~] Natural support network--Those persons, including family members, church members, neighbors, and friends, who assist and sustain an individual with supports that occur naturally within the individual's environment and that are not reimbursed or purposely developed by a person or system.

(32) [~~(30)~~] Ombudsman--Consistent with THSC, §533.039, an employee of DADS who is responsible for assisting an individual or LAR if the individual is denied a service by DADS, a DADS program or facility, or an MRA. The ombudsman must explain and provide information on DADS and MRA services, facilities, and programs, and the rules, procedures, and guidelines applicable to the individual denied services, and assist the individual in gaining access to an appropriate program or in placing the individual on an appropriate waiting list.

(33) [~~(31)~~] Permanency planning--A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(34) [~~(32)~~] Planning team--A group organized by the MRA and composed of:

(A) the individual;

(B) the individual's legally authorized representative (LAR), if any;

(C) actively-involved family members or friends of the individual who has neither the ability to provide legally adequate consent nor an LAR;

(D) other concerned persons whose inclusion is requested by the individual with the ability to provide legally adequate consent or the LAR;

(E) a representative from the designated MRA; and

(F) a representative from the individual's provider.

(35) [~~(33)~~] PMRA--Persons with Mental Retardation Act, Texas Health and Safety Code, Title 7, Subtitle D.

(36) [~~(34)~~] Provider--A public or private entity that delivers community-based residential services and supports for individuals, including, but not limited to, an intermediate care facility for individuals with mental retardation (ICF/MR) or a nursing facility. The term also includes a public or private entity that provides waiver services.

(37) [~~(35)~~] Related services--Services for school eligible individuals as described in 19 TAC §89.1060 (relating to Definitions of Certain Related Services).

(38) [~~(36)~~] Respite admission/discharge agreement--A written agreement between the state MR facility, the individual or LAR, and MRA, sample copies of which are available from the Department of Aging and Disability Services, Provider Services Division, State Mental Retardation Facilities Section, P.O. Box 149030, Mail Code W-511, Austin, Texas 78714-9030, that describes:

(A) the purpose of the respite admission including the circumstances that precipitated the need for the admission and the expected outcomes from the admission;

(B) the length of time the individual will receive respite services from the state MR facility; and

(C) the responsibilities of each party regarding the care, treatment, and discharge of the individual.

(39) [~~(37)~~] School eligible--A term describing those individuals between the ages of three and 22 who are eligible for public education services.

(40) [~~(38)~~] Service delivery system--All facility and community-based services and supports operated or contracted for by DADS.

(41) [~~(39)~~] Services and supports--Programs and assistance for persons with mental retardation that may include a determination of mental retardation, interdisciplinary team recommendations, education, special training, supervision, care, treatment, rehabilitation, residential care, and counseling, but does not include those services or programs that have been explicitly delegated by law to other state agencies.

(42) [~~(40)~~] Significantly subaverage general intellectual functioning--Consistent with THSC, §591.003, measured intelligence on standardized general intelligence tests of two or more standard deviations (not including standard error of measurement adjustments) below the age-group mean for the tests used.

(43) [~~(41)~~] State MH facility (state mental health facility)--A state hospital.

(44) [~~(42)~~] State MR facility (state mental retardation facility)--A state school or a state center with a mental retardation residential component.

(45) State MR facility living options instrument--A written document used to guide the discussion of living options during a planning meeting that results in a recommendation by the IDT of the most appropriate living arrangement for the individual.

(46) [~~(43)~~] THSC--Texas Health and Safety Code.

(47) [~~(44)~~] Waiver services--Home and community-based services provided through a Medicaid waiver program approved by Centers for Medicare and Medicaid Services (CMS) as described in §1915(c) of the Social Security Act.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805410
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 438-3734

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DIVISION 4. MOVING FROM A STATE MR FACILITY TO AN ALTERNATIVE LIVING ARRANGEMENT

40 TAC §2.274

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

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; §531.02443, which requires DADS to contract with local mental retardation authorities to implement the community living options information process required by §531.02442; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeal implements Texas Government Code, §531.0055 and §531.02443, and Texas Human Resources Code, §161.021.

§2.274. Consideration of Living Options for Individuals Residing in State MR Facilities.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805412
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 438-3734

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40 TAC §2.274

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; §531.02443, which requires DADS to contract with local mental retardation authorities to implement the community living options information process required by §531.02442; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The new section implements Texas Government Code, §531.0055 and §531.02443, and Texas Human Resources Code, §161.021.

§2.274. Consideration of Living Options for Individuals Residing in State MR Facilities.

(a) Individuals 22 years of age or older.

(1) A contract MRA must conduct the CLOIP for an individual 22 years of age or older residing in a state MR facility:

(A) before the individual's annual planning meeting as referenced in subsection (c)(2) of this section; and

(B) upon request of the individual or LAR to learn about living options other than the state MR facility.

(2) In conducting the CLOIP, the contract MRA must:

(A) provide standardized educational materials approved by DADS describing living options and supports in the community;

(B) offer the individual or LAR the opportunity to visit examples of living options available in the community and to visit with peers utilizing these options; and

(C) document the results of the CLOIP in a format approved by DADS.

(3) A state MR facility must notify the contract MRA, in accordance with DADS procedures, of a request by an individual or LAR for information regarding living options other than the state MR facility.

(4) After the contract MRA receives the notification required by paragraph (3) of this subsection, the contract MRA must contact the individual or LAR and conduct the CLOIP in accordance with paragraph (2) of this subsection.

(5) The contract MRA must:

(A) submit results of the CLOIP to the state MR facility in accordance with DADS procedures to assist the IDT in making a recommendation described in subsection (g)(4)(D) of this section; and

(B) participate in person or by telephone in a planning meeting for which the contract MRA is notified in accordance with subsection (d)(3) of this section, unless the individual or LAR requests otherwise.

(b) Individuals under 22 years of age. The designated MRA must discuss community living options with an individual under 22 years of age residing in a state MR facility or LAR in accordance with the permanency planning process described in §9.244(f) - (i) of this title (relating to Applicant Enrollment in the ICF/MR Program).

(c) Types of planning meetings in which living options are discussed for an individual residing in a state MR facility.

(1) Within 30 days after admission of an individual to a state MR facility, the state MR facility must conduct an initial planning meeting in which living options are discussed.

(2) Annually, the state MR facility must conduct a planning meeting in which living options are discussed (annual planning meeting).

(3) The state MR facility must conduct a planning meeting if, at any time, the individual or LAR requests a discussion about living options including a request for information about living options other than the state MR facility or requests to move to a specific setting or area of the state.

(d) Notification of planning meetings. In accordance with DADS procedures, the state MR facility must notify:

(1) the individual and LAR of a planning meeting described in subsection (c) of this section;

(2) the designated MRA of a planning meeting described in subsection (c) of this section and, if appropriate, request from the designated MRA information about alternative living arrangements and community services and supports in the area in which the individual is interested in living that the IDT will need before making a recommendation as described in subsection (g)(4)(D) of this section; and

(3) the contract MRA:

(A) of an annual planning meeting described in subsection (c)(2) of this section for an individual 22 years of age or older; and

(B) a planning meeting described in subsection (c)(3) of this section for which a CLOIP must be conducted by the contract MRA in accordance with subsection (a)(1)(B) of this section.

(e) Additional planning meeting participants as determined by individual or LAR. The individual with the ability to provide legally adequate consent or the LAR of an individual who does not have the ability to provide legally adequate consent may choose to:

(1) invite other family members, friends, or other interested persons to a planning meeting; or

(2) exclude any and all family members, friends, or other interested persons from attending a planning meeting.

(f) Facilitation of a planning meeting. The state MR facility must:

(1) encourage the attendance and participation in a planning meeting by those persons invited by the individual or LAR;

(2) make a reasonable attempt to schedule the planning meeting at a time that is convenient for the individual's LAR and those family members, friends, or other persons invited by the individual or LAR; and

(3) use communication devices and techniques (including the use of sign language), as appropriate, to facilitate the involvement of the individual and LAR during a planning meeting.

(g) Conducting the planning meeting.

(1) At a planning meeting described in subsection (c)(1) of this section, the IDT must review the individual's or LAR's awareness of living options explained by the designated MRA during the admission process, as required by §5.159(c) of this title (relating to Assessment of Individual's Need for Services and Supports).

(2) At a planning meeting described in subsection (c)(2) or (3) of this section, the IDT must review, as appropriate to the individual's age:

(A) the results of the CLOIP submitted to the state MR facility in accordance with subsection (a)(5)(A) of this section; or

(B) the results of the permanency planning process submitted to the state MR facility in accordance with §9.244(f)(7)(C) of this title.

(3) In conducting a planning meeting described in subsection (c) of this section, the IDT must use the State MR Facility Living Options Instrument which may be obtained from the Department of Aging and Disability Services, Provider Services Division, State Mental Retardation Facilities Section, P.O. Box 149030, Mail Code W-511, Austin, Texas 78714-9030 or at www.dads.state.tx.us.

(4) At the conclusion of a planning meeting described in subsection (c) of this section, the IDT must document:

(A) the decision of an individual who has the ability to provide legally adequate consent or an LAR to consider potential living options;

(B) the choice of living option preferred by the individual or the individual's LAR;

(C) the IDT's conclusions as to whether or not the state MR facility is the most appropriate living arrangement for the individual;

(D) the recommendation by the IDT of whether the individual should remain in the current living arrangement at the state MR facility or move to an alternative living arrangement; and

(E) for an individual under 22 years of age, the IDT's conclusions as to whether or not the permanency planning goal has been accomplished.

(h) Choice for individual to remain in state MR facility. An individual with the ability to provide legally adequate consent or the LAR may choose for the individual to remain a resident of a state MR facility if the individual has been determined to have mental retardation in accordance with §5.155 of this title (relating to Determination of Mental Retardation).

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

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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CHAPTER 18. NURSING FACILITY ADMINISTRATORS

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §18.2, concerning definitions; §18.3, concerning nursing facility administrators advisory committee; §18.4, concerning schedule of fees; §18.11, concerning academic requirements; §18.12, concerning internship requirements; §18.13, concerning alternate education, training, and experience; §18.14, concerning preceptor requirements; §18.15, concerning application requirements; §18.16, concerning examinations; §18.31, concerning initial license; §18.32, concerning provisional license; §18.33, concerning duplicate license; §18.34, concerning license renewal; §18.35, concerning continuing education requirements for license renewal; §18.36, concerning late renewals; §18.37, concerning denial of license renewal; §18.38, concerning inactive status; §18.39, concerning voluntary surrender of a license; §18.40, concerning reinstatement; §18.41, concerning licensure of persons with criminal backgrounds; §18.51, concerning referral and complaint procedures; §18.52, concerning informal reviews; §18.53, concerning formal hearings; §18.54, concerning rule or statutory violations; §18.55, concerning violations of standards of conduct; §18.56, concerning violations by unlicensed persons; and §18.57, concerning schedule of sanctions, in Chapter 18, Nursing Facility Administrators.

BACKGROUND AND PURPOSE

The purpose of the amendments is to update DADS rules governing nursing facility administrator (NFA) licensing, investigations, and sanctions. Licensing activities include validating initial and continuing education, providing quarterly seminars for administrator-in-training (AIT) preceptors, and taking licensure action, including issuance, renewal, denial, or revocation.

The amendments also provide the new fee schedule that was updated on March 1, 2006, by the National Association of Long Term Care Administrator Boards (NAB).

Additionally, the proposed amendments update rule language and terms and correct agency names and cross-references.

SECTION-BY-SECTION SUMMARY

The amendments to §§18.2 - 18.4, 18.11 - 18.16, 18.31 - 18.41, and 18.51 - 18.57 update rule language and terms and correct agency names and cross-references.

The amendment to §18.2 updates the definitions for the chapter and adds definitions for "DADS," "PES," "Regulatory Services

Division," "Self study course," "State of Texas Administrator-In-Training Internship Manual," and "Traditional business hours."

The amendment to §18.4 updates administrative and licensure fees. The amendment changes the state examination fee from $135.00 to $155.00 and the NAB examination fee from $260.00 to $285.00.

The amendment to §18.12 updates rule language governing internship requirements and terms to require the AIT to submit a signed statement from the administrator of record at the nursing facility verifying that the AIT training occurred in the facility.

The amendment to §18.14 requires a licensee seeking to sponsor an AIT to pay a $25 training fee and to meet the eligibility requirements in the State of Texas AIT Internship Manual and requires a licensee to remain in good standing in order to act as a preceptor.

The amendment to §18.16 updates state examination and NAB examination fees.

The amendment to §18.31 updates the initial license requirements an applicant must meet, including criminal conviction requirements.

The amendment to §18.34 updates license renewal requirements, including requiring a licensee seeking renewal to submit a DPS criminal conviction report and fingerprint card.

The amendment to §18.35 updates continuing education requirements to allow no more than 34, rather than six, clock hours of NAB-approved self-study courses toward the required 40 clock hours for continuing education, and to extend the deadline for meeting continuing education requirements for a licensee on deployed military duty.

The amendment to §18.38 amends the inactive status requirements to clarify the procedure for reapplying for a license if DADS has placed an administrator's license on inactive status.

The amendment to §18.51 updates division contact information, including address, mail code, phone, and fax number, used to file a complaint against a licensee.

The amendment to §18.55 adds new language to specifically prohibit a licensee from offering a gift or loan to DADS staff.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because nursing facility administrators are not small or micro-businesses.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that the public will benefit by having the correct information needed to file a complaint against a licensee. These rule revisions will also help nursing homes ensure that they are hiring qualified administrators to manage their facilities and provide their residents with the best quality of care.

Ms. Durden anticipates that there will be an economic cost to persons required to comply with the amendments based on new preceptor training fee. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS' Regulatory Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-062, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 062" in the subject line.

SUBCHAPTER A. GENERAL INFORMATION

40 TAC §§18.2 - 18.4

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§18.2. Definitions.

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

(1) Abuse--Any act, failure to act, or incitement to act done willfully, knowingly, or recklessly through words or physical action that causes or could cause mental or physical injury or harm or death to a nursing facility resident. Abuse includes [~~Includes~~] verbal, sexual, mental, psychological, [~~mental/psychological~~], or physical abuse; corporal punishment; involuntary seclusion; or any other actions within this definition.

(2) Administrative law judge (ALJ)--A State Office of Administrative Hearings (SOAH) attorney who conducts formal hearings for the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services [~~(DHS)~~].

(3) (No change.)

(4) Administrator-in-training (AIT)--A person undergoing a minimum 1,000-hour internship under a DADS-approved [~~DHS-approved~~] certified preceptor.

(5) (No change.)

(6) Application--The notarized DADS [~~DHS~~] application for licensure as a nursing facility administrator, as well as all required forms, fees, and supporting documentation.

(7) (No change.)

(8) DADS--The Department of Aging and Disability Services.

[~~(8) Contested case--A proceeding in accordance with the Administrative Procedure Act pertaining to DHS's rule enforcement and licensing activities that results in the determination of a party's legal rights, duties, or privileges as determined by an administrative law judge.~~]

[~~(9) Credentialing Department--The section of DHS's Long Term Care Regulatory division that is responsible for the licensing of nursing facility administrators.~~]

(9) [~~(10)~~] Deficiency--Violation of a federal participation requirement in a nursing facility.

(10) [~~(11)~~] Domains of the NAB--The five categories for education and continuing education [~~domains~~] of the National Association of [~~Boards of Examiners of~~] Long Term Care Administrator Boards, which [~~Administrators, Inc. (NAB)~~] are resident care and quality of life; human resources; finance; physical environment and atmosphere; and leadership and management.

(11) [~~(12)~~] Equivalent--A level of achievement that is equal in amount and quality to completion of an educational or training program.

(12) [~~(13)~~] Formal hearing--A hearing held by SOAH to adjudicate a sanction taken by DADS [~~DHS~~] against a licensed nursing facility administrator.

(13) [~~(14)~~] Good standing--The licensure status of a nursing facility administrator who is in compliance with the rules in this chapter and [~~and/or~~], if applicable, the terms of any sanction imposed by DADS [~~DHS~~].

(14) [~~(15)~~] Informal review--The opportunity for a licensee to dispute the allegations made by DADS [~~DHS~~]. The informal review includes the opportunity to show compliance.

(15) [~~(16)~~] Internship--The 1,000-hour training period in a nursing facility for an AIT.

(16) [~~(17)~~] License--A nursing facility administrator license or provisional license.

(17) [~~(18)~~] Licensee--A person licensed by DADS [~~DHS~~] as a nursing facility administrator.

[~~(19) Long Term Care Regulatory--The division of DHS responsible for long term care regulation, including surveying nursing facilities to determine compliance with licensure and certification and licensing nursing facility administrators.~~]

(18) [~~(20)~~] Misappropriation of resident property--The deliberate misplacement, exploitation, or wrongful temporary or permanent use of a nursing facility resident's belongings or money without the resident's consent. [~~The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.~~]

(19) [~~(21)~~] NAB--The National Association of Long Term Care Administrator Boards [~~Acronym for the National Association of Boards of Examiners of Long Term Care Administrators, Inc.~~], which is composed of state boards or agencies responsible for the licensure of nursing facility administrators.

(20) [~~(22)~~] NAB examination--The national examination developed by NAB that applicants must pass in combination with the state licensure examination to be issued a license to practice nursing facility administration in Texas.

(21) [~~(23)~~] NCERS--The [~~Acronym for the~~] National Continuing Education Review Service, which is the part of NAB that approves and monitors continuing education activities for nursing facility administrators.

(22) [~~(24)~~] Neglect--A deprivation of life's necessities of food, water, or shelter; or a failure of an individual to provide services, treatment, or care to a nursing facility resident that causes or could cause mental or physical injury, harm, or death to the nursing facility resident.

(23) [~~(25)~~] Nursing facility--An institution or facility licensed by DADS [~~DHS~~] as a nursing home, nursing facility, or skilled nursing facility.

(24) [~~(26)~~] Nursing facility administrator--A person who is licensed to engage in the practice of nursing facility administration, regardless of whether the person has ownership interest in the facility.

(25) [~~(27)~~] Nursing Facility Administrators Advisory Committee (NFAAC)--The nine-member governor-appointed advisory committee that makes recommendations to DADS [~~DHS~~] about the practice and regulation of nursing facility administration.

(26) [~~(28)~~] Opportunity to show compliance--An informal meeting between DADS [~~DHS~~] and a licensee that allows the licensee an opportunity to show compliance with the requirements of law for the retention of the license. The opportunity to show compliance is part of an informal review.

(27) [~~(29)~~] Preceptor--A licensed nursing facility administrator certified by DADS [~~DHS~~] to provide supervision to an AIT.

(28) PES--Professional examination services. The testing agency that administers the NAB and state examinations to applicants seeking licensure as nursing facility administrators.

(29) [~~(30)~~] Referral--A recommendation made by [~~Long Term Care~~] Regulatory Services Division staff to investigate an administrator's compliance with licensure requirements when deficiencies or [~~and/or~~] substandard quality of care deficiencies are found in a nursing facility, as required by Title 42 Code of Federal Regulations.

(30) Regulatory Services Division--The division of DADS responsible for long term care regulation, including determining nursing facility compliance with licensure and certification requirements and licensing nursing facility administrators.

(31) Sanctions--Any adverse licensure actions DADS [DHS] imposes against a licensee, including letter of reprimand, [and] suspension, revocation, [and] denial of license, and monetary penalties.

(32) Self-study course--A NAB-approved education course that an individual pursues independently to meet continuing education requirements for license renewal.

(33) [(32)] State examination--The state licensure examination that applicants must pass, in combination with the NAB examination, to be issued a license to practice nursing facility administration in Texas. This examination covers the nursing facility requirements found in Chapter 19 of this title (relating to Nursing Facility Requirements for Licensure and Medicaid Certification).

(34) State of Texas Administrator-In-Training Internship Manual--The DADS program guide used by an AIT and preceptor during the AIT's internship for nursing facility administrator licensure.

(35) [(33)] Substandard quality of care--Any deficiency in Resident Behavior and Facility Practices, Quality of Life, or Quality of Care that is immediate jeopardy to nursing facility resident health or safety; or a pattern of widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.

(36) [(34)] Survey--A resident-focused complaint/incident investigation or annual licensure or [and/or] certification inspection of a nursing facility by DADS [DHS].

[(35) Sylvan Prometric--The testing agency that administers the NAB and state examinations to applicants seeking licensure as nursing facility administrators.]

[(36) Texas Department of Human Services (DHS)--The licensing authority for nursing facility administrators.]

(37) Traditional business hours--Monday through Friday from 8:00 a.m. until 5:00 p.m.

§18.3. Nursing Facility Administrators Advisory Committee.

(a) The governor-appointed NFAAC [Nursing Facility Administrators Advisory Committee (NFAAC)] advises DADS [the Texas Department of Human Services] on:

(1) the licensing process of nursing facility administrators;

(2) (No change.)

(3) proposed rule changes;

(4) [administrator] complaints and referrals against administrators; and

(5) (No change.)

(b) (No change.)

(c) The nine-member advisory committee is made up of:

(1) three licensed nursing facility administrators, at least one of whom represents a not-for-profit nursing facility;

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

§18.4. Schedule of Fees.

DADS [The Texas Department of Human Services] charges the following administrative and licensure fees:

(1) (No change.)

(2) state examination fee--$155 [$135];

(3) state reexamination fee--$155 [$135];

(4) NAB [National Association of Boards of Examiners of Long Term Care Administrators, Inc. (NAB)] examination fee--$285 [$260];

(5) NAB reexamination fee--$285 [$260];

(6) - (11) (No change.)

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

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Kenneth L. Owens
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Department of Aging and Disability Services
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SUBCHAPTER B. REQUIREMENTS FOR LICENSURE

40 TAC §§18.11 - 18.16

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§18.11. Academic Requirements.

(a) Applicants seeking licensure must meet the following academic requirements:

(1) have a baccalaureate degree in any subject from a university or health science center accredited by an association recognized by the Texas Higher Education Coordinating Board; and

(2) complete [completion of] a minimum of 15 semester credit hours in long term care administration, or its equivalent, that includes courses in the following domains of the NAB [National Association of Boards of Examiners of Long Term Care Administrators, Inc.]:

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

(b) DADS [The Texas Department of Human Services] accepts foreign university degrees and coursework that is counted as transfer credit by accredited universities recognized by the American Association of Collegiate Registrars and Admissions Officers.

§18.12. Internship Requirements.

An AIT [~~administrator-in-training (AIT)~~] must meet the following requirements:

(1) Before starting the internship, the AIT must provide DADS [~~the Texas Department of Human Services (DHS)~~] written notice of:

(A) the name and license number of the DADS-approved [~~DHS-approved~~] preceptor providing training; and

(B) the name and address of the nursing facility where the internship will be completed, and the administrator's name if the individual is not the preceptor of record.

(2) The internship must be in a nursing facility that has [~~must have~~] a minimum of 60 beds.

(3) (No change.)

(4) A minimum of 500 of the 1,000 hours must be during traditional business hours.

(5) [~~(4)~~] The AIT can train no more than 40 hours a week.

(6) [~~(5)~~] Upon completing the internship, the AIT must submit to DADS [~~DHS~~]:

(A) one of the following:

(i) [~~(A)~~] a complete and notarized AIT Final Report and Preceptor Performance Report; or

(ii) [~~(B)~~] official transcript from a university accredited by an association recognized by the Texas Higher Education Coordinating Board that reflects completion of the internship; and[~~.~~]

(B) a signed statement from the administrator of record of the nursing facility in which the training occurred verifying the AIT trained at the nursing facility.

§18.13. Alternate Education, Training, and Experience.

(a) Applicants not meeting the academic or [~~and/or~~] internship requirements for licensure in §18.11 of this subchapter (relating to Academic Requirements) and §18.12 of this subchapter (relating to Internship Requirements [~~chapter (relating to Academic Requirements; and Internship Requirements)~~], are eligible for licensure if they present evidence satisfactory to DADS [~~the Texas Department of Human Services~~] of the following alternate education and experience:

(1) a master's degree in health administration, health services administration, health care administration, or nursing, which includes coursework that encompasses the five domains of the NAB [~~National Association of Boards of Examiners of Long Term Care Administrators, Inc. (NAB)~~], with one year of management experience and completion of a 500-hour internship; or

(2) (No change.)

(b) Management experience is defined as full-time employment as a department head or licensed professional supervising two or more employees in a nursing facility [~~home~~] or skilled nursing hospital unit.

§18.14. Preceptor Requirements.

(a) A licensee seeking to sponsor an AIT [~~administrator-in-training (AIT)~~] must:

(1) (No change.)

(2) be in good standing; [~~and~~]

(3) have paid a $25 training fee and completed DADS [~~the Texas Department of Human Services (DHS)~~] preceptor training to become a certified preceptor; and[~~.~~]

(4) meet the eligibility requirements in the State of Texas AIT Internship Manual.

(b) A preceptor must submit a complete and notarized AIT Performance Report to DADS [~~DHS~~] at the end of the internship.

(c) A preceptor must obtain [~~DHS~~] approval from DADS before [~~for~~] sponsoring more than one AIT at the same time.

(d) DADS [~~DHS~~] may consider any imposed sanction against a preceptor as grounds for refusing to allow the preceptor to sponsor an AIT.

(e) DADS [~~DHS~~] may refuse to allow a preceptor to provide training to an AIT if the preceptor did not provide adequate training to previous AITs.

(f) DADS [~~DHS~~] waives 20 of the 40 clock hours of continuing education required for license renewal for a preceptor who sponsors an AIT.

(g) A licensee is qualified to act as a preceptor [~~certificate is valid~~] for two years from the date the licensee completes DADS' [~~DHS's~~] preceptor training [~~, providing the licensee remains in good standing~~].

(h) A licensee must remain in good standing in order to act as a preceptor.

§18.15. Application Requirements.

(a) Applicants seeking licensure must submit the following to DADS [~~the Texas Department of Human Services (DHS)~~]:

(1) a complete and notarized Nursing Facility Administrator's Application for Licensure Form [~~form~~];

(2) (No change.)

(3) a Texas Department of Public Safety (DPS) Texas criminal conviction [~~Criminal Conviction~~] report and fingerprint card;

(4) (No change.)

(5) if not a part of the transcript reflecting a baccalaureate degree, another transcript reflecting 15 semester credit hours in long term care administration or its equivalent that include the five domains of the NAB as listed in §18.11 of this subchapter [~~chapter~~] (relating to Academic Requirements), or alternate education, training and experience listed in §18.13 of this subchapter (related to Alternate, Education, and Experience); and

(6) proof of completing the minimum applicable internship that meets the internship requirements in §18.12 of this subchapter [~~chapter~~] (relating to Internship Requirements).

(b) (No change.)

(c) Applicants not meeting the requirements for licensure and examination within one year after DADS [~~DHS~~] receives their application must resubmit the following to DADS [~~DHS~~]:

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

(3) a DPS Texas criminal conviction [~~Criminal Conviction~~] report and fingerprint card.

(d) DADS [~~DHS~~] is not responsible for applications, forms, notices, and correspondence unless they are received by DADS [~~DHS~~].

(e) DADS [~~DHS~~] is not responsible for mail it sends to a licensee or applicant if the licensee's or applicant's current [~~last known~~] address was not reported in writing to DADS [~~DHS~~].

§18.16. Examinations.

(a) Applicants seeking licensure as nursing facility administrators from DADS [~~the Texas Department of Human Services (DHS)~~] must pass the following examinations:

(1) (No change.)

(2) NAB [~~National Association of Boards of Examiners of Long Term Care Administrators, Inc. (NAB)~~] examination.

(b) Applicants register for examination [~~examination(s)~~] at a designated NAB website by:

(1) (No change.)

(2) paying the $155 [~~$135~~] state examination and $285 [~~$260~~] NAB examination fees on-line.

(c) DADS [~~DHS~~] sends e-mails notifying applicants of their eligibility to take the test.

(d) Applicants must not take any examination without DADS [~~DHS~~] approval.

(e) Applicants complete the on-line state and NAB examinations at PES [~~a Sylvan Prometric testing site~~].

(f) DADS [~~DHS~~] notifies applicants of test scores within two weeks after receiving examination results from the testing agency.

(g) An applicant who fails an examination and wants to retest must pay the appropriate state or NAB examination fee stated in subsection (b)(2) of this section. [~~reexamination fees of:~~]

~~[(1) $135 for the state examination; and/or]~~

~~[(2) $260 for the NAB examination.]~~

(h) Applicants failing the state or NAB examination [~~examination(s)~~] three consecutive times must complete another minimum 1,000-hour AIT [~~administrator-in-training~~] internship before retesting.

(i) (No change.)

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

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SUBCHAPTER C. LICENSES

40 TAC §§18.31 - 18.41

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§18.31. Initial License.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] issues a license certificate to applicants who:

(1) receive passing scores on the state and NAB examinations; [~~and~~]

(2) submit the $250 initial license fee to DADS; and [~~DHS.~~]

(3) meet the requirements of §18.41 of this subchapter (relating to Licensure of Persons with Criminal Backgrounds).

(b) DADS may determine that a criminal conviction or a sanction taken against an applicant in Texas or another state is a basis for pending or denying an initial license.

(c) [~~(b)~~] A license expires two years from the date issued.

(d) [~~(c)~~] Licensees must keep DADS [~~DHS~~] informed of their current home address and employment address. If employed by a nursing facility, a licensee must submit a Data Change Request form to DADS [~~DHS~~] within 30 days after [~~of~~] a change of employment.

(e) [~~(d)~~] Licensees who do not notify DADS [~~DHS~~] of a change in address or employment within the required 30 days may be subject to an administrative penalty as listed in §18.57 of this chapter (relating to Schedule of Sanctions).

~~[(e) DHS reserves the right to determine whether a criminal conviction or a sanction taken against an applicant in Texas or another state is a basis for pending or denying an initial license.]~~

§18.32. Provisional License.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] issues a provisional license to applicants currently licensed or registered as nursing facility administrators in another state who submit the following to DADS [~~DHS~~]:

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

(3) proof of the following:

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

(C) a passing score on the NAB [~~National Association of Boards of Examiners of Long Term Care Administrators, Inc.,~~] examination; and

(D) sponsorship by an administrator licensed by DADS [~~DHS~~] and who is in good standing, unless DADS waives sponsorship based on a demonstrated hardship. [~~Sponsorship is waived in cases of demonstrated hardship.~~]

(b) (No change.)

(c) DADS [~~DHS~~] issues a license certificate to a provisional license holder who:

(1) [~~who~~] passes the state examination; [~~and~~]

(2) pays DADS [~~DHS~~] the $250 initial licensure fee; and[~~,~~]

(3) has not had a license revoked in Texas or any other state.

(d) DADS may [~~DHS reserves the right to~~] determine that [~~whether~~] a criminal conviction or [~~a~~] sanction taken in [~~against an applicant in Texas or~~] another state is a basis for pending or denying a provisional license.

~~[(e) DHS does not issue a license to an applicant who has had a license revoked in Texas or any other state.]~~

§18.33. Duplicate License.

DADS [~~The Texas Department of Human Services~~] replaces lost, damaged, or destroyed license certificates to licensees who submit a notarized Duplicate License Request form and $25 duplicate license fee to DADS [~~DHS~~].

§18.34. License Renewal.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] notifies licensees of their license expiration date and renewal requirements at least 31 days before the license expires.

(b) A licensee who does not receive a renewal notice must renew the license before the license expires. [~~Failure to receive a renewal notice does not release the licensee from the responsibility of renewing the license on time.~~]

(c) Licensees seeking renewal must submit the following to DADS [~~DHS~~] on or before the date the license expires:

(1) a complete [~~and notarized~~] License Renewal form;

(2) the $250 renewal fee; [~~and~~]

(3) proof of completion of 40 clock hours of continuing education; and[~~.~~]

(4) a DPS Texas criminal conviction report and fingerprint card.

(d) DADS [~~DHS~~] uses the postmark date to determine if a renewal application is on time. If there is no postmark or the postmark is not legible, DADS [~~DHS~~] uses the [~~stamp-in~~] date that the Nursing Facility Administrator Licensing Program records the renewal application as received.

(e) DADS [~~DHS~~] issues a two-year license renewal card to eligible licensees who meet the requirements in subsection (c) of this section.

(f) DADS may deny a license renewal according to §18.37 of this subchapter (relating to Denial of License Renewal).

§18.35. Continuing Education Requirements for License Renewal.

(a) The 40 clock hours of continuing education required for license renewal must:

(1) (No change.)

(2) include one or more of the five domains of the NAB [~~National Association of Boards of Examiners of Long Term Care Administrators, Inc. (NAB)~~] listed in §18.11 of this chapter (relating to Academic Requirements);

(3) (No change.)

(4) be:

(A) (No change.)

(B) a DADS-sponsored [~~Texas Department of Human Services (DHS)-sponsored~~] event; or

(C) (No change.)

(b) DADS [~~DHS~~] accepts no more than 34 clock [~~six~~] hours of NAB-approved self-study courses toward the required 40 clock hours of continuing education.

(c) DADS [~~DHS~~] waives, at a maximum, 20 of the 40 clock hours of continuing education to a licensee who completes one three-semester hour upper-division course taken at a post-secondary institution of higher education.

(d) DADS [~~DHS~~] approves continuing education hours once per licensure renewal period for the same course, seminar, workshop, or program.

(e) DADS [~~DHS~~] waives 20 of the required 40 clock hours of continuing education for preceptors who sponsor an AIT [~~administrator-in-training~~].

(f) DADS [~~DHS~~] may perform an audit of continuing education courses, seminars, or workshops that the licensee has reported by requesting certificates of attendance.

(g) If a licensee is on deployed military duty, the deadline to meet continuing education requirements is extended based on the actual duration of the deployment up to two years.

(1) A licensee must submit a copy of the military orders to DADS within 60 days of completion of deployed duty.

(2) If continuing education requirements for licensure renewal are not met by the extension deadline, the licensee must:

(A) meet the licensure application and examination requirements for an initial license as listed in §18.15 of this chapter (relating to Application Requirements), §18.16 of this chapter (relating to Examinations), and §18.31 of this subchapter (relating to Initial License); or

(B) prior to the extension deadline, place the license in a formal inactive status in accordance with §18.38 of this subchapter (relating to Inactive Status).

§18.36. Late Renewals.

(a) A person [~~whose license has expired~~] has up to one year after [~~from~~] the expiration date of a license to renew the [~~a~~] license by:

(1) completing 40 clock hours of continuing education as listed in §18.35 of this subchapter [~~chapter~~] (relating to Continuing Education Requirements for License Renewal); and

(2) submitting the following fee to DADS [~~the Texas Department of Human Services (DHS)~~]:

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

(b) A person whose license has been expired for more than 365 days [~~one year~~] must meet the licensure and examination requirements for an initial license.

(c) A person must retake the NAB [~~National Association of Boards of Examiners of Long Term Care Administrators, Inc. (NAB)~~] exam if the person [~~applicant~~] last took and passed the NAB exam more than five years before the application date.

(d) A person who does not renew a license on or before the date the license expires must return the license to DADS [~~DHS~~].

(e) (No change.)

(f) DADS [~~DHS~~] imposes one or more sanctions listed in §18.57 of this chapter (relating to Schedule of Sanctions) against a person who practices with an expired license.

§18.37. Denial of License Renewal.

(a) DADS may deny [~~The Texas Department of Human Services (DHS) reserves the right to determine if any of the following may result in denial of~~] an application for license renewal based on either of the following:

(1) (No change.)

(2) a conviction for a crime listed in §18.41 of this subchapter [~~chapter~~] (relating to Licensure of Persons with Criminal Backgrounds).

(b) DADS does [~~DHS will~~] not renew a license if:

(1) (No change.)

(2) the [~~a~~] licensee defaulted on a guaranteed student loan as addressed in the Education Code, §57.491; or

(3) the licensee did not comply with the terms of a sanction or settlement agreement with DADS.

§18.38. Inactive Status.

(a) A licensee may place a license in a formal inactive status with DADS [~~the Texas Department of Human Services (DHS)~~] for up to two renewal periods.

(b) To place a license in a formal inactive status, the licensee submits the following to DADS [~~DHS~~] on or before the date the license expires:

(1) a completed [~~the~~] Inactive Status Application form; and

(2) (No change.)

(c) Licensees must renew the inactive license on or before the date that the [~~second~~] inactive status expires by submitting to DADS [~~DHS~~]:

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

(d) If a licensee's inactive status has expired, the licensee must meet the licensure application and examination requirements as listed in §18.15 of this chapter (relating to Application Requirements) and §18.16 of this chapter (relating to Examinations).

(e) If it has been less than five years since the individual passed the NAB examination, the individual is not required to take the NAB examination referenced in §18.16(a)(2) of this chapter, but must take the state exam.

(f) A person whose inactive status license has expired may not pay a late renewal fee.

§18.39. Voluntary Surrender of a License.

(a) A licensee may voluntarily surrender a license by returning the license certificate to DADS [~~the Texas Department of Human Services~~].

(b) A licensee who voluntarily surrenders a license while under investigation for a violation of licensure requirements may still receive:

(1) a written reprimand; or [~~and/or~~]

(2) (No change.)

(c) (No change.)

(d) A licensee who voluntarily surrenders a license in lieu of a proposed license revocation is permanently disqualified from licensure in Texas.

§18.40. Reinstatement.

Applicants who previously were licensed and in good standing in Texas may obtain a new license without reexamination if they:

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

(3) pay DADS [~~the Texas Department of Human Services~~] a $500 reactivation fee.

§18.41. Licensure of Persons with Criminal Backgrounds.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] considers an applicant's or a licensee's conviction of a crime related to the duties, responsibilities and job performance of an administrator [~~conviction(s) for crimes~~] as a potential basis for:

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

(b) DADS [~~DHS~~] considers the following when determining if a criminal conviction directly relates to the duties and responsibilities of a nursing facility administrator:

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

(c) DADS has determined [~~DHS believes~~] that the following crimes relate to nursing facility administration and reflect an inability or tendency of an individual to inadequately perform as an administrator:

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

(d) DADS [~~DHS~~] may consider other crimes and pertinent information as a potential basis for denying an initial or renewal application.

(e) Convictions under federal law or another state or nation for offenses containing elements similar to offenses listed in subsection (c) of this section may be a basis for DADS [~~DHS~~] imposing sanctions.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805415
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER D. REFERRALS, COMPLAINT PROCEDURES, AND SANCTIONS

40 TAC §§18.51 - 18.57

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§18.51. Referral and Complaint Procedures.

(a) DADS' Professional Credentialing Enforcement Unit [~~The Texas Department of Human Services (DHS), Credentialing Department,~~] receives and investigates:

(1) referrals from [~~Long Term Care~~] Regulatory Services Division regional staff to determine an administrator's compliance with licensure requirements when survey findings cite deficiencies or [~~and/or~~] substandard quality of care; and

(2) (No change.)

(b) Persons wanting to file a complaint against a licensee may contact the Professional Credentialing Enforcement [~~Department's Complaint Investigations~~] Unit:

(1) by calling (512) 438-5495 [~~231-5800~~]; or

(2) by writing the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services, Professional Credentialing Enforcement Unit [~~Department~~], Mail Code E-302 [~~Y-978~~], ATTN: NFA Complaint Investigations, P.O. Box 149030, Austin, TX 78714-9030.

(c) DADS [~~DHS~~] sends a Nursing Facility Administrator Complaint form to persons wanting to file a complaint. The complainant must [~~should~~] complete, sign, and return the form to DADS [~~DHS~~].

(d) If [~~Once~~] a referral or complaint is received, the Professional Credentialing Enforcement Unit [~~Department~~] notifies the licensee and, if applicable, the person filing the complaint of the:

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

(e) DADS [~~DHS~~] investigates referrals and complaints by first determining if a complaint is within Professional Credentialing Enforcement Unit [~~Credentialing's~~] authority to investigate, then by:

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

(f) DADS keeps [~~DHS protects copies of documents or~~] records confidential [~~for privacy and confidentiality~~] in accordance with [~~applicable~~] state and federal law [~~laws~~].

(g) DADS [~~DHS~~] prioritizes complaints as follows:

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

(h) After the investigation is complete, a final report with supporting documentation is given to the NFAAC [~~Nursing Facility Administrators Advisory Committee (NFAAC)~~] for review and recommendation consideration on the appropriate action.

(i) After evaluating [~~considering~~] the NFAAC's recommendation, DADS [~~DHS evaluates the evidence and~~] makes a decision to [~~either~~]:

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

(j) DADS [~~DHS~~] notifies the licensee and, if applicable, the person filing a complaint of the status and final outcome of a complaint or referral.

§18.52. Informal Reviews.

(a) Before DADS [~~the Texas Department of Human Services (DHS)~~] initiates proceedings for a sanction, DADS [~~DHS~~] gives a licensee:

(1) a description of the alleged rule violation(s) warranting the proposed sanction [~~action~~];

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

(b) A licensee's request for an informal review must:

(1) be received by DADS [~~DHS~~] within 10 calendar days after the licensee receives DADS' [~~DHS's~~] notice letter; and

(2) (No change.)

(c) DADS [~~DHS~~] conducts the informal review:

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

(d) DADS [~~DHS~~] provides the licensee with official notice of the outcome of the informal review.

§18.53. Formal Hearings.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] gives licensees a formal hearing notice when the following occurs:

(1) a licensee does not respond to DADS' [~~DHS's~~] notice letter regarding the informal review; or

(2) after the informal review, DADS [~~DHS~~] upholds or modifies the proposed sanction [~~in a manner that is unsatisfactory to the licensee~~].

(b) The formal hearing notice to the licensee includes:

(1) DADS' [~~DHS's~~] decision to continue with sanctions;

(2) the option [~~an offer~~] for the licensee to accept the sanction as proposed; and

(3) the option [~~notice~~] to request a formal hearing no later than 15 [~~20~~] days after receiving DADS' [~~DHS's~~] notice letter.

(c) DADS [~~DHS~~] imposes sanctions against a licensee when:

(1) a licensee accepts DADS' [~~DHS's~~] decision to impose the sanction; or

(2) after the formal hearing before the administrative law judge upholds DADS' [~~DHS's~~] proposed sanction; or

(3) the licensee does not respond to DADS' [~~DHS's~~] formal hearing notice.

(d) When an administrative penalty is proposed, DADS [~~DHS~~] schedules a formal hearing. A hearing is governed by 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) [~~with the State Office of Administrative Hearings if the licensee does not respond to DHS's formal hearing notice~~].

§18.54. Rule or Statutory Violations.

DADS may impose [~~The Texas Department of Human Services initiates~~] sanctions listed in §18.57 of this subchapter [~~chapter~~] (relating to Schedule of Sanctions) against a licensee [~~licensees~~] for the following statutory violations:

(1) (No change.)

(2) the licensee willfully or repeatedly acted in a manner inconsistent with the health and safety of the residents of a nursing facility of which the licensee is an administrator;

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

(6) the licensee has been convicted in a court of competent jurisdiction of a criminal offense listed in §18.41(c) of this chapter (relating to Licensure of Persons with Criminal Backgrounds) [~~misdemeanor or felony involving moral turpitude~~]; or

(7) (No change.)

§18.55. Violations of Standards of Conduct.

(a) DADS may impose a sanction [~~The Texas Department of Human Services (DHS) initiates sanctions~~] listed in §18.57 of this subchapter [~~chapter~~] (relating to Schedule of Sanctions) against a licensee

[~~licensees~~] for violations of the following nursing facility administrator Standards of Conduct:

(1) A licensee must employ sufficient staff to adequately meet the needs of nursing facility residents as determined by care outcomes.

(2) A licensee must ensure that sufficient resources are present to provide adequate nutrition, medications, and treatments to nursing facility residents in accordance with physician orders as determined by care outcomes.

(3) A licensee must promote and protect the rights of nursing facility residents and ensure that employees, contractors, and others respect the rights of residents.

(4) A licensee must ensure that nursing facility residents remain free of chemical and physical restraints unless required by a physician's order to protect a nursing facility resident's health and safety.

(5) A licensee must report and direct nursing facility staff to report to the appropriate government agency any suspected case of abuse, neglect, or misappropriation of resident property as defined in §18.2 of this chapter (relating to Definitions).

(6) A licensee must ensure that the nursing facility is physically maintained in a manner that protects the health and safety of the residents and the public.

(7) (No change.)

(8) A licensee must post in the nursing facility where employed the notice provided by DADS [~~DHS~~] that gives the [~~Credentialing Department's~~] address and telephone number for reporting complaints against an administrator. The notice must be posted in a conspicuous place and in clearly legible type.

(9) A licensee must not knowingly or through negligence commit, direct, or allow actions that result or could result in inadequate care, harm, or injury to a nursing facility resident.

(10) A licensee must not knowingly or through negligence allow nursing facility employees to harm nursing facility residents by coercion, threat, intimidation, solicitation, harassment, theft of personal property, or cruelty.

(11) A licensee must not knowingly or through negligence allow or direct employees to contradict or alter in any manner the orders of a physician regarding a nursing facility resident's medical or therapeutic care.

(12) (No change.)

(13) A licensee must not permit another individual to use his or her license or allow a nursing facility to falsely post his or her license.

(14) (No change.)

(15) A licensee must not knowingly allow, aid, or abet a violation by another licensed nursing facility administrator of the Texas Health and Safety Code, Chapter 242, Subchapter I, or the agency's rules adopted under that subchapter and must report such violations to DADS [~~DHS~~].

(16) (No change.)

(17) A licensee must not allow or direct nursing facility employees, contractors, or others in a manner that results in the harassment or intimidation of any person for purposes of coercing that person to use the services or equipment of a particular health agency or facility.

(18) - (21) (No change.)

(22) A licensee must not knowingly or through negligence violate any confidentiality provisions as prescribed by state or federal law concerning a nursing facility resident.

(23) A licensee must not interfere or impede an investigation by withholding or misrepresenting fact to DADS [~~DHS~~] representatives, or by using threats or harassment against any person involved or participating in the investigation.

(24) A licensee must not display a license issued by DADS [~~DHS~~] that is reproduced, altered, expired, suspended, or revoked.

(25) A licensee [~~must not and~~] must not, knowingly or through negligence, allow employees or other individuals to mismanage a resident's personal funds deposited with the nursing facility.

(26) A licensee must not [~~bribe, attempt to bribe,~~] harass [~~,~~] or intimidate employees of DADS [~~DHS~~], other government agencies, or their representatives concerning the administration of the nursing facility.

(27) A licensee must not offer or give any gift, loan, or other benefit to a person working for DADS unless the benefit is offered or given on account of kinship or a personal relationship independent of the official status of the person working for DADS.

(b) (No change.)

§18.56. Violations by Unlicensed Persons.

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

(c) A licensee [~~Licensees~~] whose license expires before an investigation is complete, may still receive:

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

(d) A licensee [~~Licensees~~] allowing a license to expire instead of accepting a proposed license revocation is [~~are~~] disqualified from licensure in Texas.

(e) A person [~~All persons~~] with an expired license [~~licenses~~] must return the license certificate to DADS [~~the Texas Department of Human Services~~].

§18.57. Schedule of Sanctions.

(a) DADS may impose [~~The Texas Department of Human Services (DHS) initiates~~] one or more of the following sanctions against a licensee [~~licensees~~] for violations listed in §18.54 of this subchapter (relating to Rule or Statutory Violations) and §18.55 of this subchapter [~~chapter~~] (relating to [~~Rule or Statutory Violations; and~~] Violations of Standards of Conduct):

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

(6) requiring a licensee to participate in continuing education; or

(7) probation.[~~; or~~]

[~~(8) referral to the Office of Attorney General for civil penalties not to exceed $1,000 per violation per day for each day the violation continues.~~]

(b) If a sanction is probated, DADS [~~DHS~~] may require the licensee to:

(1) report regularly to DADS [~~DHS~~] on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by DADS [~~DHS~~];

(3) practice under the direct supervision or guidance of a DADS-certified [~~DHS-certified~~] preceptor as specified in §18.14 of this chapter (relating to Preceptor Requirements); or [~~and/or~~]

(4) complete prescribed continuing education until the licensee attains a degree of skill satisfactory to DADS [~~DHS~~] in those areas that are the basis of the probation.

(c) Civil penalties may result from a referral to the Office of Attorney General not to exceed $1,000 per violation per day for each day the violation continues.

(d) [~~(c)~~] Administrative penalties may not exceed $1,000 per violation per day for each day the violation continues.

(e) [~~(d)~~] The amount the administrative penalty is assessed is based on:

(1) the seriousness of the violation, including:

(A) the nature, circumstances, extent, and gravity of prohibited acts; and

(B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) economic harm to property or environment;

(3) history of previous violations;

(4) amount necessary to deter future violations;

(5) efforts to correct the violations;

(6) the severity level of the violation:

(A) Level I--$500 to $1,000 for violations that have or had an adverse impact on nursing facility resident health or [~~and/or~~] safety that includes serious harm, permanent injury, or death to a nursing facility resident;

(B) Level II--$250 to $500 for violations that have or had a potential or adverse impact on the health or [~~and/or~~] safety of a nursing facility resident, but less impact than Level I; or

(C) Level III--$250 or less for violations having minimal or no significant impact on nursing facility resident health or [~~and/or~~] safety; and

(7) any other matter that justice may require.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805416
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 438-3734

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CHAPTER 47. CONTRACTING TO PROVIDE PRIMARY HOME CARE

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§47.1, 47.3, 47.11, 47.21, 47.23, 47.25, 47.41, 47.43, 47.45, 47.47, 47.49, 47.61, 47.63, 47.65, 47.67, 47.69, 47.71, 47.73, 47.81, 47.83, 47.87, and 47.89, concerning the introduction, provider contract, provider staff, service delivery plan, service, claims payment and documentation, and utilization review requirements for the Primary Home Care (PHC) Program; new §§47.57, 47.59, 47.72, 47.75, 47.91, 47.101, 47.103, 47.105, 47.107, 47.109, 47.111, 47.113, 47.115, 47.117, and 47.119, concerning the integrated care management requirements; and the repeal of §47.5, concerning overview of process, and §47.85, concerning retroactive payment procedures, in Chapter 47, Contracting to Provide Primary Home Care.

BACKGROUND AND PURPOSE

The primary purpose of this proposal is to improve controls for program access, service initiation, and service utilization in the PHC Program. This proposal also describes the process for expedited referrals and amends contracting requirements for providers with a contract assignment. Additionally, the proposed amendments update rule language and terms and correct agency names and cross-references.

New sections describe requirements for PHC services delivered through the Integrated Care Management (ICM) Program, which began February 1, 2008, and describe utilization review procedures required by the 2008-09 General Appropriations Act (Article II, Department of Aging and Disability Services, Rider 45, H.B. 1, 80th Legislature, Regular Session, 2007).

SECTION-BY-SECTION SUMMARY

The amendments to §§47.1, 47.3, 47.11, 47.21, 47.23, 47.25, 47.41, 47.43, 47.45, 47.47, 47.49, 47.61, 47.63, 47.65, 47.67, 47.69, 47.71, 47.73, 47.81, 47.83, 47.87, and 47.89 update rule language and terms and correct agency names and cross-references.

The amendment to §47.1 states that PHC Program services may be provided through the agency, service responsibility option (SRO), or consumer directed services (CDS) option for service delivery.

The amendment to §47.3 updates definitions for "community attendant services (CAS)," "medical need," "non-priority," "practitioner," "practitioner's statement," "primary home care (PHC) services," "priority," "representative," "routine referral," "signature," "supervisor," "working day," and "written;" adds definitions for "ADL," "DADS," "expedited referral," "functional limitation," "individual," "oral notice," "service delivery plan," and "utilization review;" and deletes the definitions of "client," "negotiated referral," and "practitioner's statement date."

The repeal of §47.5 deletes rule language that provides an overview of provider requirements.

The amendment to §47.11 allows a provider to provide services under any category of licensure in Chapter 97, rather than limiting the provider to the personal assistance services license category, and, in the case of contract assignment, does not require the provider to first obtain a provisional contract.

The amendment to §47.23 updates attendant qualification requirements.

The amendment to §47.25 revises the requirements for attendant orientation, including the method of and documentation of an orientation.

The amendment to §47.41 updates the requirements concerning allowable tasks.

The amendment to §47.43 updates requirements concerning methods of referral.

The amendment to §47.45 revises the requirements for pre-initiation activities, including service delivery plan documentation and delivery requirements, and amends service delivery plan variance requirements and pre-initiation activity time frames.

The amendment to §47.47 updates the requirements for determination of medical need, requires a provider to submit an original complete DADS practitioner's statement to the DADS case manager for PHC services and the DADS regional nurse for CAS, and states that if services are terminated, all pre-initiation activities, including medical need determination, must be completed before services are reinstated.

The amendment to §47.49 states that a DADS representative may be a case manager's supervisor, requires a provider to make and document a good faith effort to include all members of an interdisciplinary team (IDT) in an IDT meeting, and updates the documentation requirements of an IDT meeting.

Proposed new §47.57 contains an explanation of the three service delivery options (agency option, CDS option, and SRO) available to an individual receiving PHC Program services.

Proposed new §47.59 explains that support consultation is an optional service available when an individual receiving PHC Program services chooses CDS or SRO.

The amendment to §47.61 updates service initiation requirements and requires a provider to receive a DADS authorization for community care services form instead of establishing an individual's medical need to initiate services. The amendment also updates expedited referral requirements, updates when a service initiation notice must be sent, and states that a provider may delay service initiation only for reasons beyond its control, such as natural or other disasters, that are not directly caused by the provider.

The amendment to §47.63 updates provider service delivery requirements, including ensuring service delivery. The rule also describes service interruption timetables and what is an acceptable service interruption, states that an attendant who is unable to sign the timesheet may designate another person to sign the timesheet, and requires a provider to make and document good faith efforts to find staffing for the individual if an IDT is conducted due to provider staffing issues.

The amendment to §47.65 requires a supervisor to conduct a supervisory visit in-person and states that a supervisor may conduct a scheduled supervisory visit and a new attendant orientation jointly.

The amendment to §47.67 updates the requirements a provider must follow when increasing the hours or terminating services and states that if the provider does not implement a service delivery plan change on the effective date of the change, the provider must set a new implementation date.

Proposed new §47.72 introduces requirements related to termination of services and the right of an individual to appeal the action.

The amendment to §47.73 requires a provider to request reauthorization for all CAS upon receipt of an annual DADS authorization for community care services form and states that DADS makes the authorization determination and notifies the provider before the end of the current authorization.

Proposed new §47.75 references the complaint procedure rules with which a provider must comply.

The amendment to §47.83 amends the list describing what constitutes a financial error on the part of a provider.

The repeal of §47.85 removes rule requirements concerning retroactive payment procedures.

The amendment to §47.87 updates general record keeping requirements for providers and deletes the requirement that a provider maintain a record of company policies.

Proposed new §47.91 adds the requirements governing utilization reviews.

Proposed new §47.101 adds the purpose of the ICM Program.

Proposed new §47.103 provides an overview of the ICM Program and states that Title XIX PHC services for ICM members are coordinated through the Integrated Care Management Contractor (ICMC) and that the ICMC is responsible for administrative services related to service coordination and utilization review.

Proposed new §47.105 provides the definitions for new Subchapter H.

Proposed new §47.107 states that in addition to complying with the contracting requirements as described in §47.11 of this chapter the provider must contract with the ICMC to provide services.

Proposed new §47.109 provides the requirements a provider must follow concerning referrals, requires a provider to accept all ICMC referrals for ICM PHC services, and explains the two methods of referral.

Proposed new §47.111 provides requirements related to pre-initiation activities, including notification requirements.

Proposed new §47.113 states that in ICM IDT meetings a good faith effort must be made and documented to include an ICMC representative in the IDT meeting.

Proposed new §47.115 provides the ICM Program requirements for service delivery plan changes, including an increase in hours, decrease in hours, or termination.

Proposed new §47.117 states that in the ICM Program a provider involved in an individual transfer must coordinate with the ICMC to negotiate the transfer date.

Proposed new §47.119 provides ICM Program requirements concerning suspensions (including required and optional suspensions), notification of service suspension, and the resumption of services after a suspension.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments, new sections, and repeal are in effect, enforcing or administering the amendments, new sections, and repeal does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments, new sections, and repeal will not have an adverse economic effect on

small businesses or micro-businesses, because the proposal imposes no new requirements on providers.

PUBLIC BENEFIT AND COSTS

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendments, new sections, and repeal are in effect, the public benefit expected as a result of enforcing the amendments, new sections, and repeal is that the chapter will reflect current program policy, allow for greater control over the payment process, and provide a clearer set of rules that will be easier for providers and the public to use and understand.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the amendments, new sections, and repeal. The amendments, new sections, and the repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Carol Griebel at (512) 438-3740 in DADS' Provider Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-013, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 013" in the subject line.

SUBCHAPTER A. INTRODUCTION

40 TAC §47.1, §47.3

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.1. Purpose.

(a) This chapter establishes the requirements for a provider [~~agencies~~] contracting to provide in-home attendant services to an individual [~~eligible clients~~] through the DADS PHC [~~Texas Department of Human Services (DHS) Primary Home Care~~] Program. PHC Program services may be provided through a home and community support services agency, the service responsibility option (SRO), or the consumer directed services (CDS) option of service delivery. The SRO is described in Chapter 43 of this title (relating to Service Responsibility Option) and the CDS option is described in Chapter 41 of this title (relating to Consumer Directed Services Option).

(b) The requirements in this chapter apply to PHC [~~primary home care~~] services, FC [~~family care~~] services, and CAS [~~community attendant services~~], unless otherwise specified in the text.

§47.3. Definitions.

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

(1) ADL--Activity of daily living. An activity that is essential to daily self care, including bathing, dressing, grooming, routine hair and skin care, meal preparation, feeding, exercising, toileting, transferring, and ambulation. An ADL does not include a service that must be provided or supervised by licensed personnel.

(2) [~~(1)~~] Attendant--A person [~~An employee of a provider agency~~] who provides [~~the~~] authorized tasks to an individual [~~the client~~].

(3) CAS--Community attendant services. A service under the PHC Program providing in-home attendant services to individuals with an approved medical need for assistance with personal care tasks. CAS (formerly known as §1929(b) or frail elderly) are provided under Title XIX of the federal Social Security Act (relating to Grants to States for Medical Assistance Programs) at 42 U.S.C. §1396t (relating to Home and community care for functionally disabled elderly individuals).

(4) [~~(2)~~] Case manager--A DADS [~~Texas Department of Human Services (DHS)~~] employee who is responsible for case management activities. Activities include eligibility determination, individual [~~client~~] registration, assessment and reassessment of an individual's needs [~~client's need~~], service delivery plan development, and intercession on the individual's [~~the client's~~] behalf.

[~~(3) Client--A Community Care for Aged and Disabled (CCAD) client, as defined in Chapter 48 of this title (relating to Community Care for Aged and Disabled), who is eligible to receive services under this chapter. References in this chapter to "client" include the client's representative, unless the context indicates otherwise.~~]

[~~(4) Community attendant (CA) services--A service under the Primary Home Care Program providing in-home attendant services to clients. Clients receiving CA services must have a medical need for specific tasks. CA services (formerly known as §1929(b) or frail elderly) are provided under Title XIX of the federal Social Security Act (relating to Grants to States for Medical Assistance Programs) at 42 U.S.C. §1396t (relating to Home and community care for functionally disabled elderly individuals).~~]

(5) Contract--The formal, written agreement between DADS [~~DHS~~] and a provider [~~agency~~] to provide PHC Program services to an individual [~~DHS clients~~] eligible under this chapter in exchange for reimbursement.

(6) Contract manager--A DADS [~~DHS~~] employee who is responsible for the overall management of the contract with the provider [~~agency~~].

(7) Days--Any reference to days means calendar days, unless otherwise specified in the text. Calendar days include weekends and holidays.

(8) DADS--The Department of Aging and Disability Services.

(9) Expedited referral--An oral request from a case manager to a provider when the case manager determines that an individual's needs require that pre-initiation activities be completed in less than 14 days. The completion date is negotiated between the case manager and provider.

(10) Facsimile notice--written information sent to a designated number via facsimile.

(11) [~~(8)~~] FC [~~Family care (FC)~~] services--Family Care services. A service under the PHC [~~Primary Home Care~~] Program providing in-home attendant services to eligible adults. FC services are provided under Title XX of the federal Social Security Act (relating to Block Grants to States for Social Services) at 42 U.S.C. §1397 et seq.

(12) Functional limitation--An individual's requirement for assistance with one or more ADLs caused by a physical limitation or disability.

(13) [~~(9)~~] Imminent danger--An immediate, real threat to a person's safety.

(14) Individual--A person who is enrolled in the PHC Program and, unless the context indicates otherwise, the person's representative.

(15) [~~(10)~~] Medical need--A medical diagnosis that results in a functional limitation. [~~need for assistance with activities of daily living. For purposes of this chapter, activities of daily living do not include services that must be provided or supervised by licensed personnel.~~]

[~~(11) Negotiated referral--A request from the case manager to a provider agency to evaluate a person for service delivery, in which the case manager determines that the person's needs require that services begin on a particular date.~~]

(16) [~~(12)~~] Non-priority--The [~~One of two types of~~] eligibility status for service delivery as determined by the case manager for an individual who [~~. The other type of eligibility status for service delivery is priority. A non-priority client~~] does not meet the criteria described in §48.2918(d) [~~§48.2918(f)~~] of this title (relating to [~~Eligibility for~~] Primary Home Care or Community Attendant Services). Services delivered to such an individual [~~a client~~] may be referred to as non-priority services, and an attendant who serves such an individual [~~a client~~] may be referred to as a non-priority attendant.

(17) Notice--Includes oral, facsimile, secure e-mail and written notice.

(18) Oral notice--Directly speaking with a person. Oral notice does not include a message left by voice mail.

(19) PHC Program--Primary Home Care Program. A DADS attendant care services program. CAS, PHC, and FC are the three types of services available under the PHC Program.

(20) PHC services--A service under the PHC Program providing in-home attendant services to an individual with an approved medical need for assistance with personal care tasks. PHC services are provided under Title XIX of the federal Social Security Act, at 42 U.S.C. §1396a (relating to State plans for medical assistance).

(21) [~~(13)~~] Practitioner--A person who holds a doctor of medicine or doctor of osteopathy degree and is [~~physician~~] currently licensed in Texas, Louisiana, Arkansas, Oklahoma or New Mexico;[~~,~~] a physician assistant currently licensed in Texas;[~~,~~] or a registered nurse approved by the Texas [~~State~~] Board of Nursing [~~Nurse Examiners~~] to practice as an advanced practice nurse.

(22) [~~(14)~~] Practitioner's statement--DADS' [~~A document such as the DHS~~] Practitioner's Statement of Medical Need form. [~~that includes:~~]

[~~(A) a statement signed by a practitioner that the client has a current medical need for assistance with personal care tasks and other activities of daily living; and~~]

[~~(B) certification that the provider agency verified with the United States' Centers for Medicare and Medicaid Services that the practitioner is not excluded from participation in Medicare or Medicaid.~~]

[~~(15) Practitioner's statement date--The practitioner's statement date is:~~]

[~~(A) the later of the following:~~]

[~~*(i)* the practitioner's signature date on the practitioner's statement; or~~]

[~~*(ii)* the date the provider agency receives the practitioner's statement. If the provider agency fails to stamp the receipt date on the form, the date of the practitioner's signature will be used to determine the practitioner's statement date; or~~]

[~~(B) the date of the practitioner's oral statement obtained for a negotiated referral. The provider agency must document the practitioner's oral statement date on the practitioner's written statement required in §47.47(c)(2) of this chapter (relating to Medical Need Determination).~~]

[~~(16) Primary Home Care Program--A DHS attendant care services program. Community attendant (CA), primary home care (PHC), and family care (FC) are the three types of services available under the Primary Home Care Program.~~]

[~~(17) Primary home care (PHC) services--A service under the Primary Home Care Program providing in-home attendant services to clients. Clients receiving PHC services must have a medical need for specific tasks. PHC services are provided under Title XIX of the federal Social Security Act, at 42 U.S.C. §1396a (relating to State plans for medical assistance).~~]

(23) [~~(18)~~] Priority--The [~~One of two types of~~] eligibility status for service delivery as determined by the case manager for an individual who [~~. The other type of eligibility status for service delivery is non-priority. A priority client~~] meets the criteria described in §48.2918(d) [~~§48.2918(f)~~] of this title. Services delivered to such an individual [~~a client~~] may be referred to as priority services, and an attendant who serves such an individual [~~a client~~] may be referred to as a priority attendant.

(24) [~~(19)~~] Provider [~~agency~~]--A licensed home and community support services agency that has a contract [~~contracts with DHS to provide services to clients in exchange for reimbursement~~].

(25) [~~(20)~~] Reckless behavior--Acting with conscious indifference to the consequences.

(26) [~~(21)~~] Regional nurse--A DADS [~~DHS~~] employee who is responsible for authorizing an individual [~~a client~~] to receive CAS [~~CA services~~].

(27) [~~(22)~~] Representative--An individual's [~~The client's~~] spouse, other responsible party, designated representative, or legally authorized [~~legal~~] representative.

(28) [~~(23)~~] Routine referral--A written request from the case manager to a provider [~~agency~~] to evaluate an individual [~~a person~~] for service delivery when [~~, in which~~] the case manager determines that the individual's [~~person's~~] needs do not require an expedited [~~a negotiated~~] referral.

(29) Secure e-mail notice--Written information sent via electronic mail using sufficient precautions to protect the privacy and security of identifying information in compliance with the requirements of the health insurance portability and privacy act of 1996.

(30) Service delivery plan--A single document that is agreed upon and signed by an individual and a provider containing the elements described in §47.45(a)(2) of this chapter (relating to Pre-Initiation Activities). A single document may be more than one page.

(31) [~~(24)~~] Service schedule--A schedule for delivering attendant services containing the elements described in §47.45(a)(2)(C)(iii) of this chapter that is agreed upon and signed by the individual [~~client~~]. [~~A fixed service schedule specifies certain days, times of day, or time periods for delivery of the services. A variable service schedule states the number of hours of services to be delivered per day or per week, not to exceed the authorized hours per week, and does not otherwise specify any certain days, times of day, or time periods for delivery of the services.~~]

(32) [~~(25)~~] Signature--A person's name written in longhand or a mark representing his or her name on a document to certify it is correct. Initials are not an acceptable substitute for a signature if the person has the ability to write in longhand [~~, unless initials have been established as the person's official signature~~].

(33) [~~(26)~~] Supervisor--A provider [~~agency~~] employee who:

(A) coordinates the delivery of services in an individual's [~~the client's~~] service delivery plan;

(B) supervises attendants; and

(C) meets the requirements for a supervisor [~~found~~] in accordance with §97.404 of this title (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services).

~~[(27) Unit of service--One hour of service delivered to a client.]~~

(34) [~~(28)~~] Working day [~~days~~]--Any day except a Saturday, Sunday, or state holiday [~~Days DHS is open for business~~].

(35) [~~(29)~~] Written--Information recorded on paper or other legible document. [~~Written information may be sent by mail or fax, or hand-delivered.~~]

(36) Written notice--Written information sent via mail, facsimile, secured email, or hand delivered.

(37) Utilization review--A planned, systematic review of service utilization to evaluate efficiency, quality, and appropriateness of services and service delivery plans. Utilization review may include routinely scheduled review of services or providers, or may be focused on an identified issue.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805400
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 438-3734

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40 TAC §47.5

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

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.5. Overview of Process.

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

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER B. PROVIDER CONTRACTS

40 TAC §47.11

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or

regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.11. Contracting Requirements.

(a) General contracting requirements. A [~~The~~] provider [~~agency~~] must meet all provisions described in this chapter and Chapter 49 of this title (relating to Contracting for Community Care Services), except if a contract is assigned to the provider, the provider is not required to comply with §49.14(c) of this title (relating to Provisional Contracts).

(b) Licensure. The provider [~~agency~~] in the PHC [~~Primary Home Care~~] Program must deliver only personal assistance services, as defined in §97.2 of this title (relating to Definitions) and must provide services in accordance with all licensure requirements pursuant to Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies) [~~, only under the Personal Assistance Services (PAS) category of Home and Community Support Services Agency licensure~~].

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

Filed with the Office of the Secretary of State on October 13, 2008.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER C. STAFF REQUIREMENTS

40 TAC §§47.21, 47.23, 47.25

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.21. Supervisor Training Requirements.

(a) General training. A [~~The~~] provider [~~agency~~] must train a supervisor [~~all supervisors~~] as described in §97.245 of this title (relating to Staffing Policies).

(b) Program-specific training. The provider [~~agency~~] must ensure the supervisor understands the applicable rules and procedures of the PHC [~~Primary Home Care~~] Program.

§47.23. Attendant Qualifications.

In addition to the requirements described in §97.404 of this title (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services), an attendant [~~attendants~~] must:

[~~(1) be an employee of the provider agency;~~]

[~~(2) be 18 years of age or older;~~]

(1) [~~(3)~~] not be a legal parent, [~~or~~] foster parent, or spouse of a parent of a minor who receives the service; [~~and~~]

(2) [~~(4)~~] not be the spouse of the individual [~~a client~~] who receives the service, except for FC services; and [~~This paragraph is not applicable to family care services.~~]

(3) not be designated by a DADS case manager on DADS' authorization for community care services form as "Do not hire."

§47.25. Attendant Orientation.

(a) Orientation. In addition to the requirements described in this section, a [~~the~~] provider [~~agency~~] must ensure each attendant is oriented as described in Chapter 97, Subchapter C, of this title (relating to Minimum Standards for All Home and Community Support Services Agencies) and §97.404 of this title (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services). Orientation is not required for a supervisor when providing personal assistance services [~~supervisors acting as attendants~~].

(b) Method of orientation.

(1) A supervisor must determine the method of [~~An~~] attendant [~~must receive~~] orientation, which may be conducted: [~~in person in the client's home or other location where services are delivered.~~]

(A) in person, with the participation of the individual; or

(B) by telephone or verbally at any location without the participation of the individual at the discretion of the supervisor, if the attendant:

(i) meets the requirements described in §97.701 of this title (relating to Home Health Aides);

(ii) has six continuous months of experience in delivering attendant care;

(iii) has been oriented to the individual and there are service delivery plan changes; or

(iv) has previously provided services to the individual.

[~~(2) The client must be present when the attendant receives orientation in person.~~]

[~~(3) An attendant may receive orientation by telephone or in the provider agency office, at the discretion of the supervisor, if the attendant:~~]

[~~(A) meets the requirements described in §97.701 of this title (relating to Home Health Aides); or~~]

[~~(B) has six continuous months of experience in delivering attendant care.~~]

[~~(4) An attendant may receive orientation by telephone, at the discretion of the supervisor, when:~~]

[~~(A) the service plan changes; or~~]

[(B) the attendant previously worked for the client.]

(2) [(5)] The [provider agency] supervisor may use discretion to determine if the attendant needs to be oriented if:

(A) the attendant previously provided services to [worked for] the individual [client]; and

(B) the service delivery plan has not changed since the attendant provided services to [worked for] the individual [client].

(c) (No change.)

(d) Documentation of attendant orientation.

(1) The supervisor must record the attendant orientation [must be recorded] on a single document that includes:

(A) the individual's [client] name and [DHS client] number assigned to the individual by DADS;

(B) the attendant's [attendant] name;

(C) (No change.)

(D) if [whether] the orientation was conducted in person with the individual or without the participation of the individual [client or by telephone];

(E) information about how the individual's [the client's] condition affects the performance of tasks;

(F) - (G) (No change.)

(H) the number of hours of service the attendant is to provide;

(I) the total number of hours of service the individual [client] is authorized to receive;

(J) (No change.)

(K) specific situations about which the attendant must [should] notify the provider [agency], including:

(i) changes in the individual's [client's] needs;

(ii) incidents that affect the individual's [client's] condition;

(iii) hospitalization of the individual [client];

(iv) the individual's [client's] absence or relocation from home; [and]

(v) (No change.)

(vi) suspicions or allegations of abuse, neglect, or exploitation of the individual; and

(L) the signature of [the]:

(i) the supervisor who conducts the orientation;

(ii) (No change.)

(iii) the individual [client], if present.

(2) The provider [agency] must maintain documentation of the attendant orientation in the individual's [client] file.

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

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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SUBCHAPTER D. SERVICE DELIVERY PLAN DEVELOPMENT

40 TAC §§47.41, 47.43, 47.45, 47.47, 47.49

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.41. Allowable Tasks.

The PHC [Primary Home Care] Program includes the following tasks:

(1) personal [Personal] care tasks related to the care of the individual's [client's] physical well being, including [health. These tasks include]:

(A) (No change.)

(B) dressing, which is:

(i) dressing the individual [client];

(ii) undressing the individual [client]; and

(iii) (No change.)

(C) (No change.)

(D) feeding/eating, which is:

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

(iii) assisting with using eating and drinking utensils and adaptive devices, not including [. This does not include] tube feeding; and

(iv) (No change.)

(E) exercise, which is walking with the individual [client];

(F) grooming, shaving, or oral care [grooming/shaving/oral care], which is:

(i) - (v) (No change.)

(G) routine hair or skin [hair/skin] care, which is:

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

(iii) assisting with setting, rolling, or braiding hair, not including [. ~~This does not include~~] styling, cutting, or chemical processing of hair;

(iv) - (viii) (No change.)

(H) assistance with self-administered medications, which is [. ~~This means~~] assistance with medication as defined in §97.2(11) [~~§97.2(10)~~] of this title (relating to Definitions);

(I) toileting, which is:

(i) - (viii) (No change.)

(ix) preparing toileting supplies and equipment, not including [. ~~This does not include~~] preparing catheter equipment; and

(x) (No change.)

(J) transfer [~~transfer/ambulation~~], which is:

(i) non-ambulatory movement from one stationary position to another, not including [~~(transfer). This does not include~~] carrying;

(ii) adjusting or changing the individual's [~~client's~~] position in a bed or chair (positioning);

(iii) (No change.)

(K) ambulation, which is:

(i) [~~(iv)~~] assisting in positioning for use of a walking apparatus;

(ii) [~~(v)~~] assisting with putting on and removing leg braces and prostheses for ambulation;

(iii) [~~(vi)~~] assisting with ambulation or using steps;

(iv) [~~(vii)~~] assisting with wheelchair ambulation; and

(v) [~~(viii)~~] providing standby assistance;[.]

(2) home [~~Home~~] management tasks that support the individual's [~~client's~~] health and safety, including[. ~~These tasks include~~]:

(A) cleaning, which is:

(i) cleaning up after the individual's [~~client's~~] personal care tasks;

(ii) emptying and cleaning the individual's [~~client's~~] bedside commode;

(iii) cleaning the individual's [~~client's~~] bathroom;

(iv) changing the individual's [~~client's~~] bed linens and making the individual's [~~client's~~] bed;

(v) cleaning floor of living areas used by the individual [~~client~~];

(vi) dusting areas used by the individual [~~client~~];

(vii) - (viii) (No change.)

(ix) washing the individual's [~~client's~~] dishes; and

(x) (No change.)

(B) laundry, which is:

(i) - (iii) (No change.)

(iv) using laundromat [~~Laundromat~~] machines;

(v) - (vi) (No change.)

(C) shopping, which is:

(i) - (iii) (No change.)

(iv) storing the individual's [~~client's~~] purchased items; and[.]

(3) escorting, including [~~Escort. Escort includes the following~~]:

(A) accompanying the individual [~~client~~] outside the home to support the individual [~~client~~] in living in the community;

(B) arranging for transportation, not including direct individual transportation [. ~~The provider agency may also choose to directly provide transportation; however, direct client transportation is not reimbursed under the Primary Home Care Program~~];

(C) accompanying the individual [~~client~~] to a clinic, doctor's office, or location for medical diagnosis or treatment; and

(D) waiting in the doctor's office or clinic with an individual if [~~a client when~~] necessary due to client's condition or distance from home.

§47.43. Referrals.

(a) A [~~The~~] provider [~~agency~~] must:

(1) accept all DADS [~~Texas Department of Human Services (DHS)~~] referrals for services under the PHC [~~Primary Home Care~~] Program; and

(2) (No change.)

(b) There are two methods of referral:

(1) For expedited [~~negotiated~~] referrals, the case manager makes the referral by oral notice [~~phone~~] and on DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form.

(2) For routine referrals, the case manager makes the referral on DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form.

§47.45. Pre-Initiation Activities.

(a) Pre-initiation activities. A [~~The~~] supervisor must complete the following activities for each referral.[:]

(1) The supervisor must conduct [~~Conduct~~] an evaluation.

(A) The evaluation must be a single document that includes the individual's [~~person's~~] self-report of:

(i) (No change.)

(ii) the assistance needed for the individual [~~person~~] to perform ADLs [~~achieve activities of daily living~~], including any assistive devices or medical equipment used by the person.

(B) If the provider [~~agency~~] determines during the evaluation that the individual [~~client~~] exhibits reckless behavior that results in imminent danger to the health and safety of the individual or provider staff, [~~client,~~] the provider [~~agency~~] must convene an Interdisciplinary Team meeting as described in §47.49 of this chapter (relating to Interdisciplinary Team) to discuss the barriers to service delivery.

(2) The supervisor must develop [~~Develop~~] a service delivery plan on[. ~~The service plan must be~~] a single document that:

(A) is agreed upon and signed by the individual [~~client~~] and the provider [~~agency~~];

(B) indicates the location of service delivery; [. ~~The provider agency must:~~]

~~*[(i)* make a reasonable effort to deliver services at a location outside the client's home, if requested by the client; and]~~

~~*[(ii)* maintain written justification if the client's request was not granted; and]~~

(C) records [~~includes~~] the following:

(i) the tasks which the individual is authorized to [~~client will~~] receive;[~~.~~]

~~*[(I)* The provider agency must ensure that at least one personal care task is authorized by the Texas Department of Human Services (DHS), scheduled, and provided.]~~

~~*[(II)* Recipients of family care services are not required to receive any personal care tasks.]~~

~~*[(III)* The provider agency must ensure the tasks the client will receive do not duplicate any services received from any other source;]~~

(ii) the total weekly hours of service DADS [~~DHS~~] authorizes the individual [~~client~~] to receive;

(iii) the service schedule, which must include;

(I) the minimum number of days per week services are scheduled to be delivered as documented on the authorization for community care services form; and

(II) as necessary, based on an individual's needs, certain time periods for the delivery of specified tasks;

(iv) (No change.)

(v) a statement that:

(I) the PHC [~~Primary Home Care~~] Program only provides the tasks allowable in the program as described in §47.41 of this chapter (relating to Allowable Tasks) and agreed to on the service delivery plan; and

(II) the provider [~~agency~~] is not responsible for meeting the applicant's needs other than tasks allowed under the PHC [~~Primary Home Care~~] Program.

(3) The provider must obtain [~~Obtain~~] a complete practitioner's statement and submit for DADS' review as described in §47.47 of this chapter (relating to Medical Need Determination). This paragraph does not apply to FC [~~family care~~] services.

(A) for routine referrals:

(i) send a copy of the practitioner's statement to DADS by facsimile or secured email; or

(ii) mail a copy of the practitioner's statement to DADS.

(B) for expedited referrals:

(i) DADS may send the authorization for community services form pending receipt of the practitioner's statement if the provider notifies DADS that the provider has received a complete practitioner's statement that documents the individual's medical condition is the cause of the individual's functional impairment.

(ii) upon notification of a completed practitioner's statement, DADS and the provider will negotiate a start-of-care date.

(iii) the provider must send the complete practitioner's statement to DADS within 5 business days of service initiation.

(iv) if a complete practitioner's statement is not sent to DADS within 5 business days of service initiation the provider is not entitled to payment from DADS until the date DADS receives the completed practitioner's statement. In this circumstance, DADS will change the service initiation date to the date DADS receives the completed practitioner's statement.

(v) the signature date must be on or before the negotiated start date.

(b) Service delivery plan variances [~~differences~~].

(1) The provider [~~agency~~] must [~~orally~~] notify the case manager of a variance in the service delivery plan when the initial service delivery plan developed by the provider [~~agency~~]:

(A) has more hours than authorized on DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form; [~~or~~]

(B) has no personal care services, except for FC services; or [~~tasks. This subparagraph does not apply to family care services.~~]

(C) is temporarily changed as described in paragraph (3) of this subsection.

~~[(2) The provider agency must discuss the difference in the service plan with the case manager.]~~

(2) [~~(3)~~] The provider [~~agency~~] must provide services according to the existing service delivery plan, until the provider [~~agency~~] receives a new DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form, except the provider may temporarily change the service delivery plan if:[~~.~~]

(A) the individual requests and requires temporary assistance with allowable tasks not identified on the service delivery plan due to a change in circumstances or available supports; and

(B) the change in tasks does not increase the total approved hours of service or continue for more than 60 days.

(3) The provider must request and obtain a new DADS authorization for community services form when a temporary variance in tasks on the service delivery plan is to continue for more than 60 days or would result in more hours of service provided than have been approved.

(4) The provider must request a new DADS authorization for community care services form before a temporary variance from the service delivery plan continues for more than 60 days.

(5) [~~(4)~~] The provider [~~agency~~] must maintain the following documentation regarding the temporary service delivery plan variance [~~difference~~] in the individual's [~~client~~] file:

(A) the specific variance [~~difference~~] in the service delivery plan; [~~and~~]

(B) the duration of the temporary variance; and

(C) [~~(B)~~] the reason for the temporary variance as described in paragraph (3) of this subsection [~~decision regarding the difference~~].

(c) Pre-initiation activities due date. The provider [~~agency~~] must complete the pre-initiation activities as follows:

(1) for routine referrals, within 14 days after one of the following dates, whichever is later:

(A) the referral date [~~(Item 1)~~] on DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form; or

(B) the date the provider [agency] receives DADS' authorization for community care services [DHS's Authorization for Community Care Services] form, unless[. If] the provider [agency] fails to stamp the receipt date on the form, in which case the referral date [(Item 1)] will be used to determine timeliness; and

(2) for expedited [negotiated] referrals, by the date negotiated between the case manager and provider, which must be less than 14 days after the oral request [the service initiation date negotiated with the case manager].

(d) Delay in pre-initiation activities.

(1) A provider may delay meeting the due dates in subsection (c) of this section only for reasons beyond its control such as natural or other disasters. The provider must continue efforts to complete pre-initiation activities and set a date, if possible, for completion of pre-initiation activities.

(2) [(1)] The provider [agency] must document any failure to complete the pre-initiation activities for routine referrals by the due date, including:

(A) the reason for the delay[, which must be beyond the control of the provider agency];

(B) either the date the provider [agency] anticipates it will complete the pre-initiation activities or specific reasons why the provider [agency] cannot anticipate a completion date; and

(C) a description of the provider's [provider agency's] ongoing efforts to complete pre-initiation activities.

(3) [(2)] The provider [agency] must [orally] notify the case manager of any failure to complete the pre-initiation activities for expedited [negotiated] referrals before the negotiated date for completion of pre-initiation activities [service initiation date. Oral notice means directly speaking with the case manager and does not include a message left by voice mail]. The case manager may refer the individual [client] to another provider [agency].

(e) Documentation of pre-initiation activities.

(1) The provider [agency] may combine the evaluation and service delivery plan into a single document, but each item must be clearly identifiable.

(2) The provider [agency] must maintain documentation of the pre-initiation activities in the individual's [client] file.

§47.47. Medical Need Determination.

(a) Applicability. This section does not apply to FC [family care] services.

(b) Determining medical need. A [The] provider [agency] must obtain and submit a complete [ensure medical need determination by obtaining and submitting a] practitioner's statement to DADS for review by the applicable due date, as described in §47.45(c) [§47.45] of this chapter, (relating to Pre-Initiation Activities) for:

(1) an individual [persons] whom DADS [the Texas Department of Human Services (DHS)] refers to the provider [agency] (unless the individual [person] requests and is to receive FC [family care] services);

(2) an individual currently [clients who are] receiving FC [family care] services [and] whom DADS [DHS] refers to the provider [agency] for PHC services or CAS [primary home care or community attendant services]; and

(3) an individual currently receiving services [clients] whom DADS [DHS] refers to the provider [agency] to have medical need reassessed, as requested by the case manager, such as when the initial medical need was established for a limited time.

(c) Submitting a practitioner's statement. A provider must submit a complete practitioner's statement to:

(1) the DADS case manager for PHC services; and

(2) the DADS regional nurse for CAS.

(d) Reinstatement of services after termination. If DADS notifies the provider that services are terminated, all pre-initiation activities, including medical need determination, must be completed before services are reinstated.

[(c) Negotiated referrals. In the case of negotiated referrals, the provider agency must:]

[(1) obtain a practitioner's oral statement if the provider agency is unable to obtain a practitioner's written statement so that the provider agency can begin services on the date negotiated; and]

[(2) follow up with a practitioner's written statement as described in §47.45 of this chapter within 14 days from the date the case manager contacts the provider agency to make the negotiated referral.]

(e) [(d)] Mental illness and mental retardation. Persons diagnosed with mental illness, mental retardation, or both, are not considered to have established medical need based solely on such diagnoses, but may establish medical need through a related diagnosis that results in a functional limitation.

[(e) Documentation of medical need determination. The provider agency must maintain the practitioner's statement in the client file.]

§47.49. Interdisciplinary Team.

(a) Interdisciplinary Team (IDT). The IDT is a designated group that includes the following people [individuals] who meet when the provider [agency] identifies the need to discuss service delivery issues or barriers to service delivery:

(1) the individual [client] or the individual's [client's] representative, or both;

(2) a provider [agency] representative; and

(3) a DADS [Texas Department of Human Services (DHS)] representative, who[. A DHS representative] may be:

(A) (No change.)

(B) the case manager's supervisor (or designee);

(C) [(B)] the contract manager (or designee); or

(D) [(C)] the regional nurse (or designee).

(b) Convening an IDT meeting.

(1) The provider [agency] must convene an IDT meeting [within three working days of the date the provider agency]:

(A) within three working days of the date the provider suspends services to an individual [a client] under §47.71(a)(7) or (b) of this chapter (relating to Suspensions); or

(B) within seven working days of the date the provider identifies an issue that prevents the provider [agency] from carrying out a requirement of the PHC [Primary Home Care] Program.

(2) A provider must make and document a good faith effort to include all members of the IDT described in subsection (a) of this section.

(3) [(2)] If the provider [agency] is unable to convene an IDT meeting with all the members described in subsection (a) of this section, the provider [agency] must convene the IDT meeting with the available members and send the documentation of the IDT meeting described in subsection (e) of this section to the Regional Director [Administrator] for the DADS [DHS] region in which the individual [client] resides.

(A) The documentation must be sent within five working days after [of] the date of the IDT meeting.

(B) Further action by the provider [agency] may be required, based on a DADS [DHS] review of the IDT meeting documentation.

(c) IDT meeting.

(1) The IDT meeting may be conducted by telephone [conference call] or in person.

(2) The IDT must:

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

(C) make recommendations to the provider [agency].

(d) IDT meeting outcome. The provider [agency] must do one of the following within two working days after the IDT meeting:

(1) (No change.)

(2) discharge the individual [client] from the provider [agency] and refer the individual [case back] to the case manager for referral to another provider [agency].

(e) Documentation of the IDT meeting. The provider [agency] must document the IDT meeting in the individual's [client] file, including the:

(1) specific reasons for calling the IDT meeting; [. If the specific reasons include staffing issues, the provider agency must document good faith efforts to find staffing for the client. Examples of good faith efforts may include:]

[(A) placement of newspaper, television, or radio ads;]

[(B) outreach through churches and other nonprofits;]

[(C) use of employment agencies;]

[(D) use of state agency administered programs; and]

[(E) efforts to encourage clients to locate and refer to the provider agency potential attendants in the community;]

(2) participants in the IDT meeting[. If all members described in subsection (a) of this section are unable to participate, the provider agency must document all efforts made to convene an IDT meeting with all the members];

(3) recommendations of the IDT;

(4) [provider agency's] action as a result of the IDT recommendations; and

(5) reasons for the provider's [provider agency's] actions.

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

Filed with the Office of the Secretary of State on October 13, 2008.

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For further information, please call: (512) 438-3734

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SUBCHAPTER E. SERVICE REQUIREMENTS

40 TAC §§47.57, 47.59, 47.61, 47.63, 47.65, 47.67, 47.69, 47.71 - 47.73, 47.75

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments and new sections affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.57. Service Delivery Options.

An individual receiving PHC Program services has a choice of one of the following three service delivery options.

(1) Agency option. In the agency option:

(A) the provider is responsible for personnel decisions, such as selecting, supervising, and dismissing the attendant who provides services to the individual, with input from the individual;

(B) the provider is responsible for:

(i) recruitment of attendants and substitute attendants (a responsibility the individual may share);

(ii) payroll for attendants and substitute attendants; and

(iii) filing tax-related reports of attendants and substitute attendants;

(C) the provider is the employer of record of attendants and substitute attendants; and

(D) the provider is responsible for providing substitute attendants.

(2) Consumer directed services (CDS) option. In the CDS option, as described in Chapter 41 of this title (relating to Consumer Directed Services Option):

(A) the individual recruits, hires, manages, and fires attendants;

(B) the individual is the employer of record of his or her attendant and substitute attendant;

(C) the individual is responsible for providing substitute attendants; and

(D) the consumer directed services agency (CDSA) is responsible for financial management services, including:

(i) registering as the individual's employer-agent with the Internal Revenue Service and the Texas Workforce Commission;

(ii) managing payroll for attendants and substitute attendants, including filing tax-related reports;

(iii) tracking expenditures; and

(iv) submitting quarterly expenditure reports to the employer and case manager; and

(E) the CDSA is not required to be licensed under Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies) when performing the functions described in subparagraph (D) of this paragraph.

(3) Service responsibility option (SRO). In the SRO, as described in Chapter 43 of this title (relating to Service Responsibility Option):

(A) the individual selects, manages, supervises, and dismisses attendants;

(B) the provider is the employer of record for the attendant and substitute attendant;

(C) the provider is responsible for:

(i) providing substitute attendants if necessary;

(ii) managing payroll for attendants and substitute attendants; and

(iii) filing tax-related reports of attendants and substitute attendants;

(D) the individual and supervisor must negotiate the frequency of supervisory visits;

(E) the individual is responsible for the new attendant orientation; and

(F) the provider is required to be licensed under Chapter 97 of this title if performing the functions described in subparagraph (C) of this paragraph.

§47.59. Support Consultation.

(a) Support consultation is an optional service available when the consumer directed services (CDS) option or service responsibility option (SRO) is chosen by an individual.

(b) Support consultation in CDS:

(1) is provided by a DADS-certified support advisor and provides a level of assistance and training beyond that provided by the consumer directed services agency (CDSA) through financial management services; and

(2) helps an employer to meet the required employer responsibilities of the CDS option to successfully deliver program services.

(c) Support consultation in the SRO provides the required SRO orientation and additional support when needed by an individual to effectively carry out individual responsibilities under the SRO.

§47.61. Service Initiation.

~~[(a) Medical need requirement. The provider agency must not initiate services to a person identified in §47.47(b) of this chapter (relating to Medical Need Determination) until the practitioner has established medical need for that person. This section does not apply to family care services].~~

(a) [~~(b)~~] Service initiation. The provider [~~agency~~] must initiate services:

(1) for routine referrals described in §47.43 of this chapter (relating to Referrals):

(A) for FC [~~family care~~] services, within 14 days after the following, whichever is later:

(i) the referral date [~~(Item 1)~~] on DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form; or

(ii) the date the provider [~~agency~~] receives DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form, unless [~~. If~~] the provider [~~agency~~] fails to stamp the receipt date on the form, in which case the referral date [~~(Item 1)~~] is used to determine timeliness; or

(B) for PHC and CAS, [~~primary home care and community attendant services, by the initiation date determined by the provider agency. The service initiation date must be~~] within seven days after provider receipt of DADS' authorization for community care services form [~~of the practitioner's statement date~~]; and

(2) for expedited [~~negotiated~~] referrals described in §47.43 of this chapter, on the date negotiated between the case manager and provider.

(b) [~~(c)~~] Notification of service initiation. Within 14 days after initiating services, the provider [~~and practitioner's statement date.~~]

[~~(1) The provider agency~~] must send [~~written~~] notice of [~~:~~]

[~~(A)~~] service initiation to the case manager. [~~for family care, primary home care, and community attendant services; and~~]

~~[(B) the practitioner's statement date:]~~

~~*[(i)* to the case manager, for primary home care; or]~~

~~*[(ii)* to the regional nurse, for community attendant services.]~~

~~[(2) The provider agency must send the written notice within 14 days after initiating services.]~~

(c) [~~(d)~~] Delay in service initiation. A provider may delay service initiation only for reasons not directly caused by the provider, or reasons beyond its control, such as natural or other disasters. The provider must continue efforts to initiate services and set a date, if possible, for service initiation. The provider [~~agency~~] must document any failure to initiate services by the applicable due date in subsection (a) [~~(b)~~] of this section, including:

(1) the reason for the delay; [~~, which must be:~~]

~~[(A) beyond the control of the provider agency; and]~~

~~[(B) not caused directly by the provider agency;]~~

(2) either the date the provider [~~agency~~] anticipates it will initiate services, or specific reasons why the provider [~~agency~~] cannot anticipate a service initiation date; and

(3) a description of the provider's [~~provider agency's~~] ongoing efforts to initiate services.

(d) [~~(e)~~] Documentation of service initiation. The provider [~~agency~~] must maintain documentation of service initiation in the individual's [~~client~~] file.

§47.63. Service Delivery.

(a) Delivery of services. A provider must:

(1) ensure that services are delivered according to the service delivery plan described in §47.45 of this chapter (relating to Pre-Initiation Activities);

(2) ensure that all authorized and scheduled services are provided to an individual, except in the case of an allowable service interruption, as defined in subsection (b)(2) of this section;

(3) ensure that an individual does not receive, during a calendar month, more than five times the weekly authorized hours on DADS' authorization for community care services form;

(4) make a reasonable effort to deliver services at a location other than the individual's home, if requested by the individual and the location is within the provider's licensed service area;

(5) document why an individual's request for services to be delivered at a location outside the individual's home was not granted;

(6) ensure, except for recipients of FC services, that at least one personal care task is authorized by DADS, scheduled, and delivered; and

(7) ensure that the services an individual receives do not duplicate services received from any other source.

(b) Allowable service interruptions. Allowable service interruptions occur when an individual requests that:

(1) no hours of service be provided;

(2) fewer hours of service than reflected in the service schedule be provided;

(A) services be provided outside of a time period specified on the service delivery plan; or

(B) a specific attendant not provide services to the individual;

(3) the individual is not at the designated service location when services are scheduled;

(A) services are suspended as described in §47.71 of this chapter (relating to Suspensions); or

(B) services are not delivered for other reasons beyond the control of the provider, such as natural and other disasters.

[(a) Service interruptions. A service interruption occurs when, on a particular day or time when services are scheduled:]

[(1) the client requests that:]

[(A) no hours of service be provided; or]

[(B) fewer hours of service than reflected in the service schedule be provided; or]

[(C) a specific attendant not provide services to the client;]

[(2) the client is not at home when services are scheduled;]

[(3) services are suspended as described in §47.71 of this chapter (relating to Suspensions); or]

[(4) services are not delivered for other reasons beyond the control of the provider agency, such as acts of nature and other disasters.]

[(b) Delivery of services.]

[(1) The provider agency must ensure:]

[(A) services are delivered according to the service plan described in §47.45 of this chapter (relating to Pre-Initiation Activities);]

[(B) all authorized and scheduled services are provided to a client, except in the case of a service interruption, as defined in subsection (a) of this section; and]

[(C) a client does not receive, during a calendar month, more than five times the weekly authorized hours on the Texas Department of Human Services' (DHS's) Authorization for Community Care Services form.]

[(2) The provider agency must not exceed the weekly authorized hours except in the case of a temporary increase:]

[(A) due to unusual circumstances and client need; and]

[(B) requested by the client.]

[(C) This paragraph does not apply to the circumstances described in subsection (d) of this section.]

(c) Service interruption documentation.

(1) In the case of a priority individual [client], the provider [agency] must document all service interruptions by the 30th day after the beginning of the service interruption. The service interruption begins on the first day services are scheduled but not delivered.

(2) In the case of a non-priority individual [client], the provider [agency] must document all service interruptions that exceed 14 consecutive days by the 30th day after the day service interruption exceeds 14 consecutive days. The service interruption begins the Sunday following the week the individual did not receive all the weekly hours on a service plan.

[(A) For a fixed service schedule, the service interruption begins on the first day services are scheduled but not delivered.]

[(B) For a variable service schedule, the service interruption begins the Sunday following the week the client did not receive all the weekly hours on a service plan approved by the client.]

[(3) The reason documented must be a reason listed in subsection (a) of this section.]

(3) [(4)] If the provider [agency] learns of a service interruption after the deadlines listed in paragraphs (1) and (2) of this subsection, the provider [agency] must document the following as soon as the provider [agency] learns of the service interruption:

(A) the reason for the service interruption [. The reason documented must be a reason listed in subsection (a) of this section];

(B) the reason for the delay in documenting the service interruption; and

(C) the date the provider [agency] learned of the service interruption.

(d) Service delivery at a location other than an individual's [outside the client's] home.

(1) The provider [agency] may develop a service delivery plan that includes services regularly delivered at a location other than the individual's [client's] home. The service delivery plan must not exceed the weekly hours authorized on DADS' authorization for community care services [DHS's Authorization for Community Care Services] form.

(2) The provider [agency] may deliver services at a location other than the individual's [outside the client's] home even if

[~~when~~] the service delivery plan does not include the [~~regular~~] delivery of such services.

(3) The provider [~~agency~~]:

(A) may deliver services at a location other than an individual's [~~outside the client's~~] home only if the individual [~~client~~] requests such services and the location is within the provider's licensed service area; [~~.~~]

(B) is not required to pay for expenses incurred by attendants to deliver [~~delivering~~] services at a location other than the individual's [~~outside the client's~~] home; and [~~.~~]

(C) must:

(i) make a reasonable effort to deliver services at a location other than the individual's [~~client's~~] home when requested by the individual [~~client~~];

(ii) maintain written justification if the individual's [~~client's~~] request was not granted; and

(iii) document in the individual's [~~client's~~] file:

(I) each instance when an individual [~~a client~~] requested services at a location other than the home;

(II) whether the individual's [~~client's~~] request was granted;

(III) what tasks [~~services~~] were provided; and

(IV) where the tasks [~~services~~] were delivered.

(e) Service delivery documentation.

(1) A [~~The~~] provider [~~agency~~] must document the delivery of services, including:

(A) the provider's [~~provider agency~~] name;

(B) the provider's [~~provider agency~~] vendor number;

(C) the attendant's [~~attendant~~] name;

(D) the individual's [~~client~~] name;

(E) the number assigned to the individual by DADS [~~DHS client number~~];

(F) - (G) (No change.)

(H) the hours [~~units~~] of service delivered;

(I) the dates services were delivered; and

(J) certification that the attendant delivered the documented tasks, as follows: [~~.~~]

(i) for [~~For~~] electronic service delivery documentation systems, each person delivering services inputs a unique identifier to certify the services delivered; and [~~.~~]

(ii) for [~~For~~] paper service delivery documentation systems, each person delivering services signs the timesheet to certify the services delivered, as follows: [~~.~~]

(I) An attendant who is unable to sign the timesheet may designate another person to sign the timesheet [~~The attendant must sign his or her name or a mark representing his or her name on the timesheet to certify that it is correct. Initials are not an acceptable substitute for a signature~~].

(II) If another person is designated to sign the timesheet, the [~~An attendant who is unable to sign the timesheet may designate another person to sign the timesheet. The~~] provider [~~agency~~] must maintain written documentation of the:

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

(2) (No change.)

(f) Documentation of service delivery. A [~~The~~] provider [~~agency~~] must maintain documentation of service delivery in the individual's [~~client~~] file, including documentation that identifies [~~. The provider agency must be able to identify~~] all attendants delivering tasks to the individual [~~client~~].

(g) If an IDT meeting is held due to provider staffing issues, the provider must make and document good faith efforts to find staffing for the individual. Examples of good faith efforts include:

(1) the placement of newspaper, television, or radio ads;

(2) outreach through churches and other nonprofits;

(3) the use of employment agencies;

(4) the use of state agency administered programs; and

(5) efforts to encourage individuals to locate and refer to the provider potential attendants in the community.

§47.65. Supervisory Visits.

(a) Supervisory visits. A supervisor must conduct in-person supervisory visits to assess and document on a single form whether [~~the~~]:

(1) the service delivery plan is adequate;

(2) the individual [~~client~~] continues to need the services;

(3) the individual [~~client~~] needs a service delivery plan change;

(4) the attendant continues to be competent to provide the authorized tasks; and

(5) the attendant is delivering the authorized tasks.

(b) Frequency. A [~~The~~] supervisor must establish the frequency of in-person supervisory visits, based on the specific needs of the individual [~~client~~], the attendant, or both. The frequency of in-person supervisory visits must be at least annually.

(c) Documentation of supervisory visits. The provider [~~agency~~] must maintain documentation of each supervisory visit in the individual's [~~client~~] file.

(d) Combining a supervisory visit and a new attendant orientation. A supervisor may conduct a scheduled supervisory visit and a new attendant orientation at the same time. If combining a supervisory visit and a new attendant orientation, the supervisor must mark items described in subsection (a)(4) and (5) of this section as not applicable on the documentation.

§47.67. Service Delivery Plan Changes.

(a) Increase in hours or terminations.

(1) A [~~The~~] provider [~~agency~~] must submit written notification to [~~notify~~] the case manager [~~in writing~~] within seven days after [~~of~~] learning of any change that may:

(A) require an increase in hours in the individual's [~~client's~~] service delivery plan; or

(B) result in the termination of services due to the individual [~~client~~] receiving no personal care tasks, except for FC [~~. This subparagraph does not apply to family care~~] services.

(2) The notification must include the:

(A) date the provider [~~agency~~] learned of the need for the change;

(B) (No change.)

(C) type of change (including the number of hours of service [~~hours~~]); and

(D) signature and date of the provider [~~agency~~] representative.

(b) Decrease in hours. The provider [~~agency~~] must develop a new service delivery plan, as described in §47.45(a)(2) of this chapter (relating to Pre-Initiation Activities), within 21 days of the provider [~~agency~~] identifying the need for an ongoing decrease in hours from the service delivery plan currently approved by the individual [~~client~~].

(c) Immediate increase in hours of service.

(1) The provider [~~agency~~] must notify [~~discuss with~~] the case manager, or designee, of the reason an individual [~~reason(s) a client~~] requires an immediate increase in hours of service [~~hours~~], and must obtain approval from DADS [~~the case manager~~] of both the number of additional hours of service [~~hours~~] to be provided the individual [~~client~~] and the effective date of the change.

(2) The provider [~~agency~~] must implement the immediate increase in hours of service [~~hours~~] on the negotiated effective date of the change [~~negotiated with the case manager~~].

(3) The provider [~~agency~~] must document the immediate increase in hours of service. Documentation must include:

(A) the date the provider [~~agency~~] received approval for the change;

(B) the name of the DADS staff [~~case manager~~] who approved the change;

(C) (No change.)

(D) the number of hours of service authorized.

(4) The provider [~~agency~~] must maintain documentation of service delivery plan changes:

(A) in the individual's [~~client~~] file; and

(B) (No change.)

(d) Implementation of service delivery plan changes. The provider [~~agency~~] must implement the service delivery plan change on the following date, whichever is later:

(1) the authorization begin date [~~(Item 4)~~] on DADS' authorization for community care services form [~~the Texas Department of Human Services' (DHS's) Authorization for Community Care Services~~] form; [~~or~~]

(2) five days after the date the provider [~~agency~~] receives DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form, unless [~~. If~~] the provider [~~agency~~] fails to stamp the receipt date on the form, in which case the authorization begin date on the form [~~(Item 4)~~] will be used to determine timeliness.

(e) Delay in implementation of service delivery plan changes [~~implementation~~]. If a provider does not implement a service delivery plan change on the effective date of the change, the provider must set a new implementation date. The provider [~~agency~~] must document by the next working day any failure to implement a service delivery plan change on the effective date of the change. The documentation must include:

(1) the reason for the failure to timely implement the service delivery plan change; and

(2) (No change.)

§47.69. Transfers.

(a) Negotiation of an individual's [~~client~~] transfer from one provider [~~agency~~] to another. The providers [~~provider agencies~~] involved in an individual's [~~a client~~] transfer must coordinate with the case manager to negotiate the transfer date.

(b) Initiation of services. The receiving provider [~~agency~~] must initiate services on the negotiated date. The negotiated date is the begin date [~~(Item 4)~~] on DADS' authorization for community care services [~~the Texas Department of Human Services' (DHS's) Authorization for Community Care Services~~] form.

(c) Evaluation and service delivery plan. On or before the begin date [~~(Item 4)~~], the receiving provider [~~agency~~] must:

(1) conduct an evaluation [~~assessment~~], as described in §47.45 of this chapter (relating to Pre-Initiation Activities); and

(2) develop a service delivery plan, as described in §47.45 of this chapter.

§47.71. Suspensions.

(a) Required suspensions. A [~~The~~] provider [~~agency~~] must suspend services if:

(1) an individual [~~the client~~] permanently leaves the state or moves to a county where the provider [~~agency~~] does not contract with DADS [~~the Texas Department of Human Services (DHS)~~] to provide services under the PHC [~~Primary Home Care~~] Program;

(2) the individual [~~client~~] moves to a location where services cannot be provided under the PHC [~~Primary Home Care~~] Program;

(3) the individual [~~client~~] dies;

(4) the individual [~~client~~] is admitted to an institution, which is [~~. An institution is defined as~~] a:

(A) - (C) (No change.)

(D) state hospital; [~~or~~]

(E) intermediate care facility serving persons with mental retardation or a related condition; or

(F) correctional facility.

(5) the individual [~~client~~] requests that services [~~or specific tasks~~] end;

(6) the Health and Human Services Commission [~~DHS~~] denies the individual's [~~client's~~] Medicaid eligibility (not applicable to FC [~~family care~~] services); or

(7) the individual [~~client~~] or someone in the individual's [~~client's~~] home exhibits reckless behavior, which may result in imminent danger to the health and safety of the individual [~~client~~], the attendant, or another person, in which case[~~. If this occurs,~~] the provider [~~agency~~] must make an immediate referral to:

(A) the Texas Department of Family and Protective [~~and Regulatory~~] Services or other appropriate protective services agency;

(B) (No change.)

(C) the individual's [~~client's~~] case manager.

(b) Optional suspensions. The provider [~~agency~~] may suspend services if:

(1) the individual [~~client~~] or someone in the individual's [~~client's~~] home engages in discrimination against a provider [~~agency~~] or DADS [~~DHS~~] employee in violation of applicable law; or

(2) the individual [~~client~~] refuses services for more than 30 consecutive days.

(c) Notification of service suspension. The provider [~~agency~~] must notify the case manager [~~by fax~~] of any suspension by the next working day. The [~~faxed~~] notice [~~of a suspension~~] must include:

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

(4) for a suspension under subsection (a)(7) or (b) of this section, a written [~~an~~] explanation of the provider's [~~provider agency's~~] attempts to resolve the problem that caused the suspension, including the reasons why the problem was not resolved. [~~This paragraph only applies to suspensions under subsection (a)(7) and (b) of this section.~~]

(d) Interdisciplinary Team (IDT) meeting. The provider [~~agency~~] must convene an IDT meeting, as described in §47.49 of this chapter (relating to Interdisciplinary Team), if services are suspended under subsection (a)(7) or (b) of this section.

(e) Resuming services after suspension.

(1) A [~~The~~] provider [~~agency~~] must resume services after suspension on the earliest of the following:

(A) upon the individual's [~~client's~~] return home, or the date the provider [~~agency~~] becomes aware of the individual's [~~client's~~] return home, if applicable;

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

(D) upon the provider's [~~provider agency's~~] receipt of notification from the case manager that the provider [~~agency~~] must resume services pending the outcome of an [~~the~~] appeal.

(2) The provider [~~agency~~] must notify the case manager [~~in writing~~] of the date services resume [~~and must send the notice~~] within seven days after [~~of~~] that date.

§47.72. Compliance with Program Requirements.

(a) Termination of services. DADS may terminate services to an individual who has had services suspended on more than three occasions as described in §47.71(a)(7) or (b)(1) of this subchapter (relating to Suspensions).

(b) Right of appeal. An individual for whom services have been terminated may appeal this decision by requesting a fair hearing as described at 1 TAC Chapter 357 (relating to Hearings).

§47.73. Annual Reauthorization for Community Attendant Services (CAS).

(a) Reauthorization request.

(1) Upon receipt of the annual DADS authorization for community care services form, a [~~The~~] provider [~~agency~~] must request annual reauthorization for all CAS [~~community attendant services clients~~].

(2) The provider [~~agency~~] must send the following to the regional nurse to obtain annual reauthorization:

(A) DADS' authorization for community care services [~~the Texas Department of Human Services' (DHS's) Authorization for Community Care Services~~] form received from the case manager; [~~and~~]

(B) a signed statement indicating whether the supervisor agrees or disagrees with the tasks and hours indicated on DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form, and if [~~. If~~] the supervisor disagrees, the statement must provide the specific reasons for disagreeing with the hours and tasks on this form.

(b) Reauthorization request due date. The provider [~~agency~~] must submit the information described in subsection (a)(2) of this section to the regional nurse within 14 days after one of the following dates, whichever is later:

(1) the referral date [~~(Item 1)~~] on DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form; or

(2) the date the provider [~~agency~~] receives DADS' authorization for community care services [~~DHS's Authorization for Community Care Services~~] form, unless [~~. If~~] the provider [~~agency~~] fails to stamp the receipt date on the form, in which case the referral date [~~(Item 1)~~] will be used to determine timeliness.

(c) Authorization determination. DADS makes the authorization determination and notifies the provider before the annual reauthorization is due.

(d) [~~(c)~~] Documentation of annual reauthorization. The provider [~~agency~~] must maintain documentation of the written request for reauthorization for CAS [~~community attendant services~~] in the individual's [~~client~~] file.

§47.75. Complaints.

A provider must comply with the complaint procedures described in:

(1) §49.17 of this title (relating to Complaint Procedures);

(2) §49.18 of this title (relating to Client Rights and Responsibilities);

(3) §97.249 of this title (relating to Reportable Conduct); and

(4) §97.250 of this title (relating to Investigations).

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

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SUBCHAPTER F. CLAIMS PAYMENT AND DOCUMENTATION

40 TAC §§47.81, 47.83, 47.87, 47.89

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council

shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.81. Monitoring Medicaid Eligibility.

(a) Applicability. This section does not apply to individuals [~~clients~~] who are receiving FC [~~family care~~] services.

(b) Verification of Medicaid eligibility. A [~~The~~] provider [~~agency~~] must verify each month that an individual [~~a client~~] remains Medicaid eligible. The provider [~~agency~~] may verify the individual's [~~client's~~] current Medicaid eligibility by:

(1) viewing the individual's Health and Human Services Commission [~~the client's Texas Department of Human Services (DHS)~~] Medicaid Identification form; or

(2) using the current systems available to verify individual [~~client~~] registration.

(c) Reimbursement. The provider [~~agency~~] is not entitled to payment from DADS [~~DHS~~] for services delivered if the provider [~~agency~~] fails to verify the individual [~~client~~] has current Medicaid eligibility.

§47.83. Monitoring Reviews.

(a) Monitoring reviews. DADS [~~The Texas Department of Human Services (DHS)~~] conducts monitoring reviews in the PHC [~~Primary Home Care~~] Program as described in Chapter 49 of this title (relating to Contracting for Community Care Services) and in this chapter.

(b) Fiscal monitoring. Fiscal monitoring in the PHC [~~Primary Home Care~~] Program includes monitoring financial errors, which are applied to the entire unit of service. Financial errors include the following instances:

(1) DADS [~~DHS~~] reimburses a [~~the~~] provider [~~agency~~] for services, but the service delivery documentation is missing for the period for which services are reimbursed. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the pay period.

(2) DADS [~~DHS~~] reimburses the provider [~~agency~~] for services, but the attendant fails to complete the units of service delivered portion of the service delivery documentation. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the pay period.

(3) DADS [~~DHS~~] reimburses the provider [~~agency~~] for hours that exceed the total number of hours recorded on the service delivery documentation. DADS [~~DHS~~] applies the error to the total number of units reimbursed in excess of the units recorded on the service delivery documentation. The lowest [~~lesser~~] of the three [~~two~~] totals in subparagraphs (A) - (C) of this paragraph is used to calculate the total number of hours recorded on the service delivery documentation [~~if the following occurs~~]:

(A) the sum of time in and time out;

(B) the sum of daily totals of time; or

(C) the total time recorded.

[~~(A) the time in and time out are recorded on the service delivery documentation, and the sum of the time in and time out does not equal the total time recorded for the pay period; or~~]

[~~(B) the sum of the daily totals of time does not equal the total time recorded for the pay period.~~]

(4) DADS [~~DHS~~] reimburses the provider [~~agency~~] for units of service for days on which the individual [~~client~~] did not receive services. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the day on which the individual [~~client~~] did not receive services.

(5) DADS [~~DHS~~] reimburses the provider [~~agency~~] for units of service for days on which the individual [~~client~~] was Medicaid ineligible. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the days on which the individual [~~client~~] was Medicaid ineligible. This paragraph does not apply to FC [~~family care~~] services.

[~~(6) The provider agency makes a claim for services, but a valid practitioner's statement is missing. DHS applies the error to the total number of units claimed and not covered by a valid practitioner's statement. This paragraph does not apply to family care services.~~]

[~~(7) The provider agency makes a claim for services, but the practitioner's statement date is after the first day services were delivered. DHS applies the error to the total number of units claimed before the practitioner's statement date. This paragraph does not apply to family care services.~~]

§47.87. Record Keeping.

(a) General record keeping requirements. A [~~The~~] provider [~~agency~~] must maintain records according to:

(1) (No change.)

(2) Chapter 69 of this title (relating to Contract Administration [~~Contracted Services~~]); [~~and~~]

(3) the terms of the contract;[~~.~~]

(4) this chapter; and

(5) the provider's company policies.

(b) Program specific records. A [~~The~~] provider [~~agency~~] must maintain records of compliance with the requirements of this chapter.

(c) Financial records. A [~~The~~] provider [~~agency~~] must maintain financial records:

(1) to support its billings to DADS [~~the Texas Department of Human Services (DHS)~~] for payment under §47.89 of this chapter (relating to Reimbursement);

(2) to document reimbursements made by DADS, including [~~DHS. The documentation must include~~]:

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

(C) the warrant number;

(D) the date of receipt of the reimbursement; and

(E) any other information necessary to trace deposits of reimbursements and payments made from the reimbursements in the provider's [~~provider agency's~~] accounting system; and

(3) in accordance with generally accepted accounting principles (GAAP) and DADS [~~DHS~~] procedures, including[~~. A provider agency's financial records must include the following~~]:

(A) - (I) (No change.)

(J) records of the provider's [~~provider agency's~~] internal accounting procedures; and

(K) a chart of accounts, as defined by GAAP.[~~; and~~]

[(L) records of the provider agency's company policies.]

(d) Subcontractor records. If a provider [agency] utilizes a subcontractor, the provider [agency] must maintain records of the subcontractor's activities. Maintaining all records to support subcontractor claims is the responsibility of the provider [agency].

(e) Failure to maintain records. Failure to maintain records as specified in this section may result in:

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

(3) other actions deemed necessary or appropriate by DADS [DHS].

§47.89. Reimbursement.

(a) Billing requirements.

(1) A [The] provider [agency] must bill for services provided as described in §49.41 of this title (relating to Billings and Claims Payment).

(2) The provider [agency] must not bill DADS [Texas Department of Human Services (DHS)] for:

(A) more hours than an individual's [the client's] weekly authorization, except when services are delivered as described in §47.63(a) [§47.63(b)] of this chapter (relating to Service Delivery);

(B) (No change.)

(C) services or tasks that duplicate any services or tasks provided to the individual [client] by another source.

(b) Hourly [Unit] rate. The provider [agency] must agree to accept the hourly [unit] rate authorized by DADS [DHS].

(c) (No change.)

(d) Rounding. The provider [agency] must bill DADS [DHS] for services in quarter-hour increments, rounding up to the next quarter-hour if the actual time worked is eight minutes or more, and rounding down to the previous quarter hour if the actual time worked is seven minutes or less.

(e) Allowable tasks [Tasks]. The provider [agency] must bill DADS [DHS] only for the tasks described in §47.41 of this chapter (relating to Allowable Tasks).

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

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40 TAC §47.85

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

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.85. Retroactive Payment Procedures.

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

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SUBCHAPTER G. UTILIZATION REVIEW

40 TAC §47.91

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The new section affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.91. Utilization Review.

(a) DADS conducts utilization review of a service delivery plan and supporting documentation at any time to:

(1) determine the appropriateness of services;

(2) validate a service provision; or

(3) evaluate the quality of services.

(b) A provider, consumer directed services employer, and consumer directed services agency must submit documentation supporting the service delivery plan to DADS as requested by DADS.

(c) If DADS determines that one or more of the tasks specified in a service delivery plan do not meet the requirements described in Subchapter D of this chapter (relating to Service Delivery Plan Requirements) and Subchapter E of this chapter (relating to Service Requirements), DADS denies or reduces the hours or tasks, modifies the service delivery plan effective from the date of the utilization review, and sends written notification of the denial or reduction to the individual and provider.

(d) In addition to the utilization review conducted in accordance with subsection (a) of this section, DADS may conduct utilization reviews of providers and services based on utilization patterns and trends.

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

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SUBCHAPTER H. INTEGRATED CARE MANAGEMENT

40 TAC §§47.101, 47.103, 47.105, 47.107, 47.109, 47.111, 47.113, 47.115, 47.117, 47.119

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The new sections affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§47.101. ICM Purpose.

This subchapter contains the requirements for ICM providers contracting to provide PHC services to eligible individuals through the ICM Program. In addition, ICM providers must comply with the requirements of this chapter.

§47.103. ICM Introduction.

(a) Title XIX PHC services for ICM members are coordinated through the ICMC. The ICMC is responsible for administrative services related to service coordination and utilization review. Title XX services for ICM members are coordinated through DADS case managers. In the ICM Program, the ICMC, in conjunction with DADS, is responsible for conducting all utilization review tasks including notifying DADS when the requirements of this subchapter are not met. If DADS approves a request from the ICMC to deny or reduce a service, the ICMC will modify the service delivery plan and send written notification of the denial or reduction to the provider and DADS will send written notification of the denial or reduction to the individual.

(b) The ICMC must request that DADS terminate services to an individual who has had services suspended on more than three occasions as described in §47.71(a)(7) and (b)(1) of this chapter (relating to Suspensions). If DADS approves a request to terminate services, the rights of appeal and notification requirements described at §47.72(b) and (c) of this chapter (relating to Compliance with Program Requirements) apply.

(c) The ICMC is not responsible for monitoring the ICM provider's contract with DADS or for paying claims.

§47.105. ICM Definitions.

The following words, terms, and phrases specific to the ICM Program have the following meanings when used in this subchapter, unless the context clearly indicates otherwise:

(1) ICM--Integrated care management.

(2) ICMC--ICM contractor. An entity under contract with the Texas Health and Human Services Commission (HHSC) responsible for managing and coordinating acute care services and long term services and supports (LTSS) for applicants and individuals for the ICM Program.

(3) ICM Program--A combined waiver program, authorized by the Centers for Medicare and Medicaid Services (CMS) in accordance with §1915(b) and §1915(c) of the Social Security Act, in which the ICMC manages and coordinates acute care services and LTSS services for eligible individuals.

(4) ICM PHC services--Attendant care services, as managed by the ICMC in accordance with §1915(b) of the Social Security Act, which do not include FC and CAS.

(5) ICM provider--A licensed home and community support services agency that contracts with DADS and the ICMC to provide services to ICM members in exchange for reimbursement.

§47.107. ICM Contracting Requirements.

In addition to complying with the contracting requirements described in §47.11 of this chapter (relating to Contracting Requirements), an ICM provider must have a contract with the ICMC to provide ICM PHC services.

§47.109. ICM Referrals.

An ICM provider must comply with referral requirements described in §47.43 of this chapter (relating to Referrals), except as follows.

(1) The ICM provider must accept all ICMC referrals for ICM PHC services.

(2) There are two methods of referral:

(A) For expedited referrals, the ICMC makes the referral by oral notice and on DADS' authorization for community care services form.

(B) For routine referrals, the ICMC makes the referral on DADS' authorization for community care services form.

§47.111. ICM Pre-Initiation Activities.

(a) An ICM provider must comply with pre-initiation requirements as described in §47.45 of this chapter (relating to Pre-Initiation Activities), except that the ICMC is responsible for obtaining and submitting a complete practitioner's statement to DADS.

(b) An ICM provider must notify the ICMC with respect to:

(1) service delivery plan variances; and

(2) pre-initiation activities.

§47.113. ICM Interdisciplinary Team.

An ICM provider must comply with interdisciplinary team (IDT) requirements as described in §47.49 of this chapter (relating to Interdisciplinary Team), except that a good faith effort must be made and documented to include an ICMC representative in the IDT.

§47.115. ICM Service Delivery Plan Changes.

An ICM provider must comply with service delivery plan change requirements described in §47.67 of this chapter (relating to Service Delivery Plan Changes), except as follows.

(1) Increase in hours or termination. The ICM provider must send notice to the ICMC in writing within seven days after learning of any changes described in §47.67(a)(1) and (2) of this chapter.

(2) Decrease in hours. The ICMC and the ICM provider must coordinate with the individual to develop a new service delivery plan, as described in §47.45(a)(2) of this chapter (relating to Pre-Initiation Activities), within 21 days after the ICM provider identifies the need for an ongoing decrease in hours from the service delivery plan currently approved by the individual.

(3) Immediate increase in hours. A provider must:

(A) notify the ICMC of the reason an individual requires an immediate increase in service hours;

(B) obtain approval from the ICMC for:

(i) the number of additional service hours to be provided the individual; and

(ii) the effective date of the change;

(C) implement the immediate increase in hours on the date negotiated with the ICMC; and

(D) document the immediate increase in hours as required in §47.67(c)(3) of this chapter, except that documentation must include the name of the ICMC representative who approved the change.

§47.117. ICM Transfers.

An ICM provider must comply with transfer requirements described in §47.69 of this chapter (relating to Transfers), except that ICM providers involved in an individual's transfer must coordinate with the ICMC to negotiate the transfer date.

§47.119. ICM Suspensions.

An ICM provider must comply with suspension requirements in §47.71 of this chapter (relating to Suspensions), except as follows.

(1) Required suspensions. An ICM provider must suspend services if:

(A) the individual permanently leaves the state or moves to a county where the ICM provider does not contract with DADS and the ICMC to provide services; or

(B) the individual or someone in the individual's home exhibits reckless behavior, which may result in imminent danger to the health and safety of the individual, ICM provider employee, or another person, in which case the ICM provider must make an immediate referral to:

(i) the Texas Department of Family and Protective Services or other appropriate protective services agency;

(ii) local law enforcement, if appropriate; and

(iii) the individual's ICMC representative.

(2) Optional suspensions. An ICM provider may suspend services if:

(A) an individual or someone in the individual's home engages in discrimination against an ICM provider or ICMC employee in violation of applicable law; or

(B) the individual refuses services for more than 30 consecutive days.

(3) Notification of service suspension. An ICM provider must notify the ICMC of any suspension by the next working day. The notice of a suspension must include the elements described in §47.71(c)(1) - (4) of this chapter.

(4) Resuming services after suspension.

(A) An ICM provider must resume services after suspension in compliance with §47.71(e) of this chapter, and on the earlier of the following:

(i) on the date specified in writing by the ICMC; or

(ii) upon the ICM provider's receipt of notification from the ICMC that the ICM provider must resume services pending the outcome of an appeal.

(B) The ICM provider must notify the ICMC in writing of the date services resume and must send the notice within seven days of that date.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805409
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 23, 2008
For further information, please call: (512) 438-3734

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ADOPTED RULES

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.105

The Health and Human Services Commission (HHSC) adopts amendments to §355.105, concerning General Reporting and Documentation Requirements, Methods, and Procedures, without changes to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3506).

Background and Justification

This rule establishes cost reporting and documentation requirements, methods and procedures for all Department of Aging and Disability Services (DADS) programs for which the Health and Human Services Commission (HHSC) administers rates. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule by clarifying certain requirements relating to continuous daily timesheets and detailing the procedures for determining limits on related-party salaries, wages and benefits.

Continuous daily timesheets are required when a provider directly charges payroll costs of direct care employees who work across cost areas, service areas, and/or job classifications. Existing rules do not detail the content requirements for these timesheets. This amendment will give providers clear guidance as to what information must be included in a timesheet to be acceptable for cost report documentation purposes.

Currently, HHSC applies salary caps to salary amounts reported on Medicaid cost reports by providers for related-party administrators, directors, assistant administrators, assistant directors, and owners, partners, and stockholders. The salary caps are applied by HHSC under the authority of §355.102, which requires that, for cost reporting purposes, allowable costs must be reasonable and necessary, and, for nursing facilities (NFs), under the authority of §355.306, which describes the capping methodology in detail. The amendment creates a consolidated related-party salary capping rule for all DADS programs in a single Texas Administrative Code (TAC) section and codifies the methodology used to calculate these caps for all programs. This amendment will ensure that the calculation of related-party compensation limitation for non-NF programs is described as clearly in the rules as is the calculation of such limitations for the NF program. The amendment does not change the current method used to cap related-party salaries on the cost report, rather it serves to clarify and consolidate current practice into the rule.

The amendment also deletes obsolete language, deletes the requirement that legacy Texas Department of Mental Health and Mental Retardation providers maintain financial records for five years and instead requires these providers to comply with DADS record keeping requirements that financial records be maintained for three years and 30 days, updates agency references and updates references to other sections of the TAC. These changes will make the rule easier to understand and apply.

Comments

The 30-day comment period ended June 2, 2008. During this period, HHSC received comments regarding the proposed amendments to §355.105 from representatives of the Private Providers Association of Texas, Community Living Concepts, Inc, and Vita-Living, Inc. HHSC received some comments that were not applicable to the proposed rule. A summary of the applicable comments relating to the proposed rules and HHSC's responses follows.

Comment concerning Small Business and Micro-business Impact Analysis: Equally concerning is the Commission's analysis of the rules effect on small business noted on pages 3506 and 3507 of the May 2, 2008, *Texas Register* which states HHSC has determined that the proposed amendments do not require any changes in practice or any additional cost to the contracted provider. The Association argues otherwise and requests a copy of HHSC's analysis on which this determination is based. Completion of timesheets has been required for many years. Since the rule's inception, however, HHSC has altered its intent and provider expectations through "practice" rather than "rule" and without sufficient prior notice to providers and sound analysis of the resultant impact, both administratively and financially, such "practices" have had on contracted providers.

Response: Continuous daily timesheets are currently required documentation of costs included in the cost reports, and as such, are included in the cost report training that all cost report preparers are required to complete. Codifying existing requirements does not impose any additional hardship on any providers, including small businesses.

HHSC did not change the proposed rule in response to this comment.

Comment Concerning §355.105(b)(2)(B)(xii)(I) and (II): The Association opposes the above proposed changes for the same reasons as stated in the Association's March 17, 2008 comments related to the reimbursement rule amendments that were published as proposed in the February 15, 2008, *Texas Register.* The requirements, both the ones proposed above and those in-

cluded in other ICF/MR and HCS reimbursement-related rules under Title 1, Part 15, Chapter 355, are:

overly burdensome, lead to provider staff inefficiencies and detract from the staff's ability to provide "hand-on" care to the consumer,

unnecessarily costly to implement,

more detailed than required to document service delivery and assure program quality, and

contrary to the mandates of HB 2540 - 80th Texas Legislature which directs HHSC to explore more efficient and effective cost reporting processes.

Response: Continuous daily timesheets are required documentation of costs included in the cost reports, and as such, are included in the cost report training. This rule merely codifies these requirements.

HB 2540 requires the adoption of a pilot program. HHSC will adopt any changes made to cost report requirements as a result of the pilot at a later date. Regular processes must continue until the completion of the pilot and adoption of any changes resulting from the pilot.

HHSC did not change the proposed rule in response to this comment.

Comment Concerning §355.105(b)(2)(B)(xii)(I) and (II): Providers have in some cases advanced beyond the manual time sheets whereby using electronic time clocks for employees to record start time and stop time. To ask providers that have gone to the electric time capture systems to make a major step backwards to the use of manual continuous timesheets is saying the state does not recognize the use of technology. It has been stated that as a result of this rule that there are no changes in practices or any additional cost to the contracted provider, HHSC must not be aware how much time consuming manual time sheets are. For a small provider with a few employees this may be true, however for a provider with a large number of hourly direct care staff it is very labor intensive and therefore costly to process.

Response: These rules do not preclude electronic methods of recording time worked. Any form of time documentation that meets all the requirements spelled out in the rule is acceptable.

HHSC did not change the proposed rule in response to this comment.

Comment Concerning §355.105(b)(2)(B)(xii)(I) and (II): A commenter expressed concern about continuous daily timesheets for employees who provide direct care and administrative functions in multiple programs. The commenter was concerned about the correct reporting of these costs on the cost report.

Response: This rule does not change the current reporting and allocation requirements. Only employees who provide direct care as well as other tasks are required to complete continuous daily timesheets. Direct care costs must be directly charged to the applicable program. Employees who provide administrative tasks that support multiple programs must be allocated to all programs using one of the allowed allocation methods.

HHSC did not change the proposed rule in response to this comment.

Comment Concerning §355.105(b)(6)(i)(1) - (4): The amendments under (i)(1) and (2) should be consistent with the changes we understand will soon be adopted under §335.457(b)(2)(C)(iv) and §355.722(h). These aforementioned changes support the sum of all direct care hours for any individual owner or related party not exceed 2,600 hours in any given fiscal year. Previously the requirement limited the hours to 2,080. This change should thus be extended to the above proposed amendments governing limitations on related party salaries, wages, and/or benefits. Note: The data base to support these proposed caps is currently 5 or more years behind the cost report year to which the caps would be applied. As a consequence, there is no fair way to implement this practice and the rule provides no such duty. It has been the department's practice to announce its annual model rates and caps for the first time after the close of the cost report year, at the earliest, or upon audit years later. This exposes affected providers to hardship, uncertainty and no fair way to predict a compliant course of spending before the cost report year begins.

Response: This rule calculates the maximum reportable salary for related parties for Medicaid cost reporting purposes. The rule adopted under §335.457(b)(2)(C)(iv) and §355.72(h) calculates the maximum reportable hours for related parties. Using the 2600 hours to calculate the hourly salary cap as suggested by the commenter would result in a lower salary cap than would be calculated under the rule as proposed.

HHSC uses the previous year's audited cost report data to determine the salary caps. That data is then inflated to the current year for calculation of the final salary cap amount. Salary caps for the 2007 cost reports will be based upon 2006 cost report data inflated to the 2008 cost reporting period. The limits on related-party salaries, wages, and/or benefits discussed in this clause are applied by HHSC auditors during the cost report audit process and are applied to salaries, wages, and/or benefits that are not subject to fiscal accountability. As a result, it is not necessary for providers to know what the limitations will be prior to completing and submitting their cost reports.

HHSC did not change the proposed rule in response to this comment.

Comment Concerning §355.105(b)(6)(i)(1) - (4): As stated in the May 2, 2008, *Texas Register,* the above proposed amendments codify current practice. Based on comments from some of our member organizations, the Association is concerned about the clarity of rule and whether all providers to whom this limitation applies are familiar with the current practice, in particular providers who have not yet been required to complete a cost report or have only been in operation for one year, thus have only completed one cost report. In other words, newly certified HCS providers or ICF/MR providers who have recently acquired an ICF/MR program, yet who have not previously owned/operated one. Unless one knows what the 90th percentile factor is before a cost reporting period begins, how can one assess and ensure compliance with the limitation if the limitation to the 90th percentile is not known/calculated by HHSC until after a cost reporting period.

Response: The limits on related-party salaries, wages, and/or benefits discussed in this clause are applied by HHSC auditors during the cost report audit process and are applied to salaries, wages, and/or benefits that are not subject to fiscal accountability. As a result, it is not necessary for providers to know what the limitations will be prior to completing and submitting their cost reports.

HHSC did not change the proposed rule in response to this comment.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

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

Filed with the Office of the Secretary of State on October 13, 2008.

TRD-200805392
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 2, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS SUBCHAPTER W. RED PALM MITE QUARANTINE

4 TAC §§19.600 - 19.603

The Texas Department of Agriculture (the department) adopts new §§19.600 - 19.603, concerning a quarantine for the red palm mite, *Raoiella indica* Hirst, without changes to the proposal published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7384). The new sections are adopted to prevent introduction of red palm mite into Texas. The red palm mite was first detected in the continental United States on December 3, 2007, in Palm Beach County, Florida. Since then, the mite has spread to three additional Florida counties. As of July 21, 2008, it was detected in 120 residential properties and two nurseries in Florida. To ensure only mite-free palms are shipped into Texas, the new sections require the Florida Department of Agriculture and Consumer Services, Division of Plant Industry (DPI) to inspect the red palm mite host plants before shipment and provide mite-free phytosanitary certification. Alternatively, nurseries can enter into a compliance agreement with the DPI to follow a prescribed treatment plan and ship mite-free plants using a stamp.

The red palm mite is about 1/100th of an inch in length, bright red, and is barely visible with the naked eye. It feeds on leaves of 32 species of palms, bananas, gingers, etc. and causes localized yellowing of leaves followed by tissue death. Heavy infestation can cause significant loss of the foliage. The mite is not known to occur in Texas; and it poses a serious threat to the state's palm nurseries and to residential properties, shopping malls, businesses, and other areas where palms are used for landscaping. Although DPI is encouraging nurseries handling the mite host plants to enter into the DPI-established compliance agreement, there is no assurance all nurseries will do so. Furthermore, the quarantine will also deter residents and tourists from transporting the mite-infested host plants from infested to non-infested areas. Inspection of plants by DPI prior to shipment, or shipment of plants under the compliance agreement provision, would ensure shipments to be free of the mites. The adopted quarantine takes necessary steps to prevent the artificial introduction of the red palm mite into Texas.

New §19.600 defines the quarantined pest. New §19.601 designates the infested areas subjected to the quarantine. New §19.602 lists the articles subject to the quarantine. New §19.603 prescribes requirements for movement of the quarantined articles from the quarantined area to Texas.

No comments were received on the proposal.

The new sections are adopted under the Texas Agriculture Code, §71.001, which authorizes the department to establish a quarantine against out-of-state diseases and pests; and §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805388
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: November 4, 2008
Proposal publication date: September 5, 2008
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.16

The Texas State Securities Board adopts new §115.16, concerning the use of senior-specific certifications and professional designations without changes to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6679).

The new rule prohibits the misleading use of designations that imply that the registered dealer or agent has special training in providing brokerage services to senior citizens or retirees. While prohibiting the use of misleading designations, the rule provides a means by which an accredited designating or certifying organization could be recognized so that persons who meet the qualifications set by the organization may use a recognized designa-

tion. The rule is based on the model adopted in March 2008 by the North American Securities Administrators Association, Inc. that represents the culmination of a multi-state effort to focus national attention on unscrupulous behavior targeting senior investors.

Senior investors will be afforded protection from persons using misleading designations that imply special training or expertise in providing brokerage or other financial services to seniors and registered persons will be placed on notice that their use of misleading designations is administratively actionable. The use of questionable designations has been a significant problem, so this new rule will be a useful tool in helping to stem abuses.

No comments were received regarding adoption of the new rule.

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

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805360
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: October 30, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 305-8303

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.16

The Texas State Securities Board adopts new §116.16, concerning the use of senior-specific certifications and professional designations without changes to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6681).

The new rule prohibits the misleading use of designations that imply that the registered investment adviser or investment adviser representative has special training in advising senior citizens or retirees about their investments. While prohibiting the use of misleading designations, the rule provides a means by which an accredited designating or certifying organization could be recognized so that persons who meet the qualifications set by the organization may use a recognized designation. The rule is based on the model adopted in March 2008 by the North American Securities Administrators Association, Inc. that represents the culmination of a multi-state effort to focus national attention on unscrupulous behavior targeting senior investors.

Senior investors will be afforded protection from persons using misleading designations that imply special training or expertise in advising senior citizens or retirees about investing and registered persons will be placed on notice that their use of misleading designations is administratively actionable. The use of questionable designations has been a significant problem, so this new rule will be a useful tool in helping to stem abuses.

No comments were received regarding adoption of the new rule.

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

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805361
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: October 30, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 305-8303

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CHAPTER 133. FORMS

7 TAC §133.21

The Texas State Securities Board adopts the repeal of §133.21, a form concerning minimum bookkeeping records for securities dealers registered in Texas, without changes to the proposal as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6682).

The repeal eliminates a form that has become outdated.

The repeal eliminates an obsolete form.

No comments were received regarding adoption of the repeal.

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

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805363

Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: October 30, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 305-8303

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7 TAC §133.22

The Texas State Securities Board adopts the repeal of §133.22, a form concerning memorandum to securities dealers, without changes to the proposal as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6682).

The repeal eliminates a form that has become outdated.

The repeal eliminates an obsolete form.

No comments were received regarding adoption of the repeal.

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

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805362
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: October 30, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 305-8303

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TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §§255.1, 255.2, 255.4, 255.9, 255.11, 255.16

The Office of Rural Community Affairs (ORCA) adopts the amendments to §§255.2, 255.4, and 255.11, concerning the Community Development Block Grant (CDBG) non-entitlement area funds, without changes to the proposed text as published in the July 18, 2008, issue of the *Texas Register* (33 TexReg 5631). Sections 255.1, 255.9, and 255.16 are adopted with changes to the proposed text as published. The changes to §§255.1, 255.9 and 255.16 are made to correct typographical errors.

The adopted amendments specify criteria contained within the 2009 Action Plan.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under §487.052 of the Texas Government Code, which provides the board with the authority to adopt rules concerning the implementation of the ORCA's responsibilities.

§255.1. General Provisions.

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

(1) Applicant--A unit of general local government which is preparing to submit or has submitted an application for Texas Community Development funds to the Office or to the Texas Department of Agriculture (TDA).

(2) Application--A written request for Texas Community Development Block Grant Program TxCDBG funds in the format required by the Office or by the TDA for Texas Capital Fund (TCF) applications.

(3) Community Development Block Grant nonentitlement area funds--The funds awarded to the State of Texas pursuant to the Housing and Community Development Act of l974, Title I, as amended (42 United States Code §§5301 et seq.), and the regulations promulgated thereunder in 24 Code of Federal Regulations Part 570.

(4) Community--A unit of general local government.

(5) Contract--A written agreement, including all amendments thereto, executed by the Office, or by the TDA, and contractor which is funded with community development block grant nonentitlement area funds.

(6) Contractor--A unit of general local government with which the Office or the TDA has executed a contract.

(7) Office--The Office of Rural Community Affairs.

(8) Local government--A unit of general local government.

(9) Low-and moderate-income person--A member of a family which earns less than 80% of the area median family income, as defined under the United States Department of Housing and Urban Development §8 Assisted Housing Program.

(10) Nonentitlement area--An area which is not a metropolitan city or part of an urban county as defined in 42 United States Code, §5302.

(11) Poverty--The current official poverty line established by the Director of the Federal Office of Management and Budget.

(12) Primary beneficiary--A low or moderate income person.

(13) Regional review committee--A regional community development review committee, one of which is established in each of the 24 state planning regions established by the governor pursuant to Texas Local Government Code, §391.003.

(14) Slum or blighted area--An area which has been designated a state enterprise zone, or an area within a municipality or county that is detrimental to the public health, safety, morals, and welfare of the municipality or county because the area:

(A) has a predominance of buildings or other improvements that are dilapidated, deteriorated, or obsolete due to age or other reasons;

(B) is prone to high population densities and overcrowding due to inadequate provision for open space;

(C) is composed of open land that, because of its location within municipal or county limits, is necessary for sound community growth through replatting, planning, and development for predominantly residential uses; or

(D) has conditions that exist due to any of the causes enumerated in subparagraphs (A) - (C) of this paragraph or any combination of those causes that:

(i) endanger life or property by fire or other causes; or

(ii) are conducive to:

(I) the ill health of the residents;

(II) disease transmission;

(III) abnormally high rates of infant mortality;

(IV) abnormally high rates of juvenile delinquency and crime; or

(V) disorderly development because of inadequate or improper platting for adequate residential development of lots, streets, and public utilities.

(15) Slum or blight, spot basis--A building which has been declared as a slum or blight and has multiple and unattended building code violations, and qualifies as slum or blighted on a spot basis under local law.

(16) State review committee--The State Community Development Review Committee established pursuant to Texas Government Code, §487.353.

(17) Unemployed person--A person between the ages of 16 and 64, inclusive, who is not presently working but is seeking employment.

(18) Unit of general local government--An entity defined as a unit of general local government in 42 United States Code §5302(a)(1), as amended.

(b) Overview--Community Development Block Grant nonentitlement area funds are distributed by the TxCDBG to eligible units of general local government in the following program areas:

(1) community development fund;

(2) Texas Capital fund. The Texas Capital Fund (TCF) is administered by the TDA under an interagency agreement with the Office. Applications for the TCF shall be submitted to the TDA.

(3) planning/capacity building fund;

(4) disaster relief fund;

(5) urgent need fund;

(6) colonia fund;

(7) Young v. Martinez fund (discontinued after 2003 program year);

(8) housing fund (discontinued after 2004 program year);

(9) small towns environment program fund;

(10) microenterprise fund (program income);

(11) small business fund (program income);

(12) section 108 loan guarantee pilot program;

(13) community development supplemental fund;

(14) non-border colonia fund;

(15) renewable energy demonstration pilot program.

(c) Types of applications.

(1) Single jurisdiction applications. An applicant may submit one application per TxCDBG fund, as outlined in subsection (b) of this section, on its own behalf, or as a participant in a multi-jurisdictional application, per funding cycle (except as specified for the TCF, community development fund, housing fund, colonia fund, and small towns environment program fund).

(A) A city may submit a single jurisdiction application that includes beneficiaries located within the extraterritorial jurisdiction of the city. However, the applicant must document that each activity benefiting persons located in its extraterritorial jurisdiction is meeting its community and housing development needs, including the needs of low and moderate income persons. A city cannot submit a single jurisdiction application that includes beneficiaries located inside the corporate city limits and outside of the city's extraterritorial jurisdiction. In this instance, the city and county in which the beneficiaries outside of the city's extraterritorial jurisdiction are located must submit the project as a multi-jurisdiction application.

(B) A county may submit an application on behalf of an incorporated city when the proposed application activities provide improvements to a public facility or service that is not owned or operated by the incorporated city and the persons benefiting from the application activities are located within the city's corporate city limits or the city's extraterritorial jurisdiction. If a county submits an application on behalf of an incorporated city, then the county and that city cannot submit another single jurisdiction application or be a participating jurisdiction in a multi-jurisdiction application submitted under the same TxCDBG fund category.

(C) A county may submit a single jurisdiction application for a housing rehabilitation program that includes the rehabilitation of housing units in unincorporated areas and incorporated cities located in the county. The housing units that are rehabilitated under the county program must be located in unincorporated areas and in each incorporated city that is included as a participant in the county housing rehabilitation program. If a county submits a housing rehabilitation program application that includes the rehabilitation of housing units in incorporated cities, then the county cannot submit another single jurisdiction application or be a participating jurisdiction in a multi-jurisdiction application submitted under the same TxCDBG fund category.

(D) An application from an eligible city or county for a project that would primarily benefit another city or county that was not meeting the TxCDBG application threshold requirements would be considered ineligible.

(2) Multi jurisdiction applications. Subject to each participating community satisfying the application requirements of the TxCDBG fund under which the application is submitted and this paragraph, an application will be accepted from two or more units of general local government if the application clearly demonstrates that the proposed activities will mutually benefit the residents of the communities applying for funds. A multi-jurisdiction application solely for administrative convenience will not be accepted. Any community participating in a multi-jurisdiction application may not submit a single jurisdiction application under the project fund for which the multi-jurisdiction application was submitted. One of the participating communities must be

primarily accountable to the Office and the TDA, in instances where the TCF is accessed, for financial compliance and program performance; however, all entities participating in the multi-jurisdiction application will be accountable for application threshold compliance. Only one unit of general local government may be the official applicant and this applicant must enter into a legally binding cooperation agreement with each participant that incorporates TxCDBG requirements. A proposed project which is located in more than one jurisdiction or in which beneficiaries from more than one jurisdiction will be counted must be submitted as a multi-jurisdiction application (except as specified for the TCF and single jurisdiction applications described in paragraph (1)(A) - (D) of this subsection).

(d) Eligible location. Only projects or activities which are located in the nonentitlement areas of the state are eligible for funding under the TxCDBG. An exception to this requirement is Hidalgo County, an entitlement county, which is eligible for the colonia fund. Another exception to this requirement is that entitlement areas located in disaster recovery initiative eligible counties are eligible locations for disaster recovery initiative funds.

(e) Ineligible activities. Any type of activity not described or referred to in the Federal Housing and Community Development Act of 1974, §5305(a) (42 United States Code §5301 et seq.) is ineligible for funding under the TxCDBG.

(1) Specific ineligible activities include, but are not limited to: construction of buildings and facilities used for the general conduct of government (e.g., city halls and courthouses); new housing construction, except as described as eligible under the current TxCDBG application guides; the financing of political activities; purchases of construction equipment (except in limited circumstances under the small towns environment program); income payments, such as housing allowances; most operation and maintenance expenses (including smoke testing televising/video taping line work, or any other investigative method to determine the overall scope and location of the project work activities); pre-contract costs, except for costs incurred prior to submittal of an application and paid with local government or other funds for administrative consultant and engineering/architectural services and pre-agreement costs described in a TxCDBG contract; prisons/detention centers; government supported facilities; and racetracks.

(2) The following activities and/or uses are specifically ineligible under the TCF: monies may not be used for speculation, investment or excess improvements over the minimum improvements needed for the business. TCF funds may not be utilized for refinancing or to repay the applicant, a local related economic development entity, the benefiting business or its owners and related parties for expenditures. Educational institutions, including but not limited to colleges and/or universities, and governmental entities may not qualify as the benefiting business. Ineligible infrastructure activities/improvements include, but are not limited to: landfills, incinerators, recycling facilities, machinery and equipment. Real estate improvements designed and/or built for a single, special or limited use or purpose are an ineligible use of funds. Real estate improvements do not include machinery and equipment used in the production and/or services marketed by the business.

(f) Citizen Participation.

(1) Public hearing requirements. For each public hearing scheduled and conducted by an applicant or contractor, the following public hearing requirements shall be followed.

(A) Notice of each hearing must be published in a newspaper having general circulation in the city or county at least 72 hours prior to each scheduled hearing. The published notice must include the date, time, and location of each hearing and the topics to be considered at each hearing. The published notice must be printed in both English and Spanish, if appropriate. Articles published in such newspapers which satisfy the content and timing requirements of this subparagraph will be accepted by the Office and, in the case of TCF hearings, by the TDA, in lieu of publication of notices. Notices should also be prominently posted in public buildings and distributed to local Public Housing Authorities and other interested community groups.

(B) Each public hearing shall be held at a time and location convenient to potential or actual beneficiaries, with accommodation for persons with disabilities. Persons with disabilities must be able to attend the hearings and an applicant must make arrangements for individuals who require auxiliary aids or services if contacted at least two days prior to each hearing.

(C) When a significant number of non-English speaking residents can reasonably be expected to participate in a public hearing, an applicant or contractor shall provide an interpreter to accommodate the needs of the non-English speaking residents.

(2) Application requirements. Prior to submitting a formal application, an applicant for TxCDBG funding shall satisfy the following requirements.

(A) At least one public hearing shall be held prior to the preparation of its application and a public notice shall be published in a newspaper having general circulation in the city or county notifying the public of the availability of the application for public review prior to submitting its completed application to the Office and, in the case of TCF applications, to the TDA. The requirements described in this subparagraph are not applicable to applications submitted under the housing infrastructure fund.

(B) For an application submitted for housing infrastructure fund assistance, an applicant must hold two public hearings. At least one public hearing shall be held prior to the preparation of the application and a second public hearing shall be held prior to submission of the application.

(C) An applicant shall retain documentation of the hearing notices, a list of attendees at each hearing, minutes of the hearings, and any other records concerning the proposed use of funds for a period of three years or until the project, if funded, is closed out. Such records must be made available to the public in accordance with Texas Government Code, Chapter 552.

(D) The public hearing must include a discussion with citizens on the development of housing and community development needs, the amount of funding available, all eligible activities under the TxCDBG, the plans of the applicant to minimize displacement of persons and to assist persons actually displaced as a result of activities assisted with TxCDBG funds, and the use of past TxCDBG contract funds, if applicable. Citizens, with particular emphasis on persons of low and moderate income who are residents of slum and blight areas, shall be encouraged to submit their views and proposals regarding community development and housing needs. Local organizations that provide services or housing for low to moderate income persons, including but not limited to, the local or area Public Housing Authority, the local or area Health and Human Services office, and the local or area Mental Health and Mental Retardation office, must receive written notification concerning the date, time, location, and topics to be covered at the first public hearing. Citizens shall be made aware of the location where they may submit their views and proposals should they be unable to attend the public hearing. For submission of a housing infrastructure fund application, these requirements must be followed for the first public hearing.

(E) The notice announcing the availability of the application for public review must be published five days prior to the submission of the application and the published notice must include the fund category for which the application is submitted, the amount of funds requested, a description of the application activities, the location or locations of the application activities, and the location and hours when the application is available for review.

(F) The second public hearing for a housing infrastructure fund application must include a discussion with citizens on the proposed project, including the locations and the project activities, the amount of funds being requested, and the estimated amount of funds proposed for activities that will benefit low and moderate income persons. The published notice for this public hearing must include the location and hours when the application is available for review.

(G) Any public hearing held prior to submission of the application must be held after 5:00 p.m. on a weekday or at a convenient time on a Saturday or Sunday.

(3) Contractor requirements.

(A) A contractor must hold a public hearing concerning any substantial change, as determined by the Office and, in the case of TCF program changes, by the TDA, proposed to be made in the use of TxCDBG funds from one eligible activity to another.

(B) Upon completion of its contract, the contractor shall hold a public hearing to review its program performance, including the actual use of the funds provided under the contract.

(C) A contractor shall retain documentation of the hearing notices, a list of attendees at each hearing, minutes of the hearings, and any other records concerning the actual use of funds for a period of three years after the contract is closed out. Such records must be made available to the public in accordance with Texas Government Code, Chapter 552.

(D) The public hearings must be held after 5:00 p.m. on a weekday or at a convenient time on a Saturday or Sunday.

(4) Complaint procedures. Applicants and contractors must maintain written citizen complaint procedures that provide a timely written response to complaints and grievances. Citizens must be made aware of the location and hours at which they may obtain a copy of the written procedures.

(5) Technical assistance. An applicant shall provide technical assistance to groups representative of persons of low-and moderate-income that request such assistance in developing proposals for the use of TxCDBG funds. The level and type of assistance shall be determined by the applicant based upon the specific needs of its residents.

(g) Appeals. An applicant for funding under the TxCDBG may appeal the disposition of its application in accordance with this subsection.

(1) The appeal may only be based on one or more of the following grounds.

(A) Misplacement of an application. All or a portion of an application is lost, misfiled, or otherwise misplaced by Office staff and, in the case of TCF applications, by TDA staff, resulting in unequal consideration of the applicant's proposal.

(B) Mathematical error. In rating the application, the score on any selection criteria is incorrectly computed by the Office and, in the case of TCF applications, by the TDA due to human or computer error.

(C) Other procedural error. The application is not processed by the Office and, in the case of TCF applications, by the TDA, in accordance with the application and selection procedures set forth in this subchapter. Procedural errors alleged to have been committed by a regional review committee may only be appealed in accordance with the provisions of §255.8 of this title (relating to Regional Review Committees).

(2) The appeal must be submitted in writing to the TxCDBG of the Office no later than 30 days after the date the announcement of community development fund, community development supplemental fund and planning/capacity building fund contract awards is published in the *Texas Register.* In addition, timely appeals not submitted in writing at least five working days prior to the next regularly scheduled meeting of the state review committee will be heard at the subsequent meeting of the state review committee. The Office staff will evaluate the appeal and may either concur with the appeal and make an appropriate adjustment to the applicant's scores, or disagree with the appeal and prepare an appeal file for consideration by the state review committee at its next regularly scheduled meeting. The state review committee will make a final recommendation to the executive director of the Office. The decision of the executive director of the Office is final. If the appeal concerns a TCF application, the appeal must be submitted in writing to the TDA no later than 10 days following the date of the notification letter of the denial. If the appeal concerns a disaster relief fund or urgent need fund application, the appeal must be submitted in writing to the Office no later than 30 days following the date of the notification letter of the denial. If the appeal concerns a small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, housing fund, colonia fund or Young v. Martinez fund application, the appeal must be submitted in writing to the Office no later than 30 days after the date the announcement of contract awards is published in the *Texas Register.* The staff of either the Office or the TDA, when appropriate, evaluates the appeal and may either concur with the appeal or disagree with the appeal and prepare an appeal file for consideration by the appropriate executive director. The executive director, of the agency with which the appeal was filed, then considers the appeal within 30 days and makes the final decision.

(3) In the event the appeal is sustained and the corrected scores would have resulted in project funding, the application is approved and funded. If the appeal concerning a community development fund or planning/capacity building fund application is rejected, the office notifies the applicant of its decision, including the basis for rejection after the meeting of the state review committee at which the appeal was considered. If the appeal concerns a small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, Young v. Martinez fund, TCF, housing fund, colonia fund, disaster relief fund, small towns environment program fund, or urgent need fund application, the applicant will be notified of the decision made by the appropriate executive director within ten days after the final determination by the executive director.

(4) An applicant for a grant, loan, or award under a community development block grant program may appeal a decision of the state review committee by filing a complaint with the Board. The Board will hold a hearing on a complaint filed with the Board and render a decision.

(5) Appeals not submitted in accordance with this subsection are dismissed and may not be refiled.

(h) Threshold requirements. An applicant must satisfy each of the following requirements in order to be eligible to apply for or to receive funding under the TxCDBG:

(1) Demonstrate the ability to manage and administer the proposed project, including meeting all proposed benefits outlined in its application. The applicant can meet this threshold by:

(A) Providing the roles and responsibilities of local staff designated to administer or work on the proposed project and a plan for project implementation;

(B) Indicating the intention to use a third-party administrator, if applicable; or

(C) If local staff along with a third-party administrator, will jointly administer the proposed project, by providing the roles and responsibilities of the designated local staff.

(2) Demonstrate the financial management capacity to operate and maintain any improvement made in conjunction with the proposed project. The applicant can meet this threshold by:

(A) Providing the name of the financial person on the applicant's staff, or evidence that the applicant intends to contract services for financial oversight; and

(B) Providing a statement certifying that financial records for the proposed project will be kept at an officially designated city/county site, accessible by the public, and will be adequately managed on a timely basis using generally accepted accounting principles.

(3) Levy a local property tax or local sales tax option.

(4) Demonstrate satisfactory performance on previously awarded TxCDBG contracts. The applicant can meet this threshold by:

(A) Showing past responses, if applicable, to audit and monitoring issues (over the most recent 48 months before the application due date) within prescribed times as indicated in the Office's resolution letter(s);

(B) The presence of documentation related to past contracts (over the most recent 48 months before the application due date), through close-out monitoring and reporting, that the activity or service was made available to all intended beneficiaries, that low and moderate income persons were provided access to the service, or there has been adequate resolution of issues regarding beneficiaries served;

(C) The non-presence of any outstanding delinquent response to a written request from the Office regarding a request for repayment of funds to TxCDBG; or

(D) By not having at least one outstanding delinquent response to a written request from the Office regarding compliance issues such as a request for closeout documents or any other required information.

(5) Resolve all outstanding compliance and audit findings related to previously awarded TxCDBG contracts and any other Office contracts. The applicant can meet this threshold if the applicant is actively participating in the resolution of any outstanding audit and/or monitoring issues by responding with substantial progress on outstanding issues within the time specified in the resolution process.

(6) Submit any past due audit to the Office.

(A) A community with one year's delinquent audit may be eligible to submit an application for funding by the established application deadline, but may not receive a contract award if the audit continues to be delinquent on the date the state review committee meets to approve funding recommendations for applications from fund categories scheduled for state review committee review. For applications from fund categories that are not reviewed by the state review committee, a community with one year's delinquent audit may be eligible to submit an application for funding by the established application deadline, but may not receive a contract award if the audit continues to be delinquent on the date that the state review committee approves funding recommendations. Applications for the colonia self-help center fund and the disaster relief/urgent need fund are exempt from this threshold.

(B) A community with two years of delinquent audits may not apply for additional funding and may not receive a funding recommendation. This applies to all funding categories under the Texas Community Development Program. The colonia self-help centers fund may be exempt from this threshold, since funds for the self-help centers fund is included in the program's state budget appropriation. Failure to meet the threshold will be reported to the Texas Department of Housing and Community Affairs for review and recommendation. The disaster relief fund may be exempt from this threshold, but failure to meet this threshold will be forwarded to the Board for review and consideration.

(7) TxCDBG funds cannot be expended in any county that is designated as eligible for the Texas Water Development Board Economically Distressed Areas Program unless the county has adopted and is enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code. An incorporated city that is located in a Texas Water Development Board Economically Distressed Areas Program eligible county that has not adopted, or is not enforcing, the Model Subdivision Rules, may submit an application for TxCDBG funds. However, in lieu of county adoption of the Model Subdivision Rules, the incorporated city must adopt the Model Subdivision Rules prior to the expenditure of any TxCDBG funds by the incorporated city.

(8) Based on a pattern of unsatisfactory performance on previous TxCDBG contracts, unsatisfactory management and administration of previous TxCDBG contracts, or the presence of evidence that an applicant lacks financial management capacity based on a review of official financial records and audits related to previous TxCDBG contracts, the Office or TDA, in the case of the Texas Capital Fund application may determine that an applicant is ineligible to apply for TxCDBG funding even though at the application deadline date it meets the threshold and past performance requirements. The Office or TDA, in the case of the Texas Capital Fund applications will consider an applicant's performance during the most recent 48 months before an application due date to make the eligibility determination. An applicant would still remain eligible for funding under the disaster relief fund.

(i) Unmet benefits. Actions that may be taken against a contractor by the Office where the Office finds that the contractor did not provide the level of benefits specified in its contract include, but are not limited to:

(1) holding the contractor ineligible to apply for TxCDBG funds for a period of two program years or until any issue of restitution is resolved, whichever is longer;

(2) requiring the contractor to reimburse the Office for the difference between the amount of funds provided for the level of benefits specified in the contract and the amount of funds actually expended in providing such level of benefits; and

(3) rescoring the contractor's application, and if the level of benefits actually provided by the contractor would have changed the funding recommendation, terminating the local government's contract.

(j) False information. If an applicant provides false information in its community development fund or planning/capacity building fund application which has the effect of increasing the applicant's competitive advantage, the number of beneficiaries, or the percentage of low to moderate income beneficiaries, the Office refers the matter to the state review committee for disciplinary action. If the applicant provides false information in a small business fund, microenterprise fund, sec-

tion 108 loan guarantee pilot program, non-border colonia fund, Young v. Martinez fund, colonia fund, disaster relief fund, housing fund, small towns environment program fund, or urgent need fund application, the Office staff shall make a recommendation for action to the executive director of the Office. If the applicant provides false information in a TCF application, TDA staff shall make a recommendation for action to the appropriate executive director. The state review committee makes a recommendation for action to the executive director of the Office at its next regularly scheduled meeting. Documentation of false information must be submitted at least ten business days prior to the next regularly scheduled meeting of the state review committee to be considered at that meeting. Recommendations that the state review committee or executive director may make include, but are not limited to:

(1) Disqualification of the application and holding the locality ineligible to apply for TxCDBG funding for a period of at least one year not to exceed two program years;

(2) holding the applicant or contractor ineligible to apply for TxCDBG funds for a period of two program years or until any issue of restitution is resolved, whichever is longer; and

(3) terminating the local government's contract if the correct information would have changed the scores and resulted in a change in the rankings for purposes of funding.

(k) Substitution of standardized data. Any applicant that chooses to substitute locally generated data for standardized information available to all applicants must use the survey instrument provided by the Office and must follow the procedures prescribed in the instructions to the survey instrument. This option does not apply to applications submitted to the TCF.

(1) Only door-to-door surveys are allowed, unless an alternate method is approved in writing by the Office.

(2) Surveys, including signed tabulation sheets, signed surveys location sheets, all responses, and all non-responses must be submitted to the Office by the application deadline, for verification and spot-checking.

(3) A survey instrument that lacks information prescribed in the instructions to the survey instrument or which includes conflicting information may be considered as a non-response for that family.

(4) The applicant must demonstrate a 100% effort in contacting households to be surveyed and obtain at least an 80% response rate for surveys which include 150 or fewer beneficiary households or obtain at least a 70% response rate for surveys which include 151 or more beneficiary households.

(5) A survey that was completed on or after January 1, 1993, or January 1, 1994, or January 1, 1995, for a previous TxCDBG application may be accepted by the Office for a new application to the extent specified in the most recent application guide for the proposed project.

(l) Unobligated and recaptured funds. Deobligated funds, unobligated funds and program income generated by TCF projects shall be retained for expenditure in accordance with the Consolidated Plan. Program income derived from TCF projects will be used by the Office for eligible TxCDBG activities in accordance with the Consolidated Plan. Any deobligated funds, unobligated funds, program income, and unused funds from the current year's allocation or from previous years' allocations derived from any TxCDBG Fund, including program income recovered from TCF local revolving loan funds, and any reallocated funds which HUD has recaptured from Small Cities may be redistributed among the established current program year fund categories, for otherwise eligible projects. The selection of eligible projects to receive such funds is approved by the Office Executive Director, or when applicable, approved by the Board or by the TDA on a priority needs basis with eligible disaster relief and urgent need projects as the highest priority; followed by, any awards necessary to resolve appeals under fund categories requiring publication of contract awards in the *Texas Register,* TCF projects, special needs projects, projects in colonias, housing activities, and other projects as determined by the Office Executive Director. Other purposes or initiatives may be established as a priority use of such funds within existing fund categories by the Board. Should the TxCDBG be required to make payments to HUD to cover any loan payments not made by any recipient of a TxCDBG Section 108 loan guarantee, it would first use any available deobligated funds.

(m) Waivers. The Office may waive any provision of this subchapter upon its own motion, or upon an applicant's or contractor's written request for such a waiver if the Office finds that compelling circumstances exist outside the control of the applicant or contractor which justifies the approval of such a waiver. The Office shall not waive any provision hereof concerning the TCF program unless written request to do so is received from the Executive Director of the TDA. The provisions of the foregoing sentence shall not apply to contracts other than those awarded and/or administered by the TDA for the Office. Issues related to audit requirements will be handled by the appropriate agency.

(n) Performance threshold requirements. In addition to the requirements of subsection (h) of this section, an applicant must satisfy the following performance requirements in order to be eligible to apply for program funds. A contract is considered executed for the purposes of this subsection on the date stated in section 2 of such contract.

(1) Obligate at least 50% of the total TxCDBG funds awarded under an open TxCDBG contract within 12 months from the start date of the contract or prior to the application deadlines and have received all applicable environmental approvals from TxCDBG covering this obligation. This threshold is applicable to TxCDBG contracts with an original 24-month contract period. To meet this threshold, 50% of the TxCDBG funds must be obligated through executed contracts for administrative services, engineering services, acquisition, construction, materials purchase, etc. The TxCDBG contract activities do not have to be 50% completed, nor do 50% of the TxCDBG contract funds have to be expended to meet this threshold. This threshold is applicable to previously awarded TxCDBG contracts under the community development fund, community development supplemental fund, the colonia construction fund, the colonia planning fund, the non-border colonia fund the planning and capacity building fund, and the disaster relief/urgent need fund. This threshold is not applicable to previously awarded TxCDBG contracts under the TCF, the housing infrastructure fund, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the Young v. Martinez fund, the disaster recovery initiative program, microenterprise loan fund, small business loan fund, Section 108 loan guarantee pilot program, and the small towns environment program fund. This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TxCDBG disaster relief fund.

(2) Submit to the Office the certificate of expenditures (COE) report showing the expended TxCDBG funds and a final drawdown for any remaining TxCDBG funds as required by the most recent edition of the TxCDBG Project Implementation Manual. Any reserved funds on the COE must be approved in writing by TxCDBG staff. To meet this threshold "expended" means that the construction and services covered by the TxCDBG funds are complete and a drawdown for the TxCDBG funds has been submitted prior to the

application deadlines. This threshold will apply to an open TxCDBG contract with an original 24-month contract period and to TxCDBG contractors that have reached the end of the 24-month period prior to the application deadlines. This threshold is applicable to previously awarded TxCDBG contracts under the community development fund, community development supplemental fund, the colonia construction fund, the colonia planning fund, the non-border colonia fund, the planning and capacity building fund, and the disaster relief/urgent need fund. This threshold is not applicable to previously awarded TxCDBG contracts under the TCF, the housing infrastructure fund, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the Young v. Martinez fund, the disaster recovery initiative program, microenterprise loan fund, small business loan fund, Section 108 loan guarantee pilot program, and the small towns environment program fund (original 24-month contract extended to 36-months). This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TxCDBG disaster relief fund.

(3) TCF applicants may not have an existing contract with an award date in excess of 48 months prior to the application deadline date, regardless of extensions granted. If an existing contract requires an extension beyond the initial term, TDA must be in receipt of the request for extension no less than 30 days prior to contract expiration date. If an existing contract expires prior to or on the new application deadline date, without an approved extension, TDA must be in receipt of complete closeout documentation for the existing contract, no less than 30 days prior to the new application deadline date (complete closeout documentation is defined in the most recent version of the TCF Implementation Manual).

(4) Submit to the Office the certificate of expenditures (COE) report showing the expended TxCDBG funds and a final drawdown for any remaining TxCDBG funds as required by the most recent edition of the TxCDBG Project Implementation Manual. Any reserved funds on the COE must be approved in writing by TxCDBG staff. To meet this threshold "expended" means that the construction and services covered by the TxCDBG funds are complete and a drawdown for the TxCDBG funds has been submitted prior to the application deadlines. This threshold will apply to an open TxCDBG contract with an original 36-month contract period or a small towns environment program 24-month contract, extended to 36 months, and to TxCDBG contractors that have reached the end of the 36-month period prior to the application deadlines. This threshold is applicable to previously awarded TxCDBG contracts under the housing infrastructure fund (when the applicant is applying for the housing infrastructure fund competition) and the small towns environment program fund original 36-month contract or original 24-month contract, extended to 36 months. This threshold is not applicable to previously awarded TxCDBG contracts under the TCF, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the Young v. Martinez fund, the disaster recovery initiative program the microenterprise loan fund, the small business loan fund, and the section 108 loan guarantee pilot program. This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TxCDBG disaster relief fund.

(o) State review committee. The committee shall consult with and advise the Office's executive director on the administration and enforcement policies of the TxCDBG; in consultation with the executive director and TxCDBG office staff, review and approve grant and loan applications and associated funding awards of eligible counties and municipalities and advise and assist the Office's executive director in the allocation of program funds to the applicants; review appeals and submit recommendations for the disposition of such appeals to the Office's executive director in accordance with the procedures described in subsection (g) of this section; and report committee actions concerning these tasks to the Office's executive director through the minutes of committee meetings and written reports prepared by Office staff on behalf of the committee.

(p) Minority hiring/participation. It is the policy of the Office to encourage minority employment and participation among all applicants under the TxCDBG. All applicants to the TxCDBG are required to submit information documenting the level of minority participation as part of the application for funding.

(q) Revolving loan funds. A Revolving Loan Fund established through program income recovered from a TxCDBG contract must meet the requirements for Revolving Loan Funds described in the TxCDBG Final Statement, Consolidated Plan or Action Plan for the program year in which the original contract was awarded. Revolving Loan Funds are also subject to appropriate state and federal requirements, TxCDBG contract provisions, and the appropriate Revolving Loan Fund guidelines issued by the Office. The requirement in this section applies to all local Revolving Loan Funds (RLF) established from program income from Texas Capital Fund projects, housing projects and the Small Business Loan Fund. Funds retained in the local RLF must be committed within three years of the original TxCDBG contract programmatic close date. Every award from the RLF must be used to fund the same type of activity, for the same business, from which such income is derived. A local Revolving Loan Fund may retain a cash balance not greater than 33 percent of its total cash and outstanding loan balance. If the local government does not comply with the local RLF requirements, all program income retained in the local RLF and any future program income received from the proceeds of the RLF must be returned to the State.

(r) Withdrawal of award.

(1) Should the applicant fail to substantiate or maintain the claims and statements made in the application upon which the award is based, including failure to maintain compliance with application thresholds in subsection (h)(1) - (4) of this section, within a period ending 90 days after the date of the TxCDBG's award letter to the applicant, the award will be immediately withdrawn by the TxCDBG (excluding the colonia self-help center awards).

(2) Should the applicant fail to execute the Office's award contract (excluding Texas Capital Fund and colonia self-help center contracts) within 60 days from the date of the letter transmitting the award contract to the applicant, the award will be withdrawn by the Office.

(s) Funds recaptured from withdrawn awards. For an award that is withdrawn from an application, the Office follows different procedures for the use of those recaptured funds depending on the fund category where the award is withdrawn.

(1) Funds recaptured under the community development fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive an award from the first year regional allocation. Funds recaptured under the community development fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year regional allocation. Any funds remaining from the second year regional allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the region as long as the amount of funds still available exceeds the minimum community development fund grant amount. Any funds remaining from the second year regional allocation that are not

accepted by an applicant from the region or that are not offered to an applicant from the region may be used for other TxCDBG fund categories and, if unallocated to another fund, are then subject to the procedures described in subsection (l) of this section.

(2) Funds recaptured under the planning and capacity building fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive an award from the first year allocation. Funds recaptured under the planning and capacity building fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year allocation. Any funds remaining from the second year allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the statewide competition. Any funds remaining from the second year allocation that are not accepted by an applicant from the statewide competition or that are not offered to an applicant from the statewide competition may be used for other TxCDBG fund categories and, if unallocated to another fund, are then subject to the procedures described in subsection (l) of this section.

(3) Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive an award from the first year allocation. Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year allocation. Any funds remaining from the second year allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the statewide competition. Any funds remaining from the second year allocation that are not accepted by an applicant from the statewide competition or that are not offered to an applicant from the statewide competition are then subject to the procedures described in subsection (l) of this section.

(4) Funds recaptured under the colonia construction fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(5) Funds recaptured under the colonia planning fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(6) Funds recaptured under the program year allocation for the colonia economically distressed areas program fund from the withdrawal of an award remain available to potential colonia economically distressed areas program fund applicants during that program year. Any funds remaining from the program year allocation that are not used to fund colonia economically distressed areas program fund applications within twelve months after the Office receives the federal letter of credit would remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(7) Funds recaptured under the housing infrastructure fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(8) Funds recaptured under the program year allocation for the disaster relief/urgent need fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(9) Funds recaptured under the small towns environment program fund (STEP) from the withdrawal of an award will be made available in the next round of STEP competition following the withdraw date in the same program year. If the withdrawn award had been made in the last of the two competitions in a program year, the funds would go to the next highest scoring applicant in the same STEP competition. If there are no unfunded STEP applicants, then the recaptured funds would be available for other TxCDBG fund categories. Any unallocated STEP funds are subject to the procedures described in subsection (l) of this section.

(10) Funds recaptured under the microenterprise loan fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(11) Funds recaptured under the small business loan fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(12) Funds recaptured under the Texas Capital Fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(13) Funds recaptured under the community development supplemental fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive an award from the first year regional allocation. Funds recaptured under the community development supplemental fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year regional allocation. Any funds remaining from the second year regional allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the region as long as the amount of funds still available exceeds the minimum community development supplemental fund grant amount. Any funds remaining from the second year regional allocation that are not accepted by an applicant from the region or that are not offered to an applicant from the region may be used for other TxCDBG fund categories and, if unallocated to another fund, are then subject to the procedures described in subsection (l) of this section. This process would also apply to an application under the community development supplemental fund that received a portion of its funds from community development marginal funds. The community development marginal funds would be provided to the replacement application.

(14) For both the community development fund and community development supplemental fund (including applications funded with a portion from each of the two funds), if there are no remaining unfunded eligible applications in the region from the same biennial application period to receive the withdrawn funding, then the withdrawn funds are considered as deobligated funds, subject to the procedures described in subsection (l) of this section.

(15) Funds recaptured under the Non-border Colonia Fund from the withdrawal of an award remain available to potential Non-Border Colonia Fund applicants during that program year and, if unallocated within the non-border colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures described in subsection (l) of this section.

(t) Readiness to proceed requirements: In order to determine that the project is ready to proceed, the applicant must provide in its application information that:

(1) Identifies the source of matching funds and provides evidence that the applicant has applied for any non-local matching funds, and for local matching funds, evidence that local matching funds would be available.

(2) Provides written evidence of a ratified, legally binding agreement, contingent upon award, between the applicant and the utility that will operate the project for the continual operation of the utility system as proposed in the application. For utility projects that require the applicant or service provider to obtain a certificate of convenience and necessity for the target area proposed in the application, provides written evidence that the Texas Commission on Environmental Quality has received the applicant or service provider's application.

(3) Where applicable, provide a written commitment from service providers, such as the local water or sewer utility, stating that they will provide the intended services to the project area if the project is constructed.

(u) Performance measures. Each applicant for TxCDBG funds and each city or county receiving a contract award shall provide applicable information requested in application guides, the grant contract, or the most recent edition of the TxCDBG project implementation manual that is required by the Office to report on Community Development Block Grant program performance measures promulgated by the Board, the Texas Legislature, and the U.S. Department of Housing and Urban Development.

(v) Street paving activities. Area benefit can be used to qualify street paving activities. However, for street paving activities with multiple and non-contiguous target areas, each target area must separately meet the principally benefit low and moderate income national program objective. At least 51% of the residents located in each non-contiguous target area must be low and moderate income persons. A target area that does not meet this requirement cannot be included in an application for TxCDBG funds. The only exception to this requirement is street paving eligible under the disaster relief fund.

(w) For any award made on or after September 1, 2005, any political subdivision that receives community development block grant program money targeted toward street improvement projects in eligible colonia areas must allocate not less than five percent but not more than 15 percent of the total amount of street improvement money to providing financial assistance to colonias within the political subdivision to enable the installation of adequate street lighting in those colonias if street lighting is absent or needed.

(x) The TxCDBG is under no obligation to approve any changes in a performance statement of a TxCDBG contract that would result in a program year score lower than originally used to make the award if the lower score would have initially caused that project to be denied funding. This does not apply to colonia self-help centers or the Texas Capital Fund.

(y) Any applicant's cash match included in the TxCDBG contract budget may not be obtained from any person or entity that provides contracted professional or construction-related services (other than utility providers) to the applicant to accomplish the purpose described in the TxCDBG contract, in accordance with 24 CFR Part 570.

(z) If an audit becomes due after the award date, the Office may withhold the issuance of a contract until it receives a satisfactory audit. If a satisfactory audit is not received by the Office within four months of the audit due date, the Office may withdraw the award and re-allocate the funds in accordance with subsection (s) of this section (excludes the colonia self-help center awards and Texas Capital Fund awards).

(aa) If the Regional Review Committee for a particular region fails to approve, to the satisfaction of the Office, an objective scoring methodology for the 2009 Community Development Fund competition, the Office will award 2008 Program Year funds in that region for the Community Development Fund and Community Development Supplemental Fund based the state's existing scores under section IV (C)(1)(a-e) of the approved 2007 Texas CDBG Action Plan.

§255.9. Colonia Fund.

(a) General provisions. This fund covers the payment of assessments, access fees, and capital recovery fees for low and moderate income persons for eligible water and sewer improvements projects, all other program eligible activities, eligible planning activities projects, and the establishment of colonia self-help centers to serve severely distressed unincorporated areas of counties which meet the definition of a colonia under this fund. A colonia is defined as: any identifiable unincorporated community that is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, and sanitary housing; and was in existence as a colonia prior to the Cranston-Gonzalez National Affordable Housing Act (November 28, 1990). For an eligible county to submit an application on behalf of eligible colonia areas, the colonia areas must be within 150 miles of the Texas-Mexico border region, except that any county that is part of a standard metropolitan statistical area with a population exceeding one million is not eligible under this fund.

(1) An applicant may not submit an application under this fund and also under any other TxCDBG fund category at the same time if the proposed activity under each application is the same or substantially similar.

(2) In addition to the threshold requirements of §255.1(h) and (n) of this title (relating to General Provisions), in order to be eligible to apply for colonia funds, an applicant must document that at least 51% of the persons who would directly benefit from the implementation of each activity proposed in the application are of low to moderate income.

(3) Eligibility for the Office's colonia economically distressed areas program EDAP fund (colonia EDAP fund) is limited to counties, and nonentitlement cities (that meet other eligibility requirements including the geographic requirements of the Colonia Fund), located in those counties, that are eligible under the TxCDBG Colonia Fund and Texas Water Development Board's EDAP. Eligible colonia EDAP fund projects shall be located in unincorporated colonias and in eligible cities that annexed the eligible colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. A colonia EDAP fund application cannot be submitted until the construction of the Texas Water Development Board's Economically Distressed Areas Program financed water or sewer system begins.

(4) In accordance with Subchapter Z, Chapter 43, §43.905 of the Texas Local Government Code, eligible colonia areas annexed by municipalities on or after September 1, 1999, remains eligible for

five years after the effective date of the annexation to receive any form of assistance for which the colonia would be eligible if the annexation had not occurred. A nonentitlement city located in a county that is eligible under the TxCDBG Colonia Fund and Texas Water Development Board's Economically Distressed Areas Program that has annexed a colonia area is an eligible applicant for the Office's colonia EDAP fund. However, an application for TxCDBG colonia construction fund or colonia planning fund assistance for a colonia area annexed by a municipality on or after September 1, 1999, may only be submitted by the county where the annexed colonia area is located.

(b) Eligible activities. The only eligible activities under the colonia fund are:

(1) the payment of assessments (including any charge made as a condition of obtaining access) levied against properties owned and occupied by persons of low and moderate income to recover the capital cost for a public water and/or sewer improvement;

(2) payment of the cost of planning community development (including water and sewage facilities) and housing activities; costs for the provision of information and technical assistance to residents of the area in which the activities are located and to appropriate nonprofit organizations and public agencies acting on behalf of the residents; and costs for preliminary surveys and analyses of market needs, preliminary site engineering and architectural services, site options, applications, mortgage commitments, legal services, and obtaining construction loans;

(3) other activities eligible under the Housing and Community Development Act of 1974, §105, as amended, designed to meet the needs of residents of colonias;

(4) the establishment of colonia self-help centers and activities conducted by colonia self-help centers in accordance with the provisions of Chapter 2306, Subchapter Z, of the Texas Government Code.

(5) For the Office's colonia EDAP fund, eligible activities are limited to those that provide assistance to low and moderate income colonia residents that cannot afford the costs associated with connections and service to water or sewer systems funded through the Texas Water Development Board's Economically Distressed Areas Program. The eligible activities are water distribution lines connecting to water lines installed through the Texas Water Development Board's Economically Distressed Areas Program (when approved by the TxCDBG), sewer collection lines connecting to sewer lines installed through the Texas Water Development Board's Economically Distressed Areas Program (when approved by the TxCDBG), water or sewer connection fees, water or sewer taps, water meters, water or sewer yard service lines, plumbing improvements associated with the provision of water or sewer service to an occupied housing unit, water or sewer house service connections, reasonable associated administrative costs, and reasonable associated engineering costs.

(c) Types of applications. Eligible applicants may submit one application for the colonia construction fund and the colonia planning fund. Eligible applicants may submit one application for the colonia EDAP fund, unless the TxCDBG has an excess amount of colonia EDAP funds available in which case an eligible applicant could submit more than one application for the colonia EDAP fund. Eligible planning activities cannot be included in an application for the colonia construction fund. Two separate fund categories are available under the colonia planning fund. The colonia area planning fund is available for eligible planning activities that are targeted to selected colonia areas. The colonia comprehensive planning fund is available for countywide comprehensive planning activities that include an assessment and profiles of a county's colonia areas. Separate competitions are held for the colonia area planning fund and colonia comprehensive planning fund allocations. A county that has previously received a colonia comprehensive planning fund grant award from the Office may not submit another application for colonia comprehensive planning fund assistance. For a county to be eligible to submit an application for the colonia area planning fund, the county must have previously completed a colonia comprehensive plan that prioritizes problems and colonias for future action. The colonia or colonias included in the colonia area planning fund application must be colonias that were included in the colonia comprehensive plan.

(d) Funding cycle. The colonia construction fund is allocated to eligible county applicants on a biennial basis for the 2007 and 2008 program years pursuant to a competition held for the 2007 program year applicants. The colonia planning fund is allocated on an annual basis to eligible county applicants through competitions conducted during the program year. Applications for funding must be received by the Office by the dates and times specified in the most recent application guide for each separate colonia fund category. The colonia self-help centers fund is allocated on an annual basis to counties included in Subchapter Z, Chapter 2306, §2306.582, Texas Government Code, and/or counties designated as economically distressed areas under Chapter 17, Texas Water Code. The colonia EDAP fund is allocated on an annual basis and the funds are distributed on an as-needed basis.

(e) Selection procedures.

(1) On or before the application deadline, each eligible county may submit one application for the colonia construction fund, for colonia comprehensive planning, and for colonia area planning. Eligible applicants for the colonia EDAP fund may submit one application after construction begins on the water or sewer system financed by the Texas Water Development Board's Economically Distressed Areas Program.

(2) Upon receipt of an application, the Office staff performs an initial review to determine whether the application is complete and whether all proposed activities are eligible for funding. The results of this initial review are provided to the applicant. If not subject to disqualification, the applicant may correct any deficiencies identified within ten calendar days of the date of the staff's notification.

(3) Each regional review committee may, at its option, review and comment on a colonia fund proposal from a jurisdiction within its state planning region. These comments will become part of the application file, provided such comments are received by the Office prior to scoring of the applications.

(4) The Office then scores the colonia construction fund and colonia planning fund applications to determine rankings. Scores on the selection factors are derived from standardized data from the Census Bureau, other federal or state sources, and from information provided by the applicant. For colonia EDAP fund applications, the Office evaluates information in each application and other factors before the completion of a final technical review of each application.

(5) Following a final technical review, the Office staff presents the funding recommendations for the 2007 and 2008 colonia construction fund and the 2007 colonia planning fund to the executive director of the Office. In consultation with the executive director and TxCDBG staff, the state review committee reviews and approves grant applications and associated funding awards of eligible counties and municipalities.

(6) Upon announcement of the 2007 contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the

recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded.

(f) Selection criteria (colonia construction fund). The following is an outline of the selection criteria used by the Office for scoring colonia construction fund applications. For the 2007 and 2008 program years, four hundred thirty points are available.

(1) Community distress (total--35 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage of persons living in poverty--15

(B) Per capita income--10

(C) Percentage of housing units without complete plumbing--5

(D) Unemployment rate--5

(2) Benefit to low and moderate income persons (total--30 points). A formula is used to determine the percentage of TxCDBG funds benefiting low to moderate income persons. The percentage of low to moderate income persons benefiting from each construction, acquisition, and engineering activity is multiplied by the TxCDBG funds requested for each corresponding construction, acquisition, and engineering activity. Those calculations determine the amount of TxCDBG benefiting low to moderate income person for each of those activities. Then, the funds benefiting low to moderate income persons for each of those activities are added together and divided by the TxCDBG funds requested minus the TxCDBG funds requested for administration to determine the percentage of TxCDBG funds benefiting low to moderate income persons. Points are then awarded in accordance with the following scale:

(A) 100% to 90% of funds benefiting low to moderate income persons--30

(B) 89.99% to 80% of funds benefiting low to moderate income persons--25

(C) 79.99% to 70% of funds benefiting low to moderate income persons--20

(D) 69.99% to 60% of funds benefiting low to moderate income persons--15

(E) Below 60% of funds benefiting low to moderate income persons--5

(3) Project priorities (total--195 points). When necessary, a weighted average is used to assign scores to applications which include activities in the different project priority scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity is calculated. The percentage of the total TxCDBG construction dollars for each activity is then multiplied by the appropriate project priorities point level. The sum of the calculations determines the composite project priorities score. The different project priority scoring levels are:

(A) activities (service lines, service connections, and/or plumbing improvements) providing access to water and/or sewer systems funded through the Texas Water Development Board Economically Distressed Area program--195

(B) first time public water service activities (including yard service lines)--145 points

(C) first time public sewer service activities (including yard service lines)--145 points

(D) installation of approved residential on-site wastewater disposal systems for providing first time service--145 points

(E) installation of approved residential on-site wastewater disposal systems for failing systems that cause health issues--140 points

(F) housing activities--140 points

(G) first time water and/or sewer service through a privately-owned for profit utility--135 points

(H) expansion or improvement of existing water and/or sewer service--120 points

(I) street paving and drainage activities--75 points

(J) all other eligible activities--20 points

(4) Matching funds (total--20 points). An applicant's matching share may consist of one or more of the following contributions: cash; in-kind services or equipment use; materials or supplies; or land. An applicant's match is considered only if the contributions are used in the same target areas for activities directly related to the activities proposed in its application; if the applicant demonstrates that its matching share has been specifically designated for use in the activities proposed in its application; and if the applicant has used an acceptable and reasonable method of valuation. The population category under which county applications are scored is dependent upon the project type and the beneficiary population served. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the unincorporated residents for the entire county. For county applications addressing water and sewer improvements in unincorporated areas, the population category is based on the actual number of beneficiaries to be served by the project activities. The population category under which multi-jurisdiction applications are scored is based on the combined populations of the applicants according to the 2000 Census. Applications that include a housing rehabilitation and/or affordable new permanent housing activity for low- and moderate-income persons as a part of a multi-activity application do not have to provide any matching funds for the housing activity. This exception is for housing activities only. The TxCDBG does not consider sewer or water service lines and connections as housing activities. The TxCDBG also does not consider on-site wastewater disposal systems as housing activities. Demolition/clearance and code enforcement, when done in the same target area in conjunction with a housing rehabilitation activity, is counted as part of the housing activity. When demolition/clearance and code enforcement are proposed activities, but are not part of a housing rehabilitation activity, then the demolition/clearance and code enforcement are not considered as housing activities. Any additional activities, other than related housing activities, are scored based on the percentage of match provided for the additional activities.

(A) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(i) match equal to or greater than 5.0% of grant request--20;

(ii) match at least 2.0% but less than 5.0% of grant request--10;

(iii) match less than 2.0% of grant request--0.

(B) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(i) match equal to or greater than 10% of grant request--20;

(ii) match at least 2.5% but less than 10% of grant request--10;

(iii) match less than 2.5% of grant request--0.

(C) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(i) match equal to or greater than 15% of grant request--20;

(ii) match at least 3.5% but less than 15% of grant request--10;

(iii) match less than 3.5% of grant request--0.

(D) Applicants with populations over 5,000 according to the 2000 census:

(i) match equal to or greater than 20% of grant request--20;

(ii) match at least 5.0% but less than 20% of grant request--10;

(iii) match less than 5.0% of grant request--0.

(5) Project design (total--140 points). Each application is scored based on how the proposed project resolves the identified need and the severity of need within the applying jurisdiction. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund and in paragraph (6) of this subsection. Each application is scored by a committee composed of TxCDBG staff using the following information submitted in the application:

(A) the severity of need within the colonia area(s) and how the proposed project resolves the identified need (additional consideration is given to water activities addressing impacts from drought conditions);

(B) the TxCDBG cost per low to moderate income beneficiary;

(C) the applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TxCDBG community development fund or through community development block grant entitlement funds;

(D) the projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage;

(E) the ability of the applicant to utilize the grant funds in a timely manner;

(F) the availability of grant funds to the applicant for project financing from other sources;

(G) whether the applicant, or the service provider, has waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries;

(H) whether the applicant's proposed use of TxCDBG funds is to provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed through the Texas Water Development Board Economically Distressed Areas Program;

(I) whether the applicant has already met its basic water and wastewater needs if the application is for activities other than water or wastewater;

(J) whether the project has provided for future funding necessary to sustain the project;

(K) whether the applicant has provided any local matching funds for administrative, engineering, or construction activities;

(L) the applicant's past performance on previously awarded TxCDBG contracts; and

(M) proximity of project site to entitlement cities or metropolitan statistical areas.

(6) Project design scoring guidelines. Project design scores are assigned by Office staff using guidelines that first consider the severity of the need for each application activity and how the project resolves the need described in the application. The severity of need and resolution of the need determine the maximum project design score that can be assigned to an application. After the maximum project design score has been established, points are then deducted from this maximum score through the evaluation of the other project design evaluation factors until the maximum score and the point deductions from that maximum score determine the final assigned project design score. When necessary, a weighted average is used to set the maximum project design score to applications that include activities in the different severity of the need/project resolution maximum scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity is calculated. The percentage of the total TxCDBG construction dollars for each activity is then multiplied by the appropriate maximum project design point level. The sum of the calculations determines the maximum project design score that the applicant can be assigned before points are deducted based on the evaluation of the other project design factors.

(A) Maximum project design score that can be assigned based on the severity of the need and resolution of the problem.

(i) Activities providing first-time public sewer service to the area--maximum score 140 points.

(ii) Activities providing first-time public water service to the area--maximum score 140 points.

(iii) Installation of approved residential on-site wastewater disposal systems providing first-time sewer service--maximum score 140 points.

(iv) Installation of approved residential on-site wastewater disposal systems for failing systems that cause health issues--maximum score 130 points.

(v) Housing rehabilitation and eligible new housing construction--maximum score 130 points.

(vi) Water activities addressing and resolving water supply shortage from drought conditions--maximum score 130 points.

(vii) Water or sewer activities expanding or improving existing water or sewer system--maximum score 125 points.

(viii) Street paving activities providing first time surface pavement to the area--maximum score 100 points.

(ix) Installation of designed drainage structures providing first time designed drainage system to the area--maximum score 100 points.

(x) Reconstruction of streets with existing surface pavement--maximum score 90 points.

(xi) Installation of improvements or drainage structures to a designed drainage system--maximum score 90 points.

(xii) All other eligible activities--maximum score 80 points.

(B) TxCDBG cost per low to moderate income beneficiary. The total amount of TxCDBG funds requested by the applicant is divided by the total number of low to moderate income persons benefiting from the application activities to determine the TxCDBG cost per beneficiary.

(i) Cost per low to moderate income beneficiary is equal to or less than $2,000. Deduct zero points from the set maximum project design score.

(ii) Cost per low to moderate income beneficiary is greater than $2,000 but equal to or less than $4,000. Deduct 1 point from the set maximum project design score.

(iii) Cost per low to moderate income beneficiary is greater than $4,000 but equal to or less than $6,000. Deduct 2 points from the set maximum project design score.

(iv) Cost per low to moderate income beneficiary is greater than $6,000 but equal to or less than $8,000. Deduct 3 points from the set maximum project design score.

(v) Cost per low to moderate income beneficiary is greater than $8,000 but equal to or less than $10,000. Deduct 4 points from the set maximum project design score.

(vi) Cost per low to moderate income beneficiary is greater than $10,000 but equal to or less than $11,000. Deduct 5 points from the set maximum project design score.

(vii) Cost per low to moderate income beneficiary is greater than $11,000 but equal to or less than $13,000. Deduct 10 points from the set maximum project design score.

(viii) Cost per low to moderate income beneficiary is greater than $13,000 but equal to or less than $15,000. Deduct 15 points from the set maximum project design score.

(ix) Cost per low to moderate income beneficiary is greater than $15,000 but equal to or less than $17,000. Deduct 20 points from the set maximum project design score.

(x) Cost per low to moderate income beneficiary is greater than $17,000 but equal to or less than $19,000. Deduct 30 points from the set maximum project design score.

(xi) Cost per low to moderate income beneficiary is greater than $19,000. Deduct 40 points from the set maximum project design score.

(C) The applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TxCDBG community development fund or through community development block grant entitlement funds.

(i) The nonentitlement county submitted an application under the TxCDBG community development fund 2005/2006 biennial competition that was not addressing water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(ii) The nonentitlement county submitted an application under the TxCDBG community development fund 2003/2004 biennial competition that was not addressing water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(iii) The entitlement county did not use 2005 CDBG entitlement funds to address water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(iv) The entitlement county did not use 2004 CDBG entitlement funds to address water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(D) The projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage.

(i) The projected water and/or sewer rates may be too high for the application beneficiaries. Deduct 1 point from the set maximum project design score.

(ii) The projected water and/or sewer rates are too low to discourage water conservation by the application beneficiaries. Deduct 1 point from the set maximum project design score.

(E) The ability of the applicant to utilize the grant funds in a timely manner.

(i) The application includes the acquisition of real property, easements or rights-of-way. Deduct 1 point from the set maximum project design score.

(ii) The application includes matching funds that have not been secured by the applicant. Deduct 1 point from the set maximum project design score.

(iii) The proposed application target area is not located in an area where a service provider already has the certificate of convenience and necessity (CCN) needed to provide service to the application beneficiaries. Deduct 1 point from the set maximum project design score.

(F) The availability of grant funds to the applicant for project financing from other sources. Grant funds for any activity included in the application are available from another source. Deduct 1 point from the set maximum project design score.

(G) The applicant, or the service provider, has not waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries.

(i) Assessments and fees budgeted in the application are equal to or less that $100 per low and moderate income household. Deduct 2 points from the set maximum project design score.

(ii) Assessments and fees budgeted in the application are greater than $100 but equal to or less that $200 per low and moderate income household. Deduct 4 points from the set maximum project design score.

(iii) Assessments and fees budgeted in the application are greater than $200 but equal to or less that $300 per low and moderate income household. Deduct 6 points from the set maximum project design score.

(iv) Assessments and fees budgeted in the application are greater than $300 but equal to or less that $500 per low and moderate income household. Deduct 8 points from the set maximum project design score.

(v) Assessments and fees budgeted in the application are greater than $500 per low and moderate income household. Deduct 10 points from the set maximum project design score.

(H) Applicant's proposed use of TxCDBG funds does not provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed through the Texas Water Development Board Economically Distressed Areas Program. Deduct 2 points from the set maximum project design score.

(I) The application is for activities other than water or wastewater and the applicant has not already met its basic water and wastewater needs. Deduct 3 points from the set maximum project design score.

(J) The applicant has not documented that future funding necessary to sustain the project is available. Deduct 3 points from the set maximum project design score.

(7) Past performance. An applicant receives from zero to ten points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will primarily be based on an assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. TxCDBG staff may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. An applicant that has never received a TxCDBG grant award will automatically receive these points. TxCDBG staff will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance on TxCDBG contracts after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance may include, but is not necessarily limited to the following:

(A) The applicant's completion of the previous contract activities within the original contract period.

(B) The applicant's submission of the required close-out documents within the period prescribed for such submission.

(C) The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs.

(D) The applicant's timely response to audit findings on previous TxCDBG contracts.

(E) The applicant's submission of all contract reporting requirements such as quarterly progress reports, certificates of expenditures, and project completion reports.

(g) Selection criteria (colonia area planning fund). The following is an outline of the selection criteria used by the Office for scoring applications for eligible planning activities under this fund. Three hundred forty points are available.

(1) Community distress (total--up to 35 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage of persons living in poverty--15 points

(B) Per capita income--10 points

(C) Percentage of housing units without complete plumbing--5 points

(D) Unemployment Rate--5 points

(2) Benefit to low and moderate income persons (total--30 points). Points are awarded based on the low and moderate income percentage for all of the colonia areas where project activities are located according to the following scale:

(A) 100% to 90% of funds benefiting low to moderate income persons--30

(B) 89.99% to 80% of funds benefiting low to moderate income persons--25

(C) 79.99% to 70% of funds benefiting low to moderate income persons--20

(D) 69.99% to 60% of funds benefiting low to moderate income persons--15

(E) Below 60% of funds benefiting low to moderate income persons--5

(3) Project design (total--255 points). Each application is scored based on how the proposed planning effort resolves the identified need and the severity of need within the applying jurisdiction. A colonia planning fund application must receive a minimum score for the project design selection factor of at least 70 percent of the maximum number of points available under this factor to be considered for funding. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund. Each application is scored by TxCDBG staff using the following information submitted in the application:

(A) the severity of need within the colonia area(s) (total--up to 60 points);

(i) Evidence of severity of need as described in originally received application (total--up to 10 points).

(ii) Primary need within all target area colonia(s) generally as reported in originally received application (total--up to 20 points):

(I) all target area colonia(s) not platted (up to 20 points)

(II) all target area colonia(s) with no water (up to 20 points)

(III) all target area colonia(s) with no wastewater (up to 20 points)

(IV) all or some target area colonia(s) are partially platted or platted but not recorded (up to 10 points)

(V) target area colonia(s) partial water (up to 10 points)

(VI) target area colonia(s) partial sewer (up to 10 points)

(iii) Population (total--10 points). The change in county population from 1990 and 2000 is between:

(I) greater than 5% but less than or equal to 10% (2 points)

(II) greater than 10% but less than or equal to 15% (4 points)

(III) greater than 15% but less than or equal to 20% (6 points)

(IV) greater than 20% but less than or equal to 25% (8 points)

(V) greater than 25% (10 points)

(iv) Needs are clearly identified in original application by priority through a community needs assessment (total--up to 5 points).

(v) Evidence provided in the original application of strong citizen input or known citizen involvement in addressing need (total--up to 5 points).

(vi) Evidence provided in the original application of effort to notify special groups to solicit information on severity of need (total--up to 5 points).

(vii) Evidence provided in the original application that the public hearings to solicit input on needs were performed as described in the application guide (total--up to 5 points).

(B) how clearly the proposed planning effort removes barriers to the provision of public facilities to the colonia area(s) and results in a strategy to resolve the identified needs (total--up to 60 points);

(i) Proposed planning efforts as described in the application are clear, concise and reasonable (total--up to 15 points).

(ii) Proposed target area is clearly defined in the application (total--up to 15 points).

(iii) Proposed planning efforts as described in the application match the needs in the target area (total--up to 15 points).

(iv) Evidence in the application that the county is organized to implement the plan or would ensure that the plan is implemented (total--up to 15 points).

(C) the planning activities proposed in the application (total--up to 65 points);

(i) The description of planning activity in the original application:

(I) Describes eligible activities (total--up to 7 points).

(II) Describes understanding of plan process (total--up to 7 points).

(III) Addresses identified needs (total--up to 7 points).

(IV) Appears to result in solution to problems (total--up to 7 points).

(V) Indicates a strategy that can be implemented (total--7 points).

(ii) Considering the applicant's probable capability, the Colonia Questionnaire in the original application indicates an attempt to control problems and the original submission was complete (total--up to 10 points).

(iii) Applicant has indicated in the application that a capital improvement programming process is routinely accomplished or will be developed as part of the planning project (total--up to 10 points).

(iv) Applicant's responses to questions in the originally submitted application appear to indicate that the applicant will produce a valid Capital Improvements Program that would draw on local resources and other grant/loan programs (total--up to 10 points).

(D) whether each proposed planning activity is conducted on a colonia-wide basis (total--up to 10 points). All proposed activities will be conducted on a colonia-wide basis (up to 10 points);

(E) the extent to which any previous planning efforts for colonia areas have been accomplished (total--up to 12 points). Applicant was a previous recipient of Colonia Planning Funds and some implementation of previously funded activities or special or extenuating circumstances prohibiting implementation exist. Points will be awarded if applicant is not a previous recipient of a Colonia Planning Fund award. Points will not be awarded if applicant did not implement previously funded activities and no special or extenuating circumstances prohibiting implementation exist;

(F) the TxCDBG cost per low to moderate income beneficiary;

(i) TxCDBG cost per low to moderate income beneficiary (total--15 points):

(I) the TxCDBG cost per low to moderate income beneficiary is at least 50 percent below the median cost per beneficiary of all eligible applicants (15 points); or

(II) the TxCDBG cost per low to moderate income beneficiary is at or below the median cost per beneficiary of all eligible applicants (10 points); or

(III) the TxCDBG cost per low to moderate income beneficiary is below 150 percent of the median cost per beneficiary of all eligible applicants (7 points); or

(IV) the TxCDBG cost per low to moderate income beneficiary is 150 percent or greater than the median cost per beneficiary of all eligible applicants (5 points).

(ii) Amount requested originally appears to be reasonable and relates to the described needs with respect to the location and characteristics of the proposed target area (up to 15 points).

(G) the availability of grant funds to the applicant for project financing from other sources (total--6 points). The area would be eligible for funding under the Texas Water Development Board's Economically Distressed Areas Program (EDAP) or other programs as described in the original application; and

(H) the applicant's past performance on prior TxCDBG contracts. An applicant can receive from zero to twelve points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. The TxCDBG may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. Applicants that have never received a TxCDBG grant award will automatically receive these

points. The TxCDBG will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance may include, but is not necessarily limited to the following:

(i) The applicant's completion of the previous contract activities within the original contract period (up to 3 points).

(ii) The applicant's submission of the required close-out documents within the period prescribed for such submission (up to 3 points).

(iii) The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs (up to 3 points).

(iv) The applicant's timely response to audit findings on previous TxCDBG contracts (up to 3 points).

(4) Matching funds (total--20 points). The population category under which county applications are scored is based on the actual number of beneficiaries to be served by the colonia planning activities.

(A) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(i) match equal to or greater than 5.0% of grant request--20;

(ii) match at least 2.0% but less than 5.0% of grant request--10;

(iii) match less than 2.0% of grant request--0.

(B) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(i) match equal to or greater than 10% of grant request--20;

(ii) match at least 2.5% but less than 10% of grant request--10;

(iii) match less than 2.5% of grant request--0.

(C) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(i) match equal to or greater than 15% of grant request--20;

(ii) match at least 3.5% but less than 15% of grant request--10;

(iii) match less than 3.5% of grant request--0.

(D) Applicants with populations over 5,000 according to the 2000 census:

(i) match equal to or greater than 20% of grant request--20;

(ii) match at least 5.0% but less than 20% of grant request--10;

(iii) match less than 5.0% of grant request--0.

(h) Selection criteria (colonia comprehensive planning fund). The following is an outline of the selection criteria used by the Office for scoring applications for eligible planning activities under this fund. Two hundred points are available.

(1) Community distress (total--25 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage of persons living in poverty--10 points

(B) Per capita income--5 points

(C) Percentage of housing units without complete plumbing--5 points

(D) Unemployment Rate--5 points

(2) Project design (total--175 points). A colonia planning fund application must receive a minimum score for the project design selection factor of at least 70 percent of the maximum number of points available under this factor to be considered for funding. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund. Each application is scored by the Office staff using the following information submitted in the application:

(A) the severity of need for the comprehensive colonia planning effort and how effectively the proposed comprehensive planning effort will result in a useful assessment of colonia populations, locations, infrastructure conditions, housing conditions, and the development of short-term and long-term strategies to resolve the identified needs (total--140 points);

(i) Evidence of severity of need as described in originally received application (total--10 points).

(ii) Population (total--10 points). The change in county population from 1990 and 2000 is between:

(I) greater than 5% but less than or equal to 10% (2 points).

(II) greater than 10% but less than or equal to 15% (4 points).

(III) greater than 15% but less than or equal to 20% (6 points).

(IV) greater than 20% but less than or equal to 25% (8 points).

(V) greater than 25% (10 points).

(iii) the county population in 2000 (total--10 points):

(I) the county population is at least 50 percent below the median county population of all eligible applicants (10 points).

(II) the county population is at or below the median county population of all eligible applicants (7 points).

(III) the county population is below 150 percent of the median county population of all eligible applicants (5 points).

(IV) the county population is 150 percent or greater than the median county population of all eligible applicants (2 points).

(iv) Needs are clearly identified in original application by priority through a community needs assessment (total--5 points);

(v) Evidence provided in the original application of strong citizen input or known citizen involvement in addressing need (total--5 points);

(vi) Evidence provided in the original application of effort to notify special groups to solicit information on severity of need (total--5 points);

(vii) Evidence provided in the original application that the public hearings to solicit input on needs were performed as described in the application guide (total--5 points);

(viii) Proposed planning efforts as described in the application are clear, concise and reasonable (total--10 points).

(ix) Proposed planning efforts as described in the application match the needs in the target area (total--25 points).

(x) Evidence in the application that the county is organized to implement the plan or would ensure that the plan is implemented (total--20 points).

(xi) The description of planning activity in the original application:

(I) Describes eligible activities (total--5 points).

(II) Describes understanding of plan process (total--5 points).

(III) Addresses identified needs (total--5 points).

(IV) Appears to result in solution to problems (total--5 points).

(V) Indicates a strategy that can be implemented (total--5 points).

(xii) Considering the applicant's probable capability, the Colonia Questionnaire in the original application indicates an attempt to control problems and the original submission was complete (total--10 points).

(B) the extent to which any previous planning efforts for colonia areas have been implemented (total--10 points). Applicant was a previous recipient of Colonia Planning Funds and some implementation of previously funded activities or special or extenuating circumstances prohibiting implementation exist. Points will be awarded if applicant is not a previous recipient of a Colonia Planning Fund award. Points will not be awarded if applicant did not implement previously funded activities and no special or extenuating circumstances prohibiting implementation existed;

(C) whether the applicant provides any local matching funds for project activities. (total--13 points). The population category under which county applications are scored is based on the actual number of beneficiaries to be served by the colonia planning activities;

(i) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(I) match equal to or greater than 5.0% of grant request--13;

(II) match at least 2.0% but less than 5.0% of grant request--7;

(III) match less than 2.0% of grant request--0.

(ii) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(I) match equal to or greater than 10% of grant request--13;

(II) match at least 2.5% but less than 10% of grant request--7;

(III) match less than 2.5% of grant request--0.

(iii) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(I) match equal to or greater than 15% of grant request--13;

(II) match at least 3.5% but less than 15% of grant request--7;

(III) match less than 3.5% of grant request--0.

(iv) Applicants with populations over 5,000 according to the 2000 census:

(I) match equal to or greater than 20% of grant request--13;

(II) match at least 5.0% but less than 20% of grant request--7;

(III) match less than 5.0% of grant request--0; and

(D) the applicant's past performance on previously awarded TxCDBG contracts. An applicant can receive from zero to twelve points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. The TxCDBG may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. Applicants that have never received a TxCDBG grant award will automatically receive these points. The TxCDBG will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance will include, but is not necessarily limited to the following:

(i) The applicant's completion of the previous contract activities within the original contract period (up to 3 points).

(ii) The applicant's submission of the required close-out documents within the period prescribed for such submission (up to 3 points).

(iii) The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs (up to 3 points).

(iv) The applicant's timely response to audit findings on previous TxCDBG contracts (up to 3 points).

(i) Program guidelines (colonia self-help centers fund). The colonia self-help centers fund is administered by the Texas Department of Housing and Community Affairs (TDHCA) under an interagency agreement with the Office. The following is an outline of the administrative requirements and eligible activities under this fund.

(1) The geographic area served by each colonia self-help center shall be determined by the Office or by the TDHCA. Five colo-

nias located in each established colonia self-help center service area shall be designated to receive concentrated attention from the center. Each colonia self-help center shall set a goal to improve the living conditions of the residents located in the colonias designated for concentrated attention within a two-year period set under the contract terms. The Office and the TDHCA have the authority to make changes to the colonias designated for this concentrated attention.

(2) The Office's grant contract for each colonia self-help center is awarded and executed with the county where the colonia self-help center is located. Each county executes a subcontract agreement with a non-profit community action agency or a public housing authority.

(3) A colonia advisory committee is established and not fewer than five persons who are residents of colonias are selected from the candidates submitted by local nonprofit organizations and the commissioners court of a county where a self-help center is located. One committee member shall be appointed to represent each of the counties in which a colonia self-help center is located. Each committee member must be a resident of a colonia located in the county the member represents but may not be a board member, contractor, or employee of or have any ownership interest in an entity that is awarded a contract through the TxCDBG. The advisory committee shall advise the Office and the TDHCA regarding:

(A) the needs of colonia residents;

(B) appropriate and effective programs that are proposed or are operated through the centers; and

(C) activities that may be undertaken through the centers to better serve the needs of colonia residents.

(4) The purpose of each colonia self-help center is to assist low income and very low income individuals and families living in colonias located in the center's designated service area to finance, refinance, construct, improve or maintain a safe, suitable home in the designated service area or in another suitable area. Each self-help center may serve low income and very low income individuals and families by:

(A) providing assistance in obtaining loans or grants to build a home;

(B) teaching construction skills necessary to repair or build a home;

(C) providing model home plans;

(D) operating a program to rent or provide tools for home construction and improvement for the benefit of property owners in colonias who are building or repairing a residence or installing necessary residential infrastructure;

(E) helping to obtain, construct, assess, or improve the service and utility infrastructure designed to service residences in a colonia, including potable water, wastewater disposal, drainage, streets and utilities;

(F) surveying or platting residential property that an individual purchased without the benefit of a legal survey, plat, or record;

(G) providing credit and debt counseling related to home purchase and finance;

(H) applying for grants and loans to provide housing and other needed community improvements;

(I) monthly programs to educate individuals and families on their rights and responsibilities as property owners;

(J) providing other eligible services that the self-help center, with the Office's approval, determines are necessary to assist colonia residents in improving their physical living conditions, including help in obtaining suitable alternative housing outside of a colonia's area;

(K) providing assistance in obtaining loans or grants to enable an individual or family to acquire fee simple title to property that originally was purchased under a contract for a deed, contract for sale, or other executory contract; and

(L) providing access to computers, the internet, and computer training.

(5) A self-help center may not provide grants, financing, or mortgage loan services to purchase, build, rehabilitate, or finance construction or improvements to a home in a colonia if water service and suitable wastewater disposal are not available.

(j) Selection criteria (colonia EDAP fund). The following is an outline of the application information evaluated by a committee composed of the Office's staff.

(1) The proposed use of the colonia EDAP funds including the eligibility of the proposed activities and the effective use of the funds to provide water or sewer connections/yard lines to water/sewer systems funded through the Texas Water Development Board Economically Distressed Area Program.

(2) The ability of the applicant to utilize the grant funds in a timely manner.

(3) The availability of grant funds to the applicant for project financing from other sources.

(4) The applicant's past performance on previously awarded TxCDBG contracts.

(5) Cost per beneficiary.

(6) Proximity of project site to entitlement cities or metropolitan statistical areas.

§255.16. Non-Border Colonia Fund.

(a) General provisions. This fund covers the payment of assessments, access fees, and capital recovery fees for low and moderate income persons for eligible water and sewer improvements projects and all other program eligible activities with the exception of planning activities and economic development activities. This fund is available to eligible county applicants for projects in severely distressed unincorporated areas located farther than 150 miles from the Texas-Mexico border and non-entitlement counties, or portions of counties, within 150 miles of the Texas-Mexico border that are not eligible for the colonia fund because they are located in a standard metropolitan statistical area that has a population exceeding 1,000,000, as specified the Cranston-Gonzalez National Affordable Housing Act. Non-border colonia areas would be an identifiable unincorporated community that is determined to be colonia-like on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, and sanitary housing; and was in existence as a colonia before the date of the enactment of the Cranston-Gonzalez National Affordable Housing Act (November 28, 1990).

(1) An applicant may not submit a single jurisdiction application or a multi-jurisdiction application under this fund and also under any other TxCDBG fund category at the same time if the proposed activity under each application is the same or substantially similar.

(2) A nonentitlement county that is eligible for the colonia fund and that has only a portion of the county located within 150 miles of the Texas-Mexico border cannot submit an application for the non-

border colonia fund for any unincorporated areas located within the portion of the county located within 150 mile Texas-Mexico border. However, the eligible nonentitlement count can submit an application under the non-border colonia fund for the unincorporated areas located outside of 150 miles of the Texas-Mexico border.

(3) In addition to the threshold requirements of §255.1(h) and (n) of this title (relating to General Provisions), in order to be eligible to apply for colonia funds, an applicant must document that at least 51% of the persons who would directly benefit from the implementation of each activity proposed in the application are of low to moderate income.

(b) Funding cycle. This fund is allocated to eligible counties on a biennial basis for the 2007 and 2008 program years pursuant to a competition held for the 2007 program year applicants. Applications for funding must be received by the TxCDBG by the dates and times specified in the most recent application guide for this fund.

(c) Selection procedures.

(1) Prior to the submission deadline specified in the most recent application guide for this fund, each eligible county may submit one application to the Office for funding under the non-border colonia funds. Two copies of the application must be submitted. Each applicant should also provide at least one copy of its application to the applicant's state planning region for review and comment.

(2) Upon receipt of an application, the Office staff performs an initial review to determine whether the application is complete and whether all proposed activities are eligible for funding, if ranked. The results of this initial review are provided to the applicant. If not subject to disqualification, the applicant may correct any deficiencies identified within 10 calendar days of the date of the staff's notification.

(3) Each regional review committee may, at its option, review and comment on a non-border colonia fund proposal from a jurisdiction within its state planning region. These comments will become part of the application file, provided such comments are received by the Office prior to scoring of the applications.

(4) The Office then scores the applications to determine rankings. Scores on the selection factors are derived from standardized data from the Census Bureau, other federal or state sources, and from information provided by the applicant.

(5) Following a final technical review, the Office staff submits the 2007 program year and 2008 program year funding recommendations to the executive director of the Office. In consultation with the executive director and TxCDBG office staff, the state review committee reviews and approves grant applications and associated funding awards of eligible counties and municipalities.

(6) Upon announcement of the 2007 program year contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded.

(7) Upon announcement of the 2008 program year contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded with the remainder of the target allocation within a region.

(d) Selection criteria (non-border colonia fund). The following is an outline of the selection criteria used by the Office for scoring colonia construction fund applications. Three hundred eighty points are available.

(1) Community distress (total--35 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage of persons living in poverty--15 points

(B) Per capita income--10 points

(C) Percentage of housing units without complete plumbing--5 points

(D) Unemployment Rate--5 points

(2) Benefit to low and moderate income persons (total--30 points). A formula is used to determine the percentage of TxCDBG funds benefiting low to moderate income persons. The percentage of low to moderate income persons benefiting from each construction, acquisition, and engineering activity is multiplied by the TxCDBG funds requested for each corresponding construction, acquisition, and engineering activity. Those calculations determine the amount of TxCDBG benefiting low to moderate income person for each of those activities. Then, the funds benefiting low to moderate income persons for each of those activities are added together and divided by the TxCDBG funds requested minus the TxCDBG funds requested for administration to determine the percentage of TxCDBG funds benefiting low to moderate income persons. Points are then awarded in accordance with the following scale:

(A) 100% to 90% of funds benefiting low to moderate income persons--30

(B) 89.99% to 80% of funds benefiting low to moderate income persons--25

(C) 79.99% to 70% of funds benefiting low to moderate income persons--20

(D) 69.99% to 60% of funds benefiting low to moderate income persons--15

(E) Below 60% of funds benefiting low to moderate income persons--5

(3) Project priorities (total--145 points). When necessary, a weighted average is used to assign scores to applications which include activities in the different project priority scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity is calculated. The percentage of the total TxCDBG construction dollars for each activity is then multiplied by the appropriate project priorities point level.

The sum of the calculations determines the composite project priorities score. The different project priority scoring levels are:

(A) first time public water service activities (including yard service lines)--145 points

(B) first time public sewer service activities (including yard service lines)--145 points

(C) installation of approved residential on-site wastewater disposal systems for providing first time service--145 points

(D) installation of approved residential on-site wastewater disposal systems or failing systems that cause health issues--140 points

(E) housing activities--140 points

(F) first time water and/or sewer service through a privately-owned for profit utility--135 points

(G) expansion or improvement of existing water and/or sewer service--110 points

(H) street paving and drainage activities--75 points

(I) all other eligible activities--20 points

(4) Matching funds (total--20 points). An applicant's matching share may consist of one or more of the following contributions: cash; in-kind services or equipment use; materials or supplies; or land. An applicant's match is considered only if the contributions are used in the same target areas for activities directly related to the activities proposed in its application; if the applicant demonstrates that its matching share has been specifically designated for use in the activities proposed in its application; and if the applicant has used an acceptable and reasonable method of valuation. The population category under which county applications are scored is dependent upon the project type and the beneficiary population served. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the unincorporated residents for the entire county. For county applications addressing water and sewer improvements in unincorporated areas, the population category is based on the actual number of beneficiaries to be served by the project activities. The population category under which multi-jurisdiction applications are scored is based on the combined populations of the applicants according to the 2000 Census. Applications that include a housing rehabilitation and/or affordable new permanent housing activity for low- and moderate-income persons as a part of a multi-activity application do not have to provide any matching funds for the housing activity. This exception is for housing activities only. The TxCDBG does not consider sewer or water service lines and connections as housing activities. The TxCDBG also does not consider on-site wastewater disposal systems as housing activities. Demolition/clearance and code enforcement, when done in the same target area in conjunction with a housing rehabilitation activity, is counted as part of the housing activity. When demolition/clearance and code enforcement are proposed activities, but are not part of a housing rehabilitation activity, then the demolition/clearance and code enforcement are not considered as housing activities. Any additional activities, other than related housing activities, are scored based on the percentage of match provided for the additional activities.

(A) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(i) match equal to or greater than 5.0% of grant request--20;

(ii) match at least 2.0% but less than 5.0% of grant request--10;

(iii) match less than 2.0% of grant request--0.

(B) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(i) match equal to or greater than 10% of grant request--20;

(ii) match at least 2.5% but less than 10% of grant request--10;

(iii) match less than 2.5% of grant request--0.

(C) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(i) match equal to or greater than 15% of grant request--20;

(ii) match at least 3.5% but less than 15% of grant request--10;

(iii) match less than 3.5% of grant request--0.

(D) Applicants with populations over 5,000 according to the 2000 census:

(i) match equal to or greater than 20% of grant request--20;

(ii) match at least 5.0% but less than 20% of grant request--10;

(iii) match less than 5.0% of grant request--0.

(5) Project design (total--140 points). Each application is scored based on how the proposed project resolves the identified need and the severity of need within the applying jurisdiction. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund and in paragraph (6) of this subsection. Each application is scored by a committee composed of TxCDBG staff using the following information submitted in the application:

(A) the severity of need within the colonia area(s) and how the proposed project resolves the identified need (additional consideration is given to water activities addressing impacts from drought conditions);

(B) the TxCDBG cost per low to moderate income beneficiary;

(C) the applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TxCDBG community development fund;

(D) the projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage;

(E) the ability of the applicant to utilize the grant funds in a timely manner;

(F) the availability of grant funds to the applicant for project financing from other sources;

(G) whether the applicant, or the service provider, has waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries;

(H) whether the applicant's proposed use of TxCDBG funds is to provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed

through the Texas Water Development Board Economically Distressed Areas Program;

(I) whether the applicant has already met its basic water and wastewater needs if the application is for activities other than water or wastewater;

(J) whether the project has provided for future funding necessary to sustain the project;

(K) whether the applicant has provided any local matching funds for administrative, engineering, or construction activities;

(L) the applicant's past performance on previously awarded TxCDBG contracts; and

(M) proximity of project site to entitlement cities or metropolitan statistical areas.

(6) Project design scoring guidelines. Project design scores are assigned by Office staff using guidelines that first consider the severity of the need for each application activity and how the project resolves the need described in the application. The severity of need and resolution of the need determine the maximum project design score that can be assigned to an application. After the maximum project design score has been established, points are then deducted from this maximum score through the evaluation of the other project design evaluation factors until the maximum score and the point deductions from that maximum score determine the final assigned project design score. When necessary, a weighted average is used to set the maximum project design score to applications that include activities in the different severity of the need/project resolution maximum scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity is calculated. The percentage of the total TxCDBG construction dollars for each activity is then multiplied by the appropriate maximum project design point level. The sum of the calculations determines the maximum project design score that the applicant can be assigned before points are deducted based on the evaluation of the other project design factors.

(A) Maximum project design score that can be assigned based on the severity of the need and resolution of the problem.

(i) Activities providing first-time public sewer service to the area--maximum score 140 points.

(ii) Activities providing first-time public water service to the area--maximum score 140 points.

(iii) Installation of approved residential on-site wastewater disposal systems providing first time sewer service--maximum score 140 points.

(iv) Installation of approved residential on-site wastewater disposal systems for failing systems that cause health issues--maximum score 130 points.

(v) Housing rehabilitation and eligible new housing construction--maximum score 130 points.

(vi) Water activities addressing and resolving water supply shortage from drought conditions--maximum score 130 points.

(vii) Water or sewer activities expanding or improving existing water or sewer system--maximum score 125 points.

(viii) Street paving activities providing first time surface pavement to the area--maximum score 100 points.

(ix) Installation of designed drainage structures providing first time designed drainage system to the area--maximum score 100 points.

(x) Reconstruction of streets with existing surface pavement--maximum score 90 points.

(xi) Installation of improvements or drainage structures to a designed drainage system--maximum score 90 points.

(xii) All other eligible activities--maximum score 80 points.

(B) TxCDBG cost per low to moderate income beneficiary. The total amount of TxCDBG funds requested by the applicant is divided by the total number of low to moderate income persons benefiting from the application activities to determine the TxCDBG cost per beneficiary.

(i) Cost per low to moderate income beneficiary is equal to or less than $2,000. Deduct zero points from the set maximum project design score.

(ii) Cost per low to moderate income beneficiary is greater than $2,000 but equal to or less than $4,000. Deduct 1 point from the set maximum project design score.

(iii) Cost per low to moderate income beneficiary is greater than $4,000 but equal to or less than $6,000. Deduct 2 points from the set maximum project design score.

(iv) Cost per low to moderate income beneficiary is greater than $6,000 but equal to or less than $8,000. Deduct 3 points from the set maximum project design score.

(v) Cost per low to moderate income beneficiary is greater than $8,000 but equal to or less than $10,000. Deduct 4 points from the set maximum project design score.

(vi) Cost per low to moderate income beneficiary is greater than $10,000. Deduct 5 points from the set maximum project design score.

(C) The applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TxCDBG community development fund.

(i) The nonentitlement county submitted an application under the TxCDBG community development fund 2005/2006 biennial competition that was not addressing water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(ii) The nonentitlement county submitted an application under the TxCDBG community development fund 2003/2004 biennial competition that was not addressing water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(D) The projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage.

(i) The projected water and/or sewer rates may be too high for the application beneficiaries. Deduct 1 point from the set maximum project design score.

(ii) The projected water and/or sewer rates are too low to discourage water conservation by the application beneficiaries. Deduct 1 point from the set maximum project design score.

(E) The ability of the applicant to utilize the grant funds in a timely manner.

(i) The application includes the acquisition of real property, easements or rights-of-way. Deduct 1 point from the set maximum project design score.

(ii) The application includes matching funds that have not been secured by the applicant. Deduct 1 point from the set maximum project design score.

(iii) The proposed application target area is not located in an area where a service provider already has the certificate of convenience and necessity (CCN) needed to provide service to the application beneficiaries. Deduct 1 point from the set maximum project design score.

(F) The availability of grant funds to the applicant for project financing from other sources. Grant funds for any activity included in the application are available from another source. Deduct 1 point from the set maximum project design score.

(G) The applicant, or the service provider, has not waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries.

(i) Assessments and fees budgeted in the application are equal to or less that $100 per low and moderate income household. Deduct 2 points from the set maximum project design score.

(ii) Assessments and fees budgeted in the application are greater than $100 but equal to or less that $200 per low and moderate income household. Deduct 4 points from the set maximum project design score.

(iii) Assessments and fees budgeted in the application are greater than $200 but equal to or less that $300 per low and moderate income household. Deduct 6 points from the set maximum project design score.

(iv) Assessments and fees budgeted in the application are greater than $300 but equal to or less that $500 per low and moderate income household. Deduct 8 points from the set maximum project design score.

(v) Assessments and fees budgeted in the application are greater than $500 per low and moderate income household. Deduct 10 points from the set maximum project design score.

(H) Applicant's proposed use of TxCDBG funds does not provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed through the Texas Water Development Board Economically Distressed Areas Program. Deduct 2 points from the set maximum project design score.

(I) The application is for activities other than water or wastewater and the applicant has not already met its basic water and wastewater needs. Deduct 3 points from the set maximum project design score,

(J) The applicant has not documented that future funding necessary to sustain the project is available. Deduct 3 points from the set maximum project design score,

(7) Past performance. An applicant receives from 0 to 10 points based on the applicant's past performance on previously awarded TxCDBG contracts. The applicant's score will primarily be based on an assessment of the applicant's performance on the applicant's two most recent TxCDBG contracts that have reached the end of the original contract period stipulated in the contract. TxCDBG staff may also assess the applicant's performance on existing TxCDBG contracts that have not reached the end of the original contract period. An applicant that has never received a TxCDBG grant award will automatically receive these points. TxCDBG staff will assess the applicant's performance on TxCDBG contracts up to the application deadline date. The applicant's performance on TxCDBG contracts after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance may include, but is not necessarily limited to the following:

(A) The applicant's completion of the previous contract activities within the original contract period.

(B) The applicant's submission of the required close-out documents within the period prescribed for such submission.

(C) The applicant's timely response to monitoring findings on previous TxCDBG contracts especially any instances when the monitoring findings included disallowed costs.

(D) The applicant's timely response to audit findings on previous TxCDBG contracts.

(E) The applicant's submission of all contract reporting requirements such as quarterly progress reports, certificates of expenditures, and project completion reports.

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

Filed with the Office of the Secretary of State on October 9, 2008.

TRD-200805357
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Effective date: October 29, 2008
Proposal publication date: July 18, 2008
For further information, please call: (512) 936-7887

CHAPTER 256. ADMINISTRATION

The Office of Rural Community Affairs (ORCA) adopts amendments to Chapter 256, §§256.1, 256.3 - 256.15, and new §§256.100, 256.200, 256.300, 256.400, and 256.500, relating to the administration of ORCA, without changes to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7387).

The amended and new rules concern the management policies of the board of directors and executive director and adds certain management policies.

The term "executive committee" is replaced with "board" throughout the chapter and the board is authorized to delegate final approval of certain agency documents to the executive director. A new Subchapter B is added to govern negotiated rulemaking, alternative dispute resolution, collections, and to move the appeals process from Chapter 257 to Chapter 256, Subchapter B.

No comments were received regarding the proposal.

SUBCHAPTER A. MANAGEMENT POLICIES OF BOARD AND EXECUTIVE DIRECTOR

10 TAC §§256.1, 256.3 - 256.15

The amendments are adopted under the authority of Texas Government Code, §487.052, which provides ORCA with the authority to adopt rules as necessary to implement Chapter 487.

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

Filed with the Office of the Secretary of State on October 8, 2008.

TRD-200805350
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Effective date: October 28, 2008
Proposal publication date: September 5, 2008
For further information, please call: (512) 936-6706

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SUBCHAPTER B. GENERAL POLICIES AND PROCEDURES

10 TAC §§256.100, 256.200, 256.300, 256.400, 256.500

The new sections are adopted under the authority of Texas Government Code, §487.052, which provides ORCA with the authority to adopt rules as necessary to implement Chapter 487.

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

Filed with the Office of the Secretary of State on October 8, 2008.

TRD-200805351
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Effective date: October 28, 2008
Proposal publication date: September 5, 2008
For further information, please call: (512) 936-6706

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PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 305. PRACTICES AND PROCEDURES FOR HEARINGS AND DISCIPLINARY ACTIONS

SUBCHAPTER D. POST-SETTLEMENT AND POST-HEARING MATTERS

10 TAC §305.41

The Texas Residential Construction Commission ("commission") adopts amendments to 10 TAC §305.41, motions for rehearing, without changes to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6683).

The amendments to §305.41 clarify the process by which rulings for motions for rehearing are made. The amendments delegate authority to the Executive Director to grant an extension of time for a decision on the motion for rehearing if one or more commissioners elects to hear the motion for rehearing or fails to respond to notice of receipt of a motion and the next regularly scheduled meeting of the commission is more than 45 days after the date a party has been notified of the commission's order.

The commission received no comments on the proposed amendments.

The amendments are adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of the Act, and Government Code §2001.146, regarding the procedures for ruling on a motion for rehearing.

No other statutes, articles, or codes are affected by the adoption.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805389
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: October 30, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 463-3926

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.12

The Railroad Commission of Texas (Commission) adopts amendments to §3.12, relating to Directional Survey Company Report, without changes to the proposed version published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6491). The amendments allow the electronic filing with the Commission of directional survey company reports. The Commission adopts the amendments in preparation for implementation of a new completions system. Upon implementation, the Commission will be able to accept electronically filed Forms G-1 (Gas Well Back Pressure Test, Completion or Recompletion Report, and Log) and W-2 (Oil Well Potential Test, Completion or Recompletion Report, and Log), and Directional Survey Reports.

In April 2004, the Commission amended §3.80 of this title (relating to Commission Oil and Gas Forms, Applications, and Filing Requirements) to revise language relating to electronic filing in anticipation of changes and/or new electronic filing opportunities the Commission has, and continues to, develop. The Commission added language to §3.80 to allow an organization to make any required or discretionary filing using either the prescribed paper form or any electronic filing process in accordance with the rule. Section 3.80 states that the Commission may at its discretion accept other documents or data electronically transmit-

ted. Currently, only Production Reports (Form PR), Drilling Permit Applications (Form W-1), and Annual Disposal/Injection Well Monitoring Report (Form H-10) can be filed through the Commission Online System. Additional forms will be added as the Commission develops the online filing capabilities.

In preparation for this rulemaking and in addition to §3.12, the Commission reviewed §3.11 (relating to Inclination and Directional Surveys Required); §3.13 (relating to Casing, Cementing, Drilling, and Completion Requirements); §3.16 (relating to Log and Completion or Plugging Report); §3.28 (relating to Potential and Deliverability of Gas Wells To be Ascertained and Reported); §3.31 (relating to Gas Reservoirs and Gas Well Allowable); §3.40 (relating to Assignment of Acreage to Pooled Development and Proration Units); §3.51 (relating to Oil Potential Test Forms Required); §3.53 (relating to Annual Well Tests and Well Status Reports Required); and §3.58 (relating to Certificate of Compliance and Transportation Authority; Operator Reports), to determine whether those rules contained any language that could present a roadblock to electronic filing of certain forms. The Commission found that, when read with §3.80, the language in those rules presented no such roadblocks, with the exception of §3.12, which required that "(E)ach directional survey . . . shall be mailed by registered, certified, or overnight mail directly to the commission in Austin by the surveying company making the survey."

Therefore, the Commission amends §3.12 to allow a surveying company to file electronically if the Commission has provided for such filing. Most of the amendments in subsection (a) are non-substantive and are made for clarification. The Commission amends subsection (a)(6) to add a requirement that the filer include the drilling permit number and the API number in the identification of the well to facilitate coordination of the data from various completion filings for individual wells. The majority of the directional survey reports currently received by the Commission already include the API number. In subsection (b), the Commission adds the following sentence: "The surveying company may file electronically if the commission has provided for such filing."

The Commission received no comments on the proposed amendments.

The Commission adopts the amendments to §3.12 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 the jurisdiction of the Commission.

The Texas Natural Resources Code, §81.051 and §81.052 are affected by the adopted amendments.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052.

Cross-reference to statutes: Texas Natural Resources Code, §81.051 and §81.052.

Issued in Austin, Texas, on October 7, 2008.

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

Filed with the Office of the Secretary of State on October 7, 2008.

TRD-200805320

Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: October 27, 2008
Proposal publication date: August 15, 2008
For further information, please call: (512) 475-1295

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 31. ADMINISTRATION

16 TAC §31.10, §31.11

The Texas Alcoholic Beverage Commission (commission) adopts new §31.10, relating to how to file a complaint with the commission, and new §31.11, relating to resolution and information about complaints that have been filed with the commission, with changes to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6493).

Senate Bill 904, §12, 80th Legislature, 2007, amended §5.53 of the Texas Alcoholic Beverage Code (Code) to require the commission to adopt rules that clearly define the commission's complaint process from the time the complaint is received until it is resolved. These two new sections are adopted to comply with this requirement.

New §31.10 provides the public with information on who may file a complaint, against whom a complaint may be filed, where a complaint may be filed, what information to include in a complaint, and how to obtain instructions, assistance, and forms to file a complaint.

New §31.11 informs the public that all complaints are investigated, how the investigation into a complaint is prioritized, what is done following the investigation, the fact that a complainant will be notified of the result of a complaint investigation, how general information about complaints may be obtained, where violation histories of permit and license holders may be accessed, and how to obtain specific information about specific complaints.

No comments were received from the public on the proposed new §31.10. However, non-substantive changes were suggested by the Texas Register to subsection (b)(2) by adding (TABC) after the commission's name.

No comments were received from the public on the proposed new §31.11. However, non-substantive changes were suggested by the Texas Register by adding Texas Alcoholic Beverage Code (Code) to subsection (b) and adding Texas Alcoholic Beverage Commission (TABC) to subsection (d).

New §31.10 is authorized by §5.53 of the Texas Alcoholic Beverage Code (Code), which requires the commission to adopt a rule that clearly defines the commission's complaint process. New §33.11 is authorized by §5.54, which requires the commission to provide information on the resolution of complaints to the public. Additionally, new §31.10 and new §31.11 are authorized by §5.31, which provides the commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Code.

Cross Reference: Sections 5.31, 5.53, and 5.54 of the Code are affected by the adoption of the new rules.

§31.10. Filing a Complaint.

(a) This section relates to §5.53 of the Texas Alcoholic Beverage Code (Code), which requires the Texas Alcoholic Beverage Commission (commission) to adopt a rule to define the agency's complaint process from the time a complaint is received until the complaint is resolved.

(b) The public, consumers, commission and persons and entities regulated by the commission may file a complaint against an individual or entity holding a license, permit or certificate issued by the commission.

(1) A complaint may be submitted anonymously. If the complainant wishes to be informed of the resolution of the complaint, the complainant must provide contact information.

(2) A complaint may be submitted: in writing to the Texas Alcoholic Beverage Commission (TABC), P.O. Box 13127, Austin, Texas 78711-3127; in person at any TABC office; by phone at (512) 206-3333 or the phone number of the nearest TABC office, or by electronic mail at complaints@tabc.state.tx.us.

(c) A written complaint form, instructions on how and where to file a complaint, and a list of local TABC offices may be found on the commission's public website at www.tabc.state.tx.us. A complainant can also request that a form and instructions be mailed to a complainant by calling the commission at (512) 206-3333, or a local TABC office. A complainant may also file a complaint on plain paper without using the form by providing the following information:

(1) Complainant name and how the complainant may be contacted if they wish to be notified of the outcome or resolution of the complaint.

(2) The name or identity of the individual or entity being complained about and how the commission may find or contact the individual or locate the entity. This may include physical, mailing and e-mail address, phone numbers and persons the complainant has contacted or spoken with regarding the complaint.

(3) A brief statement of the nature of the complaint and relevant facts, including the names of persons with knowledge, times, dates, and location.

(4) If the complainant has documents or records related to the complaint, a copy of these should be attached to the complaint. Do not send original records with a complaint.

§31.11. Resolution and Information on Complaints.

(a) The commission investigates all complaints. The time and resources allocated to an investigation will be based on facts stated in the complaint. Complaints alleging conduct that presents a serious risk to the public health and safety will be given priority.

(b) If an investigation results in a finding that a provision of the Texas Alcoholic Beverage Code (Code) or commission rules have been or may have been violated, the commission may proceed with an action to cancel, suspend, or refuse to issue a permit or license under Chapters 11 and 61 of the Code, and the complainant will be informed if contact information is provided.

(c) If an investigation results in a finding that no violation of the Code or commission rules has occurred, the complainant will be informed of this result if contact information has been provided.

(d) General information and the nature and disposition of complaints can be accessed on the Texas Alcoholic Beverage Commission (TABC) public website at www.tabc.state.tx.us.

(e) The public can access the violation history of a license or permit issued by the commission on the TABC public website at www.tabc.state.tx.us.

(f) Information about a specific complaint against an individual or entity holding a license, permit or certificate issued by the commission may be obtained by filing a request under the Texas Public Information Act (TPIA). Some information in a complaint or investigation of a complaint may not be subject to disclosure under the TPIA.

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

Filed with the Office of the Secretary of State on October 8, 2008.

TRD-200805347
Lou Bright
General Counsel
Texas Alcoholic Beverage Commission
Effective date: October 28, 2008
Proposal publication date: August 15, 2008
For further information, please call: (512) 206-3204

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 67. AUCTIONEERS

16 TAC §67.80

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 TAC §67.80, regarding reducing the initial recovery fund fee from $100 to $50 to avoid collecting fees for the recovery fund that are in excess of the amount needed. The amendments are adopted without changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4955) and will not be republished.

Texas Occupations Code, Chapter 1802, Subchapter D, establishes the Auctioneer Education and Recovery Fund for the payment of claims against auctioneers licensed under Chapter 1802. The Texas Department of Licensing and Regulation ("Department") is responsible for administering the fund and for collecting from each applicant for licensure as an auctioneer or associate auctioneer a fee for the fund prior to issuing a license to the applicant. The amount of the fee is not set by statute. Subchapter D also provides that when the fund balance is less than $300,000 on December 31 of any year the Department shall collect from each licensee at renewal an additional fee equal to the greater of $50 or the licensee's pro rata share of the amount required to return the fund balance to $300,000.

At present the fund balance is in excess of $300,000 and will remain so even after funds are expended for education pursuant to §1802.156. The reduction of the initial recovery fund fee will not impair the ability of the fund to meet statutory requirements. The amendment to §67.80(i) lowers the initial recovery fund fee from $100 to $50. By reducing the fee, the Department will avoid collecting fees for the recovery fund that are in excess of the amount needed.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. The comment period

closed on July 28, 2008. The Department did not receive any public comments on the proposed rule.

The amendment 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.

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

Filed with the Office of the Secretary of State on October 9, 2008.

TRD-200805358
Brian Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
Effective date: November 1, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 463-7348

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CHAPTER 73. ELECTRICIANS

16 TAC §73.80

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 TAC §73.80, regarding decreasing the application and renewal fees for electrical sign contractors from $125 to $115 and to separate the subsection addressing both application fees and renewal fees into two distinct subsections in the rule. The amendments are adopted without changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4956) and will not be republished.

The Commission is required to set fees in amounts reasonable and necessary to cover the costs of administering programs under its jurisdiction. Pursuant to the Texas Department of Licensing and Regulation's ("Department's") annual fee review, the fees currently in place are above the amount required by the Department to cover costs. The amendments decrease the application and renewal fees for electrical sign contractors from $125 to $115. The amendments will not adversely affect the administration and enforcement of the electricians program.

In addition to the fee decrease, §73.80(a), which includes both application and renewal fees for all licensees under this program, is separated into two subsections. Section 73.80(a) addresses application fees, and §73.80(b) addresses renewal fees. These amendments accommodate any future fee changes where the application fees and renewal fees are different.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. The comment period closed on July 28, 2008. The Department did not receive any public comments on the proposed amendments.

The amendments are adopted under Texas Occupations Code, Chapters 51 and 1305, 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 1305. No other statutes, articles, or codes are affected by the adoption.

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

Filed with the Office of the Secretary of State on October 9, 2008.

TRD-200805359
Brian Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
Effective date: November 1, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 463-7348

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TITLE 28. INSURANCE

PART 6. OFFICE OF INJURED EMPLOYEE COUNSEL

CHAPTER 276. GENERAL ADMINISTRATION

The Office of Injured Employee Counsel (OIEC) adopts amendments to §276.2, concerning OIEC's mission and §276.10, concerning OIEC's Ombudsman Program and Continuing Education. The amendments to §276.2 are adopted without changes to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6547) and will not be republished. The amendments to §276.10 are adopted with changes to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6547) and will be republished. A correction of error was published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7365).

The adopted amendments to §276.2 are necessary to provide clarity to OIEC's statutory mission. The adopted amendments to §276.10 are necessary to implement Texas Labor Code §404.151 and §404.152, which is necessary to more closely align the Ombudsman Program to the agency's enabling statute, Chapter 404 of the Labor Code.

Adopted amendments to §276.2 establish and clarify OIEC's statutory mission to assist, educate, and advocate for injured employees in the workers' compensation system. This section is necessary to clarify OIEC's statutory obligation to the injured employees of Texas and to other workers' compensation system participants.

The adopted amendments to §276.2 provide a clearer understanding of OIEC's statutory mission to more accurately align itself with the agency's enabling statute (Chapter 404 of the Texas Labor Code) and to more clearly delineate the agency's mission to assist, educate, and advocate on behalf of injured employees of Texas. Although OIEC continues to build relationships with and seeks feedback from other workers' compensation stakeholders, the agency's mission was redefined to emphasize representation of interests of injured employees over the goal of creating a balanced system, which is more properly a goal of the regulatory agency. OIEC believes that an agency that clearly

serves as a voice for injured employees in the workers' compensation system results in a more balanced system that serves Texans and is subject to Texas Department of Insurance (TDI) regulation.

Adopted amendments to §276.10 encompass the additional resources that OIEC was given as a result of the 80th Texas Legislature, Regular Session, 2007. Injured Employee Services division changed its name to Ombudsman Program to more closely align the program to its enabling statute and to preserve the reputation and integrity of the Ombudsman Program. Nonsubstantive changes were made throughout §276.10 to increase reader clarity.

Adopted amendments to §276.10 provide a more comprehensive Ombudsman education and training program. Injured employees shall benefit from an Ombudsman Program where Ombudsmen provide assistance to injured employees in both informal and formal workers' compensation proceedings. Both injured employees and Ombudsmen will benefit from the existence of Regional Staff Attorneys who will provide legal research and advice to Ombudsmen assisting injured employees as required by §404.103(b) of the Texas Labor Code.

Unrepresented injured employees will receive a higher level of assistance at benefit review conferences and contested case hearings. An increased level of Ombudsman education and training is likely to result in a workers' compensation system that provides increased access to assistance, narrows the information disparity in proceedings where an injured employee's right to benefits is at stake, and provides additional information and education on the injured employee's rights and responsibilities in the workers' compensation system. Further, an increased Ombudsman education and training program is anticipated to provide Ombudsmen with a skill set and resources to provide a more efficient level of assistance for Texas' injured employees.

Comment: The commenter does not agree that Ombudsmen should be able to advocate on behalf of the injured employees of Texas resulting in violation of the Texas Labor Code §404.105 and §405.151. The commenter feels that the term "advocate" is a legal term meaning "representation" or "a person who pleads the cause of another in a court of law."

Response: As stated in Labor Code §404.105, the chapter may not be constructed as requiring or allowing legal representation for individual injured employee by an office attorney or Ombudsman in a proceeding. In addition, Labor Code §404.151 provides an outline of the specific functions of the Ombudsman program, which does not include attorney representation. Section 276.2(6)(A) and (B) require Ombudsmen to assist injured employees within the workers' compensation dispute resolution system and the resolution of complaints pending at TDI. While OIEC does agree with the commenter that Ombudsmen are prohibited from representing injured employees in a district court proceeding. OIEC disagrees that the term advocate is synonymous with the term representation in this context. OIEC, however, has amended the subsection to alleviate the concerns of the commenter by removing the word advocate.

For: None

Against: J.A. Davis and Associates, LLP

SUBCHAPTER A. GENERAL PROVISIONS

28 TAC §276.2

The amendments are adopted pursuant to Texas Labor Code §§404.151, 404.152, 404.154, 404.006, 404.103 and 404.105. Section 404.151 requires OIEC to maintain an Ombudsman Program. Section 404.152 explains the designation of Ombudsman; eligibility, training, and continuing education. Section 404.154 provides that OIEC shall widely disseminate information about the Ombudsman Program. Section 404.006 provides that the public counsel shall adopt rules as necessary to implement Chapter 404 of the Texas Labor Code. Section 404.103 provides for the operation of the Ombudsman Program. Section 404.105 provides the authority to assist individual injured employees in administrative procedures.

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

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TRD-200805333
Brian M. White
Deputy Public Counsel
Office of Injured Employee Counsel
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For further information, please call: (512) 804-4182

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SUBCHAPTER B. OMBUDSMAN PROGRAM

28 TAC §276.10

The amendments are adopted pursuant to Texas Labor Code §§404.151, 404.152, 404.154, 404.006, 404.103 and 404.105. Section 404.151 requires OIEC to maintain an Ombudsman Program. Section 404.152 explains the designation of Ombudsman; eligibility, training, and continuing education. Section 404.154 provides that OIEC shall widely disseminate information about the Ombudsman Program. Section 404.006 provides that the public counsel shall adopt rules as necessary to implement Chapter 404 of the Texas Labor Code. Section 404.103 provides for the operation of the Ombudsman Program. Section 404.105 provides the authority to assist individual injured employees in administrative procedures.

§276.10. Ombudsmen Training and Continuing Education Program.

(a) Definitions. The following words and phrases shall have the following meaning in this section unless the context clearly indicates otherwise:

(1) Adjuster's license: A workers' compensation license issued by the Texas Department of Insurance.

(2) Continuing education: A formal training program required for all ombudsmen in this state that includes continuing education for obtaining and retaining an adjuster's license.

(3) Ombudsmen education and training program: The training required by the Office of Injured Employee Counsel (OIEC) to serve as an ombudsman, which results in certification upon completion.

(b) Purpose. OIEC shall establish and maintain the ombudsmen education and training program to ensure consistent, quality, and thorough training of ombudsmen staff. The ombudsmen education and training program applies to every ombudsman, regardless of hire date. The ombudsmen education and training program shall include, but is not limited to:

(1) formal classroom training conducted by OIEC staff;

(2) on-the-job training monitored by a supervising ombudsman, associate director, and regional staff attorneys;

(3) observations of ombudsmen by supervising ombudsman, associate director, and regional staff attorneys;

(4) professional skill development and legal education on workers' compensation laws, rules, advisories, and appeals panel decisions by the regional attorneys; and

(5) resource meetings with OIEC's central staff to discuss current and pending issues instrumental to providing assistance to injured employees in informal and formal proceedings; and

(6) practical skills training and legal assistance provided by the regional staff attorneys.

(c) OIEC staff's responsibilities regarding education and training. OIEC staff shall maintain the knowledge and skills needed to properly assist unrepresented injured employees in the workers' compensation system.

(1) The Ombudsman Program is the division within OIEC that is responsible for the overall management of the ombudsmen education and training program. The Ombudsman Program's responsibilities include, but are not limited to:

(A) educating ombudsmen about the workers' compensation laws, rules, advisories, appeals panel decisions, dispute resolution, OIEC policies and procedures, and application of such information to specific cases or factual situations;

(B) selecting an Ombudsman Supervisor and an Associate Director of the Ombudsman Program to observe, supervise, train, and provide feedback to ombudsmen on a daily basis;

(C) notifying regional staff attorneys if guidance, instruction, or legal research on technical areas is needed;

(D) establishing on-going training schedules for ombudsmen and evaluating the performance of ombudsmen's progress through the education and training program;

(E) maintaining documentation to monitor the effectiveness of the ombudsman program and coordinating with OIEC's Legal Services division to develop education and training materials to address systematic issues to enhance ombudsmen's effectiveness;

(F) examining the proficiency and competency of each ombudsman by conducting technical observations and identifying areas for professional improvement;

(G) providing targeted training to individual ombudsman for professional development and incorporating the technical observations and evaluations into the performance evaluation process;

(H) providing continuing education and training, at least annually, to ombudsmen on workers' compensation laws, rules, advisories, appeals panel decisions, dispute resolution, OIEC policies and procedures; and

(I) assigning a staff attorney to each ombudsman who will advise the ombudsman on providing assistance to injured employees and preparing for informal and formal proceedings.

(2) An ombudsman's responsibilities shall include, but is not limited to:

(A) obtaining and maintaining a valid workers' compensation adjusters' license issued by the Texas Department of Insurance and submitting a copy of the license to OIEC's central office;

(B) completing the ombudsmen education and training program;

(C) participating in OIEC conferences;

(D) completing all continuing education requirements;

(E) maintaining the technical and professional skills to perform all the duties of an Ombudsman; and

(F) assisting injured employees throughout the workers' compensation system.

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

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Brian M. White
Deputy Public Counsel
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 334. UNDERGROUND AND ABOVEGROUND STORAGE TANKS

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts amendments to §§334.2, 334.8, 334.21, 334.42, 334.45, 334.47, 334.49, 334.50, 334.54, 334.71, 334.84, 334.128 and 334.301 - 334.303.

Sections 334.2, 334.8, 334.21, 334.47, 334.49, 334.54, 334.71, 334.84, 334.128 and 334.301 - 334.303 are adopted *without changes* to the proposed text as published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3556) and will not be republished. Sections 334.42, 334.45 and 334.50 are adopted *with changes* to the proposed text and will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted amendments is to incorporate into agency rules, changes to statute which were effective September 1, 2007, based on language in House Bill (HB) 3554 and HB 1956, 80th Legislature, 2007, to incorporate certain underground storage tank (UST) provisions of the federal Energy Policy Act of 2005, and to update certain technical requirements pertaining to USTs. Changes include such items as the requirements for: proof of financial assurance to be included with annual tank self-certifications; cessation of annual facility fees; secondary containment for UST systems in accordance with United States Environmental Protection Agency (EPA) and Federal Energy Policy Act requirements; and extension of the Petroleum Storage Tank (PST) Reimbursement Program for four years.

The commission also specifically requested comments on the issue of whether LPST sites should be removed from the requirements of Chapter 350, Texas Risk Reduction Program. Written

comments on this issue are addressed in the RESPONSE TO COMMENTS section of this preamble. Other issues raised by commenters are also addressed in the RESPONSE TO COMMENTS section, with corresponding changes made in the rules.

SECTION BY SECTION DISCUSSION

Throughout this rulemaking package, administrative changes have been made as necessary in accordance with Texas Register requirements.

Subchapter A - General Information

To expand the rule to incorporate reference to renewable fuels, adopted amendments to §334.2 change the definition of "Motor fuel" and the definition of "Petroleum product" to incorporate alcohol blended fuels and biodiesel blended with Number 1 and Number 2 diesel. To comply with statutory changes; adopted §334.8(c)(1)(A)(v) is amended to specify that only temporarily out of service USTs which are empty are exempt from self-certification; adopted §334.8(c)(3)(D)(iii) is amended to specify that copies of financial assurance documents are required to be submitted as part of self-certification; and adopted §334.8(c)(4)(A)(viii) is amended to specify that proof of current financial assurance must be submitted annually.

Subchapter B - Underground Storage Tank Fees

To comply with statutory changes, adopted §334.21 is amended to add language addressing the cessation of annual UST facility fees, effective September 1, 2007, until such time as reinstated by the commission at amounts set by the commission, but specifies that prior tank fees are still due. Section 334.21(b) is amended to change the reference from "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality."

Subchapter C - Technical Standards

To incorporate requirements of the federal Energy Policy Act of 2005, adopted §334.42(h) is added to specify the requirement for secondary containment, in accordance with the requirements of adopted §334.45(d), for any new tank, line or dispenser installed on or after January 1, 2009. In response to problems noted in routine inspections of UST systems, adopted §334.42(i) is added to specify that any sumps (including dispenser sumps) or manways, installed prior to January 1, 2009, which are utilized as an integral part of a UST release detection system and any overspill containers or catchment basins installed at any time, which are associated with a UST system must be inspected at least once every 60 days to assure that their sides, bottoms and any penetration points are maintained liquid tight, and that any liquids or debris found in them during an inspection must be removed and properly disposed of within 72 hours of discovery. Adopted §334.45(b)(4)(A)(i) is amended to add the term "or any other water" to the list of media which metallic tank fittings must be isolated from, to expand the list and provide clarification and consistency in rule language. Adopted §334.45(d)(1)(E) is added to specify detailed requirements for secondary containment for new tanks, lines, or dispensers (including related sumps or manways) installed on or after January 1, 2009. Adopted §334.47(b)(1)(A)(ii) is amended to add the term "or any other water" to the list of media which clad or jacketed metal tanks are electrically isolated from, to expand the list and provide clarification and consistency in rule language. Adopted §334.47(b)(1)(C) is amended to add the term "or any other water" to the list of media from which underground metal components are not isolated and must be cathodically protected to expand the list and provide clarification and consistency in rule language. Adopted §334.49(b)(2) and (3) are amended to add the term "or any other water" to the list of corrosive elements which a UST system component may be isolated from to expand the list and provide clarification and consistency in rule language and by adding the word "from" prior to the term "other metallic components" to clarify the intent of the language. Adopted §334.49(b)(3)(B) is amended to add the term "or any other water" to the list of media which must be kept out of secondary containment interstices which provide electrical isolation for corrosion protection, to expand the list and provide clarification and consistency in rule language. Adopted §334.49(c)(1)(B)(i) is amended to add the term "or any other water" to the list of media exterior surfaces might be exposed to, to expand the list and provide clarification and consistency in rule language. Adopted §334.49(d)(1)(A) and (C) are amended to add the term "or any other water" to the list of media which metal components are required to be periodically inspected and tested to assure electrical isolation from to expand the list and provide clarification and consistency in rule language and by adding the word "from" prior to the term "other metallic components" to clarify the intent of the language. Adopted §334.50(d)(7) is amended to clarify and expand the application of interstitial monitoring to include "jacketed" UST systems to increase rule flexibility. Adopted §334.50(d)(7)(C) is amended to add the term "and any other water" to "groundwater" to expand and clarify the description of the media that the sampling, testing or monitoring method used for interstitial monitoring of double wall systems must be able to detect the entrance of, and to clarify and expand the application of that interstitial monitoring to include "jacketed" tanks or piping systems. Adopted §334.54(e)(5) is added to address financial assurance requirements for tanks temporarily removed from service to comply with statutory changes.

Subchapter D - Release Reporting and Corrective Action

Adopted §334.71(b)(6) is amended to extend the deadline for submitting a site closure request from September 1, 2007 to September 1, 2011 to comply with statutory changes. Adopted §334.84(a)(4) is amended to extend the deadline for eligible owners/operators who have been granted an extension for corrective action reimbursement by the agency to apply to the agency to have an eligible corrective action site placed in the commission's State Lead Program from July 1, 2007 to July 1, 2011 to comply with statutory changes.

Subchapter F - Aboveground Storage Tanks

Adopted §334.128(a)(4) is amended to change the reference from "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality." To comply with statutory changes, adopted §334.128(e) is amended to add language addressing the cessation of annual aboveground storage tank facility fees, effective September 1, 2007, until such time as reinstated by the commission at amounts set by the commission, but specifies that prior tank fees are still due.

Subchapter H - Reimbursement Program

The following amendments are adopted to comply with statutory changes. Adopted §334.301(c) is amended by adding language in accordance with statute which extends the deadline for the performance of corrective action from before August 31, 2007 to before August 31, 2011, for eligible owners/operators who have been granted an extension for corrective action reimbursement by the agency; by amending in accordance with statute the deadline for filing a claim for reimbursement from March 1, 2008, to March 1, 2012; and by amending in accor-

dance with statute the final deadline for payment of reimbursements from September 1, 2008, to September 1, 2012. Adopted §334.302(c)(5) is amended by adding language in accordance with statute which extends the deadline for the performance of corrective action from before August 31, 2007 to before August 31, 2011, for eligible owners/operators who have been granted an extension for corrective action reimbursement by the agency. Adopted §334.302(c)(6) is amended by changing in accordance with statute the deadline for filing a claim for corrective action reimbursement with the agency from March 1, 2008, to March 1, 2012. Adopted §334.302(c)(7) is amended by changing the final deadline for payment of any expenses related to corrective action reimbursements from September 1, 2008, to September 1, 2012. Adopted §334.303(a) is amended by changing the deadline for filing an application (claim) for reimbursement from March 1, 2008, to March 1, 2012.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Although the specific intent of this rule is to implement statutory changes relating to continuation of the PST Reimbursement Program, the second prong of the definition of a "major environmental rule" is not met: The adopted rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Further, it does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) states that this section applies only to a major environmental rule adopted by a state agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These adopted rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225 even if they did meet the definition of a major environmental rule. Specifically, the adopted rules are required by state law, are not adopted solely under the general powers of the agency, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

The commission also sought public comment on the consistency of the adopted rulemaking with the regulatory impact analysis requirements of Texas Government Code, §2001.0225. No comments were received regarding this issue.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The adopted rules are an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from USTs poses a threat to both soils and groundwater with which the public may come into contact. The adopted rules are "designed to significantly advance the health and safety purpose" by extending the PST Reimbursement Program for four years, which helps ensure that funds are available for addressing contamination from releases from USTs. The adopted rules "do not impose a greater burden than is necessary to achieve the health and safety purpose" because they are narrowly tailored to the class of tank owners or operators and narrowly tailored to specific conditions or events, such as termination of financial assurance coverage.

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the adopted rules. Additionally, there are benefits to society from the adopted rules, including the extension of the PST Reimbursement Program as a funding mechanism for cleanup of contamination from releases from tanks, stricter technical standards which tend to prevent releases which could damage private property, financial assurance documentation requirements which tend to assure that cleanup of property is funded. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules (31 TAC §505.11(b)(2)) subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking protects the environment by ensuring that dollars continue to be available for cleanup of reimbursement eligible sites and by upgrading certain administrative and technical requirements of USTs that will serve to enhance the protection of coastal environments and will have no substantive effect on commis-

sion actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission also sought public comment on the consistency of the adopted rulemaking with the CMP. No comments were received regarding this issue.

PUBLIC COMMENT

A public hearing on the proposed rules was held in Austin on May 27, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The comment period closed on June 2, 2008. A total of six persons attended on behalf of five companies/firms with regard to the proposed rules. The following companies/firms were represented: 7-Eleven, Inc (7-Eleven), Valero Energy Corporation/Valero Retail Holdings (Valero), Texas Oil & Gas Association (TXOGA), Texas Petroleum Marketers & Convenience Store Association (TPCA), and Gardere, Wynne, Sewell, LLP (Gardere). One person provided oral comments on behalf of TPCA in support of the removal of LPST sites from the requirements of Chapter 350, Texas Risk Reduction Program.

Written comments were received from 15 companies/firms, industry organizations, agencies and individuals and included the following: Valero (two commenters), 7-Eleven (two commenters), Watco Tanks, Inc. (Watco), Chambers Pump Service, Inc. (Chambers), ExxonMobil Refining and Supply Company (ExxonMobil), TXOGA, Industry Council on the Environment (ICE), TPCA, EPA, ATC Associates (two commenters), Clear Fork Consulting Services, and one individual.

RESPONSE TO COMMENTS

Regarding the commission's specific request for comments in the rule preamble on the issue of whether LPST sites should be removed from the requirements of Chapter 350, Texas Risk Reduction Program; TXOGA, TPCA, ExxonMobil, 7-Eleven (two commenters), Valero, ATC Associates (two commenters), Chambers, Clear Fork Consulting Services, and one individual each submitted comments in favor of removing LPST sites from Chapter 350, Texas Risk Reduction Program, requirements.

The commission responds that this issue will be considered for proposal in a subsequent rulemaking.

Regarding proposed §334.42(h), EPA inquired as to whether Texas defers release detection (and therefore secondary containment) for emergency generator USTs. Watco indicates that it would be beneficial if the effective date of the requirement for double wall construction (or agency accepted alternative) could be set no earlier than December 31, 2008.

The commission responds that emergency generator USTs are not deferred from release detection and no amendment to the proposed rules is necessary as a result of the inquiry. The commission also responds that the subsection has been revised to specify that secondary containment for any new tank, line or dispenser installed as part of a UST system will be required "on or after January 1, 2009."

Regarding proposed §334.42(i), Valero requested confirmation that the phrase "maintained liquid tight" does not involve precision testing of overspill containment and requested flexibility and consideration of weather conditions with regard to keeping overspill containment free of water and debris. 7-Eleven stated that inspection to assure that leak detection systems are free of water and debris should be required to be performed on a regular basis and suggested that it be done at least annually. ICE expressed concern with the language requiring overspill containers or catchment basins to be maintained liquid tight and free of water and debris and felt it might inappropriately impact a large number of existing tanks subject to ground water impact or localized or significant flooding events for which related functions are still successfully performed without releases to the environment. ICE suggested that the language be changed to "maintained in a manner as to fulfill their intended purpose." ExxonMobil agreed that sumps should be kept liquid and debris free, but felt that there should be a practical *de minimus* level that is acceptable.

The commission agrees with the commenters' basic points and revised the subsection to require inspection at least once every 60 days with the removal and proper disposal of liquids and debris only required when found during an inspection.

Regarding proposed §334.45(d)(1)(E), EPA notes that proposed amendments use the terms "line" instead of "piping" and asks if the terms are interchangeable. EPA also states that its guidelines require monitoring for secondary containment every 30 days but Texas regulations require monitoring at least monthly, not to exceed 35 days.

The commission responds that the terms "line" and "piping" are used interchangeably in the existing rules and that no change is necessary in proposed language. The commission also responds that except for two specified exceptions, its existing rules require monitoring of all tanks and piping/lines at a frequency of at least once every month (not to exceed 35 days between each monitoring). This language was accepted by EPA when it granted State Program Approval to Texas in 1995; therefore, no change in the proposed rule language is deemed necessary.

Regarding proposed §334.45(d)(1)(E)(i), 7-Eleven and ICE both addressed proposed language requiring "double wall construction (or agency accepted alternative)" for new tanks and lines. 7-Eleven stated that the proposed rule does not define double wall construction or provide functional criteria for alternative technology and recommended that the agency define double wall construction and provide criteria defining acceptable alternatives. ICE stated that the double wall requirement exceeds Federal Energy Act requirements and also stated that alternative criteria should be provided.

The commission responds that Chapter 334, Subchapter C adequately addresses double wall construction for tanks and lines and that the variance procedure in §334.43 is sufficient to address any agency accepted alternatives; however, to assure that the secondary containment requirements of this clause are straightforward and easily understood, the clause has been revised to simply allow any form of secondary containment already allowed under applicable rule except the use of external liners due to the difficulty in verifying the integrity of such liners once installed.

Regarding proposed §334.45(d)(1)(E)(ii), Valero and ExxonMobil both addressed the proposed allowance for the replacement of up to 10% of the total original length of an existing single wall line with new single wall line without triggering the secondary containment (double wall) requirement for that line, each recommending a larger allowance to allow greater flexibility. Valero recommended increasing the allowance to 30%, and ExxonMobil recommended increasing it to 25%.

The commission agrees that an increase in the 10% allowance is appropriate and increased it to 20%.

Regarding proposed §334.45(d)(1)(E)(iv) and (v), 7-Eleven maintains that tightness testing should only be required at initial installation and further maintains that since the proposed rule requires liquid sensing probes, annual testing and certification of liquid sensors on an annual basis should be substituted for on-going tightness testing on a once per three-year basis, indicating that the sensors will provide continuous monitoring of the liquid tightness of sumps. EPA inquired as to whether dispenser sumps have to be compatible with the substance conveyed by the piping.

The commission responds that the required liquid sensors will only alarm in the presence of liquid. If the sump is not liquid tight, any liquid level will likely not rise to a point which would activate the sensor; therefore, the requirement for on-going tightness testing once every three years is considered necessary and will remain unchanged. The commission also responds that it amended rule language to specify that sumps or manways utilized as part of a release detection system and dispenser sumps must be compatible with the stored substance.

Regarding proposed §334.45(d)(1)(E)(v), 7-Eleven maintains that the proposed rules do not adequately define the term "new dispenser", creates uncertainty as to when under-dispenser containment must be installed at an existing UST facility and suggests that EPA Grant Guidelines for Implementing the Secondary Containment Provision of the Energy Policy Act of 2005 be utilized as a basis for more specific language.

The commission responds that proposed rule language addressing dispenser sumps is sufficiently clear and is in fact more stringent than allowances addressed in the EPA Grant Guidelines; however, for consistency and clarity, the commission modified the rule language in accordance with EPA Grant Guideline language with respect to defining the term "new dispenser."

Regarding proposed §334.45(d)(1)(E)(vi), Valero states that in their experience, under-dispenser sensors caused maintenance and operational issues that led to a decrease in release detection confidence and indicate that they currently rely on gravity flow from dispenser sumps to submersible turbine pump sumps at the tanks where sensors are located. Valero asks whether liquid sensors independent of the Automatic Tank Gauge are allowed and asks that the requirement for liquid sensors only be applicable to new tanks, lines or dispensers with secondary containment that is utilized for release detection.

The commission responds that the rules do not disallow sensors which are independent of an Automatic Tank Gauge. The commission further responds that the intent of the rules is to require liquid sensors in all sumps (including dispenser sumps) and manways regardless of whether they are utilized for release detection and therefore the proposed language will remain unchanged.

Regarding proposed §334.45(d)(1)(E)(vii), Valero recommends that the requirement to remove and properly dispose of liquids in sumps or manways within 48 hours of alert or discovery be increased to 96 hours and that the requirement only be applicable to new tanks, lines or dispensers with secondary containment that is utilized for release detection. ExxonMobil is concerned that 48 hours is insufficient time to properly respond to a sensor report of water in a sump, citing the possibility of water discovered on a Friday which might have to be removed on an emergency basis before Monday. ICE is concerned that the requirement for removal of all liquids regardless of situation will result in maintenance activities and costs which are both unnecessary to protect the environment and costly. ICE suggests that the language be modified to state "liquids in sumps or manways which interfere with the intended purpose and performance of the tank system shall be promptly removed."

The commission responds that the intent of the language is to require that all sumps (including dispenser sumps) and manways regardless of whether they are utilized for release detection be maintained reasonably free of liquids which could interfere with their function of the equipment which may by housed within them; therefore, the requirements of this clause will not be restricted to only sumps and manways utilized for release detection. The commission does agree that the 48-hour requirement for removal and proper disposal of liquids should be increased and has increased it to 72 hours.

Regarding proposed §334.45(d)(1)(E)(viii), Valero maintains that the requirement to report the presence of 1/8 inch or more of free product in an sump or manway as a suspected release is unrealistic and over-burdensome. 7-Eleven pointed out that the reference in the requirement (§334.74(4)) is in error. ExxonMobil believes that treating 1/8 inch of product in a sump as a suspected release is inappropriate and feels that a more significant level of material, such as 1/4 inch should trigger the reporting requirement.

The commission responds that current release reporting requirements are sufficient without the need for the additional language at §334.45(d)(1)(E)(viii) and has removed the clause.

Regarding proposed §334.45(d)(1)(E)(ix), Valero requests a detailed interpretation of the term "qualified person" as it applies to inspections and testing and of any requirements/processes the agency will use to implement/enforce the requirements of the clause. Valero also requests that this requirement only be applicable to new tanks, lines or dispensers with secondary containment that is utilized for release detection.

The commission responds that although it considers the proposed language adequate, to assure that the requirements of this clause are straightforward and easily understood, the clause has been revised to address related requirements more specifically and in greater detail. The commission further responds that the requirements of this clause are intended to apply to all new tanks or lines (including related sumps or manways) and/or dispenser sumps, regardless of whether they are utilized for release detection; therefore, the applicability of the clause will not be restricted to only new tanks, lines or dispensers with secondary containment that is utilized for release detection.

Regarding proposed §334.47(b)(1)(C), 7-Eleven maintains that requiring field installed cathodic protection for underground metal components which are not isolated from soil, backfill and groundwater "or any other water" could trigger a retrofit of cathodic protection for sumps which have failed liquid tightness tests and recommends inserting the phrase "not intended to be" before the word isolated in the subparagraph.

The commission responds that the addition of the term "or any other water" to the list of media which underground metal components either need to be isolated from or be equipped with cathodic protection was intentional, and therefore the proposed language will not be changed.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §334.2, §334.8

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The adopted amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The adopted amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805378
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
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SUBCHAPTER B. UNDERGROUND STORAGE TANK FEES

30 TAC §334.21

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The adopted amendment implements TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The adopted amendment also implements certain UST tank provisions of the federal Energy Policy Act of 2005.

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

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SUBCHAPTER C. TECHNICAL STANDARDS

30 TAC §§334.42, 334.45, 334.47, 334.49, 334.50, 334.54

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The adopted amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The adopted amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

§334.42. General Standards.

(a) All components of any new or existing underground storage tank (UST) system subject to the provisions of this subchapter shall be designed, installed, and operated in a manner that will prevent releases of regulated substances due to structural failure or corrosion.

(b) For all components of any new or existing UST system subject to the provisions of this subchapter which contain, have contained, or will contain a regulated substance, the surfaces of such components which are in direct contact with the regulated substance shall be constructed of or lined with materials that are compatible with the substance stored in such components. Any compatibility determination or analysis shall be in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(c) The owners and operators of UST systems subject to the provisions of this subchapter and those persons and/or business entities who engage in, perform, or supervise the installation, repair, or

removal of UST systems shall be responsible for ensuring that those UST systems are designed, installed, repaired, removed, and operated in accordance with the provisions of this subchapter, as provided under §334.12(b) of this title (relating to Other General Provisions) and under the provisions of Chapter 70 of this title (relating to Enforcement).

(d) When provisions of this subchapter require compliance with a specific code or standard of practice developed by a nationally recognized association or independent testing laboratory, the most recent version of the referenced code in effect at the time of the regulated UST activity shall be applicable.

(e) Compliance with the provisions of this subchapter shall not relieve an owner or operator of an UST system from compliance with other applicable regulations legally developed by other governmental entities. This requirement is more fully discussed in §334.12(a) of this title.

(f) Unless otherwise stated in a variance approved by the agency in accordance with §334.43 of this title (relating to Variances and Alternative Procedures), the requirements of this subchapter shall take precedence if and when such requirements are determined to be in conflict with any provisions contained in the following:

(1) any code or standard of practice developed by a nationally recognized association or independent testing laboratory; and

(2) the manufacturers' specifications and instructions for installation and operation of UST equipment.

(g) Any underground component of an UST system installed on or after September 29, 1989, shall be properly protected from corrosion by one or more of the allowable methods in §334.49(b) of this title (relating to Corrosion Protection).

(h) Any new tank or line or dispenser installed as part of a UST system on or after January 1, 2009, shall incorporate secondary containment meeting the applicable requirements of §334.45(d) of this title (relating to Technical Standards for New Underground Storage Tank Systems).

(i) Any sumps (including dispenser sumps) or manways installed prior to January 1, 2009, which are utilized as an integral part of a UST release detection system, and any overspill containers or catchment basins installed at any time, which are associated with a UST system must be inspected at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid tight. Any liquids or debris found in them during an inspection must be removed and properly disposed of within 72 hours of discovery.

§334.45. Technical Standards for New Underground Storage Tank Systems.

(a) General requirements.

(1) Any new underground storage tank (UST) system installed on or after the effective date of this subchapter shall be in compliance with the provisions of this section during the entire operational life of the UST system.

(2) Any new UST system shall be designed, installed, and operated in a manner that will prevent releases due to structural failure or corrosion for the operational life of the UST system.

(3) The surfaces of all components of the new UST system which are in direct contact with a regulated substance shall be constructed of or lined with materials that are compatible with such regulated substances.

(4) All components of the new UST system which convey, contain, or store regulated substances shall be properly protected from corrosion in accordance with the applicable provisions in §334.49 of this title (relating to Corrosion Protection).

(5) All tanks, piping, and other ancillary equipment in a new UST system shall be installed in accordance with the requirements of §334.46 of this title (relating to Installation Standards for New Underground Storage Tank Systems).

(b) Technical standards for new tanks.

(1) Tank design and construction. Each new tank shall be properly designed, constructed, and protected from corrosion in accordance with one or more of the methods listed in subparagraphs (A) - (G) of this paragraph, and in accordance with specific codes and standards of practice developed by nationally recognized associations and independent testing laboratories, as referenced in the following subparagraphs:

(A) The tank may be constructed of fiberglass-reinforced plastic. Tanks constructed under this method shall meet UL Standard 1316, "Standard for Safety for Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures;

(B) The tank may be constructed of coated steel and equipped with a factory-installed cathodic corrosion protection system. Any tank constructed under this method shall be thoroughly coated with a suitable dielectric material, shall be equipped with a factory-installed cathodic corrosion protection system meeting the appropriate design and operational requirements in §334.49(c)(1) of this title, and shall meet the following standards:

(i) UL Standard 58, "Standard for Safety for Steel Underground Tanks for Flammable and Combustible Liquids"; and

(ii) Part I of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks", or STI Standard, "Specification for sti-P_3 System of External Corrosion Protection of Underground Steel Storage Tanks."

(C) The tank may be constructed of coated steel and equipped with a field-installed cathodic corrosion protection system. Any tank constructed under this method shall be thoroughly coated with a suitable dielectric material, shall be equipped with a field-installed cathodic protection system meeting the appropriate design and operational requirements in §334.49(c)(2) of this title, and shall meet the following standards:

(i) UL Standard 58, "Standard for Safety for Steel Underground Tanks for Flammable and Combustible Liquids"; and

(ii) NACE International Standard RP0285-95, "Corrosion Control of Underground Storage Tank Systems by Cathodic Protection."

(D) The tank may be factory-constructed either as a steel/fiberglass-reinforced plastic composite tank, or as a steel tank with a bonded fiberglass-reinforced plastic external cladding or as a steel tank with a bonded fiberglass reinforced polyurethane coating. Any tank constructed under this method is not required to be equipped with a cathodic protection system, provided that the tank meets the following requirements:

(i) The tank shall be equipped with a factory-applied external fiberglass-reinforced plastic or fiberglass reinforced polyurethane cladding or laminate which has a total dry film thickness of 100 mils minimum and 125 mils nominal;

(ii) The tank shall be operated and maintained in accordance with the requirements of §334.49 of this title;

(iii) The tank shall be designed and fabricated in accordance with one or more of the following standards:

(I) Part II of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks";

(II) Steel Tank Institute (STI) ACT-100, "Specification for External Corrosion Protection of FRP Composite Steel Underground Storage Tanks"; or

(III) any other UL, or STI, or Underwriters' Laboratories of Canada (ULC) standard which incorporates the requirements contained in the standards listed in either subclause (I) or (II) of this clause; and

(iv) The tank shall be electrically isolated from all other metallic structures by use of dielectric bushings or other appropriate methods utilized in accordance with applicable industry standards.

(E) The tank may be factory-constructed as a steel tank with a bonded polyurethane external coating. Any tank constructed under this method is not required to be equipped with a cathodic protection system, provided that the tank meets the following requirements:

(i) The tank shall be equipped with a factory-applied external polyurethane coating which has a minimum dry film thickness of 70 mils;

(ii) The tank shall be operated and maintained in accordance with the applicable requirements of §334.49 of this title;

(iii) The tank shall be designed and fabricated in accordance with one or more of the following standards:

(I) Part IV of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks";

(II) Steel Tank Institute (STI) ACT-100-U, "Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks"; or

(III) any other UL, or STL, or Underwriters' Laboratories of Canada (ULC) standard which incorporates the requirements contained in the standards listed in either subclause (I) or (II) of this clause; and

(iv) The tank shall be electrically isolated from all other metallic structures by use of dielectric bushings or other appropriate methods utilized in accordance with applicable industry standards.

(F) The tank may be factory-constructed as a steel tank completely contained within a nonmetallic external tank jacket. Any tank constructed under this method is not required to be equipped with a cathodic protection system, provided that the tank meets the following requirements:

(i) The tank shall be equipped with a factory-constructed nonmetallic external jacket which provides both secondary containment and corrosion protection;

(ii) The tank shall be operated and maintained in accordance with the applicable requirements of §334.49 of this title;

(iii) The tank shall be designed and fabricated in accordance with the following:

(I) Part III of UL Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks"; or

(II) any other UL, or STI, or Underwriters' Laboratories of Canada (ULC) standard which incorporates the requirements contained in the standard listed in subclause (I) of this clause; and

(iv) The tank shall be electrically isolated from all other metallic structures by use of dielectric bushings or other appropriate methods utilized in accordance with applicable industry standards.

(G) The tank may be designed, constructed, and protected from corrosion by an alternate method which has been reviewed and determined by the agency to control corrosion and prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and safety and the environment than the methods described in subparagraphs (A) - (D) of this paragraph, in accordance with the procedures in §334.43 of this title (relating to Variances and Alternative Procedures).

(2) Spill and overfill prevention equipment. All new tanks shall be equipped with spill and overfill prevention equipment, in accordance with §334.51(b) of this title (relating to Spill and Overfill Prevention and Control).

(3) Release detection for new tanks. All new tanks shall be monitored for releases of regulated substances in accordance with §334.50 of this title (relating to Release Detection).

(4) Other new tank components.

(A) Fittings. All metallic tank fittings (e.g., bung hole plugs) shall be protected from corrosion and shall be either:

(i) isolated from the backfill material and groundwater or any other water;

(ii) thoroughly coated with a suitable dielectric material, in accordance with the tank manufacturer's specifications; or

(iii) cathodically protected in accordance with the applicable provisions in §334.49(c) of this title.

(B) Striker plates. Factory-installed striker plates shall be located on the interior bottom surface of each tank under all fill and gauge openings.

(C) Dielectric bushings or fittings. In order to provide electrical isolation of the tank from other connected metal components, all coated steel tanks equipped with either a factory-installed cathodic protection system or a factory-applied fiberglass-reinforced plastic laminate or cladding shall also be fitted with dielectric bushings or fittings at each tank opening where other metal UST system components are connected, except for unused openings closed with metal plugs and for openings where the connected component is non-metallic.

(c) Technical standards for new piping.

(1) Piping design and construction. All new underground piping (including associated valves, fittings, and connectors) in an UST system shall be properly designed, constructed, and protected from corrosion in accordance with one of the methods listed in subparagraphs (A) - (D) of this paragraph and in accordance with specific codes and standards of practice developed by nationally recognized associations and independent testing laboratories, as referenced in the following subparagraphs.

(A) The piping may be constructed of fiberglass-reinforced plastic. Piping constructed under this method shall meet the following standards:

(i) UL Standard 971, "Standard for Safety for Nonmetallic Underground Piping for Flammable Liquids"; and

(ii) UL Standard 567, "Standard for Safety for Pipe Connectors for Petroleum Products and LP Gas."

(B) The piping may be constructed of coated steel. Piping constructed under this method shall be thoroughly coated with a suitable dielectric material, shall be cathodically protected with a field-installed cathodic protection system meeting the appropriate design and operational requirements in §334.49(c) of this title, and shall meet the applicable provisions of the following standards.

(i) NFPA Standard 30, "Flammable and Combustible Liquids Code";

(ii) API Publication 1615, "Installation of Underground Petroleum Storage Systems";

(iii) API Publication 1632, "Cathodic Protection of Underground Storage Tanks and Piping Systems"; and

(iv) NACE International Standard RP0169-96, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems."

(C) The piping may be constructed of flexible nonmetallic material. Piping constructed under this method shall meet the following standards:

(i) UL Standard 971, "Standard for Safety for Nonmetallic Underground Piping for Flammable Liquids"; and

(ii) UL Standard 567, "Standard for Safety for Pipe Connectors for Petroleum Products and LP Gas."

(D) The piping may be designed, constructed, and protected from corrosion by an alternate method which has been reviewed and determined by the agency to prevent the release of any stored regulated substance in a manner that is no less protective of human health and the environment than the methods described in subparagraphs (A) and (B) of this paragraph. Any alternative methods must be submitted and approved in accordance with the procedures in §334.43 of this title.

(2) Release detection for new piping. All new piping shall be monitored for releases of regulated substances in accordance with §334.50(b)(2) of this title.

(3) Other new piping components.

(A) For piping systems in which regulated substances are conveyed under pressure to an aboveground dispensing unit, a UL-listed (or agency accepted equivalent listing by Underwriters' Laboratories of Canada (ULC)) emergency shutoff valve (also called a shear or impact valve) shall be installed in each pressurized delivery or product line and shall be securely anchored at the base of the dispenser. This shut-off valve shall include a fusible link, and shall be designed to provide a positive shut-off of product flow in the event that a fire, collision, or other emergency occurs at the dispenser end of the pressurized line.

(B) UL-listed (or agency accepted equivalent listing by Underwriter's Laboratories of Canada (ULC), or Factory Mutual Research Corporation (FMRC)) flexible connectors shall be installed at both ends of each pressurized product or delivery line to provide flexibility and to allow for vertical and horizontal movement in the piping, unless inherently flexible piping is installed in accordance with manufacturer's requirements and in accordance with an applicable code or standard of practice developed by a nationally recognized association or independent testing laboratory. The use of metal swing joints in a pressurized UST piping system is specifically prohibited.

(C) If buried and in contact with soil or backfill materials, all metallic pipe, valves, and fittings (including flexible connectors) shall be equipped with corrosion protection meeting the applicable requirements in §334.49 of this title.

(D) Only UL-listed (or agency accepted equivalent listing by Underwriters' Laboratories of Canada (ULC), or Factory Mutual Research Corporation (FMRC)) flexible connectors or nonmetallic piping listed for aboveground use or listed for use in sumps can be used without backfill cover in sumps, manways, or dispenser pans.

(d) Secondary containment for UST systems.

(1) Applicability.

(A) A secondary containment system meeting the requirements of this subsection shall be installed as part of any hazardous substance UST system, in accordance with the applicable schedules in §334.44(a)(2) and (b)(2) of this title (relating to Implementation Schedules).

(B) A double-wall tank and piping system (or approved alternative) meeting the applicable requirements of this subchapter shall be installed for any UST system situated in the Edwards Aquifer recharge or transition zones, in accordance with Chapter 213 of this title (relating to Edwards Aquifer).

(C) An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision.

(D) The agency may specifically require the installation of a secondary containment system meeting the requirements of this subsection at other times when necessary for the protection of human health or safety or the environment.

(E) Requirements applicable to new tanks, lines and/or dispensers (including related sumps or manways) installed on or after January 1, 2009:

(i) Any new tank or line installed as part of a UST system must incorporate secondary containment in accordance with the applicable requirements of this subchapter, except that external liners will not be allowed as a secondary containment method.

(ii) Up to 20% of the total original length of an existing single wall line can be replaced with new single wall line in accordance with the applicable requirements of this subchapter without triggering the secondary containment requirement for that line, unless the new line segment connects the existing line to a new dispenser. If more than 20% of the total original length of an existing single wall line is to be replaced, or the new line segment connects the existing line to a new dispenser, that line must be replaced in its entirety with one which incorporates secondary containment.

(iii) The interstice of the secondarily contained tank and/or line must be monitored in accordance with the requirements of §334.50(d)(7) of this title.

(iv) Any sumps or manways included in a new secondarily contained UST system which are utilized as an integral part of a UST release detection system must be compatible with the stored substance(s), must be installed and maintained in a manner that assures that their sides, bottoms, and any penetration points are liquid tight, and must be inspected for tightness annually and tested for tightness immediately after installation and at least once every three years thereafter.

(v) Under-dispenser containment in the form of a dispenser sump is required for any new dispenser. A new dispenser is defined as:

(I) any dispenser which is installed where none previously existed; or

(II) any existing dispenser which is removed and replaced with another dispenser and transitional piping components beneath the replacement dispenser (e.g., flexible connectors or piping risers) which serve to connect the dispenser to the underground piping are replaced. Each new dispenser must employ a dispenser sump which is compatible with the stored substance, is installed and maintained in a manner that assures that its sides, bottoms, and any penetration points are liquid tight, and must be inspected for tightness annually and tested for tightness, immediately after installation and at least once every three years thereafter.

(vi) All sumps (including dispenser sumps) and/or manways must be equipped with a liquid sensing probe/s which will alert the UST system owner or operator if more than two inches of liquid collects in any sump or manway.

(vii) Liquids in sumps or manways must be removed and properly disposed of within 72 hours of alert or discovery.

(viii) Inspections and testing:

(I) Inspections must be performed by a qualified person who is competent to conduct the inspection in accordance with recognized industry practices and in accordance with industry standards, if applicable.

(II) Testing of tanks and/or lines shall be performed in accordance with the applicable requirements of this chapter. Testing of sumps or manways (including dispenser sumps) must be performed by a qualified person who is competent to conduct the inspection in accordance with recognized industry practices and in accordance with industry standards, if applicable.

(2) General performance standards. All secondary containment systems installed as part of a UST system shall be:

(A) designed, installed, and operated in a manner that will prevent the release of regulated substances from such secondary containment system into the surrounding soil, backfill, groundwater, or surface water during the operational life of the UST system;

(B) capable of collecting and containing releases of regulated substances from any portion of the primary containment vessels (e.g., tanks and piping) until such released substances are removed;

(C) constructed of or lined with materials which are compatible with the stored regulated substance;

(D) constructed of materials having sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrological forces), physical contact with the stored regulated substance (and any other substance to which they may normally be exposed), climatic conditions, the stresses of installation, and the stresses of daily operation (including stresses from nearby vehicular traffic); and

(E) installed on a properly designed and properly placed bedding or backfill material which is capable of providing adequate support for the secondary containment system, capable of providing adequate resistance to any pressure gradients above and below the system, and capable of preventing failure due to settlement, compression, or uplift.

(3) Secondary containment for tanks. One or more of the following methods may be used to provide secondary containment for tanks.

(A) Double-wall tanks. Double-wall tanks may be used to comply with the secondary containment requirements of this subchapter, provided that such tanks shall meet the following additional provisions.

(i) The secondary wall of such double-wall tanks shall be structurally designed to contain and support the full-load capacity of the primary tank without failure.

(ii) The double-wall tank (including both the primary and secondary tank walls) shall be protected from corrosion in accordance with one or more of the allowable methods included in §334.49 of this title.

(iii) The double-wall tank shall be designed, installed, operated, and maintained in accordance with one of the applicable codes or standards of practice listed as follows:

(I) for fiberglass-reinforced plastic tanks: UL Standard 1316, "Standard for Safety for Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products, Alcohols, and Alcohol-Gasoline Mixtures."

(II) for steel tanks: STI Standard, "Standard for Dual Wall Underground Steel Storage Tanks," UL Standard 58, "Standard for Safety for Steel Underground Tanks for Flammable and Combustible Liquids," and other applicable UL standards for double-wall steel tanks; and

(III) any other code or standard of practice developed by a nationally recognized association or independent testing laboratory that has been reviewed and determined by the agency to be no less protective of human health and safety, and the environment than the standards described in subclauses (I) and (II) of this clause, in accordance with procedures in §334.43 of this title.

(iv) The double-wall tank system shall be installed in accordance with the requirements in §334.46(f)(2) of this title.

(B) External liners. Tank excavation liners may be used to comply with the secondary containment requirements of this paragraph, provided that such liners shall meet the following additional provisions.

(i) The tank excavation liner shall consist of an artificially constructed material that is of sufficient strength, thickness, puncture-resistance, and impermeability (i.e., allow permeation at a rate of no more than 0.25 ounces per square foot per 24 hours for the stored regulated substance) in order to permit the collection and containment of any releases from the UST system. The criteria for evaluation of the liner for compliance with this clause shall be in accordance with accepted industry practices for materials testing. Types of liners which may be used include certain reinforced and unreinforced flexible-membrane liners, rigid fiberglass-reinforced plastic liners, and reinforced concrete vaults.

(ii) The liner shall be protected from corrosion in accordance with one or more of the allowable methods included in §334.49 of this title.

(iii) The liner shall be sufficiently compatible with the stored regulated substance, so that any regulated substance collected in the liner system shall not cause any substantial deterioration of the liner that would allow the regulated substances to be released into the environment.

(iv) The liner shall be designed to provide a containment volume of no less than 100% of the full capacity of the largest tank within its containment area.

(v) The liner shall be installed in accordance with the requirements in §334.46(f)(4) of this title.

(4) Secondary containment for piping. One or more of the following methods shall be used to provide secondary containment for piping.

(A) Double-wall piping. Double-wall piping systems may be used to comply with the secondary containment requirements of this subchapter, provided that such piping systems meet the following additional provisions.

(i) The double-wall piping system shall be designed to contain a release from any portion of the primary piping within the secondary piping walls.

(ii) The double-wall piping system (including both the primary and secondary piping) shall be protected from corrosion in accordance with one or more of the allowable methods included in §334.49 of this title.

(iii) The double-wall piping system shall be designed, installed, and operated in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(iv) The double-wall piping system shall be installed in accordance with the requirements in §334.46(f)(3) of this title.

(B) External liners. External piping trench liners may be used to comply with the secondary containment requirements of this paragraph, provided that such liners meet the additional provisions in paragraph (3)(B) of this subsection.

(e) Technical standards for other new UST system equipment.

(1) Vent lines. All underground portions of the vent lines (including all associated underground valves, fittings, and connectors) shall be designed and constructed in accordance with the piping requirements in subsection (c)(1) of this section, shall be properly protected from corrosion in accordance with one of the allowable methods in §334.49 of this title, and shall be installed in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(2) Fill pipes. All fill pipes (including any connected fittings) shall be:

(A) designed and constructed in accordance with the piping requirements in subsection (c)(1) of this section;

(B) properly protected from corrosion in accordance with one of the allowable methods in §334.49 of this title;

(C) properly enclosed in or equipped with spill and overfill prevention equipment as required in §334.51(b) of this title; and

(D) equipped with a removable or permanent factory-constructed drop tube which shall extend to within 12 inches of the tank bottom.

(3) Release detection equipment. All release detection equipment shall be designed and constructed in accordance with the requirements for the particular type of equipment, as described in the applicable provisions in §334.50 of this title.

(4) Monitoring wells and observation wells.

(A) All monitoring wells and observation wells installed on or after the effective date of this subchapter shall be designed, constructed, and installed in accordance with the requirements in §334.46(g) of this title.

(B) Each separate tank hole in a new UST system installed on or after the effective date of this subchapter shall include a minimum number of four-inch diameter (nominal) observation wells, as specified in the following clauses:

(i) for a tank hole containing only one tank, a minimum of one observation well shall be required; and

(ii) for a tank hole containing two or more tanks, a minimum of two observation wells shall be required.

(f) Records for technical standards for new UST systems. Owners and operators of new UST systems shall maintain adequate records to demonstrate compliance with the applicable provisions in this section, which at a minimum, shall include all records required in §334.46(i) of this title. All records shall be maintained in accordance with §334.10(b) of this title (relating to Reporting and Recordkeeping).

§334.50. Release Detection.

(a) General requirements.

(1) Owners and operators of new and existing underground storage tank (UST) systems shall provide a method, or combination of methods, of release detection which shall be:

(A) capable of detecting a release from any portion of the UST system which contains regulated substances including the tanks, piping, and other underground ancillary equipment;

(B) installed, calibrated, operated, maintained, utilized, and interpreted (as applicable) in accordance with the manufacturer's and/or methodology provider's specifications and instructions consistent with the other requirements of this section, and by personnel possessing the necessary experience, training, and competence to accomplish such requirements; and

(C) capable of meeting the particular performance requirements of such method (or methods) as specifically prescribed in this section, based on the performance claims by the equipment manufacturer or methodology provider/vendor, as verified by third-party evaluation conducted by a qualified independent testing organization, using applicable United States Environmental Protection Agency protocol, provided that the following additional requirements shall also be met.

(i) Any performance claims, together with their bases or methods of determination including the summary portion of the independent third-party evaluation, shall be obtained by the owner and/or operator from the equipment manufacturer, methodology provider, or installer and shall be in writing.

(ii) When any of the following release detection methods are used on or after December 22, 1990 (except for methods permanently installed and in operation prior to that date), such method shall be capable of detecting the particular release rate or quantity specified for that method such that the probability of detection shall be at least 95% and the probability of false alarm shall be no greater than 5.0%:

(I) tank tightness testing, as prescribed in subsection (d)(1)(A) of this section;

(II) automatic tank gauging, as prescribed in subsection (d)(4) of this section;

(III) automatic line leak detectors for piping, as prescribed in subsection (b)(2)(A)(i) of this section;

(IV) piping tightness testing, as prescribed in subsection (b)(2)(A)(ii)(I) of this section;

(V) electronic leak monitoring systems for piping, as prescribed in subsection (b)(2)(A)(ii)(III) of this section; and

(VI) statistical inventory reconciliation (SIR), as prescribed in subsection (d)(9) of this section.

(2) When a release detection method operated in accordance with the particular performance standards for that method indicates that a release either has or may have occurred, the owners and operators shall comply with the applicable release reporting, investigation, and corrective action requirements in Subchapter D of this chapter (relating to Release Reporting and Corrective Action).

(3) Owners and operators of all UST systems shall comply with the release detection requirements of this section in accordance with the applicable schedules in §334.44 of this title (relating to Implementation Schedules).

(4) As prescribed in §334.47(a)(2) of this title (relating to Technical Standards for Existing Underground Storage Tank Systems), any existing UST system that cannot be equipped or monitored with a method of release detection that meets the requirements of this section shall be permanently removed from service in accordance with the applicable procedures in §334.55 of this title (relating to Permanent Removal from Service) no later than 60 days after the implementation date for release detection as prescribed by the applicable schedules in §334.44 of this title.

(5) Any owner or operator who plans to install a release detection method for a UST system shall comply with the applicable construction notification requirements in §334.6 of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems), and upon completion of the installation of such method shall also comply with the applicable registration and certification requirements of §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) and §334.8 of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems).

(6) Any equipment installed or used for conducting release detection for a UST system shall be listed, approved, designed, and operated in accordance with standards developed by a nationally recognized association or independent testing laboratory (e.g., UL) for such installation or use, as specified in §334.42(d) of this title (relating to General Standards).

(7) For a UST system to be placed temporarily out-of-service, the owner or operator must comply with the requirements of §334.54(c) of this title (relating to Temporary Removal from Service).

(b) Release detection requirements for all UST systems. Owners and operators of all UST systems shall ensure that release detection equipment or procedures are provided in accordance with the following requirements.

(1) Release detection requirements for tanks.

(A) Except as provided in subparagraphs (B) and (C) of this paragraph and in subsection (d)(9) of this section, all tanks shall be monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods described in subsection (d)(4) - (10) of this section).

(B) A combination of tank tightness testing and inventory control in accordance with subsection (d)(1) of this section may be used as an acceptable release detection method for tanks only until December 22, 1998, and the required frequency of the tank tightness test shall be based on the following criteria.

(i) A tank tightness test shall be conducted at least once each year for any tank in an existing UST system which is not being operated in violation of the upgrading or replacement schedule in §334.44(b) of this title, but has not yet been either:

(I) replaced with a UST system meeting the applicable technical and installation standards in §334.45 of this title (relating to Technical Standards for New Underground Storage Tank Systems) and §334.46 of this title (relating to Installation Standards for New Underground Storage Tank Systems); or

(II) retrofitted or equipped in accordance with the minimum upgrading requirements applicable to existing UST systems in §334.47 of this title.

(ii) A tank tightness test shall be conducted at least once every five years for any tank in a UST system which has been either:

(I) installed in accordance with the applicable technical standards for new UST systems in §334.45 and §334.46 of this title; or

(II) retrofitted or equipped in accordance with the minimum upgrading requirements applicable to existing UST systems in §334.47 of this title.

(C) The manual tank gauging method of release detection, as prescribed in subsection (d)(2) of this section, may be used as the sole release detection system only for a petroleum substance tank with a nominal capacity of 1,000 gallons or less. The monthly tank gauging method of release detection, as prescribed in subsection (d)(3) of this section, may be used as the sole release detection system only for emergency generator tanks.

(D) In addition to the requirements in subparagraphs (A) - (C) of this paragraph, any tank in a hazardous substance UST system shall also be equipped with a secondary containment system and related release detection equipment, as prescribed in subsection (c) of this section.

(2) Release detection for piping. Piping in a UST system shall be monitored in a manner which will detect a release from any portion of the piping system, in accordance with the following requirements.

(A) Requirements for pressurized piping. UST system piping that conveys regulated substances under pressure shall be in compliance with the following requirements.

(i) Each separate pressurized line shall be equipped with an automatic line leak detector meeting the following requirements.

(I) The line leak detector shall be capable of detecting any release from the piping system of three gallons per hour when the piping pressure is at ten pounds per square inch.

(II) The line leak detector shall be capable of alerting the UST system operator of any release within one hour of occurrence either by shutting off the flow of regulated substances, or by substantially restricting the flow of regulated substances.

(III) The line leak detector shall be tested at least once per year for performance and operational reliability and shall be properly calibrated and maintained, in accordance with the manufacturer's specifications and recommended procedures.

(ii) In addition to the required line leak detector prescribed in clause (i) of this subparagraph, each pressurized line shall also be tested or monitored for releases in accordance with at least one of the following methods.

(I) The piping may be tested at least once per year by means of a piping tightness test conducted in accordance with a code or standard of practice developed by a nationally recognized as-

sociation or independent testing laboratory. Any such piping tightness test shall be capable of detecting any release from the piping system of 0.1 gallons per hour when the piping pressure is at 150% of normal operating pressure.

(II) Except as provided in subsection (d)(9) of this section, the piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(III) The piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by means of an electronic leak monitoring system capable of detecting any release from the piping system of 0.2 gallons per hour at normal operating pressure.

(B) Requirements for suction piping and gravity flow piping.

(i) Except as provided in clause (ii) of this subparagraph, each separate line in a UST piping system that conveys regulated substances either under suction or by gravity flow shall meet at least one of the following requirements.

(I) Each separate line may be tested at least once every three years by means of a positive or negative pressure tightness test applicable to underground product piping and conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping test shall be capable of detecting any release from the piping system of 0.1 gallons per hour.

(II) Each line may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(ii) No release detection methods are required to be installed or applied for any piping system that conveys regulated substances under suction when such suction piping system is designed and constructed in accordance with the following standards:

(I) the below-grade piping operates at less than atmospheric pressure;

(II) the below-grade piping is sloped so that all the contents of the pipe will drain back into the storage tank if the suction is released;

(III) only one check valve is included in each suction line;

(IV) the check valve is located aboveground, directly below and as close as practical to the suction pump; and

(V) verification that the requirements under subclauses (I) - (IV) of this clause have been met can be provided in the form of:

(-a-) signed as-built drawings or plans provided by the installer or by a professional engineer who is duly licensed to practice in Texas; or

(-b-) signed written documentation provided by a UST contractor who is properly registered with the agency, by a UST installer who is properly licensed with the agency, or by a professional engineer who is duly licensed to practice in Texas.

(C) Monitoring secondary containment. In addition to the requirements in subparagraphs (A) and (B) of this paragraph, all piping in a hazardous substance UST system shall also be equipped with a secondary containment system and related release detection equipment, as prescribed in subsection (c) of this section.

(c) Additional release detection requirements for hazardous substance UST systems. In addition to the release detection requirements for all UST systems prescribed in subsections (a) and (b) of this section, owners and operators of all hazardous substance UST systems shall also assure compliance with the following additional requirements.

(1) All new hazardous substance UST systems shall be in compliance with the requirements of paragraph (3) of this subsection for the entire operational life of the system.

(2) All existing hazardous substance UST systems shall be brought into compliance with the requirements of paragraph (3) of this subsection no later than December 22, 1998.

(3) Secondary containment and monitoring.

(A) All hazardous substance UST systems (including tanks and piping) shall be equipped with a secondary containment system which shall be designed, constructed, installed, and maintained in accordance with §334.45(d) and §334.46(f) of this title.

(B) All hazardous substance UST systems (including tanks and piping) shall include one or more of the release detection methods or equipment prescribed in subsection (d)(7) - (10) of this section, which shall be capable of monitoring the space between the primary tank and piping walls and the secondary containment wall or barrier.

(d) Allowable methods of release detection. Tanks in a UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in a UST system may be monitored for releases using one or more of the methods included in paragraphs (5) - (10) of this subsection. Any method of release detection for tanks and/or piping in this section shall be allowable only when installed (or applied), operated, calibrated, and maintained in accordance with the particular requirements specified for such method in this subsection.

(1) Tank tightness testing and inventory control. A combination of tank tightness testing and inventory control may be used as a tank release detection method only until December 22, 1998, subject to the following conditions and requirements.

(A) Tank tightness test. Any tank tightness test shall be conducted in conformance with the following standards.

(i) The tank tightness test shall be conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(ii) The tank tightness test shall be performed by qualified personnel who possess the requisite experience, training, and competence to conduct the test properly, who are present at the facility and who maintain responsible oversight throughout the entire testing procedure, and who have been certified by the manufacturer or developer of the testing equipment as being qualified to perform the test. The tank tightness test shall be conducted in strict accordance with the testing procedures developed by the system manufacturer or developer.

(iii) The tank tightness test shall be capable of detecting a release of 0.1 gallons per hour from any portion of the tank which contains regulated substances.

(iv) The tank tightness test shall be performed in a manner that will account for the effects of vapor pockets, thermal expansion or contraction of the stored substance, temperature of the

stored substance, temperature stratification, evaporation or condensation, groundwater elevation, pressure variations within the system, tank end deflection, tank deformation, and any other factors that could affect the accuracy of the test procedures.

(B) Inventory control. All inventory control procedures shall be in conformance with the following requirements.

(i) All inventory control procedures shall be in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(ii) Reconciliation of detailed inventory control records shall be conducted at least once each month, and shall be sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons.

(iii) The operator shall assure that the following additional procedures and requirements are followed.

(I) Inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank shall be recorded each operating day.

(II) The equipment used shall be capable of measuring the level of stored substance over the full range of the tank's height to the nearest 1/8 inch.

(III) Substance dispensing shall be metered and recorded within an accuracy of six or less cubic inches for every five gallons of product withdrawn.

(IV) The measurement of any water level in the bottom of the tank shall be made to the nearest 1/8 inch at least once a month, and appropriate adjustments to the inventory records shall be made.

(2) Manual tank gauging. Manual tank gauging may be used as a tank release detection method, subject to the following limitations and requirements.

(A) Manual tank gauging in accordance with this subparagraph may be used as the sole method of tank release detection only for petroleum substance tanks having a nominal capacity of 1,000 gallons or less.

(B) The use of manual tank gauging shall not be considered an acceptable method for meeting the release detection requirements of this section for any tanks with a nominal capacity greater than 1,000 gallons.

(C) When used for compliance with the release detection requirements of this section, the procedures and requirements in the following clauses shall be applicable.

(i) For purposes of this subparagraph only, the following definitions are applicable.

(I) Level measurement--The average of two consecutive liquid level readings from a tank gauge, measuring stick, or other measuring equipment.

(II) Gauging period--A weekly period during which no substance is added to or removed from the tank. The duration of the gauging period is dependant upon tank volume and diameter, as specified in clause (v) of this subparagraph.

(III) Weekly deviation--The variation between the level measurements taken at the beginning and the end of one gauging period, converted to and expressed as gallons.

(IV) Monthly deviation--The arithmetic average of four consecutive weekly deviations, expressed as gallons.

(ii) Any measuring equipment shall be capable of measuring the level of stored substance over the full range of the tank's height to the nearest 1/8 inch.

(iii) Separate liquid level measurements in the tank shall be taken weekly at the beginning and the ending of the gauging period, and the weekly deviation shall be determined from such level measurements.

(iv) Once each month, after four consecutive weekly deviations are determined, a monthly deviation shall be calculated.

(v) For the purposes of the manual tank gauging method of release detection, a release shall be indicated when either the weekly deviation or the monthly deviation exceeds the maximum allowable standards indicated in the following subclauses:

(I) for a tank with a capacity of 550 gallons or less (any tank diameter): minimum duration of gauging period = 36 hours; weekly standard = ten gallons; monthly standard = five gallons;

(II) for a tank with a capacity of 551 gallons to 1,000 gallons (when tank diameter is 64 inches): minimum duration of gauging period = 44 hours; weekly standard = nine gallons; monthly standard = four gallons;

(III) for a tank with a capacity of 551 gallons to 1,000 gallons (when tank diameter is 48 inches): minimum duration of gauging period = 58 hours; weekly standard = 12 gallons; monthly standard = six gallons.

(vi) When either the weekly standard or the monthly standard is exceeded and a suspected release is thereby indicated, the owner or operator shall comply with the applicable release reporting, investigation, and corrective action requirements of Subchapter D of this chapter.

(3) Monthly tank gauging. Monthly tank gauging may be used as a tank release detection method, subject to the following limitations and requirements.

(A) Monthly tank gauging in accordance with this paragraph may be used as the sole method of tank release detection only for emergency generator tanks.

(B) The use of monthly tank gauging shall not be considered an acceptable method for meeting the release detection requirements of this section for any tanks other than emergency generator tanks.

(C) When used for compliance with the release detection requirements of this section, the procedures and requirements in the following clauses shall be applicable.

(i) For purposes of this paragraph only, the following definitions are applicable.

(I) Level measurement--The average of two consecutive liquid level readings from a tank gauge, measuring stick, or other manual or automatic measuring equipment.

(II) Gauging period--A period of at least 36 hours during which no substance is added to or removed from the tank.

(III) Monthly deviation--The variation between the level measurements taken at the beginning and the end of one gauging period, converted to and expressed as gallons.

(ii) Any measuring equipment (whether operated manually or automatically) shall be capable of measuring the level of a stored substance over the full range of the tank's height to the nearest 1/8 inch.

(iii) Separate liquid level measurements in the tank shall be taken at least once monthly at the beginning and the ending of the gauging period, and the monthly deviation shall be determined from such level measurements.

(iv) For the purposes of the monthly tank gauging method of release detection, a release shall be indicated when the monthly deviation exceeds the maximum allowable standards indicated in the following subclauses:

(I) for a tank with a capacity of 550 gallons or less: monthly standard = five gallons;

(II) for a tank with a capacity of 551 gallons to 1,000 gallons: monthly standard = seven gallons;

(III) for a tank with a capacity of 1,001 gallons to 2,000 gallons: monthly standard = 13 gallons;

(IV) for a tank with a capacity greater than 2,000 gallons: monthly standard = 1.0% of the total tank capacity.

(v) When the monthly standard is exceeded and a suspected release is thereby indicated, the owner or operator shall comply with the applicable release reporting, investigation, and corrective action requirements of Subchapter D of this chapter.

(4) Automatic tank gauging and inventory control.

(A) A combination of automatic tank gauging and inventory control may be used as a tank release detection method, subject to the following requirements.

(i) Inventory control procedures shall be in compliance with paragraph (1)(B) of this subsection.

(ii) The automatic tank gauging equipment shall be capable of:

(I) automatically monitoring the in-tank liquid levels, conducting automatic tests for substance loss, and collecting data for inventory control purposes; and

(II) performing an automatic test for substance loss that can detect a release of 0.2 gallon per hour from any portion of the tank which contains regulated substances.

(B) For emergency generator tanks only, automatic tank gauging may be used as a tank release detection method, provided that the automatic tank gauging equipment shall be capable of:

(i) automatically monitoring the in-tank liquid levels;

(ii) conducting continuous automatic tests for substance loss during the periods when the emergency generator engine is not in operation; and

(iii) performing an automatic test for substance loss that can detect a release of 0.2 gallon per hour from any portion of the tank which contains regulated substances.

(5) Vapor monitoring. Equipment and procedures designed to test or monitor for the presence of vapors from the regulated substance (or from a related tracer substance) in the soil gas of the backfilled excavation zone may be used, subject to the following limitations and requirements.

(A) The bedding and backfill materials in the excavation zone shall be sufficiently porous to allow vapors from any released regulated substance (or related tracer substance) to rapidly diffuse through the excavation zone (e.g., gravel, sand, crushed rock).

(B) The stored regulated substance, or any tracer substance placed in the tank system, shall be sufficiently volatile so that, in the event of a substance release from the UST system, vapors will develop to a level that can be readily detected by the monitoring devices located in the excavation zone.

(C) The capability of the monitoring device to detect vapors from the stored regulated substance shall not be adversely affected by the presence of any groundwater, rainfall, and/or soil moisture in a manner that would allow a release to remain undetected for more than one month (not to exceed 35 days).

(D) Any preexisting background contamination in the excavation zone shall not interfere with the capability of the vapor monitoring equipment to detect releases from the UST system.

(E) The vapor monitoring equipment shall be designed to detect vapors from either the stored regulated substance, a component or components of the stored substance, or a tracer substance placed in the UST system, and shall be capable of detecting any significant increase in vapor concentration above preexisting background levels.

(F) Prior to installation of any vapor monitoring equipment, the site of the UST system (within the excavation zone) shall be assessed by qualified personnel to:

(i) ensure that the requirements in subparagraphs (A) - (D) of this paragraph have been met; and

(ii) determine the appropriate number and positioning of any monitor wells and/or observation wells, so that releases into the excavation zone from any part of the UST system can be detected within one month of the release (not to exceed 35 days).

(G) All monitoring wells and observation wells shall be designed and installed in accordance with the requirements of §334.46(g) of this title.

(6) Groundwater monitoring. Equipment or procedures designed to test or monitor for the presence of regulated substances floating on, or dissolved in, the groundwater in the excavation zone may be used, subject to the following limitations and requirements.

(A) The stored regulated substance shall be immiscible in water and shall have a specific gravity of less than one.

(B) The natural groundwater level shall never be more than 20 feet (vertically) from the ground surface, and the hydraulic conductivity of the soils or backfill between all parts of the UST system and the monitoring points shall not be less than 0.01 centimeters per second (i.e., the soils or backfill shall consist of gravels, coarse to medium sands, or other similarly permeable material).

(C) Any automatic monitoring devices that are employed shall be capable of detecting the presence of at least 1/8 inch of free product on top of the groundwater in the monitoring well or observation well. Any manual monitoring method shall be capable of detecting a visible sheen or other accumulation of regulated substances in, or on, the groundwater in the monitoring well or observation well.

(D) Any preexisting background contamination in the monitored zone shall not interfere with the capability of the groundwater monitoring equipment or methodology to detect releases from the UST system, and the groundwater monitoring equipment or methodology shall be capable of detecting any significant increase above preexisting background levels in the amount of regulated substance floating on, or dissolved in, the groundwater.

(E) Prior to installation of any groundwater monitoring equipment, the site of the UST system (within and immediately below the excavation zone) shall be assessed by qualified personnel to:

(i) ensure compliance with the requirements of subparagraphs (A) and (B) of this paragraph; and

(ii) determine the appropriate number and positioning of any monitoring wells and/or observation wells, so that releases from any part of the UST system can be detected within one month (not to exceed 35 days) of the release.

(F) All monitoring wells and observation wells shall be designed, installed, and maintained in accordance with the requirements in §334.46(g) of this title.

(7) Interstitial monitoring for double-wall or jacketed UST systems. Equipment designed to test or monitor for the presence of regulated substance vapors or liquids in the interstitial space between the inner (primary) and outer (secondary) walls of a double-wall or jacketed UST system may be used, subject to the following conditions and requirements.

(A) Any double-wall UST system using this method of release detection shall be designed, constructed, and installed in accordance with the applicable technical and installation requirements in §334.45(d) and §334.46(f) of this title.

(B) The sampling, testing, or monitoring method shall be capable of detecting any release of stored regulated substances from any portion of the primary tank or piping within one month (not to exceed 35 days) of the release.

(C) The sampling, testing, or monitoring method shall be capable of detecting a breach or failure in the primary wall and the entrance of groundwater or any other water into the interstitial space due to a breach in the secondary wall of the double-wall or jacketed tank or piping system within one month (not to exceed 35 days) of such breach or failure (whether or not a stored regulated substance has been released into the environment).

(8) Monitoring of UST systems with secondary containment barriers. Equipment designed to test or monitor for the presence of regulated substances (liquids or vapors) in the excavation zone between the UST system and an impermeable secondary containment barrier immediately around the UST system may be used, subject to the following conditions and requirements.

(A) Any secondary containment barrier or liner system at a UST system using this method of release detection shall be designed, constructed, and installed in accordance with the applicable technical and installation requirements in §334.45(d) and §334.46(f) of this title.

(B) The sampling, testing, or monitoring method shall be capable of detecting any release of stored regulated substance from any portion of the UST system into the excavation zone between the UST system and the secondary containment barrier within one month (not to exceed 35 days) of the release.

(C) The sampling, testing, or monitoring method shall be designed and installed in a manner that will ensure that groundwater, soil moisture, and rainfall will not render the method inoperative where a release could remain undetected for more than one month (not to exceed 35 days).

(D) Prior to installation of any secondary containment release monitoring equipment, the site of the UST system shall be assessed by qualified personnel to:

(i) ensure that the secondary containment barrier will be positioned above the groundwater level and outside the designated 25-year flood plain, unless the barrier and the monitoring equipment are designed for use under such conditions; and

(ii) determine the appropriate number and positioning of any observation wells.

(E) All observation wells shall be designed and installed in accordance with the requirements in §334.46(g) of this title.

(9) Statistical inventory reconciliation (SIR) and inventory control.

(A) A combination of SIR and inventory control may be used as a release detection method for UST system tanks and lines, subject to the following requirements.

(i) Inventory control procedures must be in compliance with paragraph (1)(B) of this subsection.

(ii) The SIR methodology as utilized by its provider or vendor, or by its vendor-authorized franchisee or licensee or representative must analyze inventory control records in a manner which can detect a release of 0.2 gallons per hour from any part of the UST system.

(iii) The UST system owner and/or operator must take appropriate steps to assure that they receive a monthly analysis report from the entity which actually performs the SIR analysis (either the SIR provider/vendor or the provider/vendor-authorized franchisee or licensee or representative) in no more than 15 calendar days following the last day of the calendar month for which the analysis is performed. This analysis report must, at minimum:

(I) state the name of the SIR provider/vendor and the name and version of the SIR methodology which was utilized for the analysis as they are listed in the independent third-party evaluation of that methodology;

(II) state the name of the company and the individual (or the name of the individual if no company affiliation) who performed the analysis, if it was performed by a provider/vendor-authorized franchisee or licensee or representative;

(III) state the name and address of the facility at which analysis is performed and provide a description of each UST system for which analysis has been performed;

(IV) quantitatively state in gallons per hour for each UST system being monitored: the leak threshold for the month analyzed, and the minimum detectable leak rate for the month analyzed, and the indicated leak rate for the month analyzed;

(V) qualitatively state one of the following for each UST system being monitored: "pass," or "fail," or "inconclusive."

(iv) Any UST system analysis report result other than "pass" must be reported to the agency by the UST system owner or operator as a suspected release in accordance with §334.72 of this title (relating to Reporting of Suspected Releases).

(v) Any UST system analysis report result of "inconclusive" which has not been investigated and quantified as a "pass" (in the form of a replacement UST system analysis report meeting the requirements of clause (iii) of this subparagraph) must be reported to the agency as a suspected release within 72 hours of the time of receipt of the inconclusive analysis report result by the UST system owner or operator.

(B) At least once per calendar quarter, the SIR provider/vendor must select at random, at least one of the individual UST system analyses performed by each of its authorized franchisees or licensees or representatives during that period and audit that analysis to assure that provider/vendor standards are being maintained with regard to the acceptability of inventory control record data, the

acceptability of analysis procedures, and the accuracy of analysis results. The written result of that audit must be provided to the authorized franchisee or licensee or representative and to the owner and/or operator of the audited UST system(s) by the SIR provider/vendor during that calendar quarter. In addition, within 30 days following each calendar quarter, the SIR provider/vendor must provide to the agency a list containing the name and address of each of its authorized franchisees or licensees or representatives which specifies for each one, the name and address of each facility at which one or more UST system audits were performed during the previous calendar quarter.

(10) Alternative release detection method. Any other release detection method, or combination of methods, may be used if such method has been reviewed and determined by the agency to be capable of detecting a release from any portion of the UST system in a manner that is no less protective of human health and safety and the environment than the methods described in paragraphs (1) - (8) of this subsection, in accordance with the provisions of §334.43 of this title (relating to Variances and Alternative Procedures).

(e) Release detection records.

(1) Owners and operators shall maintain the release detection records required in this subsection in accordance with the requirements in §334.10(b) of this title (relating to Reporting and Recordkeeping).

(2) Owners and operators shall maintain records adequate to demonstrate compliance with the release detection requirements in this section, and in accordance with the following minimum requirements.

(A) All appropriate installation records related to the release detection system, as listed in §334.46(i) of this title, shall be maintained for as long as the release detection system is used.

(B) All written performance claims pertaining to any release detection system used, and documentation of the manner in which such claims have been justified, verified, or tested by the equipment manufacturer, methodology provider/vendor, or independent third-party evaluator shall be maintained for as long as the release detection system is used.

(C) Records of the results of all manual and/or automatic methods of sampling, testing, or monitoring for releases (including tank tightness tests) shall be maintained for at least five years after the sampling, testing, or monitoring is conducted.

(D) Records and calculations related to inventory control reconciliation shall be maintained for at least five years from the date of reconciliation.

(E) Written documentation of all service, calibration, maintenance, and repair of release detection equipment permanently located on-site shall be maintained for at least five years after the work is completed. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer shall be retained for as long as the release detection system is used.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805380
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: October 30, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER D. RELEASE REPORTING AND CORRECTIVE ACTION

30 TAC §334.71, §334.84

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The adopted amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The adopted amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805381
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: October 30, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER F. ABOVEGROUND STORAGE TANKS

30 TAC §334.128

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection

of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The adopted amendment implements TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The adopted amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805382
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: October 30, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER H. REIMBURSEMENT PROGRAM

30 TAC §§334.301 - 334.303

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank; and TWC, §26.3573, which allows the commission to use funds from the Petroleum Storage Tank Remediation (PSTR) Account to reimburse an eligible owner or operator or insurer for the expenses of corrective action or to pay the claim of a contractor hired by an eligible owner or operator to perform corrective action.

The adopted amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The adopted amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805383
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: October 30, 2008
Proposal publication date: May 2, 2008
For further information, please call: (512) 239-2548

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TITLE 34. PUBLIC FINANCE

PART 12. STATE EMPLOYEE CHARITABLE CAMPAIGN

CHAPTER 326. CAMPAIGN MANAGEMENT

34 TAC §326.1, §326.5

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts amendments to §326.1, concerning 10% cap; and adopts new §326.5, concerning campaign budget, without changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4821).

The adopted amendment to §326.1 clarifies statutory provisions that subject a fee charged by a campaign manager to a 10% cap. This rule is intended to comply with the SPC's understanding of Texas Attorney General Opinion, GA-0565 (2007). Fees charged by campaign managers to participating charitable organizations must only cover actual costs. When all fees of all local campaign managers and the state campaign manager are added up, the total amount may not exceed 10% of the total amount of contributions collected in the state employee charitable campaign that same year. If the total exceeds the 10% cap, the SPC may approve, but it is not required to approve, the excess amount. The SPC may approve the excess amount only if the SPC determines that the excess amount is supported by actual, reasonable and documented costs.

The adopted new §326.5 addresses the procedures to be followed with regard to campaign budgets when the projected combined expenses of the state campaign manager and each local campaign manager for the campaign year result in a combined fee that exceeds 10% of the total amount projected to be collected in the entire state employee charitable campaign that same campaign year.

No comments were received regarding adoption of the amendment and new rule.

The amendment and new rule are adopted under the authority of Texas Government Code, §659.139, which provides that the

state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The amendment and new rule also implement Texas Government Code, §659.148(b) - (c), relating to the fees that a campaign manager may charge to participating charitable organizations.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805373
Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Effective date: October 30, 2008
Proposal publication date: June 20, 2008
For further information, please call: (512) 475-0387

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CHAPTER 327. LOCAL CAMPAIGN MANAGEMENT

34 TAC §§327.1, 327.5, 327.7

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts amendments to §327.1, concerning a 10% cap; adopts new §327.5, concerning local campaign budget, and adopts new §327.7, concerning local budget form, without changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4822).

The adopted amendments to §327.1 clarifies statutory provisions that subject a fee charged by a campaign manager to a 10% cap. This rule is intended to comply with the SPC's understanding of Texas Attorney General Opinion GA-0565 (2007). Fees charged by campaign managers to participating charitable organizations must only cover actual costs. When all fees of all local campaign managers and the state campaign manager are added up, the total amount may not exceed 10% of the total amount of contributions collected in the state employee charitable campaign that same year. If the total exceeds the 10% cap, the SPC may approve, but it is not required to approve, the excess amount. The SPC may approve the excess amount only if the SPC determines that the excess amount is supported by actual, reasonable and documented costs.

The adopted new §327.5 requires each local campaign manager to submit the approved budget for the applicable local campaign area. This rule requires that the approved budget be submitted using a required format, and it authorizes the State Campaign Manager to set the deadline for submission of local budgets to the SCM. The rule is intended to facilitate compliance with the statutorily-prescribed cap on the total amount of combined fees that may be charged statewide to participating charitable organizations. The rule also increases the likelihood that a meaningful comparison may be made among the budgets of local campaign areas as a result of standardized reporting.

A new §327.7 adopts by reference a form to be used by local campaign managers to submit the local campaign budget. The form incorporates the factors that must be considered by the SPC in approving a total combined fee that exceeds the statutory 10% cap on the combined total fees to be charged to charitable organizations by all LCMs and the SCM, as a whole. Copies of the proposed form may be obtained from the State Campaign Manager at United Way of Texas, 1122 Colorado, Suite 101, Austin, Texas 78701.

No comments were received regarding adoption of the amendments and new rules.

The amendments and new rules are adopted under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The adopted amendments and new rules also implement Texas Government Code, §659.148(b) - (c), relating to the fees that a campaign manager may charge to participating charitable organizations.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805374
Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Effective date: October 30, 2008
Proposal publication date: June 20, 2008
For further information, please call: (512) 475-0387

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CHAPTER 329. ELIGIBILITY CRITERIA FOR STATEWIDE FEDERATIONS/FUNDS AND AFFILIATED ORGANIZATIONS

34 TAC §329.1

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts amendments to §329.1, concerning audit and review requirements, without changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4823).

The adopted amendments provide that if a reconciliation letter is submitted with the application for participation in the campaign, it shall be signed by the executive director of the applicant organi-

zation. The rule also states that the SPC may require additional information if the reconciliation letter is not sufficient. Some of the additional information required may include a reconciliation letter signed by the auditor or accountant who completed the audit or accountant's review or who completed the Form 990 contained in the organization's application. This provision is added to ensure that the reconciliation of discrepancies between the audit or accountant's review and the Form 990 are accurate.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The adopted amendments also implements Texas Government Code, §659.140(e)(3), wherein the SPC is directed to determine the eligibility of a federation or fund and its affiliated agencies to participate in the SECC. Basic eligibility requirements are addressed by statute in §659.146, concerning eligibility of charitable organizations in general and eligibility of federations and funds for statewide participation. These amendments incorporate those basic requirements and provide a process to facilitate review of an organization based on those provisions.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805375
Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Effective date: October 30, 2008
Proposal publication date: June 20, 2008
For further information, please call: (512) 475-0387

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CHAPTER 330. ELIGIBILITY CRITERIA FOR LOCAL FEDERATIONS/FUNDS, AFFILIATED ORGANIZATIONS, AND LOCAL CHARITABLE ORGANIZATIONS

34 TAC §330.1

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts amendments to §330.1, concerning audit and review requirements, without changes to the proposed text as published in the June 20, 2008, issue of the *Texas Register* (33 TexReg 4824).

The adopted amendments provide that, if a reconciliation letter is submitted with the application for participation in the campaign, it shall be signed by the executive director of the applicant organization. The rule also states that the SPC may require additional information if the reconciliation letter is not sufficient. Some of the additional information required may include a reconciliation letter signed by the auditor or accountant who completed the audit or accountant's review or who completed the Form 990 contained in the organization's application. This provision is added to ensure that the reconciliation of discrepancies between the audit or accountant's review and the Form 990 are accurate.

No comments were received regarding adoption of the amendment.

The amendments are adopted under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The adopted amendments also implement Government Code, §659.140(e)(3), wherein the SPC is directed to determine the eligibility of a federation or fund and its affiliated agencies to participate in the SECC. Basic eligibility requirements are addressed by statute in §659.146, concerning eligibility of charitable organizations in general. These amendments incorporate those basic requirements and provide a process to facilitate review of an organization based on those provisions.

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

Filed with the Office of the Secretary of State on October 10, 2008.

TRD-200805376
Mike Esparza
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Effective date: October 30, 2008
Proposal publication date: June 20, 2008
For further information, please call: (512) 475-0387

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

ADOPTION OF AMENDMENTS TO THE TEXAS BASIC MANUAL OF RULES, CLASSIFICATIONS AND EXPERIENCE RATING PLAN FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE RELATING TO ACQUISITION EXPENSE DISCOUNTS

The Commissioner of Insurance (Commissioner) adopts the amendments proposed by Safeco Insurance Companies (American States Insurance Company, American Economy Insurance Company, American States Insurance Company of Texas, and First National Insurance Company of America) (Safeco) in a petition (Reference No. W-0708-12) filed on July 14, 2008. Notice of the proposal was published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 7003). No comments were received on the proposal and no hearing was requested. The amendments are adopted without changes to the proposed text.

The following amendments to the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (Manual) are adopted:

Rule VI of the Manual, titled "Rates and Premium Determination," is amended by adding a new Section L, entitled "Acquisition Expense Discount." The adopted new section defines an acquisition expense discount as a "premium credit given to policyholders written by the same insurance carrier who are members of a common group or organization." The acquisition expense discount allows insurers that can identify and document reduced acquisition expenses related to writing members of such a group or organization to pass the savings on to these policyholders. The acquisition expense discount is applied in addition to the premium discount and is applicable to minimum premium policies.

Each insurer electing to offer an acquisition expense discount is required to file the discount with the Texas Department of Insurance (Department) in accordance with the Texas Administrative Code, Title 28, Chapter 5, Subchapter M, Filing Requirements. Each such insurer is required to provide the following information:

a. The definition of the common group or organization to which the acquisition expense discount will apply;

b. The acquisition expense discount percentage; and

c. Documentation supporting the acquisition expense discount.

Rule VI, Section E of the Manual, titled "Minimum Premium," is amended to state that the minimum premiums filed by the insurers shall be reduced by the acquisition expense discount, if applicable.

The Procedures Appendix, Section A(6) of the Manual, titled "Policy Issuance," is amended by adding the acquisition expense discount factor, if any is applicable, to the list of items that must be included on the Information Page of the policy. The acquisition expense discount is added as new subsection (r) and the subsequent subsections are re-designated as (s) through (x). The amount of the premium reduction, if applicable, shall be shown on the Information Page of the policy.

Rule III, Section E of the Manual, titled "Calculation of Total Estimated Policy Cost" is amended by adding to the list of items new item 19 for "Estimated Standard Premium After Premium Discount" and new item 20 for "Acquisition Expense Discount, If Applicable." The subsequent items are re-designated as (21) through (23). If the minimum premium is the total estimated policy cost, the acquisition expense discount shall be applied to the minimum premium.

The Commissioner has jurisdiction over this matter pursuant to the Insurance Code Article 5.96. Article 5.96(a) authorizes the Commissioner to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans, and policy and endorsement forms for workers' compensation insurance.

The Commissioner has determined that the new Manual rule is necessary because acquisition expense discounts would allow insurers that can identify and document reduced acquisition expenses related to writing members of such a group or organization to pass the savings on to these policyholders.

A copy of the full text of Safeco's petition and related exhibits of specific language for the adopted amendments to the Manual have been on file with the Office of the Chief Clerk of the Department since July 14, 2008, and are incorporated by reference into this Commissioner's Order.

This adoption is made pursuant to the Insurance Code Article 5.96, which exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, Chapter 2001).

The Department hereby certifies that the amendments to the Manual have been reviewed by legal counsel and found to be a valid exercise of the Department's authority.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments to the Manual proposed by the Safeco petition

(Reference No. W-0708-12) as described herein and set forth in the exhibit attached to this Order and incorporated into this Order by reference, be adopted 15 days after notice of adoption is published in the *Texas Register*.

TRD-200805425

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 14, 2008

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

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Texas Certified Self-Insurer Guaranty Association

Title 28, Part 3

The Texas Certified Self-Insurer Guaranty Association files this notice of intention to review the rule contained in Chapter 181 concerning Bylaws. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, §§9 - 10, 76th Legislature, and Texas Government Code §2001.039 as added by S.B. 178, 76th Legislature.

§181.1. Bylaws of the Texas Certified Self-Insurer Guaranty Association.

The association's reason for adopting the rule continues to exist, and it proposes to readopt this rule. Comments regarding whether the reason for adopting this rule continues to exist must be received by 5:00 p.m. on November 24, 2008 and submitted to Clay Pope, Executive Director, Texas Certified Self-Insurer Guaranty Association, 1115 San Jacinto Boulevard, Suite 275, Austin, Texas 78701.

TRD-200805442
Clay Pope
Executive Director
Texas Certified Self-Insurer Guaranty Association
Filed: October 14, 2008

Texas Department of Transportation

Title 43, Part 1

In accordance with Government Code, §2001.039, the Texas Department of Transportation (department) files this notice of intention to review Title 43 TAC, Part 1, Chapter 2, Environmental Policy, Chapter 7, Rail Facilities, and Chapter 8, Motor Vehicle Distribution.

The department will accept comments regarding whether the reasons for adopting these rules continue to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments regarding this rule review may be submitted in writing to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483.

TRD-200805455
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: October 15, 2008

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IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Automobile Burglary and Theft Prevention Authority

Request for Grant Applications under the Automobile Burglary and Theft Prevention Authority Fund

Notice of Invitation for Applications:

The Automobile Burglary and Theft Prevention Authority (ABTPA) is soliciting applications for supplemental grants to be awarded for projects under the ABTPA Fund. This grant cycle will be seven months in duration, and will begin on February 1, 2009 and end August 31, 2009.

Law Enforcement/Detection/Apprehension Projects, to establish motor vehicle burglary and theft enforcement teams and other detection/apprehension programs. Priority funding may be provided to state, county, precinct commissioner, general or home rule cities for enforcement programs in particular areas of the state where the problem is assessed as significant. Enforcement efforts covering multiple jurisdictional boundaries may receive priority for funding.

Prosecution/Adjudication/Conviction Projects, to provide for prosecutorial and judicial programs designed to assist with the prosecution of persons charged with motor vehicle theft offenses.

Prevention, Anti-Theft Devices and Automobile Registration Projects, to test experimental equipment which is considered to be designed for auto theft deterrence and registration of vehicles in the Texas Help End Auto Theft (H.E.A.T.) Program.

Reduction of the Sale of Stolen Vehicles or Parts Projects, to provide vehicle identification number labeling, including component part labeling and etching methods designed to deter the sale of stolen vehicles or parts.

Public Awareness and Crime Prevention/Education/Information Projects, to provide education and specialized training to law enforcement officers in auto theft prevention procedures, provide information linkages between state law enforcement agencies on auto theft crimes, and develop a public information and education program on theft prevention measures.

Eligible Applicants:

Current ABTPA funded agencies are eligible to apply for supplemental grants for automobile burglary and theft prevention assistance projects.

Grant Offering:

The Texas Automobile Burglary and Theft Prevention Authority will consider funding grant application requests from existing grant programs for Overtime, Equipment, Technology and Direct Operating Expenses for Auto Burglary and Theft goals and objectives in Fiscal Year 2009.

Contact Person:

Detailed specifications, including selection process for applicants is available from ABTPA.

Contact Charles Caldwell, Interim Director,

Texas Automobile Burglary and Theft Prevention Authority,

4000 Jackson Avenue

Austin, Texas 78731

(512) 374-5101

Application Deadline and Submission Requirements:

The Authority must receive applications by 5 p.m., November 24, 2008 or postmarked by November 24, 2008. Each Application must:

1. Include all signed certifications and signature pages.

2. Application must be mailed or delivered to:

Texas Automobile Burglary and Theft Prevention Authority,

4000 Jackson Avenue

Austin, Texas 78731

3. Submit **one (1) original** and **four (4) copies** of the proposal.

4. Facsimile transmissions will not be accepted.

If mailed, applications must be marked "Personal and Confidential" and addressed to the contact person listed above. If delivered, please leave application with the contact person (or designee) at the address listed.

Selection Process:

Applications will be selected according to §§57.2, 57.4, 57.7, and 57.14, as published in Title 43 Chapter 57, Texas Administrative Code. Grant award decisions by ABTPA are final and not subject to judicial review. Grants will be awarded on or before February 1, 2008.

TRD-200805417
Charles Caldwell
Interim Director
Automobile Burglary and Theft Prevention Authority
Filed: October 13, 2008

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, and Chapter 404, Texas Government Code, the Comptroller of Public Accounts (Comptroller) on behalf of the Texas Treasury Safekeeping Trust Company (TTSTC or Trust Company) announces its Request for Proposals (RFP #191a) for the purpose of obtaining investment consulting services for the Trust Company. The selected consultant (Consultant) will advise and assist the Trust Company and Comptroller in administering the Trust Company's investment activities related to endowment funds (Funds). The Funds include, among others, the Tobacco Settlement Permanent Trust and related endowments. The Comptroller is issuing this RFP on behalf of the Trust Company so that the Trust Company may move forward with retaining the necessary investment consultant. The Comptroller and Trust Company reserve the right to award more than one contract under the RFP. If approved by the Trust Company, the Consultant will be expected to begin performance

of the contract on or about February 2, 2009, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th Street, Room 201, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, October 24, 2008, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, October 24, 2008.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, November 7, 2008. Prospective proposers are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. On or about Friday, November 14, 2008, the Comptroller expects to post responses to questions on the ESBD. Respondents shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CZT), on Friday, December 5, 2008. Late Proposals will not be considered under any circumstances. Respondents shall be solely responsible for verifying time receipt of Proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Trust Company and Comptroller will make the final decision.

The Comptroller and the Trust Company reserve the right to accept or reject any or all proposals submitted. The Comptroller and the Trust Company not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller and Trust Company shall not pay for any costs incurred by any entity in responding to this Notice or to the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP--October 24, 2008, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due--November 7, 2008, 2:00 p.m. CZT; Official Responses to Questions posted--November 14, 2008; Proposals Due--December 5, 2008, 2:00 p.m. CZT; Contract Execution--February 2, 2009, or as soon thereafter as practical; Commencement of Work--February 2, 2009.

TRD-200805372
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: October 10, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/20/08 - 10/26/08 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/20/08 - 10/26/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment, or other similar purpose.

TRD-200805440
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 14, 2008

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Texas Education Agency

Notice of Correction: Request for Applications Concerning the Texas High School Redesign and Restructuring Grant, Cycle 5

The Texas Education Agency (TEA) published Request for Applications (RFA) #701-09-101 concerning the Texas High School Redesign and Restructuring Grant, Cycle 5, in the October 3, 2008, issue of the *Texas Register* (33 TexReg 8414).

The TEA is amending the deadline for receipt of applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, December 9, 2008, to be eligible to be considered for funding. This correction reflects a change from the original deadline date of Thursday, November 20, 2008.

In addition, the TEA is amending the beginning date of the project. Applicants should plan for a starting date of no earlier than April 1, 2009. This correction reflects a change from the original starting date of March 1, 2009. The ending date of the project remains the same.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, TEA, (512) 463-9269.

TRD-200805445
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: October 15, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 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. Section 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 **November 24, 2008**. Section 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) 239-1864 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 November 24, 2008**. 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, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Piertsje Deboer Vanderlei and Kornelis Wilt Vanderlei dba 5 Star Dairy; DOCKET NUMBER: 2008-0683-MLM-E; IDENTIFIER: RN101516631; LOCATION: Amherst, Lamb County; TYPE OF FACILITY: concentrated animal feeding operation; RULE VIOLATED: the Code, §26.121(a)(1), by failing to prevent an unauthorized discharge; 30 Texas Administrative Code (TAC) §321.40(g) and Permit Number TXG920000, Pollution Prevention Plan Requirements, Part III.A.4.(c), by failing to provide adequate wellhead protective measures; 30 TAC §321.36(1) and Permit Number TXG920000, Pollution Prevention Plan Requirements, Part III.A.10.(c), by failing to properly collect carcasses within 24 hours of death and properly dispose of them; and 30 TAC §335.6(a), by failing to provide notification of industrial solid waste storage, processing, or disposal; PENALTY: $3,080; Supplemental Environmental Project (SEP) offset amount of $1,232 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(2) COMPANY: Acme Brick Company; DOCKET NUMBER: 2008-1001-AIR-E; IDENTIFIER: RN100225184; LOCATION: Millsap, Parker County; TYPE OF FACILITY: brick manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(B), Federal Operating Permit (FOP) Number O-01597 General Terms and Conditions (GTC), and Texas Health and Safety Code (THSC), §382.085(b), by failing to submit a semiannual deviation report; PENALTY: $2,925; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Allied Feeds, Inc.; DOCKET NUMBER: 2008-0922-AIR-E; IDENTIFIER: RN100852672; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: small grain milling plant; RULE VIOLATED: 30 TAC §116.110(a) and §116.770(a) and THSC, §382.085(b), by failing to obtain proper authorization to operate a grain milling plant; PENALTY: $2,640; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: Block Creek Concrete Products, L.L.C.; DOCKET NUMBER: 2008-0980-AIR-E; IDENTIFIER: RN105446983; LOCATION: Kendall County; TYPE OF FACILITY: concrete products manufacturing plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b), by failing to obtain authorization prior to operating a concrete batch plant; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(5) COMPANY: Central Texas Water Supply Corporation; DOCKET NUMBER: 2008-0978-WQ-E; IDENTIFIER: RN102673480; LOCATION: Harker Heights, Bell County; TYPE OF FACILITY: public water supply; RULE VIOLATED: the Code, §26.121(a)(3), by failing to prevent an unauthorized discharge into water in the state; PENALTY: $4,250; SEP offset amount of $4,250 applied to Texas State University River Systems Institute-*Continuous Water Quality Monitoring Network*; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(6) COMPANY: Cobra Stone, Inc.; DOCKET NUMBER: 2008-0855-MLM-E; IDENTIFIER: RN105485460; LOCATION: Williamson County; TYPE OF FACILITY: stone quarry; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain coverage to discharge industrial storm water from a stone quarry; 30 TAC §213.4(a)(1) and §213.5(a)(1), by failing to obtain approval of a Water Pollution Abatement Plan prior to beginning a regulated activity over the Edwards Aquifer Recharge Zone; and 30 TAC §213.4(a)(1) and §213.5(a)(4), by failing to obtain approval of an aboveground storage tank facility plan; PENALTY: $39,000; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(7) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2008-0687-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(c), Air Permit Numbers 5920A and PSD-TX-103M3, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §116.115(b)(2)(F), Air Permit Number 21265, General Condition Number 8, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $40,000; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: City of Cresson; DOCKET NUMBER: 2008-1203-PWS-E; IDENTIFIER: RN102676012; LOCATION: near Cresson, Johnson County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(f)(3) and §290.122(b)(2) and THSC, §341.031(a), by exceeding the maximum contaminant level for total coliform and by failing to provide public notice; 30 TAC §290.109(c)(3)(A)(ii) and §290.122(b)(2), by failing to collect a set of repeat samples within 24 hours of being notified of a coliform-positive sample result and by failing to provide public notice of the failure to collect repeat samples; and 30 TAC §290.109(c)(2)(F) and §290.122(b)(2), by failing to collect five routine distribution coliform samples; PENALTY: $3,165; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Diamond Shamrock Refining Company, L.P.; DOCKET NUMBER: 2007-1544-AIR-E; IDENTIFIER: RN100210517; LOCATION: Moore County; TYPE OF FACILITY: petroleum refining plant; RULE VIOLATED: 30 TAC §116.715(a), Flexible Permit Number 9708, SC Number 9.B. (formerly 8.B.), 40 CFR §63.11(b)(5) and §63.643(a)(1), and THSC, §382.085(b), by failing to operate the flares with a constant pilot flame; 30 TAC §116.715(a), Flexible Permit Number 9708, SC Number 16 (formerly 15), and THSC, §382.085(b), by failing to maintain the minimum firebox temperature of 1,200 degrees Fahrenheit; 30 TAC §116.715(a),

Flexible Permit Number 9708, SC Number 9.C. (formerly 8.C.), 40 CFR §63.11(b)(4) and §63.643(a)(1), and THSC, §382.085(b), by failing to operate the main refinery flare without visible emissions lasting longer than five minutes; 40 CFR §63.7903(d)(3) and THSC, §382.085(b), by failing to inspect two frac tanks annually; 40 CFR §63.7921(c)(1) and (2) and §63.7950(e) and THSC, §382.085(b), by failing to include the required information in the notification of compliance status report; 40 CFR §63.7935(b) and THSC, §382.085(b), by failing to operate and maintain any affected source, including air pollution control equipment, in a manner consistent with safety and good air pollution control practices; 40 CFR §63.8692(b) and THSC, §382.085(b), by failing to submit initial notification for affected units in operation; 40 CFR §63.8693(b)(1) and THSC, §382.085(b), by failing to submit the initial semi-annual compliance report; 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 9708 and PSD-TX-861M2, SC Number 2, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to submit initial notification of an emissions event; and 30 TAC §101.20(3) and §116.715(a), Flexible Permit Number 9708 and PSD-TX-861M2, SC Number 2, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $140,443; SEP offset amount of $56,177 applied to RC&D - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(10) COMPANY: EHAN, Inc. dba Metro Mart 5; DOCKET NUMBER: 2008-0907-PST-E; IDENTIFIER: RN102246584; LOCATION: Austin, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the underground storage tanks (USTs); 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; and 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to equip each tank with a valve or other appropriate device designed to automatically shut off the flow of regulated substances into the tank; PENALTY: $5,350; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(11) COMPANY: Endeavour Inc dba Endeavour Windy Hill Estates; DOCKET NUMBER: 2008-1506-WQ-E; IDENTIFIER: RN105583512; LOCATION: Azle, Parker County; TYPE OF FACILITY: housing development; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: ExxonMobil Oil Corporation; DOCKET NUMBER: 2008-0821-AIR-E; IDENTIFIER: RN102450756; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Air Permit Number 49151, SC Number 1, FOP Number O-02041, SC Number 13, and THSC, §382.085(b), by failing to adhere to the emission limit in the maximum allowable emission rate table (MAERT) for Crude; PENALTY: $17,250; SEP offset amount of $6,900 applied to RC&D - Clean School Buses; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(13) COMPANY: GOPDQ.NET, LLC dba Big K Environmental; DOCKET NUMBER: 2008-0917-MSW-E; IDENTIFIER: RN102966595; LOCATION: Houston, Harris County; TYPE OF FACILITY: municipal solid waste (MSW); RULE VIOLATED: 30 TAC §305.125(1) and §330.7(a) and MSW Permit Number 2350 Permit Provision II. B. and II. C., by failing to obtain proper authorization to accept waste not authorized under their permit; 30 TAC §305.125(1) and MSW Permit Number 2350 Permit Provision II. D., by failing to comply with permitted waste acceptance rates; 30 TAC §305.125(1) and MSW Permit Number 2350 Permit Provision II. G., by failing to obtain authorization prior to modifying the facility; and 30 TAC §305.125(1) and MSW Permit Number 2350 Permit Provision III. A., by failing to operate in accordance with its permit process description; PENALTY: $8,625; ENFORCEMENT COORDINATOR: John Shelton, (512) 239-2563; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: GREENSPOINT ENTERPRISES LLC dba Courtesy Chevron 6; DOCKET NUMBER: 2008-0590-PST-E; IDENTIFIER: RN102482957; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.244(3) and THSC, §382.085(b), by failing to conduct monthly inspections of the Stage II vapor recovery system (VRS); 30 TAC §115.246(6) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for inspection; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued TCEQ delivery certificate by submitting a properly completed UST registration and self-certification form; and 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; PENALTY: $6,869; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Gulf South Pipeline Company, LP; DOCKET NUMBER: 2008-1022-AIR-E; IDENTIFIER: RN100219245; LOCATION: Edna, Jackson County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(B), General Operating Permit Number 514 (Number O-00212), Site-wide Requirements (b)(2), and THSC, §382.085(b), by failing to submit a semiannual deviation report; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(16) COMPANY: H & W Petroleum Company, Inc.; DOCKET NUMBER: 2008-1219-WQ-E; IDENTIFIER: RN100539378; LOCATION: Lufkin, Angelina County; TYPE OF FACILITY: new oil products distribution center; RULE VIOLATED: the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of wastewater; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(17) COMPANY: HNQ Inc. dba Kool Corner; DOCKET NUMBER: 2008-1500-PST-E; IDENTIFIER: RN101496644; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; and 30 TAC §334.8(c)(4)(A)(vii), by failing to submit the initial/renewal UST registration and self-certification form; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(18) COMPANY: James Lewis Allen dba Holiday Springs Mobile Home Park; DOCKET NUMBER: 2008-1131-PWS-E; IDENTIFIER: RN101194041; LOCATION: Harrison County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(E)(ii) and THSC, §341.0315(a), by failing to provide a pressure tank capacity of 50 gallons per connection; 30 TAC §290.46(f)(2) and (3)(A)(iii), (vi), and (B)(iii), by failing to maintain public water system operating records in an organized manner; 30 TAC §290.46(v), by failing to install all water system electrical wiring in compliance with a local or national electrical code; and 30 TAC §290.42(l), by failing to compile and maintain a plant operations manual; PENALTY: $356; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(19) COMPANY: Huntsman Petrochemical Corporation; DOCKET NUMBER: 2008-0664-AIR-E; IDENTIFIER: RN100219252; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: synthetic organic chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), New Source Review (NSR) Permit 19823, SC Number 1, FOP Number O-02288, GTC, SC 2I and 16A, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(1)(A) and (B) and §122.143(4) and THSC, §382.085(b), by failing to properly report an emissions event; 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), NSR Permit 5952A, SC Number 1, FOP Number O-01320, GTC, SC Number 2I and 13A, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §116.115(c) and §122.143(4), NSR Permit 19823, SC Number 1, FOP Number O-02288, SC Number 16, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(b)(1)(G), (H), and (J) and THSC, §382.085(b), by failing to properly report emissions events; 30 TAC §116.115(c) and §122.143(4), NSR Permit 20160, SC number 1, FOP Number O-01322, SC Number 17, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(2)(C), (F) - (H), and §122.143(4), FOP Number O-02288, GTC, SC Number 2F, and THSC, §382.085(b), by failing to properly report an emissions event; and 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), NSR Permit 19823, SC Number 1, FOP Number O-02288, GTC, SC Number 16, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $49,728; SEP offset amount of $19,891 applied to Jefferson County: Retrofit/Replacement of Heavy Equipment and Vehicles with Alternative Fueled Equipment and Vehicles; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(20) COMPANY: Javier De La O dba J De La O Electric; DOCKET NUMBER: 2008-0811-PST-E; IDENTIFIER: RN101682169; LOCATION: Mercedes, Hidalgo County; TYPE OF FACILITY: storage facility for electrical components; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding USTs; and 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, a UST that has not been brought into timely compliance with the upgrade requirements; PENALTY: $11,550; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(21) COMPANY: JERRY SPENCER, L.P. dba JJS Fastop 294; DOCKET NUMBER: 2008-0960-PST-E; IDENTIFIER: RN102780103; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(1) and THSC, §382.085(b), by failing to successfully complete all applicable tests required in the Vapor Recovery Test Procedures Handbook; PENALTY: $4,546; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Kendrick Oil Company dba Chisum Travel Center; DOCKET NUMBER: 2008-1501-PST-E; IDENTIFIER: RN104502745; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; PENALTY: $875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(23) COMPANY: City of Laredo; DOCKET NUMBER: 2008-0713-MSW-E; IDENTIFIER: RN102327582; LOCATION: Laredo, Webb County; TYPE OF FACILITY: type 1 MSW landfill; RULE VIOLATED: 30 TAC §330.121(a) and §330.165(a) and (c) and MSW Permit Number 1693A, by failing to provide daily cover to the working face of the landfill and by failing to provide intermediate cover to the inactive portion of the landfill; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Michael Graham, (817) 588-5800; REGIONAL OFFICE: 707 East Carlton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(24) COMPANY: Larry Oates Construction Company dba Fresenius Medical Care Rockport; DOCKET NUMBER: 2008-1507-WQ-E; IDENTIFIER: RN105573141; LOCATION: Rockport, Aransas County; TYPE OF FACILITY: medical center; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(25) COMPANY: Donald Page dba Last Chance Shell; DOCKET NUMBER: 2008-0933-PST-E; IDENTIFIER: RN102006202; LOCATION: Marble Falls, Burnet County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection; 30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection for the piping associated with the USTs; and 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors; PENALTY: $6,243; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(26) COMPANY: Long Beach Shavings Company, Inc.; DOCKET NUMBER: 2008-0782-AIR-E; IDENTIFIER: RN100885813; LOCATION: Magnolia, Montgomery County; TYPE OF FACILITY: wood shavings plant; RULE VIOLATED: 30 TAC §101.4 and §106.4(c) and THSC, §382.085(a) and (b), by failing to maintain emissions control equipment in good condition and to prevent nuisance smoke emissions; and 30 TAC §101.4 and §106.4(c) and THSC, §382.085(a) and (b), by failing to maintain emissions control equipment in good condition and to prevent nuisance dust emissions from the wood shavings process from leaving the plant and depositing on surrounding property; PENALTY: $4,750; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: Meheboob Momin dba M & S Grocery; DOCKET NUMBER: 2008-0985-PST-E; IDENTIFIER: RN102230679; LOCA-

TION: Orange, Orange County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; 30 TAC §115.242(3)(B) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; and 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions in front of each dispenser equipped with a Stage II system; PENALTY: $5,327; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(28) COMPANY: McClelland Water Supply Corporation; DOCKET NUMBER: 2008-0891-PWS-E; IDENTIFIER: RN101458297; LOCATION: Shelbyville, Shelby County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(i) and THSC, §341.0315(c), by failing to provide two or more wells having a total service capacity of 0.6 gallons per minute per connection; 30 TAC §290.46(f)(3)(B)(ii) and (n)(2), by failing to maintain a record of water works operation and maintenance activities; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the system's facilities and equipment; and 30 TAC §290.46(v), by failing to ensure that all electrical wiring is securely installed in compliance with a local or national electrical code; PENALTY: $1,634; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(29) COMPANY: Nash Trucking & Construction, Limited; DOCKET NUMBER: 2008-0889-WQ-E; IDENTIFIER: RN105383004; LOCATION: Gilmer, Upshur County; TYPE OF FACILITY: sand and gravel mine; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; 30 TAC §281.25(a)(4) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number TXR05W759, Part III, Section A(5)(h), by failing to conduct quarterly visual monitoring; 30 TAC §281.25(a)(4) and TPDES Permit Number TXR05W759, Part II, Section C(3) and Part III, Section A(5)(c), by failing to develop a section within the storm water pollution prevention plan to address soil erosion measures; and the Code, §26.121(a), by failing to prevent the unauthorized discharge of sediment-laden storm water; PENALTY: $9,368; SEP offset amount of $3,747 applied to RC&D - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(30) COMPANY: NuStar Terminals Texas, Inc.; DOCKET NUMBER: 2008-0905-AIR-E; IDENTIFIER: RN100218767; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: chemical storage and transfer plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to timely submit a compliance certification; PENALTY: $3,625; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(31) COMPANY: Oiltanking Beaumont Partners, L.P.; DOCKET NUMBER: 2008-0844-AIR-E; IDENTIFIER: RN101042885; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: marine storage terminal; RULE VIOLATED: 30 TAC §116.715(a) and (c)(7) and §122.143(4), FOP Number O-01804, GTC, Flexible Permit 21356, General Condition 10, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $5,400; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(32) COMPANY: Pallet & Crating Company, Inc.; DOCKET NUMBER: 2008-0880-AIR-E; IDENTIFIER: RN100822782; LOCATION: Denison, Grayson County; TYPE OF FACILITY: wood pallet and crating manufacturing operation; RULE VIOLATED: 30 TAC §116.115(c), Standard Exemption Number 97, Condition (f), and THSC, §382.085(b), by failing to maintain the incinerator blower; 30 TAC §116.115(c), Standard Exemption Number 97, Condition (i), and THSC, §382.085(b), by failing to maintain material not being worked on and material being stockpiled to be burned; 30 TAC §111.111(a)(1)(B) and THSC, §382.085(b), by failing to maintain an opacity limit of 20% averaged over a six-minute period; and 30 TAC §116.115(c), Standard Exemption Number 97, Condition (h), and THSC, §382.085(b), by failing to maintain an opacity limit of 20% average over a five-minute period; PENALTY: $1,425; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(33) COMPANY: Pasadena Refining System, Inc; DOCKET NUMBER: 2008-0050-AIR-E; IDENTIFIER: RN100716661; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c), TCEQ Permit Number 76192, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(34) COMPANY: City of Pflugerville; DOCKET NUMBER: 2008-0749-MWD-E; IDENTIFIER: RN101611440; LOCATION: Travis County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011845002 Interim and Final Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for flow and total phosphorus; PENALTY: $10,300; SEP offset amount of $8,240 applied to Lower Colorado River Authority's Household Hazardous Waste and Reusable Materials Collection; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(35) COMPANY: Byron Rusk dba RMS Automotive; DOCKET NUMBER: 2008-1223-PST-E; IDENTIFIER: RN101759157; LOCATION: Houston, Harris County; TYPE OF FACILITY: vehicle repair center; RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, a UST that has not been brought into timely compliance with the upgrade requirements; PENALTY: $4,250; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(36) COMPANY: Maurice Rosas; DOCKET NUMBER: 2008-1049-MSW-E; IDENTIFIER: RN105385645; LOCATION: Scurry County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(37) COMPANY: Shy Investment, Inc. dba Times Market 52; DOCKET NUMBER: 2008-1202-PST-E; IDENTIFIER:

RN101431542; LOCATION: Robstown, Nueces County; TYPE OF FACILITY: gas station; RULE VIOLATED: 30 TAC §334.8(c)(5)(C), by failing to ensure that all USTs are properly identified as listed on the facility's UST registration and self-certification form; 30 TAC §334.50(a)(1)(A), by failing to provide a method of release detection capable of detecting a release from any portion of the UST system; and 30 TAC §334.48(c) and §334.50(d)(1)(B)(ii) and (iii)(I), by failing to conduct effective manual or automatic inventory control procedures for all UST systems; PENALTY: $4,150; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(38) COMPANY: Texas A&M Unversity; DOCKET NUMBER: 2008-0903-AIR-E; IDENTIFIER: RN100216274; LOCATION: College Station, Brazos County; TYPE OF FACILITY: boilers used for steam, hot water, and heating; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Air NSR Permit Number 44762, SC Number 10F, FOP Number O-01624, Special Terms and Conditions (STC) 6A, and THSC, §382.085(b), by failing to comply with the 90% system reliability requirement for nitrogen oxides; 30 TAC §116.115(c) and §122.143(4), Air NSR Permit Number 44762, SC Number 3, FOP Number O-01624, STC 6, and THSC, §382.085(b), by failing to maintain permitted emissions limits; and 30 TAC §290.51(a)(3) and the Code, §5.702, by failing to pay fees and associated late fees; PENALTY: $4,375; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(39) COMPANY: Trademark Homes Inc; DOCKET NUMBER: 2008-1505-WQ-E; IDENTIFIER: RN105582886; LOCATION: Bexar County; TYPE OF FACILITY: builder; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(40) COMPANY: Viking Pools, LLC; DOCKET NUMBER: 2008-1172-AIR-E; IDENTIFIER: RN101061844; LOCATION: Midland, Midland County; TYPE OF FACILITY: swimming pool manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and §122.143(4), NSR Permit Number 36078 General Condition Number 8, FOP Number O-02438 STC Number 4, and THSC, §382.085(b), by failing to maintain volatile organic compound emissions at or below the MAERT for stack one; and 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit a timely annual permit compliance certification; PENALTY: $15,750; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

TRD-200805419
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 14, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of October 9, 2008 through October 14, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CITY OF DETROIT has applied for a renewal of TPDES Permit No. WQ0010724001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 108,000 gallons per day. The facility is located approximately 1,200 feet south of U.S. Highway 82, approximately one mile southeast of the intersection of U.S. Highway 82 and Farm-to-Market Road 2573 in Red River County, Texas.

DB WESTERN INC TEXAS which operates D.B. Western, Inc - Texas, has applied for a renewal of TPDES Permit No. WQ0004201000, which authorizes the discharge of cooling tower blowdown, boiler blowdown, water treatment waste, and previously monitored effluent (PME) (treated domestic wastewater) at a daily average flow not to exceed 600,000 gallons per day via Outfall 001. The facility is located at 12511 Strang Road, east of the Texas New Orleans Railroad, approximately 3,000 feet northwest of the intersection of State Highway 146 in the City of La Porte, Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

FELLOWSHIP CHURCH has applied for a new permit, Proposed Permit No. WQ0014895001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day via surface irrigation of 18 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located approximately 885 feet northwest of the intersection of County Road 3841 and County Road 7850, in Wood County, Texas and the disposal area is located approximately 1,300 feet southwest of the intersection of County Road 3841 and County Road 7850, in Wood County, Texas.

HALLIBURTON ENERGY SERVICES INC has applied for a renewal of TPDES Permit No. WQ0014113001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,500 gallons per day. The facility is located at 1800 Seawolf Parkway, Pelican Island, Galveston, approximately 1.7 miles along the Seawolf Parkway from the bridge, then south 1,800 feet in Galveston County, Texas.

HUNTSMAN PETROCHEMICAL CORPORATION which operates a petrochemical manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0000584000 to authorize the removal of Other Requirement Provision No. 4 to allow the discharge of deminimus quantities of process wastewater, cooling tower blowdown, boiler blowdown, demineralizer blowdown, and treated domestic wastewater from the storm water holding pond via Outfall 002; decrease the monitoring frequencies at Outfall 002 to once per week when discharge occurs; remove effluent limitations and monitoring requirements for total chromium, total copper, cyanide, and phenol at Outfall 001; remove effluent limitations and monitoring requirements for oil and grease at Outfalls 001 and 002; and remove effluent limitations and monitoring requirements for all organic priority pollutants at 001. The current permit authorizes the discharge of process wastewater, cooling tower blowdown, boiler blowdown, demineralizer blowdown, treated domestic wastewater, and storm water at a daily average flow not to exceed 750,000 gallons per day via Outfall 001; and storm water runoff on an intermittent and flow variable basis via Outfall 002. The facility is located approximately

five (5) miles east of the City of Conroe, approximately 0.25 mile south of Farm-to-Market Road 1485, and approximately 0.5 mile west of the City of Cut-N-Shoot, Montgomery County, Texas.

ROSEBUD LOTT INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. WQ0011230001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 11,000 gallons per day via surface irrigation of 5.3 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 are located approximately 1,500 feet northwest of the intersection of U.S. Highway 77 and Farm-to-Market Road 431.

SABINE RIVER AUTHORITY STATE OF LOUISIANA AND ENTEGY TEXAS INC which proposes to operate Toledo Bend Dam, a hydroelectric generating facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004845000, to authorize the discharge of once through non-contact cooling water at a daily average flow not to exceed 1,200,000 gallons per day via Outfall 001; low volume wastewater at a daily average flow not to exceed 36,000 gallons per day via Outfall 002; and storm water runoff on an intermittent and flow variable basis via Outfall 003. The facility is located 15 miles northeast of Burkeville, Texas on State Highway 692, approximately 0.6 mile northeast of the intersection with Sate Highway 255, Newton County, Texas.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied for a renewal of TPDES Permit No. WQ0011475001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed315,000 gallons per day. The facility is located on the north bank of Oyster Creek, approximately 1,700 feet southwest of the point where the Grand Parkway intersects Oyster Creek in Fort Bend County, Texas.

THE CITY OF TAYLOR has applied for a renewal of TPDES Permit No. WQ0010299001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,000,000 gallons per day. The facility is located at 100 Larry Street, east of Mustang Creek approximately 3,200 feet south of the intersection of U.S. Highway 79 and Farm-to-Market Road 112 southeast of the City of Taylor in Williamson County, Texas.

THE COLUMBIA BRAZORIA INDEPENDENT SCHOOL DISTRICT has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014893001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The facility was previously permitted under TPDES Permit No. WQ00121030001which expired July 1, 2007. The facility is located approximately one mile south of State Highway 36 from a point approximately 4.5 miles southeast of the City of West Columbia in Brazoria County, Texas.

If you need more information about these permit applications or the permitting process; please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200805457
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 15, 2008

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Texas Facilities Commission

Request for Proposals #303-9-10404

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission, Department of Assistive and Rehabilitative Services and Department of State Health Services, announces the issuance of Request for Proposals (RFP) #303-9-10404. TFC seeks a ten (10) year lease of approximately 39,204 sq. ft. of office space, 2,000 sq. ft of warehouse space and 6,000 sq. ft. of vehicle compound space for a total of 47,204 square feet in Lubbock, Lubbock County, Texas.

The deadline for questions is October 31, 2008 and the deadline for proposals is November 14, 2008 at 3:00 p.m. The anticipated award date is December 17, 2008. 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 a 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 TFC Purchaser Sandy Williams at (512) 475-0453. 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=79377*.

TRD-200805443
Kay Molina
General Counsel
Texas Facilities Commission
Filed: October 14, 2008

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Request for Proposals #303-9-10513

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-9-10513. TFC seeks a 5 year lease of approximately 12,982 square feet of office space in San Antonio, Texas.

The deadline for questions is November 15, 2008 and the deadline for proposals is November 26, 2008 at 3:00 p.m. The award date is January 5, 2009. 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 a 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 TFC Purchaser Sandy Williams at (512) 475-0453. 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=79379*.

TRD-200805428
Kay Molina
General Counsel
Texas Facilities Commission
Filed: October 14, 2008

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General Land Office

Request for Comments on the Texas Beach Watch Program

The Texas General Land Office (GLO) is requesting comments on the implementation of the Texas Beach Watch Program pursuant to the Beaches Environmental Assessment and Coastal Health Act of 2000. For full details please visit the GLO web site at http://www.glo.state.tx.us/coastal/beachwatch/beachwatchcomment.html. To obtain a written copy of the Program Summary, please contact Mr. Craig Davis at (512) 463-8126 or by e-mail at Craig.Davis@glo.state.tx.us.

Written comments must be submitted to Mr. Davis by e-mail or mailed to Texas General Land Office, Coastal Resources Division, P.O. Box 12873, Austin, Texas 78711-2873 by November 14, 2008.

TRD-200805456
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 15, 2008

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rate

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on November 17, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for Hysteroscopy with Endometrial Ablation surgery. The change is associated with a fee review for the Medicaid medical service. The public hearing will be held in the Lone Star Conference Room of the Texas Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed rate for Hysteroscopy with Endometrial Ablation surgery is proposed to be effective January 1, 2009.

Methodology and Justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, including surgery and assistant surgery services.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Texas Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1174; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, Texas Health and Human Services Commission, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805356
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 9, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rate

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 17, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for Texas Health Steps (THSteps) clinician-directed care coordination telephone consultations associated with medical policy changes. Services delivered to Medicaid clients under age 21 under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program are referred to as THSteps in Texas. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.082 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public hearings on proposed Medicaid reimbursements.

Proposal. The new payment rate for THSteps clinician-directed care coordination telephone consultations is proposed to be effective January 1, 2009.

Methodology and Justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8441, which addresses the reimbursement methodology for EPSDT services, also known as THSteps.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of or in addition to oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805422
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 14, 2008

♦ ♦ ♦

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 17, 2008 at 1:30 p.m. to receive public comment on proposed Medicaid payment rates for 2008 Healthcare Common Procedure Coding System (HCPCS) annual updates for durable medical equipment (DME), ambulatory surgical center (ASC), and dental procedure codes. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which

require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The new payment rates for the 2008 HCPCS annual updates are proposed to be effective January 1, 2009.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8021(c), which addresses the reimbursement methodology for DME as home health services; 1 TAC §355.8441(3), relating to the reimbursement methodology for DME under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program (known in Texas as THSteps); 1 TAC §355.8121, relating to the reimbursement methodology for ASCs; and 1 TAC §355.8441(11), relating to the reimbursement methodology for dental services.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805421
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 14, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 17, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for intestinal transplant procedure codes associated with medical policy changes. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.082 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public hearings on proposed Medicaid reimbursements.

Proposal. The new payment rates for intestinal transplants procedure codes are proposed to be effective January 1, 2009.

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, including surgery and assistant surgery services.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of or in addition to oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids should contact Kimbra Rawlings at (512) 491-1348 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805423
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 14, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on November 17, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for casting, splinting and strapping surgery, assistant surgery and ambulatory surgical center procedure codes. The changes are associated with fee review for these Medicaid medical services. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard., Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which requires public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed rates for casting, splinting and strapping surgery, assistant surgery and ambulatory surgical center procedure codes are proposed to be effective January 1, 2009.

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, including surgery and assistant surgery services, and 1 TAC §355.8121, which addresses the reimbursement methodology for services provided in or by an ambulatory surgical center service (ASC).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra. Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Hu-

man Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1174; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805424
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 14, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on November 17, 2008 at 1:30 p.m. to receive public comment on proposed Medicaid payment rates for Hearing Devices and Services new benefits. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for the Hearing Devices and Services New Benefit procedure codes will have a proposed effective date of December 1, 2008.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8121, which addresses the Reimbursement Methodology for Ambulatory Surgical Centers; and 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, including surgery and assistant surgery services; and 1 TAC §355.8021, which addresses the Reimbursement Rates for Home Health Services; and 1 TAC §355.8441(3), relating to the Reimbursement Methodology for Durable Medical Equipment under the Early and Periodic, Screening, Diagnosis, and Treatment (EPSDT) Program (known in Texas as THSteps).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805450
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 15, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on November 17, 2008 at 1:30 p.m. to receive public comment on proposed Medicaid payment rates for Vision Devices. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for the Vision Devices procedure codes will have a proposed effective date of January 1, 2009.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8021, which addresses the Reimbursement Rates for Home Health Services; and 1 TAC §355.8441(3), relating to the Reimbursement Methodology for Durable Medical Equipment under the Early and Periodic, Screening, Diagnosis, and Treatment (EPSDT) Program (known in Texas as THSteps).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805452
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 15, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 17, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for developmental and neurological assessment and testing procedure codes associated with medical policy changes. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.082 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public hearings on proposed Medicaid reimbursements.

Proposal. The new payment rates for developmental and neurological assessment and testing procedure codes are proposed to be effective January 1, 2009.

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, and 1 TAC §355.8081, which addresses the reimbursement methodology for laboratory services.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of or in addition to oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805454
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 15, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 17, 2008, at 1:30 p.m. to receive public comment on proposed Medicaid payment rates for outpatient behavioral health procedure associated with medical policy changes. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.082 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public hearings on proposed Medicaid reimbursements.

Proposal. The new payment rates for the outpatient behavioral health procedure for psychologists, licensed professional counselors, licensed clinical social workers, and licensed marriage and family therapists are proposed to be effective January 1, 2009.

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8081, which addresses the reimbursement methodology for psychologists and refers to 1 TAC §3535.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, and 1 TAC §355.8091, which addresses the reimbursement methodology for counseling services provided by a licensed professional counselor, a licensed clinical social worker, or a licensed marriage and family therapist.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 3, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1438; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of or in addition to oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids should contact Kimbra Rawlings at (512) 491-1438 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200805458
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 15, 2008

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Department of State Health Services

Designation of the Student Health Center of the University of Texas Health Science Center as a Site Serving Medically Underserved Populations

The Department of State Health Services (department) is required under the Occupations Code, §157.052, to designate sites serving medically underserved populations. In addition, the department is required to publish notice of such designations in the *Texas Register* and to provide an opportunity for public comment on the designations.

Accordingly, the department has proposed designating the following as a site serving medically underserved populations: The University of Texas Health Science Center, Student Health Center, 7703 Floyd Curl Drive, San Antonio, Texas 78229. The designation is based on proven eligibility as a site serving a disproportionate number of clients eligible for federal, state or locally funded health care programs.

Oral and written comments on this designation may be directed to Brian King, Program Director, Health Professions Resource Center - MC 1898, Center for Health Statistics, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347; telephone (512) 458-7261. Comments will be accepted for 30 days from the publication date of this notice.

TRD-200805354
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: October 9, 2008

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by FIREMAN'S FUND INSURANCE COMPANY OF OHIO, a foreign fire and casualty company. The home office is in Cincinnati, Ohio.

Application for admission in Texas for EAGLE LIFE INSURANCE COMPANY, a foreign life company. The home office is in West Des Moines, Iowa.

Application to change the name of SEGUROS COMERCIAL AMERICA, S.A. DE C.V. to AXA SEGUROS, S.A. DE C.V., a foreign fire and casualty company. The home office is in Mexico, D.F., Mexico.

Application to change the name of GE SEGUROS, S.A. DE C.V. to GENWORTH SEGUROS MEXICO, S.A. DE C.V., a foreign fire and casualty company. The home office is in Leon, Guanajuato, Mexico.

Application to change the name of WORLDWIDE CASUALTY INSURANCE COMPANY to GREAT AMERICAN CASUALTY INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Cincinnati, Ohio.

Application to change the name of ANNUITY & LIFE REASSURANCE AMERICA INC. to HERITAGE UNION LIFE INSURANCE COMPANY, a foreign life company. The home office is in Richmond, Virginia.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200805377
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: October 10, 2008

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Company Licensing

Application for admission to the State of Texas by BUILDERS MUTUAL CASUALTY COMPANY, a foreign fire and casualty company. The home office is in Lenexa, Kansas.

Application to change the name of VICTORIA INSURANCE COMPANY to CRANBROOK INSURANCE COMPANY, a domestic fire and casualty company. The home office is in Arlington, Texas.

Application for admission to the State of Texas by FIRST CHICAGO INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Bedford Park, IL.

Application for admission to the State of Texas by TRAVELERS PERSONAL INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Hartford, CT.

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, M/C 305-2C, Austin, Texas 78701.

TRD-200805463
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: October 15, 2008

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Notice of Public Hearing

The Commissioner of Insurance (Commissioner) will hold a public hearing under Docket No. 2699 on November 17, 2008 at 9:30 a.m. in Room 100 of the William P. Hobby, Jr., State Office Building, 333 Guadalupe Street in Austin, Texas, to consider the Texas Windstorm Insurance Association's (Association) petition for proposed increases to the current maximum limits of liability for residential dwellings and individually owned townhouses and associated contents; contents of an apartment, condominium, or townhouse; commercial structures and associated contents; and governmental structures and associated contents for policies of windstorm and hail insurance. The petition is submitted pursuant to Texas Insurance Code §§2210.502 - 2210.504.

This notice is made pursuant to the Texas Insurance Code §2210.504(a) which requires notification and a hearing prior to the Commissioner's approval, disapproval, or modification of the Association's proposed adjustments to the limits of liability for its policies of windstorm and hail insurance. This proceeding is exempt from the contested case procedures in Texas Insurance Code §40.002 and §40.003.

A copy of the Association's petition is available for review in the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701. To request a copy of the petition, contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. P-1008-17). For additional information interested parties may contact Marilyn Hamilton, Property and Casualty Associate Commissioner, MC 104-PC, Texas Department of Insurance, 333 Guadalupe, Austin, Texas 78701 or call at (512) 322-2265.

TRD-200805395
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: October 13, 2008

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Texas Department of Insurance, Division of Workers' Compensation

Notice of Public Hearing

The Texas Department of Insurance, Division of Workers' Compensation (TDI) will hold a public hearing on Thursday, November 6, 2008 in Room 1.107A at the Metro Building, 7551 Metro Center Drive in Austin.

The public hearing will begin at 10:00 a.m. and TDI will take testimony on the following rules:

Chapter 130. Impairment and Supplemental Income Benefits

Subchapter B. Supplemental Income Benefits

§130.101. Definitions.

§130.102. Eligibility for Supplemental Income Benefits; Amount.

§130.103. Determination of Entitlement or Non-entitlement for the First Quarter.

§130.104. Determination of Entitlement or Non-entitlement for the Subsequent Quarters.

§130.105. Failure to Timely File Application for Supplemental Income Benefits; Subsequent Quarters.

§130.106. Loss of Entitlement to Supplemental Income Benefits.

§130.107. Payment of Supplemental Income Benefits.

§130.108. Contesting Entitlement or Amount of Supplemental Income Benefits, Attorney Fees.

§130.109. Reinstatement of Entitlement if Discharged with Intent to Deprive of Supplemental Income Benefits.

These proposed rules were published in the October 3, 2008, issue of the *Texas Register* (33 TexReg 8290), and may be viewed on the TDI's website at *http://www.tdi.state.tx.us/wc/rules/proposedrules/toc.html*. Although the comment period for these rules closes on November 3, 2008 at 5:00 p.m., commenters may present additional comments at the hearing.

TDI offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, contact Idalia Cantu at (512) 804-4403 at least two days prior to the hearing date.

For further information regarding this notice, contact Blanca Guardiola of the Division's Legal Services Section at (512) 804-4716.

TRD-200805355

Stanton K. Strickland

Deputy Commissioner

Texas Department of Insurance, Division of Workers' Compensation

Filed: October 9, 2008

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Texas Lottery Commission

Instant Game Number 1138 "Aladdin's Lamp"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1138 is "ALADDIN'S LAMP". The play style is "coordinate with prize legend".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1138 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1138.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A1, A2, A3, A4, A5, A6, B1, B2, B3, B4, B5, B6, C1, C2, C3, C4, C5, C6, D1, D2, D3, D4, D5, D6, E1, E2, E3, E4, E5, E6, F1, F2, F3, F4, F5 and F6.

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. 1138 - 1.2D

PLAY SYMBOL	CAPTION
A1	
A2	
A3	
A4	
A5	
A6	
B1	
B2	
B3	
B4	
B5	
B6	
C1	
C2	
C3	
C4	
C5	
C6	
D1	
D2	
D3	
D4	
D5	
D6	
E1	
E2	
E3	
E4	
E5	
E6	
F1	
F2	
F3	
F4	
F5	
F6	

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $3.00, $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $40.00, $50.00, $60.00, $75.00, $100, $150 or $300.

H. High-Tier Prize - A prize of $3,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven

(7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1138), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1138-0000001-001.

K. Pack - A pack of "ALADDIN'S LAMP" Instant Game tickets 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 ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "ALADDIN'S LAMP" Instant Game No. 1138 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "ALADDIN'S LAMP" Instant Game is determined once the latex on the ticket is scratched off to expose 36 (thirty-six) play symbols. The player scratches the "TREASURE GRID COORDINATES". The player then scratches only the boxes on ALADDIN'S GRID whose letters and numbers match the "TREASURE GRID COORDINATES". The player reveals 3 matching symbols to win according to prize legend. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 36 (thirty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 36 (thirty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 36 (thirty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 36 (thirty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. A ticket may win up to four (4) times per the prize structure.

C. No duplicate TREASURE GRID COORDINATE play symbols on a ticket.

D. No grid will be used consecutively.

E. No four matching grid symbols will match a winning ALADDIN'S GRID symbol.

2.3 Procedure for Claiming Prizes.

A. To claim a "ALADDIN'S LAMP" Instant Game prize of $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $40.00, $50.00, $60.00, $75.00, $100, $150 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any

Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $40.00, $50.00, $60.00, $75.00, $100, $150 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "ALADDIN'S LAMP" Instant Game prize of $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "ALADDIN'S LAMP" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. 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 a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "ALADDIN'S LAMP" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "ALADDIN'S LAMP" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1138. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1138 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	576,000	10.42
$5	624,000	9.62
$10	192,000	31.25
$15	96,000	62.50
$20	48,000	125.00
$30	15,000	400.00
$40	10,000	600.00
$50	7,500	800.00
$60	6,250	960.00
$75	3,750	1,600.00
$100	2,450	2,448.98
$150	1,000	6,000.00
$300	500	12,000.00
$3,000	35	171,428.57
$30,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.79. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1138 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1138, 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-200805353
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 9, 2008

♦ ♦ ♦

Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transaction

Grant of Easement - Possum Kingdom State Park, Palo Pinto County

In a meeting on November 6, 2008, the Texas Parks and Wildlife Commission (the Commission) will consider granting an easement to the Possum Kingdom Water Supply Corporation for a six-inch water main, a water storage tank, and a pump station. Before taking action, the Commission will take public comment regarding the proposed transaction. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us.

TRD-200805420
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: October 14, 2008

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 6, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Friendship Cable of Texas, Inc. d/b/a Suddenlink Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36229 before the Public Utility Commission of Texas.

The requested amended CFA service area constricts the service area footprint by excluding the Village of Jones Creek, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36229.

TRD-200805384
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 10, 2008

♦ ♦ ♦

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 7, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Marcus Cable Associates, L.L.C. d/b/a Charter Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36236 before the Public Utility Commission of Texas.

The requested amended CFA service area expands the service area footprint to include the City of Cleburne, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36236.

TRD-200805385
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 10, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 7, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36235 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the addition of the municipality of Coppell, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36235.

TRD-200805386
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 10, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 10, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Friendship Cable of Texas, Inc., d/b/a Suddenlink Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36264 before the Public Utility Commission of Texas.

The requested amended CFA service area expands the service area footprint to include the city limits of Albany, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36264.

TRD-200805432
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on October 9, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Comcast of Houston, LLC for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 36261 before the Public Utility Commission of Texas.

The requested amended CFA service area expands the service area footprint to include the boundaries of the municipality of La Porte, Texas, including any future annexations.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36261.

TRD-200805448

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 15, 2008

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Notice of Application for Service Area Exception Within McCullough County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on October 9, 2008, for an amendment to certificated service area for a service area exception within McCullough County, Texas.

Docket Style and Number: Application of Central Texas Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within McCullough County. Docket Number 36259.

The Application: Central Texas Electric Cooperative, Inc. (CTEC) filed an application for a service area boundary exception to allow CTEC to provide service to a specific customer located within the certificated service area of Cap Rock Energy. Cap Rock Energy has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than October 31, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 36259.

TRD-200805438
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on October 13, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of NET TALK.COM, INC. for a Service Provider Certificate of Operating Authority, Docket Number 36267 before the Public Utility Commission of Texas.

Applicant intends to provide facilities-based telecommunications services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company d/b/a AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than November 3, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36267.

TRD-200805433
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on October 13, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of One Source Networks CLEC, LLC for a Service Provider Certificate of Operating Authority, Docket Number 36269 before the Public Utility Commission of Texas.

Applicant intends to provide residential and business resold telecommunications services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company d/b/a AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than November 3, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36269.

TRD-200805434
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on October 13, 2008, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assignment of two thousand blocks of numbers in the Houston rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 36270.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than November 5, 2008. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36270.

TRD-200805439

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Notice of Application to Amend Certificated Service Area Boundaries in Cameron County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on October 8, 2008, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County (Church of the Advent, Episcopal). Docket Number 36254.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Church of the Advent, Episcopal, requesting BPUB to provide electric utility service to a 21.88-acre tract of land. The estimated cost to BPUB to provide service to this proposed area is $40,900.00. The area is presently undeveloped. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than October 31, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 36254.

TRD-200805437
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On October 13, 2008, Xpance Broadband, Ltd. filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60757. Applicant intends to relinquish its certificate.

The Application: Application of Xpance Broadband, Ltd. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 36272.

Persons wishing to 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 1-888-782-8477 no later than November 5, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36272.

TRD-200805435
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing on October 8, 2008, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215. The Applicant will file the LRIC study on or after October 18, 2008.

Docket Title and Number: Application of Verizon Southwest, Inc. for Approval of LRIC Study for TLS Local Loop Optical Transport Access Pursuant to P.U.C. Substantive Rule §26.215, Docket Number 36255.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 36255. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at 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 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 36255.

TRD-200805431
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 14, 2008

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Request for Proposals for a Cost-Benefit Analysis of the Deployment of Utility Infrastructure Upgrades and Storm Hardening Programs

The Public Utility Commission of Texas (PUCT or Commission) is issuing a Request for Proposals (RFP) for an entity to provide a cost-benefit analysis of the recommendations in the Final Staff Report (Project No. 32182, Item No. 93), *PUC Investigation of Methods to Improve Electric and Telecommunications Infrastructure to Minimize Long Term Outages and Restoration Costs Associated with Gulf Coast Hurricanes.* Proposers must file their sealed proposals in Project No. 36209 at PUCT Central Records before 5:00 p.m., Friday, November 7, 2008.

The contract awardee will evaluate data from electric and telecommunications utilities related to hurricanes and tropical storms impacting the Texas coast within the last ten years to assess infrastructure damage caused by wind, trees/flying debris, inland flooding, and storm surge and the associated restoration costs. The analysis shall include an evaluation of the cost to electric utilities of implementing annual vegetation management programs and ground-based pole inspection programs throughout the State of Texas.

Another component of the analysis is an evaluation of the costs and benefits of implementing certain requirements in hurricane-prone areas (within 50 miles of the coast), including construction of electric substations and telecommunications central offices above the 100-year floodplain, providing adequate back-up power for central offices and substations, construction of transmission lines to meet current National Elec-

trical Safety Code wind-loading standards, and building underground transmission and distribution lines. The contract awardee will also determine the societal costs associated with lost productivity during an extended power outage and the benefits associated with shorter restoration times.

RFP documentation may be obtained by contacting Chris Wood:

Chris Wood, Purchaser

Public Utility Commission of Texas

P.O. Box 13326

Austin, TX 78711-3326

(512) 936-7069

chris.wood@puc.state.tx.us

RFP documentation also is located on the PUCT website at http://www.puc.state.tx.us/about/procurement/currentrfps.cfm

TRD-200805459
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 15, 2008

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Supreme Court of Texas

Order Adopting Amendments to Article III of the State Bar Rules

Misc. Docket No. 08-9148

ORDERED that:

1. The Court adopts the following amendments to Article III of the State Bar Rules, which the State Bar Board of Directors approved in substantially similar form on January 25, 2008.

2. By Order dated May 14, 2008, in Misc. Docket No. 08-9048, the Supreme Court of Texas proposed amendments to Articles I and III of the State Bar Rules and invited public comment. The Court then made additional revisions to the rules. By Order dated August 20, 2008, in Misc. Docket No. 08-9117, the Court adopted the final version of Article I.

3. Amended Article III of the State Bar Rules takes effect on October 6, 2008.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature; and

d. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

SIGNED AND ENTERED this 6th day of October, 2008.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Harriet O'Neill, Justice

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J. Dale Wainwright, Justice

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Scott Brister, Justice

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David M. Medina, Justice

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Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

ARTICLE III--MEMBERSHIP

SECTION 2. Enrollment in the State Bar

A. Each person who ~~becomes~~ is licensed to practice law in Texas shall, in accordance with the applicable Supreme Court rules governing admission to the bar, ~~no earlier than ten (10) days prior to~~ and no later than ten (10) days following the date of admission, (i) file with the clerk an enrollment form stating his or her name, ~~permanent place of residence, principal place of practice~~ preferred physical address or post office box, telephone number, facsimile number, e-mail address, and such other information as may be required by the clerk and (ii) pay all fees and assessments then required., ~~and t~~ This filing and payment shall constitute enrollment in the State Bar. The preferred physical address or post office box shall constitute the member's registered address and will be used for receiving official notices from the State Bar, including membership compliance information, member benefits, and disciplinary matters. A member is mandated to notify the State Bar of any change in the information required above within thirty (30) days of such change.

Notes:

Section 552.1176 of the Government Code prescribes the confidentiality of certain information maintained by the State Bar, including the home address, home telephone number, e-mail address, social security number, and date of birth of a person licensed to practice law in Texas.

TRD-200805352
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: October 9, 2008

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Galveston, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is the scope of work proposed for the Scholes International Airport at Galveston.

Current Project: City of Galveston. TxDOT CSJ No. 0912GVSTN. Replace REILs at Runway 13-31 and Runway 17-35; replace PAPI-4 Runway 17 and Runway 13-31; replace Runway 17-35 MIRLs; replace Runway 13-31 HIRLs; replace taxiway lights; replace and elevate vault; assess and check wiring to supplemental windcone; install/replace signage; install emergency generator; and reconstruct/rehabilitate various airside pavements at the Scholes International Airport.

The DBE goal for the current project is 3%. TxDOT Project Manager is Clayton Bridwell.

The City of Galveston reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Scholes International Airport at Galveston". The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT, Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at

www.txdot.gov/services/aviation/consultant.htm.

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion.

PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT, Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than November 6, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation engineering proposals can be found at

http://www.txdot.gov/services/aviation/consultant.htm.

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Clayton Bridwell, Project Manager.

TRD-200805393
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: October 13, 2008

♦ ♦ ♦

The Texas A&M University System

Request for Qualifications

Tarleton State University

RFQ 9-0001: Institutional Review

Tarleton State University is accepting submissions and intends to enter into an Agreement with a consultant to perform the duties of an institutional review for the Office of the President. Minimum service requirements involve conducting an objective assessment (institutional review) of the general condition of Tarleton State University to include, but not be limited to, the following:

1. Providing a list of background materials needed (which may consist of the company's standard template of requested materials).

2. Providing a team of three or four "experts" in the field of higher education that would conduct the institutional review. It is preferred that at least one of these experts has some working knowledge of Texas public higher education. Each team member's list of qualifications must accompany the proposal response.

3. Coordinating dates for the campus visit with the President's Office staff, which will include visits with various constituents at the main campus and off-campus locations (i.e., Fort Worth, Thurber, Granbury, Waco, and Killeen).

4. Providing a preliminary interview schedule to the President's Office for review and comments.

5. Reviewing and assessing campus specific areas that include (1) academic programs; (2) technology; (3) faculty; (4) students; (5) administration; (6) budget and finance; (7) intercollegiate athletics and auxiliary services; (8) senior officers; (9) private support and outside grants; (10) public relations (including fundraising and alumni relations); (11) institutional governance; and (12) other issues and conditions presented during the course of the review. Particular emphasis will be given to institutional advancement (including alumni and public relations), general organizational structure (with a particular focus on research and enrollment management), financial aid and scholarships, continuing education, and academic programs with the best opportunities for growth.

6. Identifying opportunities for operational improvements.

7. Providing regular updates to the President's Cabinet.

8. Reviewing specific findings and recommendations with the President's Cabinet and provide a draft document to the Cabinet for clarification.

9. Completing the review and final report within 45 days of campus visit.

10. Providing a final document to President Dottavio.

The CEO of Tarleton has determined that these consulting services are necessary. As a new president, it is important that the necessary evaluative processes of an outside consultant are utilized to help identify areas within the University that may need improvement or changes, in order to function more efficiently and effectively. In addition, the University's Strategic Plan developed in 2007 will provide guidance for several years to come. The Institutional Review provides an opportunity for a relatively new Strategic Plan to be effectively coordinated with new initiatives by the president.

The awarded vendor shall complete all authorized work in accordance with the time for performance described for the work and be consistent with the highest customs, standards and practices of his/her business or profession.

The Request for Qualifications (RFQ) documentation may be obtained by contacting: Ms. Beth Chandler, Director of Purchasing, Central Services and HUB Program, Tarleton State University, Box T-0600, Stephenville, Texas 76402 or e-mail at chandle@tarleton.edu.

Tarleton State University will base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and if other considerations are equal give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state of Texas.

Submissions must be received on or before 3:00 p.m. CST on November 24, 2008.

TRD-200805418
Vickie Burt Spillers
Executive Secretary to the Board
The Texas A&M University System
Filed: October 14, 2008

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The University of Texas System

Award of Consultant Contract Notification

The University of Texas System ("University"), in accordance with the provisions of *Texas Government Code*, Chapter 2254, entered into a contract for consulting services ("Contract") with Global Options, Inc. ("Consultant"). The University received an emergency waiver from the Texas Governor's Office from the Notice of Intent requirements of §2254.028; and from the pre-contract publication requirements of §2254.029 of the *Texas Government Code* on October 3, 2008. Therefore, the proposal was not previously published in the *Texas Register*.

Project Description:

In accordance with the Request for Emergency Waiver and Consultant's response thereto, Consultant shall assist University of Texas institutions prepare, process, and recover claims for damages from the Federal Emergency Management Agency (FEMA) caused by natural disasters including, but not limited to, claims arising from Hurricane Ike.

Name and Address of Consultant:

Global Options, Inc.

1501 M Street, NW, 5th Floor

Washington DC 20005

Total Value of Contract:

The overall maximum value of the contract is indefinite, subject to the contractual authority delegated by The University of Texas System Board of Regents to the University's representative. The allowable fees for each specifically authorized project will be established in an "Authorization to Commence Work" issued by a University institution.

Contract Dates:

The Contract was executed by Consultant on October 6, 2008, and by University on October 9, 2008, and dated effective October 1, 2008.

Due Dates for Contract Products:

The consulting services will be completed and delivered to University no later than September 30, 2013.

The Contract expires on September 30, 2013.

TRD-200805427
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: October 14, 2008

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Texas Water Development Board

Request for Statements of Qualifications - Study Commission

The Study Commission on Region C Water Supply (Study Commission) requests the submission of Statements of Qualifications (SOQs) from interested applicants leading to the possible award of contracts to perform work identified in a Scope of Work prepared by the Study Commission and listed below as Task 1 through Task 8. Funding will be through Texas Water Development Board (TWDB) grants to the Study Commission. A contract will be negotiated by the Study Commission with the most qualified applicant and payments will be made by the Study Commission's Administrator.

Statements of qualifications are requested for the work identified below as "Independent Third Party".

Disqualification

Per Senate Bill 3, 80th Texas Legislature, Regular Session, the Study Commission may not be assisted by any person that is a party to or is employed by a party to a contract to perform engineering work with respect to site selection, permitting, design, or construction of the proposed Marvin Nichols reservoir.

Description of Scope of Work to be Performed

Task 1: Water Supply Alternatives

SB3 Section 4.04 (e)(1): "Review the water supply alternatives available to the Region C Regional Water Planning Area, including obtaining additional water supply from Wright Patman Lake, Toledo Bend Reservoir, Lake Texoma, Lake O' the Pines, other existing and proposed reservoirs, and groundwater."

Purpose

The purpose of this work is to identify and summarize all water supply alternatives that have been considered for Region C. This review will be used to identify any gaps in this information and to assess whether additional studies should be undertaken.

Proposed Work Items

Task 1.1: Identify and review all relevant and available plans and studies that have examined water supply alternatives with the potential to supply water to the Region C Planning Area.

a. Work will include, but not be limited to the following tasks:

i. Perform a literature search for all available planning or engineering-related water supply plans and studies that have considered, evaluated, or proposed water supply alternatives for the Region C Planning Area. Due diligence should be made to obtain all studies, including those studies that have not necessarily been utilized in the state's Regional Water Planning Process, and should cover efforts back to 1985.

ii. Compile a comprehensive list of the identified studies with a brief written synopsis of each study, and a summary of the components of each study including, but not limited to:

a. title of study document;

b. date of study;

c. study sponsor(s);

d. study author(s);

e. type of study (e.g. technical vs. planning level);

f. subject of study (specific facility vs. water user water plan); and

g. other objective components that are considered relevant to this Part as identified by the Study Commission or Contractor.

iii. Develop a list of water supply alternatives for evaluation. Present the compiled list of alternatives and studies at the first available meeting of the Study Commission for additions or deletions to the list and approval of the list for use by the Study Commission and its designated contractors.

Deliverables

Brief summary report, data files, and presentation of results to the Study Commission. Report synopses and bibliography should be submitted in a .pdf format for posting to a web page for public access should the Study Commission so desire.

Task 1.2: Identify and summarize the water supply alternatives described within the plans and studies identified in Task 1.1 including, but not limited to;

* Wright Patman Lake, Toledo Bend Reservoir, Lake Texoma, Lake O' the Pines;

* Other existing and proposed reservoirs;

* Groundwater;

* The water supply alternatives identified in the 2001 and 2006 Region C Water Plans; and

* The water supply alternatives described in the plans and studies identified in Task 1.1.

a. Work will include, but not be limited to the following tasks:

i. Identify each water supply alternative *from each study.* This may, for example, result in 5 summaries of the 'same' alternative but from 5 different studies;

ii. Compile a comprehensive list of all water supply alternatives listed above with an appropriate cross reference to the source plan or study;

iii. Provide a brief written summary of the water supply alternative and a summary of the components of each water supply alternative including, but not limited to:

a. name of water supply alternative;

b. category/type of water supply alternative (e.g. reuse vs. groundwater);

c. water supply volume (e.g. firm yield) as calculated in accordance with TWDB's technical guidance in the regional water planning contracts (i.e. Exhibit B) which requires that firm yield be calculated under drought of record conditions;

d. detailed cost of water supply alternative as standardized by TWDB's technical guidance in the regional water planning contracts;

e. number and name(s) of entities who would develop the water supply alternative and number and name(s) of entities who would be supplied by the water supply alternative;

f. cross-reference for each version of each water supply alternative (e.g. title of study, year, and page number);

g. level of detail of study of the water supply alternative (e.g. planning level versus engineering level);

h. type of study (specific facility vs. water user water plan);

i. date of study;

j. study sponsor(s);

k. study author(s);

l. identification of whether the water supply alternative was a recommended water management strategy in the 2001 or 2006 Region C Water Plans;

m. conditions and terms for viability of the water supply alternative;

n. other attributes considered relevant to this Subtask as identified by the Study Commission or Contractor;

o. water quality of source;

p. permitting requirements;

q. environmental impact;

r. operational considerations (e.g., flood control, system operation, etc.); and

s. economic impact to both Regions C and D (e.g., gain/loss of jobs, industry, manufacturing, etc.).

iv. Characterize and clarify the significant variations between attributes for different versions of the same water supply alternative; and

v. Prepare a draft summary report and brief the Study Commission members on the water supply alternatives identified and the significant variations between versions of similar water supply alternatives.

Deliverables

Summary report, data files, and presentation of results to Study Commission.

Task 1.3: Identify potential gaps in the existing plans and studies and make recommendations to the Study Commission on what additional studies might be undertaken to bridge any identified gaps.

a. Work will include, but not be limited to the following tasks:

i. Contacting all major water providers in Region C to determine the availability of relevant studies;

ii. Identify potential gaps in existing water supply plans and studies;

iii. Based on the contractor's best professional judgment, develop preliminary recommendations on what additional studies could be undertaken to bridge any identified gaps;

iv. Present the preliminary recommendations to the Study Commission and collect feedback from the Study Commission to determine all additional studies needed; and

v. Develop draft scopes of work for the additional studies as determined under Task 1.3.a.iv above.

Deliverables

Summary report, data files, presentation of results to Study Commission, draft scopes of work.

Task 1.4: Provide background review of 2006 Region C Water Plan.

a. Work will include, but not be limited to, the following tasks:

i. Summarize the major or significant elements of the 2006 Region C Water Plan using appropriate tables, figures, graphs, and section summaries;

ii. Summarize in a similar manner all water supply alternatives considered; and

iii. Present summary of 2006 Region C Water Plan for all Major Water Providers including all water supply alternatives recommended and designated as alternatives.

Deliverables

Summary report, data files, presentation of results to Study Commission.

Proposed Contractor

Independent Third Party (Tasks 1.1, 1.2, and 1.3)

TWDB (Task 1.4)

Task 2: Socioeconomic Impacts

SB3 Section 4.04 (e)(2): "in connection with the review under Subdivision (1) of this subsection, analyze the socioeconomic effect on the area where the water supply is located that would result from the use of the water to meet the water needs of the Region C Regional Water Planning Area, including:

(A) the effects on landowners, agricultural and natural resources, businesses, industries, and taxing entities of different water management strategies; and

(B) in connection with the use by the Region C Regional Water Planning Area of water from Wright Patman Lake, the effect on water availability in that lake and the effect on industries relying on that water availability;"

Purpose

In connection with the review of water supply alternatives in Task 1, the Study Commission will analyze the socioeconomic impacts of water supply alternatives on geographic regions where the alternatives are located. In addition, the Study Commission will review the impacts of using water from Wright Patman Lake to meet future water needs of Region C. This analysis will focus on potential changes to water availability in the lake, and any associated impacts to cities, businesses and industries that rely on the lake for water supplies. The following document summarizes the initial tasks required to meet these mandates.

Proposed Work Items

Regional economic and demographic impact analysis for Regions D and C of potential water supply alternatives for Region C.

2.1 Furnish a copy of the "Draft List of Citations for Studies Related to Task 2" to each Study Commission member (list is included at the end of this Task description).

2.2 Request from the Study Commission a list of agencies or organizations the Contractor should approach to secure any additional reports or studies that are responsive to the requirements of Task 2.

2.3 Prepare list of all existing reports, studies for review and consent of Study Commission for work on this Task. As a part of its review and approval for use, the Study Commission shall identify all areas of dispute and decide on what additional work could be done to resolve an issue.

2.4 The contractor will identify and evaluate the socioeconomic and demographic impacts to different economic sectors in areas where water supply alternatives would be or are located. Economic sectors include but are not limited to landowners, agricultural and natural resources, commercial business, industrial facilities, and taxing entities. Measured impacts should include direct and secondary losses and/or gains in regional output (i.e., gross sales), regional value-added (i.e., income), employment, local and state sales taxes, property taxes, population, and any other variables considered important to a specific region. Initially, the contractor will conduct an extensive review of any planning, socioeconomic and/or engineering studies that quantify socioeconomic impacts (as described above) to geographic regions where supply alternatives are located.

2.5 The contractor will compile a list of identified studies with written synopses that summarize and critique the attributes, methodologies and results of each study, and identify gaps in existing studies, and if needed, recommend a methodology and approach to the Study Commission to bridge identified gaps.

Deliverables

The contractor will provide a written report summarizing results of identified studies along with copies of the reports and any associated data files (if available) and provide recommendations for further analyses including a scope of work if needed. The contractor will present results to the Study Commission upon request.

Proposed Contractor:

Independent Third Party (Work Items 2.1 - 2.5)

Citations for Studies Related to Tasks (e)(2A) and (e)(2B) of Section 4.04 of Senate Bill 3 - Socioeconomic Impact Analysis of Water Supply Alternatives

1. Weinstein, L.B. and Clower, T.L. "The Economic, Fiscal and Developmental Impacts of the Proposed Marvin Nichols Reservoir Project." Prepared for the Sulphur River Basin Authority. March, 2003.

2. Weihuan, Xu., "The Economic Impact of the Proposed Marvin Nichols I Reservoir to the Northeast Texas Forest Industry." Prepared by the Texas Forest Service of the Texas A&M University System. Publication 162. August, 2002.

3. Perryman, Ray., Technical memorandum reviewing and critiquing the draft economic impact analysis of the proposed Marvin Nichols Reservoir conducted by Weinstein, L.B. and Clower T.L, (March 2003) and a review of the economic impact analysis conducted Weihuan, Xu of the Texas Forest Service (August 2002). Prepared for Mr. John Rutledge of Freese and Nichols, Inc. December, 2002.

4. Stowe, Jack. "Socioeconomic Analysis of Selected Interbasin Transfers in Texas." Prepared by R.W. Beck and Associates for the Texas Water Development Board. October, 2007.

Task 3: Water Conservation and Reuse Strategies

SB3 Section 4.04 (e)(3): "determine whether water demand in the Region C Regional Water Planning Area may be reduced through addi-

tional conservation and reuse measures so as to postpone the need for additional water supplies;"

Purpose

The purpose of this task is to review the water conservation and reuse strategies of "water user groups" included in the 2006 Region C Regional Water Plan including:

1. water user groups (about 360) with identified water supply needs that include water conservation or reuse strategies;

2. water user groups (about 20) with identified water supply needs that did not include water conservation or reuse strategies;

3. water user groups (about 45) who do not have an identified water supply need but did include conservation or reuse strategies.

Proposed Work Items

3.1 The Contractor will review the 2006 Region C Regional Water Plan's water conservation and reuse strategies for each of the above water user groups. For each water user group above, the Contractor will prepare a tabulation of the specific strategies and the methodologies and assumptions utilized for including or omitting water conservation and reuse strategies in the plan.

3.2 The Contractor will develop a transmittal letter and survey form that will be used to transmit the data in Task 1 and a questionnaire that will be provided to either the Utility Director or Water Conservation Director of each water user group in the above list.

3.3 The letter will request that the utility review its specific water conservation and reuse strategies as included in the 2006 Region C Water Plan, including information on:

a. List all conservation initiatives currently underway and planned.

b. List obstacles to increasing conservation in service area of Region C.

c. List reuse programs implemented by agency.

d. List factors that would limit additional reuse.

3.4 The survey will ask the utility to consider current state-of-art water conservation and reuse best management practices, including an analysis of cost effectiveness, and then identify the potential for:

a. the utility to accomplish the impacts of the strategies as contained in the 2006 Region C Regional Water Plan;

b. any increase in utilization or volume of the water conservation and reuse strategies that were included in the 2006 Region C Regional Water Plan; and

c. implementation and estimated volume of any additional water conservation or reuse strategies not included in the 2006 Region C Regional Water Plan.

3.5 The Contractor will transmit by mail the data, letter, and survey form to each water user group in the above list. A follow up reminder letter may also be utilized.

3.6 After the requested response deadline has passed, Contractor will attempt to contact by telephone or personal visit any utilities who have not responded to the request for information.

3.7 The Contractor will develop a side-by-side comparison of the water user groups 2006 strategies and strategies in the requested survey.

3.8 At the completion of the study, the Contractor will provide a report containing the process used in the study and the results obtained from each of the water user groups requested to respond to the survey to the extent possible the Contractor should avoid creating a series of executive summaries and literature reviews that already exist within the Region C 2006 Water Plan that do not offer substantive information to allow the Study Commission on Region C Water Supply to move forward with definitive tasks.

Proposed Contractor:

Independent Third Party (Work Items 3.1 - 3.8)

Task 4: Securing a definitive policy statement from the United States Army Corps of Engineers

SB3 Section 4.04 (e)(4):" evaluate measures that would need to be taken to comply with the mitigation requirements of the United States Army Corps of Engineers in connection with any proposed new reservoirs, including identifying potential mitigation sites;"

Purpose

To secure a definitive policy statement from the United States Army Corps of Engineers relating to mitigation requirements for new reservoir and water resource development projects.

Proposed Work Items

Task 4.1: The TWDB shall request the United States Army Corps of Engineers (USCOE) to make a presentation to the Study Commission on Region C Water Supply that includes:

a. To the extent possible, the impact of the newly issued regulations titled "Final Compensatory Mitigation Rule" on any new reservoir project.

b. A policy statement of the USCOE relating to mitigation that includes but is not limited to:

i. Procedure used to determine required amount of mitigation acreage including timeline and cost.

ii. Procedure used to determine location of mitigation acreage and options available under the "Final Compensatory Mitigation Rule."

iii. Whether or not the USCOE can stipulate measures that would need to be taken to comply with mitigation requirements in connection with any proposed new reservoir, including identifying potential mitigation sites and amount of mitigation acreage required prior to December 1, 2010.

Task 4.2: Depending on the outcome of Task 4.1, it may be necessary for the Study Commission to redirect efforts to comply with SB 3 Section 4.04 (e)(4).

Deliverables

United States Army Corps of Engineers' written policy statement on mitigation requirements for each new reservoir included in the Region C Water Plan.

Proposed Contractor: United States Army Corps of Engineers

Task 5: Determination of mitigation burden to be shared by the Region C and D Regional Water Planning Areas

SB3 Section 4.04 (e)(5):" consider whether the mitigation burden described by Subdivision (4) of this subsection may be shared by the Regions C and D Regional Water Planning Areas in proportion to the allocation to each region of water in any proposed reservoir;"

Purpose

To secure a definitive policy statement from the United States Army Corps of Engineers relating to whether the mitigation burden determined under Task 4 may be shared by the Region C and D Regional Water Planning Areas in proportion to the allocation to each region of water in any proposed reservoir located in Region D.

Proposed Work Items

Task 5.1: The TWDB shall request the United States Army Corps of Engineers (USCOE) to make a presentation to the Study Commission on Region C Water Supply that includes:

a. A discussion of the performance standards and criteria for three types of wetlands mitigation options: mitigation banks, in-lieu programs, and permittee responsible compensatory mitigation as described in the "Final Compensatory Mitigation Rule" as issued by the EPA and USCOE.

b. Identification of sites suitable for mitigation within Region D. This should include satellite imagery with mitigation sites overlain on same area map. This same procedure should be performed for mitigation sites located in Region C. If the USCOE is unable to perform Task 5.1b, an independent third party contractor will identify suitable sites as discussed and prepare area maps and summarize in a brief report following the standards and criteria listed in Task 5.1a.

Task 5.2: Depending on the outcome of Task 5.1, it may be necessary for the Study Commission to redirect efforts to comply with SB 3 Section 4.04 (e)(5).

Deliverables

United States Army Corps of Engineers' written policy statement as to whether the mitigation burden may be shared by the Region C and Region D Regional Water Planning Areas.

Proposed Contractor:

United States Army Corps of Engineers (Task 5.1a and 5.1b)

Independent Third Party (Task 5.1b as necessary)

Task 6: Determining innovative methods of compensation to affected property owners

SB3 Section 4.04 (e)(6): "review innovative methods of compensation to affected property owners, including royalties for water stored on acquired properties and annual payments to landowners for properties acquired for the construction of a reservoir to satisfy future water management strategies;"

Purpose

To review innovative methods of compensation to affected property owners, including royalties for water stored on acquired properties and annual payments to landowners for properties acquired for the construction of a reservoir to satisfy future water management strategies.

Proposed Work Items

Task 6.1

1. Conduct literature search of public works projects involving water supply development in Texas as well as other parts of the United States where innovative methods of compensation to affected property owners have been used.

2. Conduct similar literature search for all public works projects in general where innovative methods of compensation have been used.

3. Based on information found, summarize all pertinent facts for review by Study Commission.

Task 6.2

1. Obtain input from professionals and experts (invited by the Study Commission) who have knowledge of innovative compensation methods available under current law to landowners from non-profit governmental entities for public works water development projects.

2. Compile a summary of all comments received for use by the Study Commission.

Task 6.3

1. The Study Commission shall review all written and verbal information received concerning innovative methods of compensation.

Deliverables

Report by Study Commission of findings and conclusions if any.

Proposed Contractor:

Independent Third Party (Work Items - Tasks 6.1 and 6.2)

Task 7: Evaluate the minimum number of surface acres impacted by the construction of the proposed new reservoirs

SB3 Section 4.04 (e)(7): "evaluate the minimum number of surface acres required for the construction of proposed reservoirs in order to develop adequate water supply;"

Purpose

The purpose of this work is to evaluate the minimum number of surface acres impacted by the construction of the proposed new reservoirs recommended in the 2006 Region C Water Plan. This includes Lake Fastrill, Lake Ralph Hall, Lower Bois d'Arc Reservoir, and Marvin Nichols Reservoir. Location and appropriate operating elevations of each proposed reservoir should reflect the data from the 2006 Region C Water Plan.

Proposed Work Items

7.1 Work will include, but not be limited to the following tasks:

a. Identify and summarize the existing methodologies and estimates of the surface acres impacted by the proposed new reservoir based on the literature search performed in Task 1.1.a.i;

b. Based on the contractor's best professional judgment, the contractor will make a recommendation on the minimum number of surface acres impacted based on task 7.1.a. above or the contractor will develop alternative methodologies for estimating the minimum number of surface acres required for the construction of proposed reservoirs in order to develop adequate water supply;

c. Present summary findings and alternative methodologies to the Study Commission and collect feedback from the Study Commission to determine what alternative methodologies, if any, should be used to evaluate the minimum number of surface acres required for the construction of the proposed new reservoirs;

d. Based on the Study Commission's feedback, determine if additional analyses should be performed using alternative methodologies to evaluate the surface acreage impacted by the proposed new reservoirs; and

e. Develop a draft scope of work for any additional analyses needed.

Deliverables

Summary report, data files, and presentation of results to Study Commission.

Proposed Contractor:

Independent Third Party (Work Items 7.1a - e)

Task 8: Identify the locations of proposed reservoir sites and proposed mitigation sites

SB3 Section 4.04 (e)(8): "identify the locations of proposed reservoir sites and proposed mitigation sites, as applicable, as selected in accordance with existing state and federal law, in the Regions C and D Regional Water Planning Areas using satellite imagery with sufficient resolution to permit land ownership to be determined."

Purpose

To identify the locations of proposed reservoir sites and proposed mitigation sites, as applicable, as selected in accordance with existing state and federal law, in the Region C and D Regional Water Planning Areas using satellite imagery with sufficient resolution to permit land ownership to be determined.

Proposed Work Items

Task 8.1: Land Ownership Determination

a. Determine if land ownership records exist in a digitized form appropriate for inclusion into satellite imagery. This shall be done for each County affected by reservoir construction.

b. Determine the cost and time required to convert existing records to an appropriate digital format for each County, if necessary.

c. Determine the cost and time required to produce a land ownership map from existing County Deed Records for each reservoir project.

Deliverable

Contractor shall report the results and findings of determinations required in Work Items 8.1a, 8.1b, and 8.1c to the Study Commission.

Task 8.2: Satellite Imagery

a. Determine if satellite imagery exists and is available in the appropriate digital format for each reservoir site in the 2006 Region C Water Plan.

b. Determine if satellite imagery exists and is available in appropriate digital format for possible mitigation sites for each reservoir as determined under Task 4 SB 3 Section 4.04 (e)(4).

c. If satellite imagery does not exist, determine cost and time to acquire needed imagery.

Deliverable

Contractor shall report the results and findings of determinations required in Work Items 8.2a, 8.2b, and 8.2c to the Study Commission.

Task 8.3: Consideration by Study Commission of information provided by Contractor from completion of Task 8.1 and Task 8.2 above.

a. If compatible land ownership data and satellite imagery exist or can be generated, consideration will be given by the Study Commission to complete this task as required.

b. If compatible land ownership records do not exist, consideration will be given to producing a land ownership map from existing County Deed Records that can be overlain onto satellite imagery.

c. Given excessive cost or time constraints, the Study Commission may give consideration to redirect efforts to comply with SB3 Section 4.04 (e)(8).

Task 8.4: Merge data onto satellite imagery if directed by Study Commission.

a. Prepare both electronic and printed version of mapping to appropriate scale and size to identify the locations of proposed reservoir sites, proposed mitigation sites, and land ownership for each reservoir in 2006 Region C Water Plan.

b. Provide one copy of electronic and one copy of printed version of mapping to each member of the Study Commission.

Deliverable

Satellite imagery with proposed reservoir sites, proposed mitigation sites, and land ownership for each reservoir project in the 2006 Region C Water Plan.

Proposed Contractor:

Independent Third Party (Work Items all Task 8.1, Task 8.2, and Task 8.4)

Description of Applicant Criteria

The applicant should: (1) demonstrate applicant's ability to perform scope of work as prepared by the Study Commission. This should include but is not limited to previous projects of a similar nature. (2) provide qualifications of individuals that will be directly involved in the work product and deliverables; (3) show a clear understanding of the requirement identified in Section 4.04 of Senate Bill 3 as passed by the 80th Legislature of Texas; and (4) have excellent oral presentation and writing abilities. The Study Commission reserves the right to not accept any or all submissions based on availability of funding and its evaluation of the qualifications as submitted.

The applicant should be prepared to make an oral presentation to the Study Commission, if requested. The scope of work, schedule, and contract amount will be negotiated after the Study Commission selects the most qualified applicant. Failure to reach a negotiated contract may result in subsequent negotiations with the next most-qualified applicant; however, a negotiation will not occur with applicants who are determined by the Study Commission to be unqualified or otherwise unsuited to perform the requested research. Applicants selected to perform work identified in the scope of work will be required to make presentations at one or more of the Study Commission's public meetings.

Deadline for Submittal and Contact Person for Additional Information

Historically Underutilized Businesses (HUBs) are encouraged to submit Statements of Qualifications and/or participate as subcontractors in the water research program. As instructed at Texas Government Code §2161.252 and Texas Administrative Code, Title 34, Part 1, Chapter 20, Subchapter B, §20.14, if the anticipated cost of the study is to exceed $100,000, the applicant must complete a HUB Subcontracting Plan according to: http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-subcontracting-plan.

Ten double-sided, double-spaced copies of a completed Statement of Qualifications must be filed with the North Texas Municipal Water District prior to 5:00 p.m., November 7, 2008.

Statements of Qualifications can be directed by mail to Mr. Jim Parks, North Texas Municipal Water District Executive Director, 505 E. Brown Street, P.O. Box 2408, Wylie, Texas, 75098. Questions may be directed to Jim Parks at (972) 442-5405. All questions and responses will be made available to all applicants and will be subject to disclosure under the Open Records Act.

Selection of Consultant/Review Criteria

Ranking of all qualified applications received will be based on the highest combined score as evaluated by the Study Commission. The criteria for scoring each application is available upon request and also at the following Internet address: http://www.twdb.state.tx.us/wrpi/rwp/committee/rgc/rgc.htm

Costs Incurred

All costs directly or indirectly related to the preparation of a response to this SOQ shall be the sole responsibility of and shall be borne by the firm.

Rights of the Study Commission

This RFQ does not commit the Study Commission to enter into a contract, nor does it obligate the Study Commission to pay for any costs incurred in the preparation and submission of proposals or in anticipation of a contract. The Study Commission reserves the right to:

* Make selections or solicit additional responses based on its sole discretion;

* Reject any and all proposals and enter into direct negotiations with any, all or some of the providers whether or not they provided a submittal to this SOQ;

* Issue subsequent Requests for Statements of Qualifications for Proposals;

* Remedy technical errors in the Statements of Qualifications process;

* Approve or disapprove the use of particular sub-consultants; or

* Enter into an agreement with any provider or negotiate with more than one provider for the provision of any, all or some of the listed services.

TRD-200805444
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: October 14, 2008

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited as follows: 33 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 "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table 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 one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).