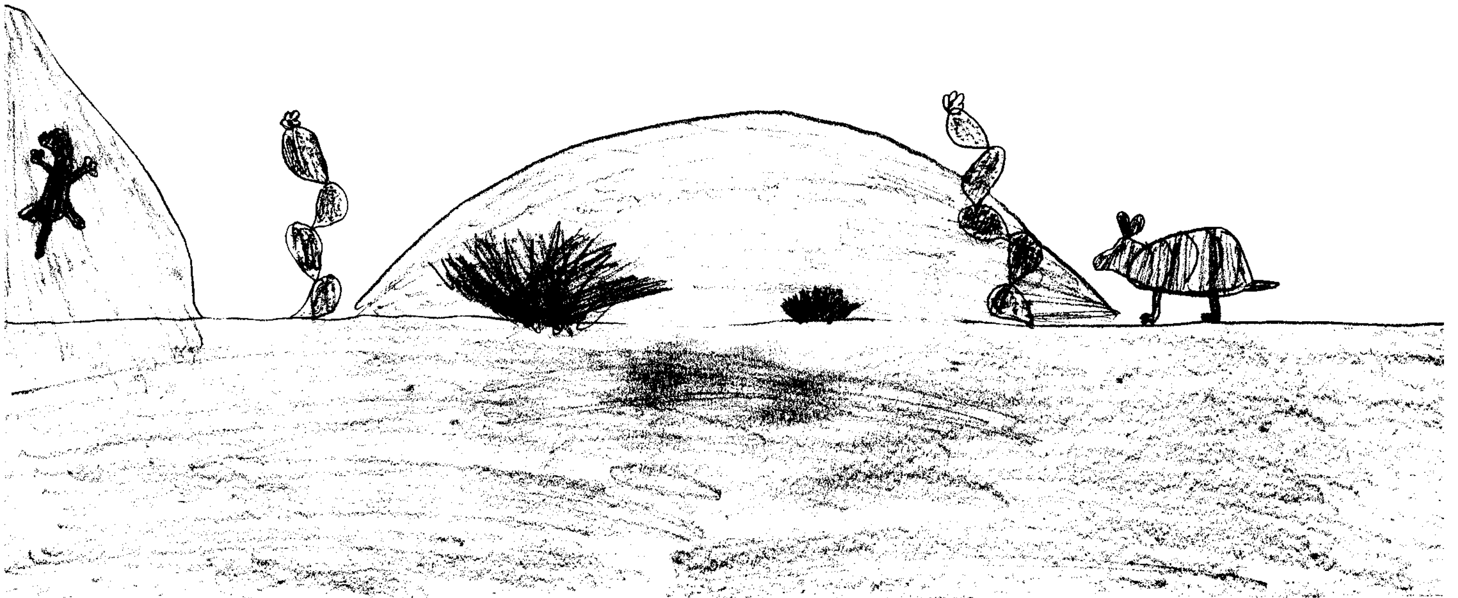
Texas Register

Volume 33 Number 49 December 5, 2008 Pages 9821 - 10112

Kylee Robinson
3rd Grade



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Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

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The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

TEXAS REGISTER

a section of the
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Austin, TX 78711-3824
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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/

• • •

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

THE ATTORNEY GENERAL

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

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us.

Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

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

Request for Opinions

RQ-0759-GA

Requestor:

The Honorable Rex Emerson

Kerr County Attorney

County Courthouse, Suite BA-103

700 Main Street

Kerrville, Texas 78028

Re: Definition of "audit" for purposes of section 775.082, Health and Safety Code (RQ-0759-GA)

Briefs requested by December 22, 2008

RQ-0760-GA

Requestor:

The Honorable Tim Curry

Tarrant County Criminal District Attorney

401 West Belknap

Fort Worth, Texas 76196

Re: Authority of the Texas Youth Commission to require a juvenile to register as a sex offender (RQ-0760-GA)

Briefs requested by December 22, 2008

RQ-0761-GA

Requestor:

The Honorable Rex Emerson

Kerr County Attorney

County Courthouse, Suite BA-103

700 Main Street

Kerrville, Texas 78028

Re: Whether a non-profit organization may sponsor a poker tournament in a privately leased community building (RQ-0761-GA)

Briefs requested by December 22, 2008

RQ-0762-GA

Requestor:

The Honorable Rodney W. Anderson

Brazos County Attorney

300 East 26th Street, Suite 325

Bryan, Texas 77803

Re: Authority of a justice of the peace in a proceeding under section 25.094, Education Code, which creates the offense of failure to attend school (RQ-0762-GA)

Briefs requested by December 22, 2008

RQ-0763-GA

Requestor:

The Honorable Craig Stoddart

Rockwall County Acting Criminal District Attorney

Rockwall Government Center

1101 Ridge Road, Suite 105

Rockwall, Texas 75087

Re: Validity of a city charter provision that permits a majority of council members to call a public meeting (RQ-0763-GA)

Briefs requested by December 22, 2008

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

TRD-200806139
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: November 21, 2008

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 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS
SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION
DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.218

The Public Utility Commission of Texas (commission) adopts on an emergency basis new §25.218, relating to the Estimation of Electric Consumption for Certain Customers Affected by Hurricane Ike. This section is being adopted under Project Number 36150.

The new emergency rule will result in more accurate estimates of electric consumption and more accurate bills for customers for whom Hurricane Ike prevented meters from being read The commission previously addressed this issue in its orders dated September 26, 2008 and October 10, 2008, suspending certain rules in response to the disaster resulting from Hurricane Ike. These orders were adopted pursuant to emergency disaster proclamations made by the Governor. The Governor's final disaster declaration expired on November 6, 2008. The commission's new emergency rule is required to extend the suspension of certain rules related to estimated meter readings until January 1, 2009 in order to adequately address the imminent peril to the health, safety and welfare caused by Hurricane Ike. Therefore, this rule shall be effective immediately on filing with the secretary of state.

This rule was published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9039). The Office of Public Utility Counsel submitted comments supporting the new rule; a public hearing was not requested.

This new section is adopted on an emergency basis under the Texas Government Code §2001.034 (Vernon 2000 & Supp. 2008) (APA), which provides for the adoption of a rule on an emergency basis and the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 & Supp. 2008) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §36.001, which grants the commission the authority to adopt rules for determining the classification of customers and the applicability of rates; and PURA §39.203, which grants the commission the authority to establish reasonable and comparable terms and conditions for open access on distribution facilities for all retail electric utilities offering customer choice.

Cross Reference to Statutes: Texas Government Code §2001.034 (Vernon 2000 & Supp. 2008), Public Utility Regulatory Act §§14.002, 36.001, and 39.203.

§25.218. Estimation of Electric Consumption for Certain Customers Affected by Hurricane Ike.

(a) Purpose. This section establishes safeguards to provide more accurate bills for customers whose electric consumption has been estimated following Hurricane Ike, by requiring that estimates of their consumption take into account periods when the customer was not taking service.

(b) Application. This section applies to a transmission and distribution utility that provides service in Harris, Galveston, Brazoria, or Chambers County and is subject to §25.214 of this title (relating to Terms and Conditions of Retail Electric Delivery Service Provided by Investor Owned Transmission and Distribution Utilities) and the Pro Forma Delivery Tariff.

(c) Estimation following an actual meter reading. Notwithstanding §25.214 of this title and Section 4.8.1.4 of the Pro Forma Delivery Tariff, if a transmission and distribution utility obtains an actual meter reading for a customer following a period in which it has estimated consumption as a consequence of damage to utility or customer property from Hurricane Ike, the utility shall allocate any over- or under-estimated usage in a manner that takes into account periods that the customer was not likely to have been taking service.

(d) Effective date. This section is effective until January 1, 2009.

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 November 20, 2008.

TRD-200806086
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective Date: November 20, 2008
Expiration Date: March 19, 2009
For further information, please call: (512) 936-7223

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 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS--STANDARDS

The Commission on State Emergency Communications (CSEC) proposes the repeal of and new §251.10, concerning Guidelines for Implementing Wireless E9-1-1 Service.

The repeal of and new §251.10 are the result of CSEC's statutory rule review of its Chapter 251 rules. CSEC administers by chapter the review required by Government Code §2001.039. Notice of CSEC's review of its Chapter 251 rules was published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 951). Notice of CSEC's intent to repeal and replace §251.10, along with a strawman of the new rule, was published in the in the In Addition section of the April 25, 2008, issue of the *Texas Register* (33 TexReg 3465). To date, no comments have been received regarding either the proposed repeal of §251.10 or the strawman. CSEC has determined that sufficient reason exists to repeal existing §251.10 and to propose a new §251.10 on account of the wholesale changes made to the rule.

Section 251.10 establishes guidelines for Regional Planning Commissions (RPCs) and wireless service providers (WSPs) to follow in implementing and providing wireless E9-1-1 service. CSEC proposes to repeal existing §251.10 as much of the text is outdated and no longer applicable. Proposed §251.10 consists of the minimum requirements for implementing and testing wireless 9-1-1 service. As proposed, the rule also requires RPCs and WSPs to enter into service agreements in a form prescribed by CSEC. Finally, the proposed rule instructs WSPs regarding requests for reimbursement of reasonable costs and RPCs regarding requests for information from WSPs.

FISCAL NOTE

Paul Mallett, CSEC's Executive Director, has determined that for each year of the first five fiscal years that the repeal of old and implementation of new §251.10 are in effect there will be no cost implications to the state or local governments as a result of enforcing or administering the new section.

PUBLIC BENEFIT

Mr. Mallett has determined that for each year of the first five years the repeal and new section are in effect, the public benefits anticipated as a result of the proposed revisions will be added certainty amongst the agency's stakeholders and WSPs regarding their obligations and responsibilities in providing wireless E9-1-1 emergency service.

Mr. Mallett has also determined that for each year of the first five years the repeal and new section are in effect there are no probable economic costs to persons required to comply with the section.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

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

LOCAL EMPLOYMENT IMPACT STATEMENT

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

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

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

PUBLIC COMMENT

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

1 TAC §251.10

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

STATUTORY AUTHORITY

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

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

§251.10. Guidelines for Implementing Wireless E9-1-1 Service.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805988
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-6930

1 TAC §251.10

STATUTORY AUTHORITY

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

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

§251.10. Guidelines for Implementing Wireless E9-1-1 Service.

(a) Responsibilities. Regional planning commissions (RPCs) and wireless service providers (WSPs) are responsible for implementing and providing Wireless E9-1-1 Service in accordance with this rule, the Commission's applicable program policy statements and the Wireless E9-1-1 Service Agreement between the RPC and WSP.

(b) Implementation and Requests for Wireless E9-1-1 Service. Prior to a WSP's implementation of Wireless E9-1-1 Service in an RPC's region, the WSP shall submit to the Commission on a form prescribed by the Commission the details of its technical approach to implementing Wireless E9-1-1 Service including, but not limited to, it's preferred deployment method and methods for delivering the required voice and data elements. The Commission will review and evaluate the information submitted and notify the RPC that it may request Wireless E9-1-1 Service from the WSP. If the WSP expands its service area within an RPC's region and WSP has executed a Wireless E9-1-1 Service Agreement with the RPC, a new request from the RPC shall not be required; rather, the prior request shall cover all parts of the RPC's region.

(c) Deployment Method. Unless otherwise approved by the Commission or Commission Staff as an exception, the RPC and the WSP will agree upon one, or a combination, of the following methods of wireless call delivery:

(1) Call Associated Signaling (CAS);

(2) Non-Callpath Associated Signaling (NCAS); and

(3) Exceptions to CAS and NCAS, as in the case of stand alone ALI environments or Hybrid CAS/NCAS--specific solution should be illustrated and demonstrated prior to execution of contract.

(d) Testing. Prior to implementing Wireless E9-1-1 Service, the RPC, WSP, local service provider and any third party shall conduct database and equipment testing to ensure WSP's capacity to correctly route and deliver accurate ANI and/or ALI for wireless 9-1-1 calls depending on the level of service requested by the RPC. Future testing shall be performed as may be required by the RPC.

(e) Wireless E9-1-1 Service Agreement. The RPC and WSP shall enter into a Wireless E9-1-1 Service Agreement in a form prescribed by the Commission.

(f) Class of Service. Unless an exception is approved by the Commission, the following standard Classes of Service (COS) shall be used by the RPCs and the WSPs to identify calls delivered to the PSAP:

(1) WRLS for Wireless E9-1-1 Phase I Service; and

(2) WPH2 for Wireless E9-1-1 Phase II Service.

(g) Reimbursement. The WSP may request reimbursement for reasonable costs by submitting detailed cost information to the Commission in a form prescribed by the Commission and made a part of the Wireless E9-1-1 Service Agreement. Reasonable costs to be reimbursed by the RPC may include trunking, database and other associated implementation costs. In determining the reasonableness of costs, the Commission may compare the costs being submitted for recovery by one provider to the costs of other, similarly situated providers.

(h) RPC Requests for Information. RPC may request additional information from WSP, which may include, but is not limited to, a description of WSP's network, database, equipment display requirements, training and accessibility elements, technical solutions, network diagrams, documented wireless 9-1-1 call set-up times, deployment plans and timelines, specific work plans, WSP network contingency and disaster recovery plans, escalation lists, trouble call response times, and wholesale/resale customer list.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805993
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-6930

1 TAC §251.14

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

The Commission on State Emergency Communications (CSEC) proposes the repeal of §251.14, concerning General Provisions and Definitions. Concurrent with the repeal of §251.14, CSEC is proposing new §252.7, concerning Definitions.

The repeal of §251.14 is a result of CSEC's statutory rule review of its Chapter 251 rules. CSEC conducts by chapter the review required by Government Code §2001.039. Notice of CSEC's review of its Chapter 251 rules was published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 951). CSEC has determined that sufficient reason exists to repeal §251.14 and replace it with proposed new §252.7.

FISCAL NOTE

Paul Mallett, CSEC's Executive Director, has determined that for each year of the first five fiscal years (FY) that §251.14 is repealed there will be no cost implications to the state or local governments as a result of enforcing or administering the repeal of §251.14.

PUBLIC BENEFIT

Mr. Mallett has determined that for each year of the first five years the repeal is in effect, the public benefits anticipated as a result of enforcing the repeal will be to clarify the general applicability of CSEC's defined terms (as incorporated in proposed

§252.7) and address possible conflicts between terms used in CSEC rules and/or program policy statements (PPS) and the National Emergency Number Association's (NENA) Master Glossary of 9-1-1 Terms.

Mr. Mallett has also determined that for each year of the first five years the repeal is in effect there are no probable economic costs to persons required to comply with the repeal as proposed.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

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

LOCAL EMPLOYMENT IMPACT STATEMENT

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

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

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

PUBLIC COMMENT

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

STATUTORY AUTHORITY

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

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

§251.14. General Provisions and Definitions.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805987
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-6930

CHAPTER 252. ADMINISTRATION

1 TAC §252.7

The Commission on State Emergency Communications (CSEC) proposes new §252.7, concerning Definitions.

The predecessor to §252.7 is §251.14, which CSEC is concurrently proposing to repeal. The repeal of §251.14 is the result of CSEC's statutory rule review of its Chapter 251 rules. Notice of CSEC's review of Chapter 251 rules was published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 951).

Section 252.7 is being proposed to define terms commonly used in the provisioning of 9-1-1 service. Section 252.7 also addresses possible conflicts between terms used in CSEC rules and/or program policy statements (PPS) and the National Emergency Number Association's (NENA) Master Glossary of 9-1-1 Terms.

FISCAL NOTE

Paul Mallett, CSEC's Executive Director, has determined that for each year of the first five fiscal years that §252.7 is in effect there will be no cost implications to the state or local governments as a result of enforcing or administering the new section.

PUBLIC BENEFIT

Mr. Mallett has determined that for each year of the first five years the new section is in effect, the public benefits anticipated as a result of the proposed section will be added certainty amongst the agency's stakeholders, other 9-1-1 governmental entities, and the 9-1-1 industry regarding terms used in providing 9-1-1 service.

Mr. Mallett has also determined that for each year of the first five years the new section is in effect there are no probable economic costs to persons required to comply with the section.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

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

LOCAL EMPLOYMENT IMPACT STATEMENT

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

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

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

PUBLIC COMMENT

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

STATUTORY AUTHORITY

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

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

§252.7. Definitions.

(a) Purpose. This rule defines terms commonly used by the Commission. Terms not defined in this rule or another Commission rule or policy statement shall be defined by Applicable Law. The National Emergency Number Association (NENA) Master Glossary of 9-1-1 Terminology is adopted by reference. Commission rules and/or policy statements shall govern in the event of a conflict with the definitions in the NENA Master Glossary.

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

(1) 9-1-1 Call Taking Position--Equipment required to deliver an emergency 9-1-1 call. The position is defined as the equipment necessary to answer the call, not the associated personnel. A position consists of a device for answering the 9-1-1 calls, a device to display 9-1-1 call information, and the related telephone circuitry and computer and/or router equipment necessary to ensure reliable handling of the 9-1-1 call.

(2) 9-1-1 Database--An organized collection of information, which is typically stored in computer systems that are comprised of fields, records (data), and indexes. In 9-1-1, such databases include master street address guides (MSAG), telephone numbers, emergency service numbers (ESNs), and telephone customer records. This information is used for the delivery of location information to a designated public safety answering point (PSAP). Use of the 9-1-1 database must be authorized by the Commission and RPC. The database is developed and maintained by the local government agency and/or the RPC as described within the regional strategic plan in accordance with Commission Rule 251.9, Guidelines for Database Maintenance Funds.

(3) 9-1-1 Equipment--Items and components whose cost is over $5,000 and have a useful life of at least one year.

(4) 9-1-1 Funds--Funds assessed and disbursed in accordance with the Texas Health and Safety Code, Chapter 771.

(5) 9-1-1 Network--The dedicated network of equipment, circuits, and controls assembled to establish communication paths to deliver 9-1-1 emergency communications.

(6) Applicable Law--Includes, but is not limited to, federal law and FCC regulations; Texas Health and Safety Code Chapter 771; Commission rules, Texas Administrative Code (TAC), Title 1, Part 12; Public Utility Commission of Texas rules, TAC Title 16, Part 2, Chapters 22 and 26; the Uniform Grant Management Standards, TAC Title 1, Part 1, Chapter 5, Subchapter A, Division 4. Also referred to as "applicable laws and rules."

(7) Capital Asset--Items and components whose cost is over $5,000 and which have a useful life of at least one year.

(8) Capital Purchase--A procurement of items, systems, or services that cost is over $5,000 in the aggregate, and that have a useful life of at least one year.

(9) Commission--Commission on State Emergency Communications. Also referred to as CSEC.

(10) Contingency Routing Plan--Routing scheme to provide for the provision of uninterrupted 9-1-1 service in the event of an incident that requires the temporary rerouting of 9-1-1 calls due to man-made or natural disasters.

(11) Controlled Assets--Items and components that have a cost of $5,000 or less and have a useful life of at least one year and have a high risk for loss.

(12) Customer Premises Equipment (CPE)--The terminal equipment at a PSAP.

(13) Database Maintenance--A program for the maintenance of the regional MSAG.

(14) Digital Map--A computer generated and stored data set based on a coordinate system, which includes geographical and attribute information pertaining to a defined location. A digital map includes street name and location information, data sets related to emergency service provider boundaries, as well as other associated data.

(15) Emergency Communication District (District)--A public agency or group of public agencies acting jointly that provided 9-1-1 service before September 1, 1987, or that had voted or contracted before that date to provide that service; or a District created under Texas Health and Safety Code, Chapter 772, Subchapters B, C, D, or F.

(16) Equipment Maintenance--The preservation and upkeep of 9-1-1 equipment in order to insure that it continues to operate and perform at a level comparable to that exhibited at its initial acquisition.

(17) FCC--The Federal Communications Commission.

(18) Integrated Services--Primary or third party computer software applications that have been installed or implemented on an existing 9-1-1 call taking position's workstation that were not designed or intended for the workstation at the time of purchase or not loaded onto the workstation by the equipment vendor when originally installed at the PSAP.

(19) Interlocal Agreement--A contract cooperatively executed between local governments or other political subdivisions of the state to perform administrative functions or provide services, relating to 9-1-1 telecommunications.

(20) Local Government--A county, municipality, public agency, or any other political subdivision that provides, participates in the provision of, or has authority to provide fire-fighting, law enforcement, ambulance, medical, 9-1-1, or other emergency services and/or addressing functions.

(21) Local Monitoring Plan--The RPC schedule for monitoring all interlocal contracts, 9-1-1 funded activities, equipment, PSAPs, and subcontractors.

(22) Primary PSAP--PSAP to which 9-1-1 calls are routed directly from a central office/selective routing tandem.

(23) Regional Planning Commission (RPC)--A commission established under Local Government Code, Chapter 391, also referred to as a regional council of governments.

(24) Regional Strategic Plan--A plan developed by each RPC for the establishment and operation of 9-1-1 service throughout the region that the RPC serves. The service and contents must meet the standards established by the Commission. A Regional Strategic Plan may also be referred to as Regional Plan or Strategic Plan.

(25) TDD--The acronym for Telecommunication Device for the Deaf. Other interchangeable acronyms accepted are TTY (Teletypewriter) or TT (Text Telephone).

(26) Uniform Grant Management Standards (UGMS)--As developed by the Governor's Office of Budget, Planning and Policy under the authority of Chapter 783 of the Texas Government Code.

(27) Useful Life--The period of time that a piece of capital equipment can consistently and acceptably fulfill its' service or functional assignment.

(28) Wireless 9-1-1 Call--A call made by a wireless end user utilizing a WSP wireless network, initiated by dialing "9-1-1"

(and, as necessary, pressing the "Send" or analogous transmitting button) on a Wireless Handset.

(29) Wireless E9-1-1 Phase I Service--The service by which the wireless service provider (WSP) delivers to the designated PSAP the wireless end user's call back number and cell site/sector information when a wireless end user has made a 911 call, as contracted by the RPC.

(30) Wireless E9-1-1 Phase II Service--The service by which the WSP delivers to the designated PSAP the wireless end user's call back number, cell site/sector information, as well as X, Y (longitude, latitude) coordinates to the accuracy standards set forth in the FCC Order.

(31) Wireless E9-1-1 Service Agreement--The standard Phase I and/or Phase II Wireless E9-1-1 Service Agreement, as applicable, provided by the Commission and available on the Commission's web site.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805996
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-6930

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) proposes 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 amendment is proposed to prevent further spread of the Diaprepes root weevil and facilitate its eradication.

The department filed an amendment to §19.161 on an emergency basis on October 13, 2008, which was published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8697). The expanded quarantined area in the proposed §19.161 is identical to the expanded quarantined area described in the emergency quarantine now in effect. The department believes addition of the Bayview area, where the Diaprepes root weevils were detected, to the quarantine on a permanent basis is both necessary and appropriate to prevent the spread of the weevils into the nearby citrus groves and nurseries and in other citrus and nursery growing areas of Texas. Without this proposed amendment, 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 proposed amendment enhances chances for a successful eradication since it prevents artificial spread of the quarantined pest and provides for its elimination, thus protecting the industry. The proposed amendment to §19.161 expands the quarantined area, consistent with the detection of the Diaprepes root weevils near Bayview, Texas.

Dr. Shashank Nilakhe, state entomologist, has determined that for the first five-year period the proposed amended section is in effect, there will be fiscal implications to the state government, as a result of enforcing or administering the proposed amendment. There will be an annual cost to the state of $50,000 for implementation of the treatment program required by the quarantine. There will be no fiscal implications to the local government.

Dr. Nilakhe has also determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the amended section will be to prevent artificial spread of the Diaprepes root weevil outside the quarantined areas of the state. The amendment will also facilitate eradication of this insect pest. Approximately 15 acres of citrus and 15 residential properties are located in the new quarantined area. The eradication primarily involves application of insecticidal treatments. The department has an ongoing Diaprepes eradication program in the McAllen area.

Nurseries in the Bayview area will not face any treatment costs since none of the nurseries are located in the new quarantined area. Consequently, a small business as defined under the Texas Government Code §2006.001(2), and a micro-business as defined under the Texas Government Code §2006.001(1), do not exist in the proposed quarantined area. Therefore, there will be no adverse economic effect to a micro-business or a small business and consequently a Regulatory Flexibility Analysis is not required. There will be no cost to individuals living in the quarantined area. If treatment is required to individual residences, it will be provided by the department at no cost.

Comments on the proposal may be submitted to Dr. Shashank Nilakhe, State Entomologist, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Agriculture Code, §71.001, which authorizes the department to establish a quarantine for an infested area against an in-state pest if it determines the pest is dangerous and is not widely distributed in this state;

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.

The code affected by the proposal is the Texas Agriculture Code, Chapter 71.

§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 proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806026
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-4075

CHAPTER 20. COTTON PEST CONTROL

The Texas Department of Agriculture (the department) proposes amendments to §20.1 concerning definitions for cotton pest control and to §20.22 concerning stalk destruction requirements and deadlines. The amendments are proposed to delete two terms no longer in use, define one new term, update definitions of certain terms, modify the destruction requirements for Pest Management Zone 10, and clarify the destruction requirements for all pest management zones.

Amendments to §20.1 are proposed to delete obsolete terms and clarify definitions. The term "cotton destruction date" is changed to "destruction deadline". The definition of "Destroyed, or destruction", "regrowth cotton" and "volunteer cotton" are changed and the definition of "standing stalks" is deleted.

The amendments to §20.22 are proposed in response to a request from the Cotton Producer Advisory Committee of Pest Management Zone 10 and to improve clarity. The proposed amendments promote suppression of pink bollworm populations in Pest Management Zone 10 by making flood irrigation acceptable as an alternative to plowing in that zone, as part of the process for cotton stalk destruction. Research conducted by entomologists Beasley, C. A., and C. J. Adams for Texas A&M University (The Southwestern Entomologist 20: 73-106, 1995) supports the efficacy of flood irrigation in suppression of pink bollworm. Pest Management Zone 10 will retain the existing requirement for shredding of the cotton to make it non-hostable and the requirement of keeping the field non-hostable, regardless of whether the field is plowed or flood irrigated. The destruction requirements for other pest management zones are unchanged by the proposed changes, although the wording of their requirements has been changed for improved clarity.

Dr. Robert Crocker, coordinator for pest management, citrus and biotechnology programs, has determined that for the first five-year period the proposed amendments are in effect, there will be no anticipated fiscal impact for state and local governments as a result of administering or enforcing the rule, as proposed.

Dr. Crocker also has determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of administering and enforcing the sections are increased regulatory efficiency and increased suppression of overwintering populations of boll weevils and pink bollworms in Pest Management Zone 10. There is no cost anticipated to micro-businesses, small businesses or individuals required to comply with the amendments.

Comments on the proposal may be submitted to Dr. Robert Crocker, Coordinator for Pest Management, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

4 TAC §20.1

The amendments to §20.1 are proposed in accordance with the Texas Agriculture Code (the Code), §74.006 which provides the department with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74; and the Code, §74.004 which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other cotton parts and products of host plants for cotton pests.

The code affected by the proposal is the Texas Agriculture Code, Chapter 74.

§20.1. Definitions.

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

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

[~~(5) Cotton destruction date--The date established in this chapter for the destruction of cotton stalks.~~]

(5) [~~(6)~~] Cotton lint--All forms of raw ginned cotton except linters and gin waste.

(6) [~~(7)~~] Cotton products--Seed cotton, cotton lint, linters, oil mill waste, gin waste, squares, bolls, gin trash, cotton seed, cottonseed hulls, and all other forms of unmanufactured cotton fiber.

(7) [~~(8)~~] Cotton seed--The seed of the cotton plant, separated from lint.

(8) [(9)] Destroyed, or destruction--Compliant with applicable requirements and restrictions established in Subchapter C of this chapter. [Killed (including the leaves, stems, flowers, fruit, and roots) or rendered non-hostable.]

(9) Destruction deadline--The date established in this chapter for destruction of cotton stalks.

(10) - (23) (No change.)

(24) Regrowth cotton, or regrowth--Vegetative and/or reproductive growth produced on a cotton plant following its destruction or partial destruction. [Cotton that has not been completely destroyed in such a way as to absolutely prevent further growth.]

(25) - (27) (No change.)

[(28) Standing stalks--Original, undestroyed cotton plants growing in a field before or after harvesting.]

(28) [(29)] Suppressed area--An area in which some boll weevil reproduction may be present in the area or a portion thereof, and in which the movement of regulated articles presents a threat to the success of the boll weevil eradication program The boll weevil population must be equal to or less than 0.025 boll weevils per trap per week for the cotton-growing season as measured by boll weevil pheromone traps operated by the Texas Boll Weevil Eradication Foundation or other governmental agency.

(29) [(30)] Trap--type of adult boll weevil pheromone trap approved by the Texas Boll Weevil Eradication Foundation.

(30) [(31)] Treatment--The act of eliminating possible cotton pest infestation(s) by means of cleaning, spraying or fumigation to eliminate the infestation.

(31) [(32)] Volunteer cotton--For purposes of this chapter, a cotton plant or plants that were not deliberately planted [cotton developing from incidental seeds].

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806159
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-4075

SUBCHAPTER C. STALK DESTRUCTION PROGRAM

4 TAC §20.22

The amendments to §20.22 are proposed in accordance with the Texas Agriculture Code (the Code), §74.006 which provides the department with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74; and the Code, §74.004 which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other cotton parts and products of host plants for cotton pests.

The code affected by the proposal is the Texas Agriculture Code, Chapter 74.

§20.22. Stalk Destruction Requirements.

(a) Deadline and methods. From the destruction deadline until the end date for destruction requirements (see graphic for this subsection), all cotton plants in a Pest Management Zone shall be non-hostable. Enforcement of destruction requirements begins on the day immediately following the destruction deadline date. Additional requirements for stalk destruction are as follows:

(1) Zone 9--All cotton plants shall be shredded.

(2) Zone 10--All cotton plants shall be shredded; also, the field shall be:

(A) Plowed, with soil being tilled to a depth of six or more inches; or

(B) Flood irrigated, following shredding of the plants, with sufficient irrigation applied to wet all soil. When flood irrigation is elected:

(i) In advance of the irrigation date, the department shall be notified in writing of intent to flood irrigate (specifying the field's location, FSA Farm Number, FSA Tract Number, FSA Field Number, a contact person and a contact phone number).

(ii) A copy of irrigation records shall be presented for inspection during normal working hours, within 5 working days, if so requested in writing by the department.
Figure: 4 TAC §20.22(a)(2)(B)(ii)

[(a) Deadline and methods. All cotton plants in pest management zones 1-8 shall be rendered non-hostable by the stalk destruction dates indicated for the zone. Destruction shall be performed periodically to prevent the presence of fruiting structures. Destruction of all cotton plants shall be accomplished in Zone 9 by shredding and in Zone 10 by shredding and plowing. In Zone 9, destruction shall be performed as necessary to keep cotton non-hostable. In Zone 10, soil must be tilled to a depth of 6 or more inches and destruction shall be performed as necessary to prevent regrowth and volunteer cotton.]
[Figure: 4 TAC §20.22(a)]

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

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806160
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-4075

CHAPTER 29. ECONOMIC DEVELOPMENT SUBCHAPTER B. GO TEXAN RURAL COMMUNITY PROGRAM RULES

4 TAC §29.21

The Texas Department of Agriculture (the department) proposes amendments to Title 4, Part 1, Chapter 29, Subchapter B, §29.21, concerning the department's GO TEXAN Rural Community Program. The amendment to §29.21 is proposed to modify the definition of a "non-metropolitan county" to achieve necessary program goals of economic development in rural Texas. The definition of "non-metropolitan county" is changed to include counties located in a U.S. Census Bureau designated metropolitan statistical area with a county population of less than 50,000.

Rick Rhodes, assistant commissioner for rural economic development, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of administering or enforcing the amended section.

Mr. Rhodes has also determined that for each year of the first five years the proposed amended section is in effect, the public benefit anticipated as a result of administering and enforcing the amended section will be an increase in economic activity in rural Texas communities due to the name recognition of the GO TEXAN certification mark, by providing more rural Texas communities with an effective tool to market and promote themselves as a desirable rural community or travel destinations. There will be no cost to micro-businesses or small businesses, or individuals since the amendment only affects the eligibility for membership in the Program by units of local government.

Comments may be submitted to Rick Rhodes, Assistant Commissioner for Rural Economic Development, P.O. Box 12847, Austin, Texas 78711. Comments must be receive no later that 30 days from the date of publication of the proposal in the *Texas Register*.

The amendment to §29.21 is proposed under the Texas Agriculture Code (the Code), §12.016, which authorizes the department to adopt rules to administer its duties under the Code; and §12.027, which authorizes the department to establish and maintain an economic development program.

The code that will be affected by this proposal is the Texas Agriculture Code, Chapter 12.

§29.21. Definitions.

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

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

(10) Non-metropolitan county--A Texas county that is not located in or does not encompass a metropolitan statistical area, as identified by the U.S. Census. Counties located in a U.S. Census Bureau designated metropolitan statistical area are not eligible as a non-metropolitan county unless the county's population is less than 50,000.

(11) - (12) (No change.)

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

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806037
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-4075

TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 11. ADMINISTRATIVE DEPARTMENT

13 TAC §11.10

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

The Texas Historical Commission proposes the repeal of §11.10 (relating to Charges for Public Records) of Title 13, Part 2, Chapter 11 of the Texas Administrative Code. The section has been superseded by legislation and the adoption by the Attorney General of Texas of a uniform rule for all agencies on this subject.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the repeal is in effect there will not be fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Oaks has also determined that the public benefit anticipated as a result of the repeal is a reduction in confusion as to whether this rule or the Attorney General's rule applies to the calculation of charges for public records requested from the Commission. Additionally, Mr. Oaks has determined that there will be no effect on small or micro businesses. There will be no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

The repeal is proposed under the Texas Government Code §442.005, which provides the Commission with authority to promulgate rules that will reasonably affect the purposes of this chapter.

§11.10. Charges for Public Records.

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

Filed with the Office of the Secretary of State on November 20, 2008.

TRD-200806088
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Proposed date of adoption: January 30, 2009
For further information, please call: (512) 463-8817

♦ ♦ ♦

13 TAC §11.12

The Texas Historical Commission proposes new §11.12, relating to Limitations on Responses to Public Information Requests, of Title 13, Part 2, Chapter 11 of the Texas Administrative Code. The purpose of this section is to implement Texas Government Code §552.275, which allows governmental bodies to set limitations on the amount of time a governmental body must spend responding to requests under the Public Information Act without charging the requestor for the personnel time spent responding to the requests. This proposal would set that limit at 36 hours, as allowed by the statute.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the rule is in effect there will not be fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Oaks has also determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of this new rule will be a limitation on the abuse of the Public Information Act that requires that agency resources be diverted from the mission of the Commission to serving the needs of a single requestor. Additionally, Mr. Oaks has determined that there will be no effect on small or micro businesses. There will be no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

The new rule is proposed under the Texas Government Code §442.005, which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of this chapter, and Texas Government Code §552.275, which provides that governmental bodies may adopt rules on this subject.

§11.12. Limitations on Responses to Public Information Requests.

(a) The reasonable limit on the amount of time that personnel of the commission are required to spend producing public information for inspection or duplication by a single requestor, or providing copies of public information to a requestor, without recovering its costs attributable to that personnel time is set at 36 hours for each fiscal year of the commission, from September 1 to August 31.

(b) A single requestor includes a request for public information submitted in the name of a minor, as defined by §101.003(a), Texas Family Code, included in the calculation of the cumulative amount of time spent complying with a request for public information by a parent, guardian, or other person who has control of the minor under a court order and with whom the minor resides, unless that parent, guardian, or other person establishes that another person submitted that request in the name of the minor.

(c) A single requestor includes members, officers, employees, agents, or representatives of a single corporation, firm, partnership, joint venture, familial unit, or other similar entity acting in concert to request public information from the commission.

(d) Each time the commission complies with a request for public information, the commission shall provide the requestor with a written statement of the amount of personnel time spent complying with that request and the cumulative amount of time spent complying with requests for public information from that requestor during the applicable 12-month period. The amount of time spent preparing the written statement may not be included in the amount of time included in the statement provided to the requestor under this subsection.

(e) If in connection with a request for public information, the cumulative amount of personnel time spent complying with requests for public information from the same requestor equals or exceeds the limit established by the commission under subsection (a) of this section, the commission shall provide the requestor with a written estimate of the total cost, including materials, personnel time, and overhead expenses, necessary to comply with the request. The written estimate must be provided to the requestor on or before the 10th day after the date on which the public information was requested. The amount of this charge relating to the cost of locating, compiling, and producing the public information shall be calculated in accordance with rules prescribed by the attorney general under Texas Government Code §552.262(a) and (b).

(f) If the commission determines that additional time is required to prepare the written estimate under subsection (e) of this section and provides the requestor with a written statement of that determination, the commission will provide the written statement under that subsection as soon as practicable, but on or before the 10th day after the date the commission provided the statement under this subsection.

(g) If a commission provides a requestor with the written statement under subsection (e) of this section, the commission is not required to produce public information for inspection or duplication or to provide copies of public information in response to the requestor's request unless on or before the 10th day after the date the commission provided the written statement under that subsection, the requestor submits a statement in writing to the commission in which the requestor commits to pay the lesser of:

(1) the actual costs incurred in complying with the requestor's request, including the cost of materials and personnel time and overhead; or

(2) the amount stated in the written statement provided under subsection (e) of this section.

(h) If the requestor fails or refuses to submit the written statement under subsection (g) of this section, the requestor is considered to have withdrawn the requestor's pending request for public information.

(i) This section does not prohibit the commission from providing a copy of public information without charge or at a reduced rate under Texas Government Code §552.267 or from waiving a charge for providing a copy of public information under that section.

(j) This section does not apply if the requestor is a representative of:

(1) a radio or television station that holds a license issued by the Federal Communications Commission; or

(2) a newspaper that is qualified under Texas Government Code §2051.044 to publish legal notices or is a free newspaper of general circulation and that is published at least once a week and available and of interest to the general public in connection with the dissemination of news.

(k) This section does not apply if the requestor is an elected official of the United States, this state, or a political subdivision of this state.

(l) This section does not apply if the requestor is a representative of a publicly funded legal services organization that is exempt from federal income taxation under §501(a), Internal Revenue Code of

1986, as amended, by being listed as an exempt entity under §501(c)(3) of that code.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806172
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Proposed date of adoption: January 30, 2009
For further information, please call: (512) 463-8817

CHAPTER 27. PROCEDURE

The Texas Historical Commission (hereafter referred to as the Commission) proposes the repeal of Chapter 27, concerning Procedures, of the Texas Administrative Code, Title 13, Part 2.

The repeal of §§27.1 - 27.8, 27.21, 27.22, 27.31, 27.33, 27.35, 27.37, 27.51, 27.53, 27.55, 27.57, 27.59, 27.61, 27.63, 27.65, 27.67, 27.69, 27.81, 27.83, 27.85, 27.87, 27.89, 27.91, 27.93, 27.95, 27.111, 27.113, 27.121, 27.123, 27.125, 27.127, 27.129, 27.141, 27.143, 27.145, 27.147, 27.149, 27.151, 27.153, 27.155, 27.157, 27.159, 27.161, 27.163, 27.165, 27.181, 27.183, 27.185, 27.187, 27.189, 27.191, 27.201, 27.203, 27.205, 27.207, 27.221, 27.223, 27.225, 27.227, 27.241, and 27.242 is being proposed because these rules have been superseded by legislation and uniform rules for all agencies adoption by the State Office of Administrative Hearings.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period after the repeal of these rules there will not be fiscal implications for state or local governments as a result of the repeal of these rules.

Mr. Oaks has also determined that the public benefit anticipated as a result of the repeal is a reduction in confusion as to whether the Commission's rule or the rules of the State Office of Administrative Hearings applies to actions of the Commission. Additionally, Mr. Oaks has determined that there will be no effect on small or micro businesses, and there will be no anticipated economic cost to persons as a result of the repeal of Chapter 27.

Comments on the proposed repeal of Chapter 27 may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register.*

SUBCHAPTER A. DEFINITIONS AND GENERAL

13 TAC §§27.1 - 27.8

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.1. Purpose and Scope.
§27.2. Definitions.
§27.3. Filing Documents.
§27.4. Computing Time.
§27.5. Agreements To Be in Writing.
§27.6. Conduct and Decorum.
§27.7. Procedures Not Otherwise Provided.
§27.8. Severability.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806054
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

SUBCHAPTER B. ADJUDICATIVE PROCEDURES

DIVISION 1. GENERAL

13 TAC §27.21, §27.22

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.21. Scope.
§27.22. Informal Disposition.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806056
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 2. PARTICIPANTS

13 TAC §§27.31, 27.33, 27.35, 27.37

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.31. Classification of Participants.

§27.33. Alignment of Parties.

§27.35. Party Designations and Appearances.

§27.37. Representative Appearance.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806060
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 3. PLEADINGS

13 TAC §§27.51, 27.53, 27.55, 27.57, 27.59, 27.61, 27.63, 27.65, 27.67, 27.69

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.51. Classification of Pleadings.

§27.53. Form and Content of Pleadings.

§27.55. Filing.

§27.57. Service of Pleadings.

§27.59. Determination of Completeness of Initial Pleadings.

§27.61. Exceptions to Pleadings.

§27.63. Amended Pleadings.

§27.65. Incorporation of Records by Reference.

§27.67. Lost Records and Papers.

§27.69. Notice of Nonparty Participation.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806064
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 4. DOCKETING AND NOTICE

13 TAC §§27.81, 27.83, 27.85, 27.87, 27.89, 27.91, 27.93, 27.95

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.81. Docketing and Numbering Causes.

§27.83. Notice of Hearing and Call for Participants.

§27.85. Revised Notice.

§27.87. Written Motions.

§27.89. Prefiling Prepared Testimony and Exhibits.

§27.91. Examiner.

§27.93. Designation and Use of Hearing Examiners.

§27.95. Qualifications of Hearing Examiners.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806065
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 5. PREHEARING PROCEEDINGS

13 TAC §27.111, §27.113

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.111. Prehearing Conference.
§27.113. Motion To Consolidate.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806066
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 6. HEARINGS

13 TAC §§27.121, 27.123, 27.125, 27.127, 27.129

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.121. Place and Nature of Hearings.
§27.123. Postponement and Continuance.
§27.125. Order of Procedure.
§27.127. Reporters and Transcripts.
§27.129. The Record.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806067
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 7. EVIDENCE

13 TAC §§27.141, 27.143, 27.145, 27.147, 27.149, 27.151, 27.153, 27.155, 27.157, 27.159, 27.161, 27.163, 27.165

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.141. Witnesses To Be Sworn.
§27.143. Witnesses Limited.
§27.145. Rules of Evidence.
§27.147. Formal Exceptions.
§27.149. Offer of Proof.
§27.151. Official Notice.
§27.153. Documentary Evidence.
§27.155. Admissibility of Prepared Testimony and Exhibits.
§27.157. Exhibits.
§27.159. Subpoenas.
§27.161. Depositions.
§27.163. Interim Orders.
§27.165. Briefs.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806068
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 8. PROPOSAL FOR DECISION; EXAMINER'S REPORT

13 TAC §§27.181, 27.183, 27.185, 27.187, 27.189, 27.191

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.181. Proposal for Decision and Examiner's Report.
§27.183. Countersignature by Attorney General or His Designee.
§27.185. Filing of Exceptions and Replies.
§27.187. Form of Exceptions and Replies.
§27.189. Oral Argument before the Committee.
§27.191. Pleading before Final Decision.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806069
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 9. ORDERS

13 TAC §§27.201, 27.203, 27.205, 27.207

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.201. Final Decision or Order.

§27.203. Form, Content, and Service.

§27.205. Effective Date of Decision or Order.

§27.207. Administrative Finality.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806070
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

DIVISION 10. ANCILLARY PROCEEDINGS AND PROCEEDINGS BEYOND ORDER

13 TAC §§27.221, 27.223, 27.225, 27.227

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.221. Rehearing.

§27.223. Emergency Orders.

§27.225. Show Cause Orders and Complaints.

§27.227. Ex Parte Communications.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806071
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

SUBCHAPTER C. PROCEEDINGS REGARDING PERMITS FOR SALVAGE, RESTORATION, OR STUDY

13 TAC §27.241, §27.242

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

The repeal of these rules is proposed under the Texas Government Code §442.005 and Title 9, Chapter 191, §191.052 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§27.241. Scope.

§27.242. Application.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806072
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-1858

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1018

The Texas Education Agency (TEA) proposes an amendment to §61.1018, concerning payment of supplemental compensation. Section 61.1018 addresses the administration of payments for supplemental compensation to eligible entities. The proposed amendment would align the rule with statutory changes authorized by House Bill (HB) 1, 79th Texas Legislature, Third Called Session, 2006. The proposed amendment would redefine the payment described in the rule, specifying it as a wage increase rather than a supplement, and modify the method of providing state funding for that payment.

Before the 2005 legislative session, administration of supplemental compensation was the responsibility of the Teacher Retirement System of Texas (TRS). However, eligible entities reported their eligible employees to the TEA, and the TEA made the payments of supplemental compensation on behalf of the TRS. To provide more efficient administration of the program, Senate Bill 1863, 79th Texas Legislature, Regular Session, 2005, added the Texas Education Code (TEC), Chapter 22, School District Employees and Volunteers, Subchapter D, Compensation Supplementation, shifting the responsibility for supplemental compensation to the TEA. The TEA exercised rulemaking authority to adopt, effective January 31, 2006, 19 TAC §61.1018, Payment of Supplemental Compensation, which specifies definitions; establishes reporting requirements; delineates eligibility criteria; and sets forth the funding formula, distribution procedures, and settle-up process.

HB 1, 79th Texas Legislature, Third Called Session, 2006, amended the TEC, Chapter 22, Subchapter D, to convert the payment authorized by this chapter from supplemental compensation to a wage increase. The bill also requires that certain employees of eligible entities annually elect in writing whether to designate part of their compensation as health care supplementation.

The proposed amendment to 19 TAC §61.1018 would implement these statutory changes. Specific changes to the rule would include the following.

Throughout the rule, references to the payment provided for by the TEC, Chapter 22, Subchapter D, would be changed to reflect the conversion of that payment from supplemental compensation to a wage increase.

The explanation of the purpose of the rule in subsection (a) would be modified to reflect the conversion of the payment authorized by the TEC, Chapter 22, Subchapter D, from supplemental compensation to a wage increase.

In subsection (b), modifications would be made to the definitions for entity, full-time employee, and part-time employee. New definitions would be added for the terms minimum-salary-schedule employee and staff salary allotment, and the definition for professional staff would be removed.

In subsection (c), outdated information about the reporting of staff information would be deleted, and language in the subsection would be rearranged to reflect the deletion.

In subsection (d), changes to eligibility would be made to reflect the amended definitions in subsection (b). Also, based on statutory changes, the eligibility requirement that an individual must have been employed by an eligible entity for at least 91 days would be removed and replaced with a requirement that an individual must have provided written election of whether to designate a portion of his or her compensation to be used as health care supplementation.

Subsection (e) would be replaced with new language regarding the funding formula for the payment to reflect the conversion of the payment authorized by the TEC, Chapter 22, Subchapter D, from supplemental compensation to a wage increase.

Subsection (f), addressing outdated provisions for distribution of the payment, would be deleted.

New subsection (f) would be added to modify the settle-up process to reflect the conversion of the payment authorized by the TEC, Chapter 22, Subchapter D, from supplemental compensation to a wage increase. Deadlines for the settle-up process and TEA's adjustment of the allotment would also be specified.

Subsection (g), regarding outdated settle-up procedures, would be deleted.

In addition, the section title would be updated from "Payment of Supplemental Compensation" to "Payment of Health Care Supplementation" to correspond with the type of payment described in the rule.

At the beginning of a school year, the TEA estimates the payment due to an eligible entity under the TEC, Chapter 22, Subchapter D. All eligible entities are required to submit monthly, through the online Foundation School Program Payment System's Staff Salary Data module, the number of employees making up several different categories (e.g., full-time classroom teachers, part-time classroom teachers, and administrators). This information allows the TEA to compute, at the end of the school year, the payment under the TEC, Chapter 22, Subchapter D, that the eligible entity was actually entitled to receive so that the TEA can reconcile that amount against the amount that was paid based on estimated data.

The Staff Salary Data module replaces the Health Care Funding Application, which was closed at the conclusion of the 2005-2006 school year and deleted as a data collection in July 2008. The type of data currently collected through the Staff Salary Data module is similar to the type of data that was collected through the Health Care Funding Application.

Eligible entities may need to change existing forms or create new forms related to health care coverage to allow employees to indicate whether they are electing to designate a portion of their compensation to be used as health care supplementation.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendment. The TEA already has a system in place for gathering the staff data necessary to process the payment of the wage increase.

Ms. Beaulieu has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the implementation of statutory changes for payments of health care supplementation. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins December 5, 2008, and ends January 5, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on December 5, 2008.

The amendment is proposed under the TEC, §22.102, which authorizes the TEA to adopt rules to implement health care supplementation.

The proposed amendment implements the TEC, Chapter 22, Subchapter D.

§61.1018. Payment of Health Care Supplementation [~~Supplemental Compensation~~].

(a) Purpose. In accordance with the Texas Education Code (TEC), Chapter 22, Subchapter D, each year [~~month~~] the Texas Education Agency (TEA) shall distribute staff salary allotment funds to eligible entities[~~, subject to the availability of funds,~~] for the purpose of making payments of health care supplementation to eligible employees [~~payment of supplemental compensation~~], as specified by the provisions delineated in this section.

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

(1) Eligible entity [~~Entity~~]--An eligible entity is defined as:

(A) a school district or other educational district whose employees are members of the Teacher Retirement System of Texas (TRS);

(B) a participating open-enrollment charter school; or

(C) a regional education service center.

(2) Full-time employee--An individual is employed as a full-time employee if the individual:

(A) is a participating member of the TRS;

(B) is employed by an eligible entity [~~a school district, other educational district whose employees are members of the TRS, a participating charter school, or a regional education service center~~];

(C) is not a retiree covered under the Texas Public School Retired Employees Group Benefits Act [~~Program~~] established under the Texas Insurance Code, Chapter 1575;

(D) is not a minimum-salary-schedule employee [~~professional staff~~]; and

(E) works for an eligible entity or any combination of eligible entities for 30 or more hours each week.

(3) Minimum-salary-schedule employee--A classroom teacher, full-time librarian, full-time counselor, or full-time nurse subject to the minimum salary schedule under the TEC, §21.402.

(4) [~~(3)~~] Part-time employee--An individual is employed as a part-time employee if the individual:

(A) is a participating member of the TRS;

(B) is employed by an eligible entity [~~a school district, other educational district whose employees are members of the TRS, a participating charter school, or a regional education service center~~];

(C) is not a retiree covered under the Texas Public School Retired Employees Group Benefits Act [~~Program~~] established under the Texas Insurance Code, Chapter 1575;

(D) is not a minimum-salary-schedule employee [~~professional staff~~]; and

(E) works for an eligible entity or any combination of eligible entities for fewer [~~less~~] than 30 hours each week.

[~~(4) Professional staff--An individual is employed as professional staff if:~~]

[~~(A) the individual is employed by a school district, a charter school, or other eligible entity that is not a regional education service center and 50% or more of the individual's time is reported under any combination of the role identifications in the Public Education Information Management System (PEIMS) specified in this subparagraph, or under any subsequently created role identifications that describe roles that are substantially similar to the ones identified in this subparagraph;~~]
[~~Figure: 19 TAC §61.1018(b)(4)(A)~~]

[~~(B) the individual is employed by a regional education service center and 50% or more of the individual's time is reported under any combination of the role identifications in PEIMS specified in this subparagraph, or under any subsequently created role identifications that describe roles that are substantially similar to the ones identified in this subparagraph; or~~]
[~~Figure: 19 TAC §61.1018(b)(4)(B)~~]

[~~(C) regardless of how the individual's time is reported in PEIMS, 50% or more of the individual's time is reported in a role that is substantially similar to a role set out in subparagraph (A) or (B) of this paragraph, as determined by the reporting entity or combination of entities.~~]

(5) Staff salary allotment--An allotment made up of the health care supplementation funding an eligible entity is due under the TEC, Chapter 22, Subchapter D, based on the entity's number of full-time and part-time employees.

(c) Reporting. For each designated report month, each eligible entity must [~~shall~~] report to the TEA the number of full-time and part-time employees eligible to receive health care supplementation [~~supplemental compensation and the total number of professional staff~~], as determined by the eligible entity in accordance with requirements established by the TEA in this section. The TEA may dispute, seek verification of, or conduct an investigation regarding the reported number of employees and staff at any time after receiving the report.

[~~(1) The TEA division responsible for state funding must receive each monthly report by 5:00 p.m. Central Time on the 10th calendar day of each month or, if that date is not a business day, by 5:00 p.m. Central Time on the first business day after the 10th calendar day of the month.~~]

[~~(2) The TEA may dispute, seek verification of, or conduct an investigation regarding the reported number of employees and staff at any time after receiving the report.~~]

(d) Eligibility. For the purposes of this section, an individual is eligible to receive health care supplementation [~~supplemental compensation~~] if the individual:

(1) is employed by an eligible entity;

(2) [(1)] is a full-time employee, as defined in subsection (b)(2) of this section, or a part-time employee, as defined in subsection (b)(4) [(b)(3)] of this section;

(3) [(2)] is not a minimum-salary-schedule employee [professional staff member], as defined in [by] subsection (b)(3) [(b)(4)] of this section; and

[(3) has been employed by an eligible entity for a period of at least 91 days.]

(4) has provided written election of whether to designate a portion of the individual's compensation to be used as health care supplementation, in accordance with the TEC, §22.105.

(e) Funding formula. The funds for health care supplementation will comprise the staff salary allotment. Funding for the staff salary allotment is based on the number of employees who are eligible and the full- or part-time status of those employees. The staff salary allotment will be paid to the eligible entity as part of its regularly scheduled payments from the Foundation School Program (FSP). If the eligible entity is not scheduled or eligible to receive FSP payments, the staff salary allotment will be paid to the entity in a separate payment.

(1) During the school year, the staff salary allotment will be based on the sum of:

(A) an amount equal to the estimated number of full-time employees multiplied by $500; and

(B) an amount equal to the estimated number of part-time employees multiplied by $250.

(2) The final staff salary allotment due to an eligible entity for a school year will be determined by the reports of eligible employees submitted to the division responsible for state funding during the settle-up processes as described in subsection (f) of this section.

(3) The formula for determining the final staff salary allotment is as follows.

(A) The data submitted by an eligible entity to the division responsible for state funding is used to calculate the entity's staff salary allotment.

(B) Each month, the count of full-time employees is multiplied by $500/12.

(C) Each month, the count of part-time employees is multiplied by $250/12.

(D) The final staff salary allotment is determined by summing the monthly amounts for the full-time and part-time staff for the state fiscal year beginning September 1 and ending August 31.

(f) Settle-up. The TEA may make adjustments to previously reported numbers and may make a corresponding increase or decrease in funds that would otherwise be remitted to an eligible entity at any time after receipt of a report. A final determination of the staff salary allotment due to an eligible entity will be based on the reports of eligible employees submitted to the TEA division responsible for state funding.

(1) Near-final settle-up. Eligible entities must submit proposed adjustments to reports of eligible employees for a school year by August 31 of that school year for those adjustments to be reflected in the near-final settle-up reconciliation. Additional amounts owed to an eligible entity for health care supplementation will be added to the staff salary allotment due to the eligible entity in the subsequent school year. Any reductions in payments will be subtracted from the staff salary allotment due to the eligible entity in the subsequent school year until the overpayment has been recovered.

(2) Final settle-up. Eligible entities must submit proposed adjustments to reports of eligible employees for a school year by March 31 of the following school year for those adjustments to be reflected in the final settle-up reconciliation. Additional amounts owed to an eligible entity for health care supplementation will be added to the staff salary allotment due to the eligible entity in April and subsequent months of the current school year. Any overpayments from a prior year that exceed the amount owed to an eligible entity for health care supplementation by March 31 of the following school year will be subtracted from other FSP payments owed to that eligible entity in April and subsequent months until the full amount of overpayment has been recovered. Any overpayments that cannot be subtracted from the current staff salary allotment or other FSP payments will be due and payable on request from the TEA.

(3) Adjustments to allotment. For a period not to exceed five years after the close of a fiscal year, the TEA may adjust the amount of an eligible entity's staff salary allotment for that year as a result of review, investigation, or audit of the eligible entity's reports of eligible employees and other data related to the staff salary allotment.

[(e) Funding formula. The TEA will remit funds to an entity if the TEA receives the required report on or before the deadline and does not seek verification of, choose to investigate, or otherwise dispute information in the report upon initial review. The remittance is subject to later adjustment if the TEA determines that there are errors in the report. The TEA will remit to the entity, subject to the availability of funds appropriated for this purpose, the sum of:]

[(1) an amount equal to the number of full-time employees reported by the entity for the reporting month multiplied by $500 and divided by 12; and]

[(2) an amount equal to the number of part-time employees reported by the entity for the reporting month multiplied by $250 and divided by 12.]

[(f) Distribution.]

[(1) If a report is submitted after the deadline specified in subsection (c) of this section, remittance to the reporting entity will be delayed by at least one month even if the TEA does not dispute or seek verification of the numbers reported.]

[(2) In the first month an individual becomes eligible for the supplement, all entities must begin to distribute the appropriate monthly supplement to each eligible individual employed by the entity, regardless of whether reports are submitted in accordance with the deadlines and other requirements of this section.]

[(3) Entities must continue to make the appropriate monthly distribution to eligible individuals for the length of time that such individuals are employed, as determined by the entity, for at least one day of the applicable month, provided that the individual did not receive a monthly distribution from another entity for employment that occurred earlier in the same month.]

[(g) Settle-up.]

[(1) Entities must submit proposed adjustments to previously reported numbers through September 30 of the fiscal year following the reporting month. The TEA may make adjustments to previously reported numbers and may make a corresponding increase or decrease in funds that would otherwise be remitted to an entity at any time after receipt of a report.]

~~[(2) A final determination of supplemental compensation for a school year shall be based on the reports of eligible employees submitted to the TEA division responsible for state funding. Any adjustments to prior year reporting must be completed by September 30 of the following school year.]~~

~~[(A) Additional amounts owed to districts for supplemental compensation shall be added to payments of supplemental compensation in the subsequent school year, and any reductions in payments shall be subtracted from payments of supplemental compensation in the subsequent school year until the overpayment has been recovered.]~~

~~[(B) Any overpayments from a prior year that exceed the amount of supplemental compensation owed to a school district or charter school by March 31 of the following school year will be subtracted from the Foundation School Fund payments owed to that school district or charter school in April and subsequent months until the full amount of overpayment has been recovered. Any overpayments that cannot be subtracted from current payments of supplemental compensation or Foundation School Fund payments will be due and payable upon request from the TEA.]~~

~~[(C) Adjustments to state assistance based on changes in the final number of eligible employees resulting from a subsequent audit or review of the data reported to the TEA or to the TRS must be requested no later than 12 months following the close of the school year for which the adjustment is sought.]~~

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806167
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 475-1497

CHAPTER 100. CHARTERS
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS

The Texas Education Agency (TEA) proposes amendments to §§100.1011, 100.1022, 100.1023, 100.1031, 100.1047, and 100.1155, concerning open-enrollment charter schools. The sections address general provisions as well as provisions relating to commissioner action and intervention, funding and financial operations, and governance. The proposed rule actions would modify a definition, update statutory citations and *Texas Administrative Code* references, and remove a provision relating to a repealed rule.

In accordance with House Bill 6, 77th Texas Legislature, 2001, the commissioner exercised rulemaking authority to adopt 19 TAC Chapter 100, Charters, Subchapter AA, Commissioner's Rules Concerning Open-Enrollment Charter Schools, covering a wide range of issues related to open-enrollment charter schools. The rules in 19 TAC Chapter 100, Subchapter AA, are organized in divisions addressing related subject matter, as follows: Division 1, General Provisions; Division 2, Commissioner Action and Intervention; Division 3, Charter School Funding and Financial Operations; Division 4, Property of Open-Enrollment Charter Schools; Division 5, Charter School Governance; and Division 6, Charter School Operations. During the recent required review of rules in 19 TAC Chapter 100, Subchapter AA, staff identified the need to modify a definition, update statutory citations and *Texas Administrative Code* references, and remove reference to a repealed rule. The proposed amendments would affect rules in Divisions 1, 2, 3, and 5, as follows.

Division 1. General Provisions.

The proposed amendment to 19 TAC §100.1011, Definitions, would modify the definition of "former charter holder" by including those charter schools that have been ordered closed by any applicable section of the Texas Education Code (TEC), Chapter 39, Public School System Accountability.

Division 2. Commissioner Action and Intervention.

The proposed amendment to 19 TAC §100.1022, Standards for Adverse Action on an Open-Enrollment Charter, would update all references to TEC, §7.027(a), with the correct statutory reference of TEC, §7.028, regarding compliance monitoring. In addition, subsection (c) would be modified to reflect the correct title of 19 TAC Chapter 97, Subchapter DD, and subsection (g)(4)(C)(vi) would be updated to reflect the correct title of 19 TAC §100.1027.

The proposed amendment to 19 TAC §100.1023, Intervention Based on Charter Violations, would correct the title of 19 TAC Chapter 97, Subchapter DD, in subsection (b).

The proposed amendment to 19 TAC §100.1031, Charter Renewal, would update the reference in subsection (c) to TEC, §12.112, with the correct statutory reference of TEC, §12.114(a), regarding the revision of a charter contract.

Division 3. Charter School Funding and Financial Operations.

The proposed amendment to 19 TAC §100.1047, Accounting for State Funds, would revise subsection (d) to delete a provision relating to repealed 19 TAC §129.22, Court-Related Students, and reorganize the existing provision for reporting actual student attendance data to the TEA.

Division 5. Charter School Governance.

The proposed amendment to 19 TAC §100.1155, Procedures for Prohibiting a Management Contract, would update subsection (b) to reflect the correct title of 19 TAC Chapter 97, Subchapter DD, and subsection (b)(1)(B) to reflect the correct title of 19 TAC §100.1027.

Raymond F. Glynn, deputy commissioner for school district leadership and educator quality, has determined that for the first five-year period the amendments are in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendments.

Dr. Glynn has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be correct statutory references in rule and the deletion of an obsolete provision. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility anal-

ysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins December 5, 2008, and ends January 5, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on December 5, 2008.

DIVISION 1. GENERAL PROVISIONS

19 TAC §100.1011

The amendment is proposed under the TEC, Chapter 12, Subchapter D, which authorizes the commissioner of education to adopt rules and procedures related to the implementation of open-enrollment charter schools.

The proposed amendment implements the TEC, Chapter 12, Subchapter D.

§100.1011. Definitions.

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

(1) (No change.)

(2) Former charter holder--An entity that is or was a charter holder, but that has ceased to operate a charter school because its open-enrollment charter has been revoked, surrendered, abandoned, or denied renewal, or because all programs have been ordered closed under TEC, Chapter 39 [~~§39.131(a)(10) or §39.132(b)~~].

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

(3) - (24) (No change.)

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806168
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 475-1497

DIVISION 2. COMMISSIONER ACTION AND INTERVENTION

19 TAC §§100.1022, 100.1023, 100.1031

The amendments are proposed under the TEC, Chapter 12, Subchapter D, which authorizes the commissioner of education to adopt rules and procedures related to the implementation of open-enrollment charter schools.

The proposed amendments implement the TEC, Chapter 12, Subchapter D.

§100.1022. Standards for Adverse Action on an Open-Enrollment Charter.

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

(c) Minimum financial performance required. Continuation of an open-enrollment charter is contingent on the charter holder satisfying generally accepted accounting standards of fiscal management as demonstrated by annual audit reports under §100.1047(c) of this title (relating to Accounting for State Funds) and final investigative audit reports under Chapter 97, Subchapter DD, of this title (relating to [~~Procedures for~~] Investigative Reports, [~~and~~] Sanctions, and Record Reviews).

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

(d) Minimum compliance performance required. Continuation of an open-enrollment charter is contingent on the charter holder's compliance with TEC, Chapter 12, Subchapter D; federal and state laws and rules, financial accountability standards (including student attendance accounting and grant requirements), and data integrity as demonstrated by monitoring reports under TEC, §7.028 [~~§7.027(a)~~]; final investigative reports under Chapter 97, Subchapter DD, and other evidence.

(1) (No change.)

(2) Determination of performance. For purposes of this subsection, required minimum compliance performance shall be determined as follows.

(A) A charter holder's compliance with TEC, Chapter 12, Subchapter D; federal and state laws and rules; financial accountability standards (including student attendance accounting and grant requirements); or data integrity standards may be determined by applying the applicable standards to the facts as found by TEA monitoring reports under TEC, §7.028 [~~§7.027(a)~~], or final investigative reports under Chapter 97, Subchapter DD. Such reports establish non-compliance if the facts found therein are not in compliance with these standards. Other evidence may be considered.

(B) (No change.)

(3) (No change.)

(e) (No change.)

(f) Minimum charter performance required. Continuation of an open-enrollment charter is contingent on the charter holder's implementation of and compliance with the terms of its open-enrollment charter as defined by §100.1011(15) of this title (relating to Definitions).

(1) (No change.)

(2) Determination of performance. For purposes of this subsection, required minimum charter performance shall be determined as follows.

(A) A charter holder's compliance with its open-enrollment charter may be determined by applying the charter terms to the facts as found by [~~the~~] TEA monitoring reports under TEC, §7.028 [~~§7.027(a)~~], or final investigative reports under Chapter 97, Subchapter DD. Such reports establish non-compliance if the facts found therein are not in compliance with these terms. Other evidence may be considered.

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

(3) (No change.)

(g) Probation and modification; mitigating and aggravating factors.

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

(4) Aggravating factors precluding probation or modification. An aggravating factor is a fact or circumstance that increases the degree of culpability for, or harm to the public interest caused by, a failure to achieve the required minimum charter performance. The existence of an aggravating factor must be plead by the TEA under §100.1021 and proven by a preponderance of the evidence. An aggravating factor found under subparagraph (B) of this paragraph shall preclude a lesser sanction that would otherwise be available under paragraph (2) of this subsection.

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

(C) Aggravating factors include the following.

(i) - (v) (No change.)

(vi) The charter holder or its management company failed to cooperate with TEA interventions and sanctions relating to the problem, as required by §100.1027 of this title (relating to Accountability Ratings and [~~Accreditation~~] Sanctions).

(vii) (No change.)

§100.1023. Intervention Based on Charter Violations.

(a) (No change.)

(b) A determination under this section shall be made under Chapter 97, Subchapter DD, of this title (relating to [~~Procedures for~~] Investigative Reports, [~~and~~] Sanctions, and Record Reviews).

§100.1031. Charter Renewal.

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

(c) Notwithstanding subsection (b) of this section, the commissioner may require, as a condition of renewal, that the charter holder amend a contract under TEC, §12.114(a) [~~§12.112~~], to correct any ambiguities, defects, or other infirmities.

(d) (No change.)

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806169
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 475-1497

DIVISION 3. CHARTER SCHOOL FUNDING AND FINANCIAL OPERATIONS

19 TAC §100.1047

The amendment is proposed under the TEC, Chapter 12, Subchapter D, which authorizes the commissioner of education to adopt rules and procedures related to the implementation of open-enrollment charter schools.

The proposed amendment implements the TEC, Chapter 12, Subchapter D.

§100.1047. Accounting for State Funds.

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

(d) Attendance accounting. A charter holder shall comply with the Student Attendance Accounting Handbook, as adopted by reference in §129.1025 of this title (relating to Adoption By Reference: Student Attendance Accounting Handbook), and with TEC, §25.002, and Chapter 129 of this title (relating to Student Attendance); except that a charter school shall report its actual student attendance data to the TEA at six-week intervals, or as directed by the TEA.[~~:~~]

[~~(1) a charter holder is not required to comply with §129.22 of this title (relating to Court- Related Students); and~~]

[~~(2) a charter school shall report its actual student attendance data to the agency at six-week intervals, or as directed by the agency.~~]

(e) - (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 November 24, 2008.

TRD-200806170
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 475-1497

DIVISION 5. CHARTER SCHOOL GOVERNANCE

19 TAC §100.1155

The amendment is proposed under the TEC, Chapter 12, Subchapter D, which authorizes the commissioner of education to adopt rules and procedures related to the implementation of open-enrollment charter schools.

The proposed amendment implements the TEC, Chapter 12, Subchapter D.

§100.1155. Procedures for Prohibiting a Management Contract.

(a) (No change.)

(b) Procedures for making determination. A determination under subsection (a) of this section shall be made under Chapter 97, Subchapter DD, of this title (relating to [~~Procedures for~~] Investigative Reports, [~~and~~] Sanctions, and Record Reviews). In making this determination:

(1) the commissioner may rely on one or more of the following:

(A) (No change.)

(B) any finding or determination made by the commissioner under §§100.1021 of this title (relating to Adverse Action on an Open-Enrollment Charter), 100.1023 of this title (relating to Intervention Based on Charter Violations), 100.1025 of this title (relating to Intervention Based on Health, Safety, or Welfare of Students),

100.1027 of this title (relating to Accountability Ratings and [~~Accreditation~~] Sanctions), or 100.1031 of this title (relating to Charter Renewal), if the finding or determination is final under the rules governing such proceedings; or

(C) (No change.)

(2) (No change.)

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

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806171
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 475-1497

TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §1.141

The Texas Board of Architectural Examiners proposes an amendment to §1.141 of Chapter 1, Subchapter H, concerning professional conduct of architects. The reason for the proposed amendment is to correct a cross-reference to a statute in the rule. As amended the rule refers to Chapter 1051, Texas Occupations Code, instead of the current reference to its predecessor in Vernon's Texas Civil Statutes referenced in the rule.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the rule will refer to the agency's enabling laws as they are currently compiled. Thus the public will not be misdirected to the agency's enabling statutes as they were compiled prior to their codification. There is no economic cost to persons required to comply with the section as amended.

The amendment does not impose any additional regulatory burden upon small or micro businesses or individuals. Therefore, no economic impact statement or flexibility analysis of the amendment is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.208, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, and which require the board to establish standards of conduct for persons regulated by the board.

The proposed amendment does not affect any other statutes.

§1.141. General.

(a) These rules of professional conduct are promulgated pursuant to the Architects' Registration Law (the Act), Chapter 1051, Texas Occupations Code, [~~Article 249a, Vernon's Texas Civil Statutes,~~] which directs the Board to make all rules consistent with the laws and constitution of Texas which are reasonably necessary for the regulation of the practice of architecture and the enforcement of the Act. Except as otherwise noted, these rules of professional conduct apply only to situations which are directly or indirectly related to the practice of architecture.

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

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806178
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8544

22 TAC §1.149

The Texas Board of Architectural Examiners proposes an amendment to §1.149 of Chapter 1, Subchapter H, concerning criminal convictions. The purpose for the proposed amendment is to update cross-references to laws within the rule to reflect the codification of those laws.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state or local government arising from the proposed amendment to the rule.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the rule will direct the public to the referenced laws as they are currently compiled within the Texas Occupations Code and the Texas Government Code, respectively.

There will be no change in the cost to persons required to comply with the section. The amendment does not impose any additional regulatory burden upon small or micro businesses or individuals. Therefore, no economic impact statement or flexibility analysis of the amendment is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.207, Texas Occupations Code Annotated, which provide

the Texas Board of Architectural Examiners with authority to promulgate rules and require the board to adopt rules to comply with Chapter 53, Texas Occupations Code, relating to the conviction of license holders for criminal conduct.

The proposed amendment does not affect any other statutes.

§1.149. Criminal Convictions.

(a) Pursuant to Chapter 53, Texas Occupations Code and §2005.052, Texas Government Code, [~~Article 6252-13c and Article 6252-13d, Vernon's Texas Civil Statutes,~~] the Board may suspend or revoke an existing certificate of registration, disqualify a person from receiving a certificate of registration, or deny to a person the opportunity to be examined for a certificate of registration because of the person's conviction of a crime if the crime directly relates to the duties and responsibilities of a registered architect. The following procedures will apply in the consideration of an application for registration as an Architect or in the consideration of a Registrant's criminal history:

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

(b) - (h) (No change.)

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806179
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8544

CHAPTER 3. LANDSCAPE ARCHITECTS

SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §3.141

The Texas Board of Architectural Examiners proposes an amendment to §3.141 of Chapter 3, Subchapter H, concerning professional conduct of landscape architects. The reason for the proposed amendment is to correct an obsolete cross-reference to the agency's enabling legislation in the rule. As amended the rule refers to Chapters 1051 and 1052, Texas Occupations Code, instead of the current reference to the predecessor of those chapters in Vernon's Texas Civil Statutes relating to the practice of landscape architecture.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state or local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the rule will refer to the agency's enabling laws as they are currently compiled. Thus the public will not be misdirected to the agency's enabling statutes as they were compiled prior to their codification. There will be no economic cost to persons required to comply with the section as amended.

The amendment does not impose any additional regulatory burden upon small or micro businesses or individuals. Therefore, no economic impact statement or flexibility analysis of the amendment is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.208, Texas Occupations Code, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and requires the board to establish standards of conduct for persons regulated by the board.

The proposed amendment does not affect any other statutes.

§3.141. General.

(a) These rules of professional conduct are promulgated pursuant to the Landscape Architects' Registration Law (the Act), Chapters 1051 and 1052, Texas Occupations Code [~~Article 249c, Vernon's Texas Civil Statutes,~~] which directs the Board to make all rules consistent with the laws and constitution of Texas which are reasonably necessary for the regulation of the practice of landscape architecture and the enforcement of the Act. Except as otherwise noted, these rules of professional conduct apply only to situations which are directly or indirectly related to the practice of landscape architecture.

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

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806181
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8544

22 TAC §3.149

The Texas Board of Architectural Examiners proposes an amendment to §3.149 of Chapter 3, Subchapter H, concerning criminal convictions. The purpose for the proposed amendment is to update cross-references to the board's enabling laws within the rule to reflect the codification of those laws.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state or local government arising from the adoption of the rule as proposed.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the rule will direct the public to the referenced laws as they are currently compiled within the Texas Occupations Code and the Texas Government Code, respectively.

There will be no change in the cost to persons required to comply with the section. The amendment does not impose any additional regulatory burden upon small or micro businesses or in-

dividuals. Therefore, no economic impact statement or flexibility analysis of the amendment is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.207, Texas Occupations Code Annotated, which provides the Texas Board of Architectural Examiners with authority to promulgate rules and requires the board to adopt rules to comply with Chapter 53, Texas Occupations Code, relating to the conviction of license holders for criminal conduct.

The proposed amendment does not affect any other statutes.

§3.149. Criminal Convictions.

(a) Pursuant to Chapter 53, Texas Occupations Code and §2005.052, Texas Government Code, [~~Article 6252-13c and Article 6252-13d, Vernon's Texas Civil Statutes,~~] the Board may suspend or revoke an existing certificate of registration, disqualify a person from receiving a certificate of registration, or deny to a person the opportunity to be examined for a certificate of registration because of the person's conviction of a crime if the crime directly relates to the duties and responsibilities of a registered landscape architect. The following procedures will apply in the consideration of an application for registration as a Landscape Architect or in the consideration of a Registrant's criminal history:

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

(b) - (h) (No change.)

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806182
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8544

CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER D. CERTIFICATION AND ANNUAL REGISTRATION

22 TAC §5.78

The Texas Board of Architectural Examiners proposes an amendment to §5.78 of Chapter 5, Subchapter D, concerning inactive status and the use of the title "emeritus interior designer." Under the current rule an interior designer whose registration is on inactive status may use the title "emeritus interior designer" if he or she has been registered for 15 years on or before January 1, 2008. The current rule also imposes a 20-year experience prerequisite for use of the title as of January 1, 2013 in a cross-reference to a part of the rule that no longer exists. The proposed amendment eliminates the obsolete cross-references and the 20-year experience requirement, and limits the use of the emeritus title by inactive interior designers to those who are at least 65 years of age and who have been registered for at least 15 years. By statute, an interior designer may retire and become registered as an emeritus interior designer if he or she is at least 65 years of age and has been an interior designer for at least 20 years. The interior designer registration laws have not been in effect for 20 years so no one who initially registered in Texas qualifies for emeritus status. The proposed amendment would continue the pre-existing rule to allow 65-year-old interior designers whose registrations are on inactive status (and who therefore may not practice) to use the emeritus title until they have been registered for 20 years at which time they may change their registration to emeritus status.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, the proposed amendment will not have a fiscal impact on state or local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the proposed amendment will eliminate an internal cross-reference within the rule to a part of the rule that no longer exists. The proposed amendment will also eliminate a reference to a deadline that has already passed and is therefore obsolete. The proposed amendment would also allow inactive interior designers who would otherwise qualify to change their registration to emeritus status to use the emeritus title until the interior design registration law reaches the age at which interior designers will qualify for emeritus status.

There will be no change in the cost to persons required to comply with the section. The amended rule will have no impact on small business. The amendment does not impose any additional regulatory burden upon small or micro businesses or individuals. Therefore, no economic impact statement or flexibility analysis of the amendment is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

This amendment is proposed pursuant to §1051.202 and §1051.355, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and to establish a procedure by which a person may place her or his certificate of registration on inactive status in which status the person may not engage in an activity regulated by the board.

This proposed amendment does not affect any other statutes.

§5.78. Inactive Status.

(a) - (h) (No change.)

(i) An Inactive Interior Designer may use the title "Emeritus Interior Designer" or "Interior Designer Emeritus" after filing the appropriate form with the Board if: [~~the Inactive Interior Designer~~]

(1) the Inactive Interior Designer is at least 65 years of age and has been registered at least 15 years, or

(2) held an emeritus interior design registration on or before January 2, 2002.

(j) (No change.)

[~~(k) As of January 1, 2008, at least fifteen (15) years of registration shall be required under Subsection 5.78(i)(1). As of January 1, 2013, at least twenty (20) years of registration shall be required under Subsection 5.78(i)(1).~~]

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806184
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8544

SUBCHAPTER H. PROFESSIONAL CONDUCT

22 TAC §5.151

The Texas Board of Architectural Examiners proposes an amendment to §5.151 of Chapter 5, Subchapter H, concerning professional conduct of interior designers. The purpose for the proposed amendment is to update a cross-reference within the rule to the board's enabling laws to reflect the codification of those laws.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state and local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the rule will direct the public to the referenced laws as they are currently compiled within the Texas Occupations Code.

There will be no change in the cost to persons required to comply with the section. The amendment does not impose any additional regulatory burden upon small or micro businesses or individuals. Therefore, no economic impact statement or flexibility analysis of the amendment is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.208, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with general authority to promulgate rules and which require the board to establish standards of conduct for persons regulated by the board.

The proposed amendment does not affect any other statutes.

§5.151. General.

(a) These rules of professional conduct are promulgated pursuant to the Interior Designers' Registration Law (the Act), Chapters 1051 and 1053, Texas Occupations Code, [~~Article 249e, Vernon's Texas Civil Statutes,~~] which directs the Board to make all rules consistent with the laws and constitution of Texas which are reasonably necessary for the regulation of the practice of interior design and the enforcement of the Act. Except as otherwise noted, these rules of professional conduct apply only to situations which are directly or indirectly related to the practice of interior design.

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

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806185
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8544

22 TAC §5.158

The Texas Board of Architectural Examiners proposes an amendment to §5.158 of Chapter 5, Subchapter H, concerning criminal convictions. The purpose for the proposed amendment is to update cross-references to laws within the rule to reflect the codification of those laws.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state or local government.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the rule will direct the public to the referenced laws as they are currently compiled within the Texas Occupations Code and the Texas Government Code, respectively.

There will be no change in the cost to persons required to comply with the section. The amendment does not impose any additional regulatory burden upon small or micro businesses or individuals. Therefore, no economic impact statement or flexibility analysis of the amendment is required.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The amendment is proposed pursuant to §1051.202 and §1051.207, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to promulgate rules and require the board to adopt rules to comply with Chapter 53, Texas Occupations Code, relating to the conviction of license holders for criminal conduct.

The proposed amendment does not affect any other statutes.

§5.158. Criminal Convictions.

(a) Pursuant to Chapter 53, Texas Occupations Code and §2005.052, Texas Government Code, [~~Article 6252-13c and Article 6252-13d, Vernon's Texas Civil Statutes,~~] the Board may suspend or revoke an existing certificate of registration, disqualify a person from receiving a certificate of registration, or deny to a person the opportunity to be examined for a certificate of registration because of the person's conviction of a crime if the crime directly relates to the duties and responsibilities of a registered interior designer. The following procedures will apply in the consideration of an application for registration as an Interior Designer or in the consideration of a Registrant's criminal history:

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

(b) - (h) (No change.)

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806186
Cathy L. Hendricks
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8544

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.8

The Texas Optometry Board proposes amendments to §273.8 concerning reinstatement of expired licenses to remove a requirement to conform to the statute.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the proposed repeal of the rule is in effect, there will be no fiscal implications for state and local governments as a result of enforcing or administering the rule.

Mr. Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated is that the applicant will be required to comply with statutory requirements. The amendments will not require any additional costs for persons applying to reinstate an expired license, and therefore no disparate effect is foreseen on small or micro-businesses.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151, and §351.304. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession, and §351.304 to require reexamination upon license expiration.

§273.8. Renewal of License.

(a) Expired license.

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

(4) If a person's license has been expired for one year or longer, the person may not renew the license but may obtain a new license by taking and passing the jurisprudence exam[~~, obtaining 16 hours of board approved continuing education,~~] and complying with the requirements and procedures for obtaining an initial license. If the person was not licensed as a therapeutic optometrist when the license expired, the person must also complete the requirements for therapeutic license in §§280.1 - 280.3 of this title prior to obtaining a new license.

(5) The board, however, may renew without examination an expired license of a person who was previously licensed in Texas, is currently licensed in another state, and has been in practice for two years immediately preceding application for renewal. The person shall be required to furnish documentation of continuous practice for the two-year period, pay the renewal fee as established by subsection (a)(3) of this section [~~title, above~~]. The person must furnish license verifications from each state in which the person is currently or previously licensed. A license renewal under this section is subject to the same requirements of §351.501 of the Act as a license applicant.

(6) (No change.)

(7) A licensee receiving a felony or misdemeanor criminal conviction, other than a Class C Misdemeanor traffic violation, shall report the conviction to the Board within thirty days of the date the conviction is entered by the court. A licensee receiving a conviction shall also report the fact that the licensee was convicted at the next license renewal. The failure of a licensee to report a criminal conviction is deceit, dishonesty and misrepresentation in the practice of optometry and authorizes the board to take disciplinary action under §351.501 [~~section 351.501~~] of the Act. The licensee shall furnish any document relating to the criminal conviction as requested by the Board.

(b) Mandatory Continuing Education for Renewal of License.

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

(4) The licensee must pay to the board the license renewal fee with a late penalty fee authorized by §351.304 [~~Section 351.304~~] of the Act, plus a penalty authorized by §351.308 [~~Section 351.308~~] of the Act, in an amount equal to the amount of the license renewal fee.

(5) - (6) (No change.)

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

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806033
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8502

CHAPTER 280. THERAPEUTIC OPTOMETRY

22 TAC §280.8, §280.10

The Texas Optometry Board proposes amendment to §280.8 concerning satisfaction of course work, examination and skill evaluation requirements for the optometric glaucoma specialist applications and to §280.10 concerning drug orders for Controlled Substances. The amendment to §280.8 clarifies the requirements for finding that the course work and examination required to apply for the optometric glaucoma specialist license are part of the current curriculum of certified schools or colleges of optometry. Under the amendment, applicants may have the required skills evaluation performed by an ophthalmologist or optometric glaucoma specialist. The amendment to §280.10 adds the additional information required by Senate Bill 1879, 80th Legislature, Regular Session, clarifies when a Controlled Sub-

stances registration is required, and updates citations in the Optometry Act.

The agency has withdrawn the proposed amendment to §280.8 published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7663). The current proposed amendment includes the amendment originally published in the September 12, 2008, issue of the *Texas Register*.

The agency received comments from the Texas Ophthalmological Association on the amendment which is now included in this amendment to §280.8.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the amendments.

Chris Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendment will be that applicants for an optometric glaucoma specialist license will no longer be required to close or leave their practices, or to make arrangements to leave internship practices, in order to obtain course work previously completed in optometry school. The public benefit also includes the ability of an applicant to have an alternative certification of required skills available. For the amendment to §280.10, the public benefit anticipated as a result of enforcing the amendment will be that prescriptions for controlled substances contain language required by the Texas Health and Safety Code.

Economic Impact Statement and Regulatory Flexibility Analysis

The Board licenses approximately 3,600 optometrists and therapeutic optometrists. Approximately 2,900 have active licenses. A significant majority of licensees own or work in one or more of the 1,000 to 3,000 optometric practices which meet the definition of a small business. Some of these practices meet the definition of a micro business. The Board does not license these practices.

It is anticipated that there will be no economic costs for persons or businesses who are required to comply with the amendments. Since future applicants will not be required under the §280.8 amendment to leave practices and internships for travel to the limited sites providing a repeat of the course work, the amendment should result in significant cost savings to these persons. The alternate certification option also will not impose any additional costs on the applicants required to comply with the amendment. For the amendment to §280.10, it is anticipated that there will be no economic costs for persons or businesses who are required to comply with the amendment as the additional requirements require less than five additional words or numbers on a prescription order. No disparate effect is foreseen on small or micro-businesses.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

Since August 2000, the agency has licensed 2,000 optometric glaucoma specialists. A majority of the agency's active licensees hold the optometric glaucoma specialist license and are therefore authorized to treat glaucoma under the provisions of §351.358 and §351.3581 of the Texas Optometry Act. The agency has adopted rules, 22 TAC §280.8 to §280.11, concerning the licensing and practice of optometric glaucoma specialists. Sections 351.358 and 351.3581 were added to the Texas Optometry Act by House Bill 1059, 76th Legislature, Regular Session, with an effective date of September 1, 1999. Section Three of the bill added a new section to the Texas Optometry Act, titled Optometric Health Care Advisory Committee. Section Three is codified as §351.165 of the Texas Optometry Act. This section set up a committee to make recommendations to the agency and the Texas Medical Board regarding requirements for education and clinical training of applicants for the optometric glaucoma specialist license. The legislature specifically restricted the authority of the Committee in subsection (g), which states: "Unless continued in existence by act of the legislature, the Optometric Health Care Advisory Committee is abolished, and this section expires September 1, 2005." The legislature did not choose to continue this section.

The agency agrees with the comments from the Texas Ophthalmological Association that §351.165 of the Texas Optometry Act expired on September 1, 2005. The agency also notes that the Optometric Health Care Advisory Committee was abolished on that same date.

The commentor stated that the expiration of §351.165 is not the repeal of that section, and that the recommendations made by the Optometric Health Care Advisory Committee did not expire with the expiration of the statute. The commentor further stated that the proposed amendment of §280.8 is inconsistent with statutory law.

The agency disagrees with the commentor that it does not have the legal authority to amend this rule regarding the method the agency may use to determine the competency of applicants for the optometric glaucoma specialist license. Section 351.165 has expired. The agency has determined that licensees who are authorized to treat glaucoma under the Texas Optometry Act, are also competent to make a evaluation of the skills of an applicant for that license. These are the same skills regularly employed by the licensees now authorized to treat glaucoma.

The agency disagrees with the commentor regarding the status of §351.165. The reaching of the expiration date acted to repeal the section. The sections of the Optometry Act still effective, §351.358 and §351.3581, require that applicants take an instructional clinical course and exam, but do not contain a requirement that an ophthalmologist approve a series of skills evaluations for applicants as a requirement for license as an optometric glaucoma specialist. The rule amendment requires applicants to comply with all the requirements of §351.3581.

The agency agrees with the commentor that §351.3581 refers to the requirements of §351.165, however, §351.165 has expired and the Committee authorized by that section was abolished. The agency disagrees with the commentor regarding the authority to adopt this amendment and asserts that this amendment of §280.8 complies with the requirements of §351.151 and §351.3581, the effective and applicable statutes for this rule amendment.

In comments received October 10, 2008, the Texas Ophthalmological Association commented on the amendment to §280.8 published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 1954). These comments were not received in the 30 day period as required by the notice in the *Texas Register*. The current amendment has a commenting period of thirty days.

The amendments are proposed under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.358 and 351.3581,

and §481.074 of the Texas Health and Safety Code. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. Sections 351.358 and 351.3581 set the requirements for optometric glaucoma specialist license and allow optometric glaucoma specialist licensees to prescribe Controlled Substances. Section 481.074 of the Texas Health and Safety Code sets out the requirements for a prescription order for Controlled Substances.

§280.8. Optometric Glaucoma Specialist: Required Education, Examination and Clinical Skills Evaluation.

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

(d) Clinical Skills Evaluation. Each applicant for licensure as an optometric glaucoma specialist shall submit a signed and dated certification prepared by a licensed ophthalmologist or optometric glaucoma specialist. The certification shall confirm the demonstration by the applicant in an adequate and appropriate manner, as directly observed by the ophthalmologist or optometric glaucoma specialist, of the following skills:

(1) tonometry,

(2) gonioscopy,

(3) slit lamp examination,

(4) optic nerve examination/fundus, and

(5) interpretation of visual fields.

(e) Applicants Graduating from Curriculums Which Include Instructional Clinical Course [~~Work~~]. An applicantmeets [~~shall be considered as having met~~] the requirements of §351.3581 of the Act and subsections (a) - (c) of this section, provided:

(1) the Board determines in a review of the curriculum and by certification of the dean of a school or college of optometry that:

(A) The [~~the~~] course work [~~and examination~~] required for certification in this section, including an instructional clinic review component, is part of the school or college of optometry's [~~is included in the~~] regular curriculum [~~required for graduation from the school or college of optometry~~], and that the examination required for graduation from the school or college is the substantive equivalent of an examination approved by the Board pursuant to subsection (b) of this section.

(B) The [~~the~~] students of the school or college must receive clinical training and satisfy the evaluation requirement set out [~~in the skills listed~~] in subsection (d) of this section.

[~~(2) Clinical Skills Evaluation. Notwithstanding subsection (d) of this section, each applicant meeting the requirements of paragraph (3) of this subsection shall submit a signed and dated certification prepared by a licensed ophthalmologist or optometric glaucoma specialist. The certification shall confirm the demonstration by the applicant in an adequate and appropriate manner, as directly observed by the ophthalmologist or optometric glaucoma specialist, of the following skills:~~]

[~~(A) tonometry,~~]

[~~(B) gonioscopy,~~]

[~~(C) slit lamp examination,~~]

[~~(D) optic nerve examination/fundus, and~~]

[~~(E) interpretation of visual fields.~~]

(2) [~~(3)~~] This subsection [~~rule~~] shall apply to all applicants graduating on or after May 1, 2008, from a school or college of optometry for which the Board has issued a determination under paragraph (1) of this subsection, in the calendar year during which the determination was issued or any year thereafter.

§280.10. Optometric Glaucoma Specialist: Administration and Prescribing of Oral Medications and Anti-Glaucoma Drugs.

(a) An optometric glaucoma specialist may administer and prescribe any drug authorized by the Texas Optometry Act, §351.358 and §351.3581 [~~Article 4552-1.03, as amended by House Bill 1051, 76th Legislature, Regular Session~~], in addition to those drugs that may be administered and prescribed by a therapeutic optometrist.

(b) The requirements of §280.5 and the statutes cited in the rule apply to the optometric glaucoma specialist's prescription orders, the administration of drugs in the optometric office and the labeling of drugs supplied to patients. The requirements for a prescription order for a Controlled Substance are listed in subsection (f) of this section.

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

(f) Controlled Substances

(1) The following paragraphs apply to an optometric glaucoma specialist possessing, administering or prescribing a Schedule III, IV or V analgesic Controlled Substance. The paragraphs also apply to an optometric glaucoma specialist who has obtained the registrations necessary to possess, administer, or prescribe a Schedule III, IV or V Controlled Substance.

(2) [~~(1)~~] An optometric glaucoma specialist must possess a current Controlled Substances Registration from the United States Drug Enforcement Administration (DEA) and the Texas Department of Public Safety (DPS) in order to procure, possess, administer or prescribe a Schedule III, IV or V analgesic Controlled Substance. A licensee applying for or possessing a Controlled Substances Registration must observe all requirements of the Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, applicable federal law, and all requirements of the Texas Department of Public Safety (DPS) Drug Rules, 37 T.A.C. Chapter 13[~~, in making application and maintaining renewal of a United States Drug Enforcement Administration (DEA) registration number for possession and prescribing authority of the Schedule III, IV, and V analgesic controlled substances~~].

(3) [~~(2)~~] An optometric glaucoma specialist must obtain a registration number from the DPS for the principal office of practice. Application may be made for a separate registration for the possession, administration, and prescribing of controlled substances at a satellite office but all requirements of this rule shall apply in all locations.

[~~(3) The optometric glaucoma specialist shall include the optometrist's DEA number on all prescriptions for controlled substances.~~]

(4) All prescriptions for a Schedule III, IV or V Controlled Substance shall contain the following information (Licensees telephoning or communicating the prescription orally to a pharmacist shall supply the information in this subsection to the pharmacist, except for the signature of the optometric glaucoma specialist.):

(A) date of issuance;

(B) name, address and date of birth of the patient for whom the controlled substance is prescribed;

(C) name, strength, and quantity (written as both a number and as a word) of the controlled substance prescribed;

(D) direction for use of the controlled substance;

(E) intended use of the controlled substance prescribed unless the optometric glaucoma specialist determines the furnishing of this information is not in the best interest of the patient;

(F) printed or stamped name, address and business telephone number of the optometric glaucoma specialist;

(G) written signature of the prescribing optometric glaucoma specialist;

(H) complete license number of the prescribing optometric glaucoma specialist; and

(I) DEA and DPS registration number.

(5) An optometric glaucoma specialist shall maintain a complete and accurate record of purchases (to include samples received from pharmaceutical manufacturer representatives) and administrations of Schedule III, IV or V analgesic Controlled Substances.

(6) [(4)] The record keeping listed in this section shall be subject to inspection at all times by the Texas Department of Public Safety, the U.S. Drug Enforcement Administration, and the Texas Optometry Board and any officer or employee of the governmental agencies shall have the right to inspect and copy records, reports, and other documents, and inspect security controls, inventory and premises where Schedule III, IV, and V analgesic controlled substances are possessed or administered.

(7) [(5)] Minimum security controls shall be established to include but not limited to:

(A) establishing adequate security to prevent unauthorized access and diversion of the controlled substance,

(B) during the course of business activities, not allowing any individual access to the storage area for controlled substances except those authorized by the optometric glaucoma specialist,

(C) storing the controlled substance in a securely locked, substantially constructed cabinet or security cabinet which shall meet the requirements under the DPS Drug Rules, and

(D) not employ in any manner an individual that would have access to controlled substances who has had a federal or state application for controlled substances denied or revoked, or have been convicted of a felony offense under any state or federal law relating to controlled substances or been convicted of any other felony, or have been a licensee of a health regulatory agency whose license has been revoked, canceled, or suspended.

(8) [(6)] Failure of the optometric glaucoma specialist to maintain strict security and proper accountability of controlled substance shall be deemed to be a violation of the Texas Optometry Act, §351.501 and §351.551.

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

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806035
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-8502

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.9

The Texas State Board of Examiners of Psychologists proposes amendments to §463.9, Licensed Specialist in School Psychology. The amendments are being proposed to assist the LSSP applicant in transitioning from an internship to the LSSP trainee status.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee 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 help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700 or email Brenda.skiff@tsbep.state.tx.us.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§463.9. Licensed Specialist in School Psychology.

(a) Application Requirements. A completed application for licensure as a specialist in school psychology includes the following, in addition to the requirements set forth in Board rule §463.5 of this title (relating to Application File Requirements):

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

(b) (No change.)

(c) Completion of internship. Applicants must have completed a minimum of 1200 hours, of which 600 must be in a public school. A formal internship or other site-based training must be provided through a formal course of supervised study from a regionally accredited institution of higher education in which the applicant was enrolled or be obtained in accordance with Board rule §463.11(c)(1) and (c)(2)(C) of this title (relating to Licensed Psychologist). The internship in the public school must be supervised by an individual qualified in accordance with Board rule §465.38 of this title (relating to Psychological Services in the Schools). Internship which is not obtained in a public school must be supervised by a licensed psychologist. No experience with a supervisor who is related within the second degree of affinity or within the second degree by consanguinity to the person, or is under Board disciplinary order, may be considered for specialist in school psychology licensure. Internships may not involve more than two sites (a school district is considered one site) and must be obtained in not less than one or more than two academic years. These individuals must be designated as interns. Direct, systematic supervision must involve a minimum of one face-to-face contact hour

per week or two consecutive face-to-face contact hours once every two weeks with the intern. The internship must include direct intern application of assessment, intervention, behavior management, and consultation, for children representing a range of ages, populations and needs.

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

(f) Trainee Requirements. An applicant for the specialist in school psychology license who meets all requirements, prior to taking and passing the Jurisprudence examination, may, in accordance with Board rule §465.38(4) of this title (relating to Psychological Services in the Schools), practice under supervision as a trainee for not more than one calendar year.

(g) Provision of psychological services in the public schools by unlicensed individuals. An unlicensed individual may [~~legally~~] provide psychological services under supervision in the public schools pursuant to §501.004(a)(2) of the Act. Services may be provided if: [~~as an intern provided that the individual is enrolled in an internship, practicum or other site based training in a school psychology program in a regionally accredited institution of higher education. Once the individual has completed the internship required for licensure as an LSSP and is no longer enrolled in a formal program, the individual may not provide psychological services in the public schools. After the individual has passed the National School Psychology Examination, he or she must apply for licensure as an LSSP with the Board. After the Board has reviewed the LSSP application and approved the training of the applicant, the applicant will be issued an LSSP trainee status letter which allows the applicant to practice in accordance with the LSSP trainee requirements of this rule.~~]

(1) the individual is enrolled in an internship, practicum or other site based training in a school psychology program in a regionally accredited institution of higher education, or

(2) the individual has completed an internship in a school psychology program in a regionally accredited institution of higher education and has an application for licensure as an LSSP pending before the Board and the Board has not notified the applicant that he or she does not meet the training requirements for this licensure, or

(3) the individual has been issued a trainee status letter by the Board.

(h) Once an individual has completed the internship required for licensure as an LSSP and has passed the National School Psychology Exam, he or she must apply for licensure as an LSSP with the Board. After the Board has reviewed the LSSP application and approved the training of the applicant, the applicant will be issued an LSSP trainee status letter which allows the applicant to practice in accordance with the LSSP trainee requirements of this rule.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806003
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 305-7706

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 135. AMBULATORY SURGICAL CENTERS

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §§135.1 - 135.29, 135.41, 135.42, 135.51 - 135.54 and new §§135.1 - 135.29, 135.41 - 135.43, and 135.51 - 135.56, concerning the regulation of ambulatory surgical centers.

BACKGROUND AND PURPOSE

The repeals and new sections are necessary to update, reorganize, and clarify the rules and to implement legislation by the 80th Legislature, Regular Session, 2007, specifically, the amendment to Health and Safety Code, Chapter 324, Consumer Access to Health Care Information (Senate Bill 1731).

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 135.1 - 135.29, 135.41, 135.42, and 135.51 - 135.54 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Proposed new §§135.1 - 135.29, 135.41 - 135.43, and 135.51 - 135.56 provide clarification to the rules, update references to statutes, rules, codes, guidelines and standards, the names and contact information of associations, boards, commissions, conferences, societies and the department programs. The new §135.1 deletes language that is not statutory. The new §135.2 deletes definitions not used in the rules and revises the definition of advanced practice nurse, licensed vocational nurse, physician, and registered nurse. The new §135.4 requires ambulatory surgical centers (ASCs) to comply with Health and Safety Code, Chapter 324, Consumer Access to Health Care Information. The new §135.9 requires a preanesthesia evaluation by an individual qualified to administer anesthesia. The new §135.11 requires all ASCs to document all approvals or delegations of anesthesia services and include the training, experience, and qualifications of the person who provided the service, and revises the language concerning the physician evaluation of the patient immediately prior to the procedure using the language from the Medicare conditions for coverage for ambulatory surgical centers for consistency. New §135.13 clarifies that the discretion of the governing body to require preoperative laboratory orders is upon the recommendation of the medical staff. The new §§135.20 -135.22 and 135.29 update the license term from annual to two years. The new §135.27 deletes the requirement for ASCs to submit an annual patient safety program report to the department, as the authorizing section of Health and Safety Code, Chapter 243, Subchapter B, Patient Safety Program, expired September 1, 2007. The new §135.42 contains existing language and adds language similar to the hospital licensing rules for clarity and consistency. The new §135.43 adds requirements for the use of alcohol-based hand rubs and gasoline and gasoline powered equipment. The new §135.52 clarifies the prohibition relating to construction in

designated 100-year flood plains; clarifies the design for the handicapped; decreases the spatial requirement for the general storage from 50 to 30 square feet per operating room; adds the requirement for a hand washing fixture in the postoperative recovery suite; deletes the requirement for emergency eyewash; increases the spatial requirement for the treatment room from 100 to 120 square feet; increases the spatial requirement for the examination room from 80 to 100 square feet; adds the requirement for a soap dispenser at each hand washing facility; clarifies that a pressure monitoring devices must be mounted below the ceiling line so that it can be observed; changes the requirement for hot water temperature not to exceed 110 degrees to a range of 105 to 120 degrees Fahrenheit; adds the requirement for ground fault circuit interrupters; and adds the requirement for the nurses calling system to have a signal in the sterile processing room and equipment storage. The new §§135.53 - 135.55 are reorganized for clarity and to be consistent with the hospital licensing rules. The new §135.56 updates existing tables.

FISCAL NOTE

Renee Clack, Section Director, Health Care Quality Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Clack has also determined that there will be no negative effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

Ms. Clack has determined that some small businesses are subject to regulation under the proposed rules. However, no additional economic burden is associated with the proposed regulatory changes so no adverse economic impact to small businesses is anticipated. Therefore, an economic impact statement and regulatory flexibility analysis for small businesses are not required.

PUBLIC BENEFIT

In addition, Ms. Clack has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to ensure patient health and safety when ambulatory surgical center care is necessary.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Debbie Peterson, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, (512) 834-6730 or by email to debbie.peterson@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

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

SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

25 TAC §§135.1 - 135.29

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

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Health and Safety Code, Chapters 243, 324, and 1001; and Government Code, Chapter 531.

§135.1. Scope and Purpose.

§135.2. Definitions.

§135.3. Fees.

§135.4. ASC Operation.

§135.5. Patient Rights.

§135.6. Administration.

§135.7. Quality of Care.

§135.8. Quality Assurance.

§135.9. Medical Records.

§135.10. Facilities and Environment.

§135.11. Anesthesia and Surgical Services.

§135.12. Pharmaceutical Services.

§135.13. Pathology and Medical Laboratory Services.

§135.14. Radiology Services.

§135.15. Facility Staffing and Training.

§135.16. Teaching and Publication.

§135.17. Research Activities.

§135.18. Unlicensed Ambulatory Surgical Center.

§135.19. Exemptions.

§135.20. Initial Application and Issuance of License.

§135.21. Inspections.

§135.22. Renewal of Annual License.

§135.23. Conditions of Licensure.

§135.24. Enforcement.

§135.25. Complaints.

§135.26. Reporting Requirements.

§135.27. Patient Safety Program.

§135.28. Confidentiality.

§135.29. Time Periods for Processing and Issuing a License.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806187
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 458-7111 x6972

25 TAC §§135.1 - 135.29

STATUTORY AUTHORITY

The proposed new rules are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Health and Safety Code, Chapters 243, 324, and 1001; and Government Code, Chapter 531

§135.1. Scope and Purpose.

(a) The purpose of these sections is to implement Health and Safety Code, Chapter 243, which requires ambulatory surgical centers to be licensed by the Department of State Health Services.

(b) These sections provide minimum standards for ambulatory surgical center licenses and procedures for granting, denying, suspending, and revoking a license and licensure fees. The sections under this subchapter primarily cover the licensing procedures and standards for operation, and the remaining sections of this chapter primarily cover the requirements concerning construction design and the life safety code.

(c) The standards pertaining to the construction and design, the qualifications of the professional staff and other personnel, the equipment essential to the health and welfare of the patients, sanitary and hygienic conditions, and the quality assurance program may not exceed the minimum standards for certification under the Social Security Act, Title XVIII, 42 United States Code (USC), §§1395 et seq.

§135.2. Definitions.

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

(1) Act--Texas Ambulatory Surgical Center Licensing Act, Health and Safety Code, Chapter 243.

(2) Action plan--A written document that includes specific measures to correct identified problems or areas of concern; identifies strategies for implementing system improvements; and includes outcome measures to indicate the effectiveness of system improvements in reducing, controlling or eliminating identified problem areas.

(3) Administrator--A person who is a physician, registered nurse, has a baccalaureate or postgraduate degree in administration or a health-related field, or has one year of administrative experience in a health care setting.

(4) Advanced practice nurse (APN)--A registered nurse approved by the Texas Board of Nursing to practice as an advanced practice nurse in Texas. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with "advanced nurse practitioner."

(5) Ambulatory Surgical Center (ASC)--A facility that primarily provides surgical services to patients who do not require overnight hospitalization or extensive recovery, convalescent time or observation. The planned total length of stay for an ASC patient shall not exceed 23 hours. Patient stays of greater than 23 hours shall be the result of an unanticipated medical condition and shall occur infrequently. The 23-hour period begins with the induction of anesthesia.

(6) Autologous blood units--Units of blood or blood products derived from the recipient.

(7) Available--Able to be physically present in the facility to assume responsibility for the delivery of patient care services within five minutes.

(8) Certified registered nurse anesthetist (CRNA)--A currently licensed registered nurse who has current certification from the Council on Certification of Nurse Anesthetists and who is currently authorized to practice as an advanced practice nurse by the Texas Board of Nursing.

(9) Change of ownership--

(A) a sole proprietor who transfers all or part of the ASC's ownership to another person or persons;

(B) the removal, addition, or substitution of a person or persons as a general, managing, or controlling partner in an ASC owned by a partnership and the tax identification number of that ownership changes; or

(C) a corporation that transfers all or part of the corporate stock which represents the ASC's ownership to another person or persons and the tax identification number of that ownership changes.

(10) Dentist--A person who is currently licensed under the laws of this state to practice dentistry.

(11) Department--The Department of State Health Services.

(12) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharge into any waters, including ground waters.

(13) Extended observation--The period of time that a patient remains in the facility following recovery from anesthesia and discharge from the postanesthesia care unit, during which additional comfort measures or observation may be provided.

(14) Health care practitioners (qualified medical personnel)--Individuals currently licensed under the laws of this state who are authorized to provide services in an ASC.

(15) Licensed vocational nurse (LVN)--A person who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.

(16) Medicare-approved reference laboratory--A facility that has been certified and found eligible for Medicare reimbursement, and includes hospital laboratories which may be Joint Commission or American Osteopathic Association accredited or nonaccredited Medicare approved hospitals, and Medicare certified independent laboratories.

(17) Person--Any individual, firm, partnership, corporation, or association.

(18) Physician--An individual licensed by the Texas Medical Board and authorized to practice medicine in the State of Texas.

(19) Premises--A building where patients receive outpatient surgical services.

(20) Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing as a registered nurse.

(21) Title XVIII--Title XVIII of the United States Social Security Act, 42 United States Code (USC), §§1395 et seq.

§135.3. Fees.

(a) Initial license fee. The fee for an initial license (includes change of ownership or relocation) is $5,200. The license term is two years.

(b) Renewal license fee. The fee for a renewal license is $5,200. The license term is two years.

(c) Official submission. The department shall not consider an application as officially submitted until the applicant pays the application fee and submits the application form.

(d) Nonrefundable. Fees paid to the department are not refundable.

(e) Payment of fees. All fees shall be paid to the Department of State Health Services.

(f) Fee schedule review. The department shall make periodic reviews of its fee schedule and make any adjustments necessary to provide funds to meet its expenses without creating an unnecessary surplus. Such adjustments shall be through section amendments.

(g) Other fees. The department is authorized to collect subscription and convenience fees, in amounts determined by the Texas-Online Authority, to recover costs associated with application and renewal application processing through TexasOnline, in accordance with Government Code, §2054.111.

§135.4. Ambulatory Surgical Center (ASC) Operation.

(a) The ASC shall have a governing body that sets policy and assumes full legal responsibility for the total operation of the ASC.

(b) The governing body shall be responsible for assuring that medical staff bylaws are current and on file.

(c) The governing body shall address and is fully responsible, either directly or by appropriate professional delegation, for the operation and performance of the ASC. Governing body responsibilities include, but are not limited to:

(1) determining the mission, goals, and objectives of the ASC;

(2) assuring that facilities and personnel are adequate and appropriate to carry out the mission;

(3) establishing an organizational structure and specifying functional relationships among the various components of the ASC;

(4) adopting bylaws or similar rules and regulations for the orderly development and management of the ASC;

(5) adopting policies or procedures necessary for the orderly conduct of the ASC;

(6) assuring that the quality of care is evaluated and that identified problems are addressed;

(7) reviewing all legal and ethical matters concerning the ASC and its staff and, when necessary, responding appropriately;

(8) maintaining effective communication throughout the ASC;

(9) establishing a system of financial management and accountability that includes an audit appropriate to the ASC;

(10) developing, implementing, and enforcing a policy on the rights of patients;

(11) approving all major contracts or arrangements affecting the medical care provided under its auspices, including, but not limited to, those concerning:

(A) the employment of health care practitioners;

(B) an effective procedure for the immediate transfer to a hospital of patients requiring emergency care beyond the capabilities of the ASC. The ASC shall have a written transfer agreement with a hospital or all physicians performing surgery at the ASC shall have admitting privileges at a local hospital;

(C) the use of external laboratories;

(D) an effective procedure for obtaining emergency laboratory, radiology, and pharmaceutical services if laboratory, X-ray, and pharmacy services are not provided on site;

(E) the provision of education to students and postgraduate trainees if the ASC participates in such programs;

(12) formulating long-range plans in accordance with the mission, goals, and objectives of the ASC;

(13) operating the ASC without limitation because of race, creed, sex, or national origin;

(14) assuring that all marketing and advertising concerning the ASC does not imply that it provides care or services which it is not capable of providing; and

(15) developing a system of risk management appropriate to the ASC including, but not limited to:

(A) periodic review of all litigation involving the ASC, its staff, and health care practitioners regarding activities in the ASC;

(B) periodic review of all incidents reported by staff and patients;

(C) review of all deaths, trauma, or adverse reactions occurring on premises; and

(D) evaluation of patient complaints.

(d) The governing body shall provide for full disclosure of ownership to the department.

(e) The governing body shall meet at least annually and keep such minutes or other records as may be necessary for the orderly conduct of the ASC.

(f) If the governing body elects, appoints, or employs officers and administrators to carry out its directives, the authority, responsibility, and functions of all such positions shall be defined.

(g) When a majority of its members are physicians, the governing body, either directly or by delegation, shall make (in a manner consistent with state law and based on evidence of the education, training, and current competence of the physician) initial appointments, reappointments, and assignment or curtailment of medical privileges. When a majority of the members of the governing body are not physicians, the ASC's bylaws or similar rules and regulations shall specify a procedure for establishing medical review for the purpose of making (in a manner consistent with state law and based on evidence of the education, training, and current competence of the physician) initial appointments, reappointments, and assignment or curtailment of medical privileges.

(h) The governing body shall provide (in a manner consistent with state law and based on evidence of education, training, and current competence) for the initial appointment, reappointment, and assignment or curtailment of privileges and practice for non-physician health care personnel and practitioners.

(i) The governing body shall encourage personnel to participate in continuing education that is relevant to their responsibilities within the ASC.

(j) The governing body shall adopt, implement, and enforce written policies to ensure compliance with Health and Safety Code, Chapter 324, Consumer Access to Health Care Information.

(k) The governing body shall adopt, implement and enforce written policies to ensure compliance with applicable state laws.

(l) An ASC that performs abortions shall adopt, implement and enforce a policy to ensure compliance with Health and Safety Code, Chapters 245 and 171, Subchapters A and B (relating to Abortion and Informed Consent).

§135.5. Patient Rights.

(a) Patients shall be treated with respect, consideration, and dignity.

(b) Patients shall be provided appropriate privacy.

(c) Patient records shall be treated confidentially and, except when authorized by law, patients shall be given the opportunity to approve or refuse their release.

(d) Patients shall be provided, to the degree known, appropriate information concerning their diagnosis, treatment, and prognosis. When it is medically inadvisable to give such information to a patient, the information shall be provided to a person designated by the patient or to a legally authorized person.

(e) Patients shall be given the opportunity to participate in decisions involving their health care, except when such participation is contraindicated for medical reasons.

(f) Information shall be available to patients and staff concerning:

(1) patient rights, including those specified in subsections (a) - (e) of this section;

(2) patient conduct and responsibilities;

(3) services available at the ambulatory surgical center (ASC);

(4) provisions for after-hours and emergency care;

(5) fees for services;

(6) payment policies;

(7) patient's right to refuse to participate in experimental research; and

(8) methods for expressing complaints and suggestions to the ASC.

(g) Marketing or advertising regarding the competence and/or capabilities of the organization shall not be misleading to patients.

§135.6. Administration.

(a) Administrative policies, procedures, and controls shall be established and implemented to assure the orderly and efficient management of the ambulatory surgical center (ASC). Administrative responsibilities shall include, but are not limited to:

(1) enforcing policies delegated by the governing body;

(2) employing qualified management personnel;

(3) long-range and short-range planning for the needs of the ASC, as determined by the governing body;

(4) using methods of communicating and reporting, designed to assure the orderly flow of information within the ASC;

(5) controlling the purchase, maintenance, and distribution of the equipment, materials, and facilities of the ASC;

(6) establishing lines of authority, accountability, and supervision of personnel;

(7) establishing controls relating to the custody of the official documents of the ASC; and

(8) maintaining the confidentiality, security, and physical safety of data on patients and staff.

(b) Personnel policies shall be established and implemented to facilitate attainment of the mission, goals, and objectives of the ASC. Personnel policies shall:

(1) define and delineate functional responsibilities and authority;

(2) require the employment of personnel with qualifications commensurate with job responsibilities and authority, including appropriate licensure or certification;

(3) require periodic appraisal of each person's job performance;

(4) specify responsibilities and privileges of employment;

(5) be made known to employees at the time of employment; and

(6) provide adequate orientation and training to familiarize all personnel with the ASC's policies, procedures, and facilities.

(c) The ASC shall periodically assess patient satisfaction with services and facilities provided by the ASC. The findings shall be reviewed by the governing body.

(d) When students and postgraduate trainees are present, their status shall be defined in the ASC's personnel policies.

(e) All employee categories shall be included in personnel policies and appropriate job descriptions shall be developed.

§135.7. Quality of Care.

(a) All health care practitioners shall have the necessary and appropriate training and skills to deliver the services provided by the ambulatory surgical center (ASC).

(b) Health care practitioners shall practice in accordance with applicable state law and conform to the standards and ethics of their professions.

(c) Patient care responsibilities shall be delineated in accordance with recognized standards of practice.

(d) There shall be qualified medical personnel available for emergency treatment whenever there is a patient in the ASC who has received services.

(e) The provision of quality health care services shall be demonstrated by at least the following:

(1) accessible and available health services;

(2) appropriate and timely diagnostic procedures;

(3) treatment that is consistent with clinical impression or working diagnosis;

(4) appropriate and timely consultation;

(5) absence of clinically unnecessary diagnostic or therapeutic procedures;

(6) provision for services when the ASC is not open;

(7) appropriate, accurate, and complete medical record entries; and

(8) adequate transfer of information when patients are transferred to and from other health care providers.

(f) When clinically indicated, patients shall be contacted as quickly as possible for follow-up regarding significant problems and/or abnormal laboratory or radiologic findings that have been identified.

(g) When the need arises, patients shall be transferred from the care of one health care practitioner to another.

(1) Adequate specialty consultation services shall be made available by prior arrangement.

(2) Referral to another health care practitioner shall be clearly outlined to the patient and arranged with the accepting health care practitioner prior to transfer.

(h) Concern for the appropriateness of care shall be governed by the following:

(1) the relevance of health care services to the needs of the patients;

(2) the absence of duplicative diagnostic procedures;

(3) the appropriateness of treatment frequency; and

(4) the use of ancillary services that is consistent with patients' needs.

(i) Education activities shall relate, in part, to the findings as quality assurance activities and shall include cardiopulmonary resuscitation training.

§135.8. Quality Assurance.

(a) Quality assurance includes the selection of professional personnel prior to engagement for service, ongoing review of clinical responsibilities and authority, and peer review and supervision of all professional and technical activities of personnel.

(b) The professional and administrative staff shall understand, support, and participate in the quality assurance program.

(c) The quality assurance program shall address clinical, administrative, and cost effective issues. Exclusive concentration on administrative cost effective issues does not fulfill this requirement.

(d) Quality assurance activities shall be conducted by the quality assurance committee, which is composed of specific clinical disciplines within the ambulatory surgical center (ASC) (individual medical specialties, nursing, etc.), and shall be consistent with the characteristics of the overall quality assurance program and the services provided by the ASC.

(e) Problem identification and resolution activities shall be conducted as part of an ongoing, organized quality assurance program in which all practitioners in all clinical disciplines have an opportunity to participate. A variety of self-assessment methodologies may be used to implement the quality assurance program. Assessment techniques shall examine the structure, process, or outcome of care, and shall be assessed prospectively, concurrently, or retrospectively.

(f) Quality assurance activities shall address the following.

(1) Important problems or concerns in the care of patients shall be identified. Although the medical record is an important data source for identifying previously unrecognized problems, any sources may be used. Problems concerning accessibility, medical-legal issues, and wasteful practices shall be considered, as well as concerns previously recognized by patients and staff but inadequately addressed.

(2) The frequency, severity, and source of suspected problems or concerns shall be assessed.

(A) Health care practitioners shall participate in the development and application of the criteria used to evaluate the care they provide.

(B) Health care practitioners shall participate in the evaluation of the problems or concerns identified.

(C) A record shall be maintained of all fires, patient deaths, and all transfers from the ASC to the hospital.

(3) Measures shall be implemented to resolve important problems or concerns that have been identified. Health care practitioners as well as administrative staff shall participate in the resolution of the problems or concerns that are identified.

(4) The problems or concerns shall be reassessed to determine objectively whether or not the measures have achieved and sustained the desired result, and if not, why not.

(5) Through the ASC's designated mechanisms, quality assurance activities shall be reported, as appropriate, to the proper personnel and the governing body.

(g) Quality assurance activities described in subsection (f) of this section shall encompass, but are not limited to:

(1) the clinical performance of health care practitioners;

(2) the standards for medical records;

(3) quality controls for and the use of radiology, pathology, and medical laboratory services;

(4) other professional and technical services provided; and

(5) studies of patient satisfaction.

(h) The quality assurance program shall be a well-defined organized program designed to enhance patient care through the ongoing objective assessment of important aspects of patient care and the associated or identified problems. The responsibilities for quality assurance activities shall be clearly delineated.

(1) Qualified medical staff shall participate in assessment of medical services by health care practitioners and shall be accomplished by a specified member(s) of the medical staff or by staff as a group.

(2) Nursing service shall be represented by one or more qualified registered nurses in quality assurance activities.

§135.9. Medical Records.

(a) The ambulatory surgical center (ASC) shall develop and maintain a system for the collection, processing, maintenance, storage, retrieval, and distribution of patient medical records.

(b) An individual medical record shall be established for each person receiving care.

(c) All clinical information relevant to a patient shall be readily available to health care practitioners involved in the care of that patient.

(d) Except when otherwise required by law, any record that contains clinical, social, financial, or other data on a patient shall be strictly confidential and shall be protected from loss, tampering, alteration, destruction, and unauthorized or inadvertent disclosure.

(e) A person shall be designated to be in charge of medical records whose responsibilities include, but are not limited to:

(1) the confidentiality, security, and safe storage of medical records;

(2) the timely retrieval of individual medical records upon request;

(3) the specific identification of each patient's medical record;

(4) the supervision of the collection, processing, maintenance, storage, retrieval, and distribution of medical records; and

(5) the maintenance of a predetermined organized medical record format.

(f) Policies concerning medical records shall follow current statute in regard to retention of active records, retirement of inactive records, and the release of information contained in the record.

(g) Except when otherwise required by law, the content and format of medical records, including the sequence of information, shall be uniform.

(h) Reports, histories and physicals, progress notes, and other patient information (such as laboratory reports, x-ray readings, and consultation) shall be incorporated into the medical record in a timely manner.

(i) Medical records shall be available to authorized health care practitioners any time the ASC is open to patients.

(j) The ASC record shall include the following:

(1) patient identification;

(2) allergies and untoward reactions to drugs recorded in a prominent and uniform location;

(3) all preoperative, postoperative medications administered and drug/dose/route/frequency/quantity of all postoperative drugs dispensed to the patient by the ASC and entered on the patient's record;

(4) significant medical history and results of physical examination;

(5) a preanesthesia evaluation by an individual qualified to administer anesthesia;

(6) preoperative diagnostic studies entered before surgery, if required by policy or ordered by a physician or advanced practice nurse;

(7) findings and techniques of the operation (operative report);

(8) pathology report on all tissues removed during surgery, except those exempted by the governing body;

(9) anesthesia administration record that includes either general, local, or regional anesthetic;

(10) documentation of a properly executed informed consent;

(11) evidence of evaluation of the patient by a physician or advanced practice nurse prior to dismissal;

(12) evidence that the patient left the facility in the company of a responsible adult, unless a physician or advanced practice nurse writes an order that the patient may leave the facility without the company of a responsible adult; and

(13) for patients with a length of stay greater than eight hours, an evaluation of nutritional needs and evidence of how identified needs were met.

(k) Appropriate medical advice given to a patient by telephone shall be entered in the patient's medical record and appropriately signed or initialed.

(l) Entries in patients' medical records shall be legible to clinical personnel, and shall be accurate and completed promptly.

(m) Any notation in a patient's medical record indicating diagnostic or therapeutic intervention as part of clinical research shall be clearly contrasted with entries regarding the provision of nonresearch-related care.

(n) When necessary for assuring continuity of care, summaries of records of a patient who was treated elsewhere (such as by another physician, hospital, ambulatory surgical center, nursing home, or consultant) shall be obtained.

(o) When necessary for assuring continuity of care, summaries or photocopies of the patient's record shall be transferred to the health care practitioner to whom the patient was referred and, if appropriate, to the facility where future care will be rendered.

(p) Certain repetitive procedures are suitable for pre-printed operative notes. These operative notes are suitable as long as they are approved by the governing body, and signed by the surgeon, and transmit to a knowledgeable reader the events of the surgical procedure.

(q) All final tissue and abnormal cytology reports from the Medicare-approved reference laboratory shall be signed by a pathologist.

§135.10. Facilities and Environment.

(a) The ambulatory surgical center (ASC) shall have the necessary personnel, equipment, and procedures to handle medical emergencies that may arise in connection with services sought or provided. At a minimum, the ASC shall provide:

(1) periodic instruction of all personnel in the proper use of safety, emergency, and fire-extinguishing equipment;

(2) procedures, including adequate surveillance techniques, that minimize sources and transmission of infections;

(3) a comprehensive emergency plan to address internal and external emergencies, including:

(A) a provision for the safe evacuation of patients during an internal emergency, especially patients who have difficulty walking;

(B) a provision for the most efficient use of available facilities and services during an external emergency; and

(C) a requirement for at least four drills a year of the internal emergency plan.

(b) Hazards that might lead to slipping, falling, electrical shock, burns, poisoning, or other trauma shall be eliminated.

(c) Facilities shall be clean and properly maintained.

(d) An emergency call system shall be provided and readily accessible to staff and patients in all areas of the facility.

(e) All equipment, including emergency equipment, shall be properly maintained and periodically tested.

(f) There shall be a system for the proper identification, management, handling, transport, treatment, and disposition of hazardous materials and wastes whether solid, liquid, or gas.

(1) This system shall include, but is not limited to, infectious, radioactive, chemical, and physical hazards.

(2) The system shall provide for the protection of patients, staff, and the environment.

(g) An ambulatory surgical center shall meet the requirements set forth by the department in §§1.131 et seq. of this title (relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities).

(h) Sufficient space, equipment, and supplies shall be provided to perform the volume of work with optimal accuracy, precision, efficiency, and safety in the laboratory and x-ray. The ASC shall furnish equipment for basic diagnostic purposes, depending on the extent of services provided. Dressing area(s) shall be required, depending on services provided, with convenient access to toilets, and may be shared with patient changing/preoperative rooms.

§135.11. Anesthesia and Surgical Services.

(a) Anesthesia services.

(1) Anesthesia services provided in the ambulatory surgical center (ASC) shall be limited to those that are approved by the governing body, which may include the following.

(A) Topical anesthesia--An anesthetic agent applied directly or by spray to the skin or mucous membranes, intended to produce transient and reversible loss of sensation to the circumscribed area.

(B) Local anesthesia--Administration of an agent that produces a transient and reversible loss of sensation to a circumscribed portion of the body.

(C) Regional anesthesia--Anesthetic injected around a single nerve, a network of nerves, or vein that serves the area involved in a surgical procedure to block pain.

(D) Minimal sedation (anxiolysis)--A drug-induced state during which patients respond normally to verbal commands. Although cognitive function and coordination may be impaired, ventilatory and cardiovascular functions are unaffected.

(E) Moderate sedation/analgesia ("conscious sedation")--A drug-induced depression of consciousness during which patients respond purposefully to verbal commands, either alone or accompanied by light tactile stimulation. No interventions are required to maintain a patent airway, and spontaneous ventilation is adequate. Cardiovascular function is usually maintained. (Reflex withdrawal from a painful stimulus is NOT considered a purposeful response.)

(F) Deep sedation/analgesia--A drug-induced depression of consciousness during which patients cannot be easily aroused but respond purposefully following repeated or painful stimulation. The ability to independently maintain ventilatory function may be impaired. Patients may require assistance in maintaining a patent airway, and spontaneous ventilation may be inadequate. Cardiovascular function is usually maintained. (Reflex withdrawal from a painful stimulus is NOT considered a purposeful response.)

(G) General anesthesia--A drug-induced loss of consciousness during which patients are not arousable, even by painful stimulation. The ability to independently maintain ventilatory function is often impaired. Patients often require assistance in maintaining a patent airway, and positive pressure ventilation may be required because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function. Cardiovascular function may be impaired.

(2) The anesthesia department shall be under the medical direction of a physician approved by the governing body upon the recommendation of the ASC medical staff.

(3) The medical staff shall develop written policies and practice guidelines for the anesthesia service, which shall be approved,

implemented and enforced by the governing body. The policies and guidelines shall include consideration of the applicable practice standards and guidelines of the American Society of Anesthesiologists, the American Association of Nurse Anesthetists, and the licensing rules and standards applicable to those categories of licensed professionals qualified to administer anesthesia.

(4) Only personnel who have been approved by the facility to provide anesthesia services shall administer anesthesia. All approvals or delegations of anesthesia services as authorized by law shall be documented and include the training, experience, and qualifications of the person who provided the service. A qualified registered nurse (RN) who is not a certified registered nurse anesthetist (CRNA), in accordance with the orders of the operating surgeon or an anesthesiologist, may administer topical anesthesia, local anesthesia, minimal sedation and moderate sedation, in accordance with all applicable rules, polices, directives and guidelines issued by the Texas Board of Nursing. When an RN who is not a CRNA administers sedation, as permitted in this paragraph, the facility shall:

(A) verify that the registered nurse has the requisite training, education, and experience;

(B) maintain documentation to support that the registered nurse has demonstrated competency in the administration of sedation;

(C) with input from the facility's qualified anesthesia providers, develop, implement and enforce detailed, written policies and procedures to guide the registered nurse; and

(D) ensure that, when administering sedation during a procedure, the registered nurse has no other duties except to monitor the patient.

(5) Anesthesia shall not be administered unless the physician has evaluated the patient immediately prior to the procedure to assess the risk of the anesthesia and of the procedure to be performed.

(6) The anesthesiologist or the operating surgeon shall be available until all of his or her patients operated on that day have been discharged from the postanesthesia care unit.

(7) Patients who have received anesthesia shall be evaluated for proper anesthesia recovery by the operating surgeon or the person administering the anesthesia prior to discharge from the postanesthesia care unit using criteria approved by the medical staff.

(8) Patients who remain in the facility for extended observation following discharge from the postanesthesia care unit shall be evaluated immediately prior to leaving the facility by a physician, the person administering the anesthesia, or a registered nurse acting in accordance with physician's orders and written policies, procedures and criteria developed by the medical staff.

(9) A physician shall be on call and able to respond physically or by telephone within 30 minutes until all patients have been discharged from the ASC.

(10) Emergency equipment and supplies appropriate for the type of anesthesia services provided shall be maintained and accessible to staff at all times.

(A) Functioning equipment and supplies which are required for all facilities include:

(i) suctioning equipment, including a source of suction and suction catheters in appropriate sizes for the population being served;

(ii) source of compressed oxygen;

(iii) basic airway management equipment, including oral and nasal airways, face masks, and self-inflating breathing bag valve set;

(iv) blood pressure monitoring equipment; and

(v) emergency medications specified by the medical staff and appropriate to the type of surgical procedures and anesthesia services provided by the facility.

(B) In addition to the equipment and supplies required under subparagraph (A) of this paragraph, facilities which provide moderate sedation/analgesia, deep sedation/analgesia, regional analgesia and/or general anesthesia shall provide the following:

(i) intravenous equipment, including catheters, tubing, fluids, dressing supplies, and appropriately sized needles and syringes;

(ii) advanced airway management equipment, including laryngoscopes and an assortment of blades, endotracheal tubes and stylets in appropriate sizes for the population being served;

(iii) a mechanism for monitoring blood oxygenation, such as pulse oximetry;

(iv) electrocardiographic monitoring equipment;

(v) cardiovertor-defibrillator; and

(vi) pharmacologic antagonists as specified by the medical staff and appropriate to the type of anesthesia services provided.

(b) Surgical services.

(1) Surgical procedures performed in the ASC shall be limited to those procedures that are approved by the governing body upon the recommendation of qualified medical personnel.

(2) Adequate supervision of surgery conducted in the ASC shall be a responsibility of the governing body, shall be recommended by qualified medical personnel, and shall be provided by appropriate personnel.

(3) Surgical procedures shall be performed only by health care practitioners who are licensed to perform such procedures within Texas and who have been granted privileges to perform those procedures by the governing body of the ASC, upon the recommendation of qualified medical personnel and after medical review of the practitioner's documented education, training, experience, and current competence.

(4) Surgical procedures to be performed in the ASC shall be reviewed periodically as part of the peer review portion of the ASC's quality assurance program.

(5) An appropriate history, physical examination, and pertinent preoperative diagnostic studies shall be incorporated into the patient's medical record prior to surgery.

(6) The necessity or appropriateness of the proposed surgery, as well as any available alternative treatment techniques, shall be discussed with the patient prior to scheduling the patient for surgery.

(7) Licensed nurses and other personnel assisting in the provision of surgical services shall be appropriately trained and supervised and shall be available in sufficient numbers for the surgical care provided.

(8) Each operating room shall be designed and equipped so that the types of surgery conducted can be performed in a manner that

protects the lives and assures the physical safety of all persons in the area.

(A) If flammable agents are present in an operating room the room shall be constructed and equipped in compliance with standards established by the National Fire Protection Association (NFPA 99, Annex 2, Flammable Anesthetizing Locations, 1999) and with applicable state and local fire codes.

(B) If nonflammable agents are present in an operating room the room shall be constructed and equipped in compliance with standards established by the National Fire Protection Association (NFPA 99, Chapters 4 and 8, 1999) and with applicable state and local fire codes.

(9) With the exception of those tissues exempted by the governing body after medical review, tissues removed during surgery shall be examined by a pathologist, whose signed report of the examination shall be made a part of the patient's medical record.

(10) A description of the findings and techniques of an operation shall be accurately and completely written or dictated immediately after the procedure by the health care practitioner who performed the operation. If the description is dictated, an accurate written summary shall be immediately available to the health care practitioners providing patient care and becomes a part of the patient's medical record. Refer to §135.9(p) of this title (relating to Medical Records).

(11) A safe environment for treating surgical patients, including adequate safeguards to protect the patient from cross infection, shall be assured through the provision of adequate space, equipment, and personnel.

(A) Provisions shall be made for the isolation or immediate transfer of patients with communicable diseases.

(B) All persons entering operating rooms shall be properly attired.

(C) Acceptable aseptic techniques shall be used by all persons in the surgical area.

(D) Only authorized persons shall be allowed in the surgical area.

(E) Suitable equipment for rapid and routine sterilization shall be available to assure that operating room materials are sterile.

(F) Environmental controls shall be implemented to assure a safe and sanitary environment.

(G) Operating rooms shall be appropriately cleaned before each operation.

(12) Written policies and procedures for decontamination, disinfection, sterilization, and storage of sterile supplies shall be developed, implemented and enforced. Policies shall include, but not be limited to, the receiving, cleaning, decontaminating, disinfecting, preparing, and sterilization of critical items (reusable items), as well as for the assembly, wrapping, storage, distribution, and the monitoring and control of sterile items and equipment.

(A) Policies and procedures shall be developed following standards, guidelines and recommendations issued by the Association of periOperative Registered Nurses (AORN), the Association for Professionals in Infection Control and Epidemiology (APIC), the Centers for Disease Control and Prevention (CDC) and, if applicable, the Society of Gastroenterology Nurses and Associates (SGNA). Standards, guidelines, and recommendations of these organizations are available for review at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas. Copies may also be obtained directly from each organization, as follows: AORN, 2170 South Parker Road, Suite 300, Denver Colorado, 80231, (800) 755-2676; APIC, 1275 K Street, Northwest, Suite 1000, Washington, District of Columbia, 20005-4006, (202) 789-1890; CDC, 1600 Clifton Road, Atlanta, Georgia, 30333, (800) 311-3435; SGNA, 401 North Michigan Avenue, Chicago, Illinois, 60611-4267, (312) 321-5165.

(B) Policies and procedures shall also address proper use of external chemical indicators and biological indicators.

(C) Performance records for all sterilizers shall be maintained for a period of six months.

(D) Preventive maintenance of all sterilizers shall be completed according to manufacturer's recommendations on a scheduled basis. A preventive maintenance record shall be maintained for each sterilizer. These records shall be retained at least one year and shall be available for review to the facility within two hours of request by the department.

(13) Emergency power adequate for the type of surgery performed shall be available in the operative and postoperative recovery areas.

(14) Periodic calibration and/or preventive maintenance of all equipment shall be provided in accordance with manufacturer's guidelines.

(15) The informed consent of the patient or, if applicable, of the patient's legal representative shall be obtained before an operation is performed.

(16) A written procedure shall be established for observation and care of the patient during the preoperative preparation and postoperative recovery period.

(17) Written protocols shall be established for instructing patients in self-care after surgery, including written instructions to be given to patients who receive conscious sedation, regional, and general anesthesia.

(18) Patients who have received anesthesia shall only be allowed to leave the facility in the company of a responsible adult, unless the operating surgeon, a physician, or an advanced practice nurse writes an order that the patient may leave without the company of a responsible adult.

(19) An effective written procedure for the immediate transfer to a hospital of patients requiring emergency care beyond the capabilities of the ASC shall be developed. The ASC shall have a written transfer agreement with a hospital, or all physicians on staff at the ASC shall have admitting privileges at a local hospital.

§135.12. Pharmaceutical Services.

(a) The ambulatory surgical center (ASC) shall provide drugs and biologicals in a safe and effective manner in accordance with professional practices and shall be in compliance with all state and federal laws and regulations. The ASC shall be licensed as required by the Texas State Board of Pharmacy and comply with 22 Texas Administrative Code, §291.76 (relating to Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center).

(b) Pharmaceutical services may be made available by the ASC through a contractual agreement and shall be provided in accordance with the same ethical and professional practices and legal requirements that would be required if such services were provided directly by the ASC.

§135.13. Pathology and Medical Laboratory Services.

Pathological and clinical services shall be provided or made available when appropriate to meet the needs of the patients and adequately support the ambulatory surgical center's (ASC's) clinical capabilities.

(1) Pathology and clinical laboratory services shall include, but are not limited to:

(A) conducting laboratory procedures that are appropriate to the needs of the patients;

(B) performing tests in a timely manner;

(C) distributing test results within 24 hours after completion of a test and maintaining a copy of the results in the laboratory; and

(D) performing and documenting appropriate quality assurance procedures, including, but not limited to, calibrating equipment periodically and validating test results through use of standardized control specimens or laboratories.

(2) Preoperative laboratory procedures may be required as follows.

(A) It shall be at the discretion of the governing body upon the recommendation of the medical staff to require preoperative laboratory orders.

(B) If specific preoperative laboratory work is required, the medical staff shall approve them in accordance with the medical staff bylaws. Other laboratory work shall be performed only on the order of a physician, podiatrist, dentist, or advanced practice nurse and written on the patient's chart.

(C) These services shall be provided either directly within or through an effective contract arrangement with a Medicare-approved reference laboratory.

(D) The contractual agreement with the Medicare-approved reference laboratory shall provide for routine and stat work to include pathology, clinical, and blood bank services, if blood is authorized by the ASC, and shall be available for review.

(3) The patient may be instructed to go directly to the Medicare-approved reference laboratory, or the specimen may be collected on the ambulatory surgical center's premises and then referred to the Medicare-approved reference laboratory.

(4) If the specimens are collected on the premises only, the following shall be maintained:

(A) procedures and policies governing the Medicare-approved reference laboratory specimen requirements; identification, collection, labeling, storage, and transportation of the specimen, and preventive maintenance of equipment used in processing and storage of specimen;

(B) a log book which shall include patient name and identification number, doctor's name, date the specimen was drawn and sent to the Medicare-approved reference laboratory, laboratory tests ordered, date the final report came back from the reference laboratory, and condition of the specimen. The final report shall be on the patient chart, with copies kept in the ASC's laboratory.

(5) If laboratory tests are performed on the premises, the following shall be maintained:

(A) procedures governing identification, collection, labeling, and storage of specimens;

(B) a log book, which shall include patient name and identification number, practitioner's name, date the specimen was drawn, test ordered, and results;

(C) procedures for each test procedure performed by the laboratory, including source of reagents, standards, and calibration procedures, and information concerning the basis for the tested normal ranges;

(D) procedures and documentation of performed maintenance on equipment used to process laboratory work;

(E) dated reports of all examinations performed and made a part of the patient's medical record; and

(F) proficiency testing.

(6) Quality control of the laboratory shall be monitored through the quality assurance committee.

(7) If the ASC designates its laboratory to perform as an independent laboratory, it shall be surveyed according to 42 Code of Federal Regulations, §§493.1 - 493.1780.

(8) The ASC can allow laboratory work to be performed and brought in from other Medicare-approved reference laboratories or practitioners' offices and the reports shall be on the patient's charts before surgery.

(A) Written criteria describing the length of time tests can be done prior to surgery shall be developed by the medical staff and approved by the governing body.

(B) Laboratory work shall be performed in a Medicare-approved reference laboratory or in the patient's healthcare practitioner's office. This shall be written in a policy accepted by the medical staff and governing body.

(9) If it is the ASC's policy to administer blood, policies shall be developed on administration of blood transfusions to include autologous blood units in accordance with the ASC's operative procedures. If the operative procedure(s) performed in the ASC requires or may require the necessity for transfusions, policies and procedures shall include provisions for stat and routine transfusions. These policies and procedures shall include, but are not limited to, collection, labeling, and transportation of specimen in accordance with the ASC or contract service policies. All patient results shall appear in the patient's chart.

(10) If the ASC performs surgery which incorporates the removal of a tissue specimen or the freezing of a tissue specimen, the specimen shall be submitted to a Medicare-approved reference laboratory. The following shall be maintained:

(A) procedures governing the Medicare-approved reference laboratory specimen requirements, identification, collection, labeling, storage, and transportation of the specimen;

(B) documentation to include patient name and identification number, practitioner's name, date the tissue specimen was collected and referred to the Medicare-approved reference laboratory, and date the final report came back from the Medicare-approved reference laboratory. Final copies shall be placed in the patient's chart, with copies kept in the ASC; and

(C) the medical staff bylaws may exempt tissue specimens from pathology examination and the list of exemptions shall be available for review.

(11) The medical staff bylaws shall define those specimens for macroscopic pathology examination only and both macroscopic and microscopic pathology examinations.

(12) The original pathology report shall be included in the patient's chart.

(13) Pathology tissue reports and positive cytology reports shall have the authorized signature of the pathologist interpreting the report.

§135.14. Radiology Services.

(a) Radiology services shall be provided or made available when appropriate to meet the needs of the patients and adequately support the ambulatory surgical center's (ASC's) clinical capabilities. Policy and procedures shall be available for emergency and/or routine radiological procedures.

(b) A radiologist shall authenticate all examination reports, except reports of specific procedures that may be authenticated by physicians who are not radiologists, but who have been granted privileges by the governing body or its designee to authenticate such reports.

(c) Services shall be provided either directly within or through a Medicare-approved facility and the contracts shall be available for review.

(d) If X-ray services are performed within the ASC, the X-ray department shall be surveyed according to 42 Code of Federal Regulations §482.26 or §§486.100 - 486.110.

(e) Procedure manuals shall include procedures for all examinations performed, infection control in the ASC and operating rooms to include dress code of personnel and cleaning of equipment.

(f) Policies shall address the quality aspects of radiology services, including, but not limited to:

(1) performing radiology services only upon the written order of a physician, dentist, advanced practice nurse, or other authorized health care practitioner (such orders shall be accompanied by a concise statement of the reason for the examination); and

(2) limiting the use of any radioactive sources in the ASC to physicians who have been granted privileges for such use on the basis of their training, experience, and current competence.

(g) Policies shall address the safety aspects of radiology services, including, but not limited to:

(1) regulation of the use, removal, handling, and storage of any radioactive material which is required to be licensed by the Department of State Health Services, Radiation Safety Licensing Branch;

(2) precautions against electrical, mechanical, and radiation hazards;

(3) proper shielding where radiation sources are used;

(4) acceptable monitoring devices for all personnel who might be exposed to radiation (monitoring devices shall be worn by such personnel in any area with a radiation hazard);

(5) maintenance of radiation exposure records on personnel; and

(6) authenticated, dated reports of all examinations performed shall be made a part of the patient's medical record.

(h) Laser equipment shall be licensed as required by the Department of State Health Services, Radiation Safety Licensing Branch. Policies and procedures shall be established and implemented for laser technology which include laser safety programs, education and training of laser personnel, credentialing for each specific laser, and a requirement for all personnel working with lasers to be adequately trained in the safety and use of each type of laser utilized.

§135.15. Facility Staffing and Training.

(a) Nursing services.

(1) There shall be an organized nursing service under the direction of a qualified registered nurse (RN). The ambulatory surgical center (ASC) shall be staffed to assure that the nursing needs of all patients are met.

(2) There shall be a written plan of administrative authority for all nursing services with responsibilities and duties of each category of nursing personnel delineated and a written job description for each category. The scope of nursing service shall include, but is not limited to, nursing care rendered to patients preoperatively, intraoperatively, and postoperatively.

(A) The responsible individual for nursing services shall be a qualified registered nurse (RN) whose responsibility and authority for nursing service shall be clearly defined and includes supervision of both personnel performance and patient care.

(B) There shall be a written delineation of functions, qualifications, and patient care responsibilities for all categories of nursing personnel.

(C) Surgical technicians and licensed vocational nurses may be permitted to serve as the scrub nurse under the direct supervision of an RN; they shall not be permitted to function as circulating nurses in the operating rooms, except in ASCs where no general anesthesia is administered and when there is an adequate number of RNs immediately available for an emergency situation. Licensed vocational nurses and surgical technicians may assist in circulatory duties under the direct supervision of a qualified RN during general anesthesia cases.

(D) Nursing services shall be provided in accordance with current recognized standards or recommended practices.

(3) There shall be an adequate number of RNs on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of an RN for emergency care or for any patient when needed.

(A) An RN shall assign the nursing care of each patient to other nursing personnel in accordance with the patient's needs and the preparation and qualifications of the nursing staff available.

(B) There shall be other nursing personnel in sufficient numbers to provide nursing care not requiring the service of an RN.

(4) An RN qualified, at a minimum, with current certification in basic cardiac life support shall be on duty and on the premises at all times whenever patients are present in the facility.

(b) Additional staffing requirements. In addition to meeting the requirements for nursing staff under subsection (a) of this section, facilities shall comply with the following minimum staffing requirements.

(1) Facilities that provide only topical anesthesia, local anesthesia and/or minimal sedation are required to have a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility.

(2) Facilities that provide moderate sedation/analgesia are required to have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual trained and currently certified in advanced cardiac life support and, if surgery is performed on pediatric patients, pediatric advanced life support shall be available until all patients have been discharged from the postanesthesia care unit.

(3) Facilities that provide deep sedation/analgesia, general anesthesia, and/or regional anesthesia shall have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual who is trained and currently certified in advanced cardiac life support and, if surgery is performed on pediatric patients, pediatric advanced life support shall be on duty on the premises and sufficiently free of other duties to enable the individual to respond rapidly to emergency situations until all patients have been discharged from the postanesthesia care unit.

§135.16. Teaching and Publication.

(a) Policies concerning teaching activities shall be developed, implemented, and enforced which address:

(1) the terms and conditions of reimbursement or other compensation;

(2) the reasonableness of the time spent away from direct patient care and administrative activities; and

(3) the training of all students and postgraduate trainees, including the extent of their involvement in patient care activities.

(b) A policy concerning the provision of health care by personnel in any student or postgraduate trainee status shall be developed, implemented, and enforced, and provide for close and adequate supervision and for informing the patient of the status of the provider.

(c) A policy shall be developed, implemented, and enforced concerning publishing activities. The policy shall address:

(1) the need for governing body approval when the views, policies, and procedures expressed in the publication are attributed to the ASC; and

(2) the terms and conditions of compensation from publication and the cost of publication.

§135.17. Research Activities.

(a) Research activities shall be performed in accordance with ethical and professional practices and legal requirements, and these activities shall be periodically monitored by the governing body.

(b) The protocols for conducting research shall be approved by the governing body or its designee after medical and legal review.

(c) Any research activities carried out within the ambulatory surgical center (ASC) shall be appropriate to the expertise of staff and the resources in the ASC.

(d) Individuals engaged in research shall be provided with adequate facilities.

(e) Provisions shall be made to assure that the rights and welfare of all research subjects are adequately protected and that the informed consent of the subject, in the language spoken by him or her, is obtained by adequate and appropriate methods.

(f) All professional staff shall be informed of the ASC's research policies.

§135.18. Unlicensed Ambulatory Surgical Center.

(a) If the department has reason to believe that a person or facility may be providing ambulatory surgical services without a license as required by the Act, the person or facility shall be so notified in writing by certified mail, return receipt requested, and shall submit to the department the following information within 20 days of receipt of the notice:

(1) an application for a license and the license fee, which is nonrefundable;

(2) a claim for exemption under §135.19 of this title (relating to Exemptions); or

(3) any and all documentation necessary to establish that ambulatory surgical services are not being provided. Documentation shall include a notarized statement attesting to the fact that ambulatory surgical services are not provided and a statement of the type(s) of service(s) that are provided.

(b) If the person or facility has submitted an application for a license, the application shall be processed in accordance with §135.20 of this title (relating to Initial Application and Issuance of License).

(c) If the person or facility submits a claim for exemption, the exemption claim shall be processed in accordance with §135.19 of this title.

(d) If the person or facility submits sufficient documentation to establish that ambulatory surgical services are not provided, the department shall so notify the person or facility in writing within 30 days that no license is required. If the documentation submitted is determined to be insufficient by the department, the person or facility shall be so notified in writing and shall have 10 days to respond. Following receipt of the response, if any, the department shall then notify the person or facility in writing within 10 days of the determination.

§135.19. Exemptions.

(a) The following facilities are not required to be licensed under the Act:

(1) an office or clinic of a licensed physician, dentist, or podiatrist;

(2) a licensed nursing home; or

(3) a licensed hospital.

(b) If a person or facility is uncertain about whether or not licensing under the Act is required, a written claim for exemption, including all documentation supporting the exemption claim, may be submitted to the department.

(c) The department shall evaluate the claim for exemption and notify the person or facility in writing of the proposed decision within 30 days following receipt of the claim for exemption.

(d) If the proposed decision is to grant the claim for exemption, the department shall provide written notice according to subsection (c) of this section.

(e) If the claim for exemption is proposed to be denied, the person or facility so affected shall have the right to appeal the determination to the department by written letter with the reasons supporting exemption within 10 days following receipt of the proposed denial.

(f) If the person or facility does not request an appeal as provided in subsection (e) of this section, the right to appeal is deemed to be waived and the denial of the exemption becomes final 30 days following the person or facility's receipt of the proposed denial.

(g) The person or facility shall submit a completed application and nonrefundable licensing fee to the department within 20 days following the final denial of exemption.

§135.20. Initial Application and Issuance of License.

(a) All first-time applications for licensing, including those from unlicensed operating ambulatory surgical centers (ASCs) and licensed ASCs for which a change of ownership or relocation is anticipated, are applications for an initial license.

(b) Upon written or verbal request, the department shall furnish a person with an application form for an ASC license. The applicant shall submit to the department a completed original application and the nonrefundable license fee.

(1) The applicant shall provide:

(A) the name and address of the owner of the ASC, or a list of names and addresses of persons who own an interest in the ASC;

(B) the name, Texas license number, and license expiration date of the medical chief of staff;

(C) the number of physicians, dentists, podiatrists and advanced practice nurses on staff at the ASC;

(D) the name, Texas license number, and license expiration date of the director of nursing of the ASC;

(E) whether the ASC has applied for certification under Title XVIII of the Social Security Act; and

(F) number of surgery suites.

(G) the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) denial, suspension, probation, or revocation of an ambulatory surgical center license in any state, a license for any health care facility or a license for a home and community support services agency (agency) in any state; or any other enforcement action, such as (but not limited to) court civil or criminal action in any state;

(ii) denial, suspension, probation, or revocation of or other enforcement action against an ambulatory surgical center license in any state, a license for any health care facility in any state, or a license for an agency in any state which is or was proposed by the licensing agency and the status of the proposal;

(iii) surrendering a license before expiration of the license or allowing a license to expire in lieu of the department proceeding with enforcement action;

(iv) federal or state (any state) criminal felony arrests or convictions;

(v) Medicare or Medicaid sanctions or penalties relating to the operation of a health care facility or agency;

(vi) operation of a health care facility or agency that has been decertified or terminated from participation in any state under Medicare or Medicaid; or

(vii) debarment, exclusion, or contract cancellation in any state from Medicare or Medicaid; and

(H) for the two-year period preceding the application date, the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) federal or state (any state) criminal misdemeanor arrests or convictions;

(ii) federal or state (any state) tax liens;

(iii) unsatisfied final judgments;

(iv) eviction involving any property or space used as an ambulatory surgical center or health care facility in any state;

(v) injunctive orders from any court; or

(vi) unresolved final federal or state (any state) Medicare or Medicaid audit exceptions.

(2) Upon receipt of the application, the department shall review the application to determine whether it is complete. All documents submitted to the department shall be originals. The address provided on the application shall be the address at which the ASC is operating.

(3) If the department determines that the application for an unlicensed ASC is complete and correct, a representative of the department shall schedule a pre-survey conference with the applicant in order to inform the applicant of the standards for the operation of the ASC. A pre-survey conference may, at the department's discretion, be waived for an applicant of a licensed ASC for which a change of ownership is anticipated.

(4) After a pre-survey conference has been held or waived at the department's discretion and the facility has received an approved architectural inspection conducted by the department, the department may issue a license to an ASC to provide ambulatory surgical services in accordance with these sections.

(c) When it is determined that the facility is in compliance with subsection (b) of this section, the department shall issue the license to the applicant.

(1) Effective date. The license shall be effective on the date the facility is determined to be in compliance with subsection (b) of this section.

(2) Expiration date.

(A) If the effective date of the license is the first day of a month, the license expires on the last day of the 23rd month after issuance.

(B) If the effective date of the license is the second or any subsequent day of a month, the license expires on the last day of the 24th month after issuance.

(d) If an applicant decides not to continue the application process for a license, the application may be withdrawn. The applicant shall submit a written request to withdraw to the department. The department shall acknowledge receipt of the request to withdraw.

(e) During the initial licensing period, the department shall conduct a survey of the ASC to ascertain compliance with the provisions of the Health and Safety Code, Chapter 243, and this chapter.

(1) The ASC shall request that an on-site survey be conducted after the ASC has provided services to a minimum of one patient.

(2) The ASC shall be providing services at the time of the survey.

(3) If the ASC has applied to participate in the federal Medicare program, the Medicare survey may be conducted in conjunction with the licensing survey.

(4) The initial licensing survey may be waived if the ASC provides documented evidence of accreditation by the Joint Commission, the Accreditation Association for Ambulatory Health Care, or the American Association for Accreditation of Ambulatory Surgery Facilities and Medicare deemed status.

§135.21. Inspections.

(a) The department shall conduct an on-site inspection to evaluate the ambulatory surgical center's (ASC's) compliance with the standards for licensing set forth in these sections.

(1) The department shall evaluate the ASC on a standard-by-standard basis before the first renewal license is issued, unless waived in accordance with §135.20(e)(4) of this title (relating to Initial Application and Issuance of License).

(2) An on-site licensing inspection may be conducted once every three years.

(3) The department may make any survey or investigation that it considers necessary. A department representative(s) may enter the premises of a facility at any reasonable time to make a survey or an investigation to ensure compliance with or prevent a violation of Health and Safety Code, Chapter 243, an order or special order of the commissioner, a special license provision, a court order granting injunctive relief, or other enforcement procedures. Ensuring compliance includes permitting photocopying of any records or other information by or on behalf of the department as necessary to determine or verify compliance with the statute or rules adopted under the statute, except that the department may not photocopy, reproduce, remove or dictate from any part of the root cause analysis or action plan required in §135.27 of this title (relating to Patient Safety Program).

(b) If an on-site inspection is conducted at an ASC and deficiencies are cited, the surveyor shall request the applicant or person in charge to sign the statement of deficiencies as an acknowledgment of receipt of a copy of the statement of deficiencies. Signing the statement of deficiencies does not indicate agreement with any deficiencies. If the applicant or person in charge declines to sign the form, the surveyor shall note the declination on the statement of deficiencies and the name of the person so declining. The surveyor shall leave a copy of the statement of deficiencies at the ASC and, if the person in charge is not the applicant, mail a copy of the statement of deficiencies to the applicant.

(c) After an inspection is completed, the surveyor shall prepare a survey report which contains the following:

(1) a completed survey report form;

(2) a statement of which standards were evaluated;

(3) a statement of deficiencies, if any, and the signature of the applicant or person in charge;

(4) a plan of correction which has been provided by the ASC and the date(s) by which correction(s) will be made; and

(5) any comments by the applicant or person in charge concerning the survey.

(d) The survey report form shall be submitted as follows.

(1) The surveyor shall submit the survey report to their supervisor for evaluation and decision.

(2) A license shall be issued to an ASC that is in compliance with minimum standards in accordance with these sections at the time of the on-site inspection.

(3) If deficiencies are cited and the plan of correction is acceptable, written notice shall be sent to the applicant acknowledging same.

(4) If deficiencies are cited and the plan of correction is not acceptable, the department shall notify the applicant in writing and request that the plan of correction be resubmitted. Upon resubmission of the acceptable plan of correction, written notice shall be sent to the applicant acknowledging same.

(5) The ASC shall come into compliance at least 30 days prior to the expiration date of the license.

(6) The department shall verify the correction of deficiencies by mail or by an on-site inspection.

(7) If the ASC does not timely come into compliance, the department may take action in accordance with §135.24 of this title (relating to Enforcement).

§135.22. Renewal of License.

(a) The department shall send written notice of expiration of a license to an applicant at least 60 days before the expiration date. If the applicant has not received notice, it is the duty of the applicant to notify the department and request a renewal application.

(b) The department shall issue a renewal license to an ambulatory surgical center (ASC) that meets the minimum standards for a license set forth in these sections.

(1) The ASC shall submit the following to the department no later than 30 days prior to the expiration date of the license:

(A) a completed renewal application form;

(B) a nonrefundable license fee; and

(C) if the ASC is accredited by the Joint Commission, the Accreditation Association for Ambulatory Health Care, or the American Association for Accreditation of Ambulatory Surgery Facilities, documented evidence of current accreditation status.

(2) Renewal licenses shall be valid for two years.

(c) If the applicant fails to timely submit an application and fee in accordance with subsection (b) of this section, the department shall notify the applicant that the ASC shall cease providing ambulatory surgical services. If the ASC can provide the department with sufficient evidence that the submission was completed in a timely manner and all dates were adhered to, the cease to perform shall be dismissed. If the ASC cannot provide sufficient evidence, the ASC shall immediately thereafter return the license by certified mail. If the applicant wishes to provide ambulatory surgical services after the expiration date of the license, the applicant shall reapply for an annual license under §135.20 of this title (relating to Initial Application and Issuance of License).

§135.23. Conditions of Licensure.

(a) An ambulatory surgical center (ASC) license is issued only for the premises and person or governmental unit named on the application.

(b) An ASC license is issued for a single physical location, and shall not include multiple buildings or offsite locations.

(c) Multiple ASCs may share a single building, provided that:

(1) each ASC is separately licensed; and

(2) no part of the building may be dually licensed by more than one ASC.

(d) No license may be transferred or assigned from one person to another person. If a change of ownership of a licensed ASC is anticipated, in order to ensure continuity of patient services, the department shall be informed in writing and the applicant shall submit a license application and nonrefundable fee at least 30 days prior to the change of ownership of each ASC. The procedure shall be handled in accordance with §135.20 of this title (relating to Initial Application and Issuance

of License), with the exception of the pre-survey conference and the on-site inspection, unless deemed necessary by the department. A license shall be issued for the newly acquired ASC effective on the date the ownership changed. The previous license shall be void on the date of acquisition.

(e) No license may be transferred from one ASC location to another. If an ASC is relocating, the ASC shall complete and submit a license application and nonrefundable fee at least 30 days prior to the relocation of the ASC. The procedure shall be handled in accordance with §135.20 of this title, with the exception of the pre-survey conference, unless deemed necessary by the department. An initial license shall be issued for the relocated ASC effective on the date the relocation occurred. The previous license shall be void on the date of relocation.

(f) Written notice to the department of any change in telephone number shall be received within 30 days after the number has changed.

(g) If the name of an ASC is changed, the department shall be notified in writing within 30 days after the effective date of the name change.

§135.24. Enforcement.

(a) Reasons for enforcement action.

(1) The Department of State Health Services (department) may deny, suspend, or revoke an ambulatory surgical center's (ASC's) license in accordance with Health and Safety Code (HSC), §243.011 if the applicant or licensee:

(A) fails to comply with any provision of the Act;

(B) fails to comply with any provision of this chapter or any other applicable laws;

(C) fails to comply with a special license condition;

(D) fails to comply with an order of the commissioner or another enforcement procedure under the statute;

(E) has a history of noncompliance with the rules adopted under this chapter relating to patient health, safety, and rights which reflects more than nominal noncompliance;

(F) has aided, committed, abetted, or permitted the commission of an illegal act;

(G) fails to provide an adequate application or renewal information;

(H) fails to timely pay assessed administrative penalties in accordance with the Act;

(I) fails to comply with applicable requirements within a designated probation period;

(J) fails to submit an acceptable plan of correction for cited deficiencies; or

(K) if the facility is participating under Title XVIII, and the Centers for Medicare and Medicare Services terminates the ASC's Medicare provider agreement.

(2) The department may suspend or revoke an existing valid license or disqualify a person from receiving a license because of a person's conviction of a felony or misdemeanor, if the crime directly relates to the duties and responsibilities of the ownership or operation of an ambulatory surgical center.

(A) In determining whether a criminal conviction directly relates, the department shall consider the provisions of Occupations Code, Chapter 53.

(B) The following felonies and misdemeanors directly relate because these criminal offenses indicate an ability or a tendency for the person to be unable to own or operate an ambulatory surgical center:

(i) a misdemeanor violation of the statute;

(ii) a misdemeanor or felony involving moral turpitude;

(iii) a conviction relating to deceptive business practices;

(iv) a misdemeanor of practicing any health-related profession without a required license;

(v) a conviction under any federal or state law relating to drugs, dangerous drugs, or controlled substances;

(vi) an offense under the Penal Code, Title 5, involving a patient or a client of any health care facility, a home and community support services agency, or a health care professional;

(vii) a misdemeanor or felony offense under various titles of the Penal Code, as follows:

(I) Title 4 concerning offenses of attempting or conspiring to commit any of the offenses in this subsection;

(II) Title 5 concerning offenses against the person;

(III) Title 7 concerning offenses against property;

(IV) Title 9 concerning offenses against public order and decency; or

(V) Title 10 concerning offenses against public health, safety, and morals; and

(viii) other misdemeanors and felonies which indicate an inability or tendency for the person to be unable to own or operate an ambulatory surgical center.

(C) Upon a licensee's felony conviction, felony probation revocation, revocation of parole, or revocation of mandatory supervision, the license shall be revoked.

(3) If the department proposes to deny, suspend, or revoke a license, the department shall give the applicant written notification of the reasons for the proposed action and offer the applicant an opportunity for a hearing. The applicant may request a hearing within 30 days after the date the applicant receives notice. The request shall be in writing and submitted to the department as instructed in the notice of violation letter. A hearing shall be conducted pursuant to the Government Code, Chapter 2001, Administrative Procedure Act, and §§1.21, 1.23, 1.25, and 1.27 of this title (relating to Formal Hearing Procedures). If a hearing is not requested in writing within 30 days after receiving notice of the proposed action, the applicant is deemed to have waived the opportunity for a hearing and the proposed action shall be taken.

(4) If the department finds that a violation of the standards or licensing requirements prescribed by the Act creates an immediate threat to the health and safety of patients of an ASC, the department may petition the district court for a temporary restraining order to restrain continuing violations.

(5) The provisions of Occupations Code, Chapter 53, Consequences of Criminal Conviction, apply to an ASC.

(6) If a person violates the licensing requirements or the standards prescribed by the Act, the department may petition the district court for an injunction to prohibit the person from continuing the violation or to restrain or prevent the establishment or operation of an ASC without a license issued under the Act.

(b) Emergency suspension of a license. The department may issue an emergency order to suspend a license issued under this chapter, if the department has reasonable cause to believe that the conduct of a license holder creates an immediate danger to the public health and safety.

(1) An emergency suspension is effective immediately without a hearing on notice to the license holder.

(2) On written request of the license holder, the department shall conduct a hearing not earlier than the 10th day or later than the 30th day after the date the hearing request is received to determine if the emergency suspension is to be continued, modified, or rescinded. The hearing and any appeal are governed by the department's rules for a contested case hearing and Government Code, Chapter 2001.

(c) Probation. In lieu of denying, suspending or revoking the license under subsection (a) of this section, the department may schedule the ASC for a probation period of not less than thirty days, if the ASC's noncompliance does not endanger the health and safety of the public.

(1) The department shall provide notice of the probation to the ASC not later than the 10th day before the date the probation begins. The notice shall include the items of noncompliance that resulted in placing the ASC on probation, and shall designate the period of the probation.

(2) During the probationary period, the ASC shall correct the items of noncompliance and provide a written report to the department that describes the corrective actions taken.

(3) The department may verify the corrective actions through an on-site inspection.

(d) Administrative penalty. The department may impose an administrative penalty on a person licensed under this chapter who violates the Act, this chapter, or order adopted under this chapter.

(1) A penalty collected under this section shall be deposited in the state treasury in the general revenue fund.

(2) A proceeding to impose the penalty is considered to be a contested case under Government Code, Chapter 2001.

(3) The amount of the penalty may not exceed $1,000 for each violation, and each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. The total amount of the penalty assessed for a violation continuing or occurring on separate days under this paragraph may not exceed $5,000.

(4) In determining the amount of an administrative penalty assessed under this section, the department shall consider:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(B) the threat to health or safety caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter a future violation;

(E) whether the violator demonstrated good faith, including when applicable whether the violator made good faith efforts to correct the violation; and

(F) any other matter that justice may require.

(5) If the department initially determines that a violation occurred, the department shall give written notice of the report by certified mail to the person alleged to have committed the violation following the survey exit date. The notice shall include:

(A) a brief summary of the alleged violation;

(B) a statement of the amount of the recommended penalty; and

(C) a statement of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(6) Within 20 days after the date the person receives the notice under paragraph (5) of this subsection, the person in writing may:

(A) accept the determination and recommended penalty of the department; or

(B) make a request for a hearing on the occurrence of the violation, the amount of the penalty, or both.

(7) If the person accepts the determination and recommended penalty or if the person fails to respond to the notice, the commissioner or the commissioner's designee by order shall approve the determination and impose the recommended penalty.

(8) If the person requests a hearing, the commissioner shall refer the matter to the State Office of Administrative Hearings (SOAH). The hearing shall be conducted in accordance with Government Code, Chapter 2001, and all applicable SOAH and department rules.

(9) Based on the proposal for decision made by the administrative law judge under paragraph (8) of this subsection, the commissioner by order may find that a violation occurred and impose a penalty, or may find that a violation did not occur. The commissioner or the commissioner's designee shall give notice of the commissioner's order under paragraph (7) of this subsection to the person alleged to have committed the violation in accordance with Government Code, Chapter 2001. The notice shall include:

(A) a statement of the right of the person to judicial review of the order;

(B) separate statements of the findings of fact and conclusions of law; and

(C) the amount of any penalty assessed.

(10) Within 30 days after the date an order of the commissioner under paragraph (7) of this subsection that imposes an administrative penalty becomes final, the person shall:

(A) pay the penalty; or

(B) appeal the penalty by filing a petition for judicial review of the commissioner's order contesting the occurrence of the violation, the amount of the penalty, or both.

(11) Within the 30-day period prescribed by paragraph (10) of this subsection, a person who files a petition for judicial review may:

(A) stay enforcement of the penalty by:

(i) paying the penalty to the court for placement in an escrow account; or

(ii) giving the court a supersedeas bond that is approved by the court for the amount of the penalty, and that is effective until all judicial review of the commissioner's order is final; or

(B) request the court to stay enforcement of the penalty by:

(i) filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the penalty and is financially unable to give the supersedeas bond; and

(ii) sending a copy of the affidavit to the commissioner by certified mail.

(C) If the commissioner receives a copy of an affidavit under subparagraph (B) of this paragraph, the commissioner may file with the court, within five days after the date the copy is received, a contest to the affidavit. In accordance with Health and Safety Code, §243.016(c), the court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true. The person who files an affidavit has the burden of proving that the person is financially unable to pay the penalty or to give a supersedeas bond.

(12) If the person does not pay the penalty and the enforcement of the penalty is not stayed, the department may refer the matter to the attorney general for collection of the penalty. As provided by the Health and Safety Code, §243.016(d), the attorney general may sue to collect the penalty.

(13) A decision by the court is governed by Health and Safety Code, §243.016(e) and (f), and provides the following.

(A) If the court sustains the finding that a violation occurred, the court may uphold or reduce the amount of the penalty and order the person to pay the full or reduced amount of the penalty.

(B) If the court does not sustain the finding that a violation occurred, the court shall order that a penalty is not owed.

(14) The remittance of penalty and interest is governed by Health and Safety Code, §243.016(g) and provides the following.

(A) If the person paid the penalty and if the amount of the penalty is reduced or the penalty is not upheld by the court, the court shall order, when the court's judgment becomes final, that the appropriate amount plus accrued interest be remitted to the person within 30 days after the date that the judgment of the court becomes final.

(B) The interest accrues at the rate charged on loans to depository institutions by the New York Federal Reserve Bank.

(C) The interest shall be paid for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted.

(15) The release of supersedeas bond is governed by Health and Safety Code, §243.016(h), and provides the following.

(A) If the person gave a supersedeas bond and the court does not uphold the penalty, the court shall order, when the court's judgment becomes final, the release of the bond.

(B) If the person gave a supersedeas bond and the amount of the penalty is reduced, the court shall order the release of the bond after the person pays the reduced amount.

§135.25. Complaints.

(a) In response to a complaint, the department or its authorized representative may enter the premises of an ambulatory surgical center (ASC) during normal business hours as necessary to assure compliance with the Act and these sections. The investigation may be conducted on-site, unannounced or announced, or may be investigated by phone or mail.

(b) All licensed ambulatory surgical centers are required to provide the patient and his/her guardian at time of admission a written statement identifying the department as the responsible agency for ambulatory surgical centers complaint investigations. The statement shall inform persons to direct complaint to the Department of State Health Services, Manager, Health Facility Compliance Group, Post Office Box 149347, Austin, Texas 78714-9347, (888) 973-0022. This information shall also be prominently and conspicuously posted for display in an area of the facility that is readily available to patients, families and visitors. Complaints may be registered with the department by phone or in writing. A complainant may provide his/her name, address, and phone number to the department. Anonymous complaints may be registered. All complaints are confidential.

(c) The department shall evaluate all complaints against all ambulatory surgical centers. Only those allegations determined to be relevant to the Act shall be authorized for investigation.

(d) Conduct of the investigation shall include, but is not limited to:

(1) a conference prior to commencing the on-site inspection for the purpose of explaining the nature and scope of the inspection between the department's authorized representative and the person who is in charge of the ASC;

(2) inspection of the ASC;

(3) inspection of medical and personnel records, including administrative files, reports, records, or working papers;

(4) an interview with any willing recipient of ambulatory surgical center services at the ASC or in the recipient's home if the recipient grants permission in writing;

(5) an interview with any health care practitioner or ambulatory surgical center personnel who care for the recipient of ambulatory surgical services; and

(6) a conference at the conclusion of the inspection between the department's representative and the person who is in charge of the ASC.

(A) The department's representative shall identify any records that have been reproduced.

(B) Any records that are removed from an ASC (other than those reproduced) shall be removed only with the consent of the ASC. The ASC shall furnish copies of all records pertinent to the investigation at the department's request.

(e) The department shall review the report of the investigation and determine the validity of the complaint.

§135.26. Reporting Requirements.

(a) The ambulatory surgical center (ASC) shall make a report of the following incidents to the department. A written letter of explanation with supporting documents shall be mailed to the department within 10 business days of the incident. The mailing address is Department of State Health Services, Facility Licensing Group, Post Office Box 149347, Austin, Texas 78714-9347.

(1) The death of a patient while under the care of the ASC;

(2) The transfer of a patient to a hospital;

(3) Patient development of complications within 24 hours of discharge from the ASC resulting in admission to a hospital; and

(4) A patient stay exceeding 23 hours.

(b) On an annual basis, the ASC shall report the types and numbers of procedures performed and the average length of stay during the previous 12-month period. The report shall be made using a form to be prescribed by the department.

(c) Any theft of drugs and/or diversion of controlled drugs shall be reported to the local police agency, the Texas State Board of Pharmacy, the Texas Department of Public Safety, and/or the Drug Enforcement Administration, and the Department of State Health Services.

(d) An ASC that performs abortions shall comply with the reporting requirements specified in the Health and Safety Code, §245.011.

(e) Occurrences of fire in the ASC shall be reported as specified under §135.41(a)(2) of this title (relating to Fire Prevention and Protection) and §135.43(b)(6) of this title (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids).

§135.27. Patient Safety Program.

(a) Definitions.

(1) Adverse event--An event that results in unintended harm to the patient by an act of commission or omission rather than by the underlying disease or condition of the patient.

(2) Medical error--The failure of a planned action to be completed as intended, the use of a wrong plan to achieve an aim, or the failure of an unplanned action that should have been completed, that results in an adverse event.

(3) Reportable event--A medical error or adverse event or occurrence which staff are required to report internally.

(4) Root cause analysis--An interdisciplinary review process for identifying the basic or contributing causal factors that underlie a variation in performance associated with an adverse event or reportable event. It focuses primarily on systems and processes, includes an analysis of underlying cause and effect, progresses from special causes in clinical processes to common causes in organizational processes, and identifies potential improvements in processes or systems.

(b) Content. The ambulatory surgical center (ASC) shall develop, implement and maintain an effective, ongoing, organization-wide, data driven patient safety program (PSP).

(1) The governing body shall ensure that the PSP reflects the complexity of the ASC's organization and services, including those services furnished under contract or arrangement, and focuses on the prevention and reduction of medical errors and adverse events.

(2) The PSP shall be in writing, approved by the governing body and made available for review by the department. It shall include the following components:

(A) the definition of medical errors, adverse events and reportable events;

(B) the process for internal reporting of medical errors, adverse events and reportable events;

(C) a list of events and occurrences which staff are required to report internally, including at least the following events:

(i) a medication error resulting in a patient's unanticipated death or major permanent loss of bodily function in circumstances unrelated to the natural course of the illness or underlying condition of the patient;

(ii) the suicide of a patient in a setting in which the patient received care 24 hours a day;

(iii) the sexual assault of a patient during treatment or while the patient was on the premises of the ASC;

(iv) a hemolytic transfusion reaction in a patient resulting from the administration of blood or blood products with major blood group incompatibilities;

(v) a surgical procedure on the wrong patient or on the wrong body part of a patient;

(vi) a foreign object accidentally left in a patient during a procedure;

(vii) a patient death or serious disability associated with the use or function of a device designed for patient care that is used or functions other than as intended;

(D) time frames for internal reporting of medical errors, adverse events and reportable events;

(E) consequences for failing to report events in accordance with ASC policy;

(F) mechanisms for preservation and collection of event data;

(G) the process for conducting root cause analysis;

(H) the process for communicating action plans; and

(I) the process for feedback to staff regarding the root cause analysis and action plan.

(c) Education and training. The ASC shall provide patient safety education and training to staff who have responsibilities related to the implementation, development, supervision, or evaluation of the PSP. Training shall include all PSP components as set out in subsection (b)(2) of this section.

(d) Management. The ASC shall designate one or more individuals, or an interdisciplinary group, qualified by training or experience to be responsible for the management of the patient safety program. These responsibilities shall include:

(1) coordinating all patient safety activities;

(2) facilitating assessment and appropriate response to reported events;

(3) monitoring the root cause analysis and resulting action plans; and

(4) serving as liaison among ASC departments and committees to ensure facility-wide integration of the PSP.

(e) Reportable event. Within 45 days of becoming aware of a reportable event specified under subsection (b)(2)(C) of this section, the ambulatory surgery center shall:

(1) complete a root cause analysis to examine the cause and effect of the event through an impartial process; and

(2) develop an action plan identifying the strategies that the ASC intends to employ to reduce the risk of similar events occurring in the future. The action plan shall:

(A) designate responsibility for implementation and oversight;

(B) specify time frames for implementation; and

(C) include a strategy for measuring the effectiveness of the actions taken.

(3) The ASC shall make the root cause analysis and action plan available for on-site review by department representatives.

§135.28. Confidentiality.

Request for information and access to records are governed by the Texas Public Information Act, Government Code, Chapter 552.

(1) A written request for information is required. The request shall sufficiently identify the information requested.

(2) The department may ask for a clarification if it cannot reasonably understand a particular request.

§135.29. Time Periods for Processing and Issuing a License.

(a) General.

(1) The date a license application is received is the date the application reaches the Department of State Health Services (department).

(2) An application for an initial license is complete when the department has received, reviewed, and found acceptable the information described in §135.20 of this title (relating to Initial Application and Issuance of License).

(3) An application for a renewal license is complete when the department has received, reviewed, and found acceptable the information described in §135.22 of this title (relating to Renewal of License).

(b) Time Periods. An application from a facility for an initial license or a renewal license shall be processed in accordance with the following time periods.

(1) The first time period begins on the date the department receives the application and ends on the date the license is issued, or if the application is received incomplete, the period ends on the date the facility is issued a written notice that the application is incomplete. The written notice shall describe the specific information that is required before the application is considered complete. The first time period is 45 calendar days.

(2) The second time period begins on the date the last item necessary to complete the application is received and ends on the date the license is issued. The second time period is 45 calendar days.

(c) Reimbursement of fees.

(1) In the event the application is not processed in the time periods stated in subsection (b) of this section, the applicant has the right to request that the department reimburse in full the fee paid in that particular application process. If the department does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request shall be denied.

(2) Good cause for exceeding the period established is considered to exist if:

(A) the number of applications for licenses to be processed exceeds by 15% or more the number processed in the same calendar quarter the preceding year;

(B) another public or private entity utilized in the application process caused the delay; or

(C) other conditions existed giving good cause for exceeding the established periods.

(d) Appeal. If the request for reimbursement as authorized by subsection (c) of this section is denied, the applicant may then appeal to the commissioner for a resolution of the dispute. The applicant shall give written notice to the commissioner requesting reimbursement of the fee paid because the application was not processed within the established time period. The department shall submit a written report of the facts related to the processing of the application and good cause for exceeding the established time periods. The commissioner shall make the final decision and provide written notification of the decision to the applicant and the department.

(e) Hearings. If a hearing is proposed during the processing of the application, the hearing shall be conducted pursuant to the Government Code, Chapter 2001, Administrative Procedure Act (APA), the hearing procedures of the State Office of Administrative Hearings (Texas Government Code, Chapter 2003 and 1 Texas Administrative Code, Chapter 155, Rules of Procedures).

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806188
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER B. SAFETY REQUIREMENTS FOR NEW AND EXISTING AMBULATORY SURGICAL CENTERS

25 TAC §135.41, §135.42

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

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Health and Safety Code, Chapters 243, 324, and 1001; and Government Code, Chapter 531.

§135.41. Fire Prevention, Protection, and Safety.

§135.42. Handling and Storage of Gases, Anesthetics, and Flammable Liquids.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806189

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER B. FIRE PREVENTION AND SAFETY REQUIREMENTS

25 TAC §§135.41 - 135.43

STATUTORY AUTHORITY

The proposed new rules are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Health and Safety Code, Chapters 243, 324, and 1001; and Government Code, Chapter 531.

§135.41. Fire Prevention and Protection.

(a) Compliance. An ambulatory surgical center (ASC) shall comply with the provisions of this section with respect to fire prevention and protection.

(1) Fire inspections. An ASC shall comply with local fire codes.

(2) Fire reporting. Except as required under §135.43(b)(6) of this title (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids), an ASC shall report all occurrences of fire to the local fire authority and in writing to the facility licensing group manager as soon as possible but not later than 10 calendar days following the occurrence. Any fire occurrence causing injury to a person shall be reported no later than the next business day to the facility licensing group manager by fax, (512) 834-4514, or overnight mail to Department of State Health Services, Facility Licensing Group Manager, Post Office Box 149347, Austin, Texas 78714-9347.

(3) Smoking policy. An ASC shall adopt, implement and enforce a written smoking policy. The policy shall include the minimum provisions of National Fire Protection Association 101, Life Safety Code, 2003 Edition (NFPA 101), §20.7.4. All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101 or (800) 344-3555.

(b) Fire extinguishing systems. An ASC shall adopt, implement, and enforce a written policy for periodic inspection, testing and maintenance of fire-fighting equipment, portable fire extinguishers, and when installed sprinkler systems. If installed, fire sprinkler systems shall comply with National Fire Protection Association 13, Standard for the Installation of Sprinkler Systems, 2002 Edition (NFPA 13).

(1) Water-based fire protection systems. All fire sprinkler systems, fire pumps, fire standpipe and hose systems, water storage tanks, and valves and fire department connections shall be inspected, tested and maintained in accordance with National Fire Protection Association 25, Standard for the Inspection, Testing and Maintenance of Water-Based Fire Protection Systems, 2002 Edition.

(2) Portable fire extinguishers. Every portable fire extinguisher located in an ASC or upon ASC property shall be installed, tagged, and maintained in accordance with National Fire Protection Association 10, Standard for Portable Fire Extinguishers, 2002 Edition.

(c) Fire protection and evacuation plan. A plan for the protection of patients in the event of fire and their evacuation from the building when necessary shall be formulated according to NFPA 101, §20.7. Copies of the plan shall be available to all staff.

(1) Posting requirements. An evacuation floor plan shall be prominently and conspicuously posted for display throughout the ASC in public areas that are readily visible to patients, employees, and visitors.

(2) Annual training. Each ASC shall conduct an annual training program for instruction of all personnel in the location and use of fire-fighting equipment. All employees shall be instructed regarding their duties under the fire protection and evacuation plan.

(3) Fire drills. The ASC shall conduct at least one fire drill per shift, per quarter. Each drill shall include the use of communication of alarms, use of fire-fighting equipment, simulation of evacuation of patients, discussion with patients, visitors, other occupants, employees and staff about the evacuation plan. Written reports shall be maintained to include evidence of staff and patient participation. Fire exit drills shall incorporate the minimum requirements of NFPA 101, §§20.7.1.2 through 20.7.2.3.

(4) Fire-fighting equipment. All staff shall be familiar with the locations of fire-fighting equipment. Fire-fighting equipment shall be located so that a person shall not have to travel more than 75 feet from any point to reach the equipment.

(d) Fire alarm system. A fire alarm system shall be installed, maintained and tested, in accordance with National Fire Protection Association 72, National Fire Alarm Code, 2002 Edition (NFPA 72) and NFPA 101, §20.3.4.

(e) System for communicating an alarm of fire. A reliable communication system shall be provided as a means of reporting a fire to the fire department. This is in addition to the automatic alarm transmission to the fire department required by NFPA 101, §20.3.4.4.

(f) Fire department access. As an aid to fire department services, every ASC shall provide the following.

(1) Driveways. The ASC shall maintain driveways, free from all obstructions, to main buildings for fire department apparatus use.

(2) Submission of plans. Upon request, the ASC shall submit a copy of the floor plans of the building to the local fire department officials.

(3) Outside identification. The ASC shall place proper identification on the outside of the main building showing the locations of siamese connections and standpipes as required by the local fire department services.

(g) Fire department protection. When an ASC is located outside of the service area or range of the public fire protection, arrangements shall be made to have the nearest fire department respond in case of a fire.

(h) Physical environment. A facility shall provide a physical environment that protects the health, welfare, and safety of patients, personnel and the public. The physical premises of the facility and those areas of the facility's surrounding physical structure that are used by the patients (including all stairwells, corridors and passageways) must meet the local building and fire safety codes as they relate to safe access and patient privacy.

§135.42. General Safety.

(a) Safety officer. The governing body shall appoint a safety officer who is knowledgeable in safety practices in health care facilities. The safety officer shall carry out the functions of the safety program.

(b) Safety activities.

(1) Incident reports. The safety officer shall establish an incident reporting system which includes a mechanism to ensure that all incidents recorded are evaluated, and documentation is provided to show follow-up and corrective actions.

(2) Safety policies and procedures. Safety policies and procedures for each department or service shall be developed, implemented, and enforced.

(3) Safety training and continuing education. Safety training shall be established as part of new employee orientation and in the continuing education of all employees.

(c) Written authority. The authority of the safety officer to take action, when conditions exist that are a possible threat to life, health, or building damage, shall be defined in writing and approved by the governing body.

(d) Safety manual. Each department or service shall have a safety policy and procedure manual within its own area that becomes a part of the overall facility safety manual.

(e) Emergency communication system. An emergency communication system shall be provided in each facility. The system shall be self-sufficient and capable of operating without reliance on the building's service or emergency power supply. Such system shall have the capability of communicating with the available community or state emergency networks, including police and fire departments.

(f) Fans. All portable fans and ceiling fans shall not be utilized in all patient treatment areas/rooms.

(g) Electrical extension cords and cables. Electrical extension cords and cables shall not be used for permanent wiring. Temporary electrical cords or cables shall be secured and protected to prevent tripping.

§135.43. Handling and Storage of Gases, Anesthetics, and Flammable Liquids.

(a) An ambulatory surgical center (ASC) shall comply with the requirements of this section for handling and storage of gases, anesthetics, and flammable liquids. The ASC premises shall be kept free from accumulations of combustible materials not necessary for immediate operation of the facility.

(b) Flammable germicides. If flammable germicides, including alcohol-based products, are used for preoperative surgical skin preparation, the facility shall:

(1) use only self-contained, single-use, pre-measured applicators to apply the surgical skin preparations;

(2) follow all manufacturer product safety warnings and guidelines;

(3) develop, implement, and enforce written policies and procedures outlining the safety precautions required related to the use of the products, which, at a minimum, shall include minimum drying times, prevention and management of product pooling, parameters related to draping and the use of ignition sources, staff responsibilities related to ensuring safe use of the product, and documentation requirements sufficient to evaluate compliance with the written polices and procedures;

(4) ensure that all staff working in the surgical environment where flammable surgical skin preparation products are in use have received training on product safety and the facility policies and procedures related to the use of the product;

(5) develop, implement and enforce an interdisciplinary team process for the investigation and analysis of all surgical suite fires and alleged violations of the polices; and

(6) provide a written report of all occurrences of surgical suite fires within two business days to the department in care of the facility licensing group, and complete an investigation of the occurrence and develop and implement a corrective action plan within 30 days.

(c) Flammable and nonflammable gases and liquids. Flammability of liquids and gases shall be determined by National Fire Protection Association 329, Handling Releases of Flammable and Combustible Liquids and Gases, 2002 Edition. All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101 or (800) 344-3555.

(1) Nonflammable gases (examples include, but are not limited to, oxygen and nitrous oxide) shall be stored and distributed in accordance with Chapter 5 of the National Fire Protection Association 99, Standard for Health Care Facilities, 2002 edition (NFPA 99).

(A) Medical gases and liquefied medical gases shall be handled in accordance with the requirements of NFPA 99, Chapter 9.

(B) Oxygen shall be administered in accordance with NFPA 99, §9.6.

(2) Piped flammable gas systems intended for use in laboratories and piping systems for fuel gases shall comply with requirements of NFPA 99, §11.11.

(3) Flammable gases shall be stored in accordance with NFPA 99, §11.10.

(4) Flammable and combustible liquids used in laboratories shall be handled and stored in accordance with NFPA 99, §11.7, and National Fire Protection Association 101, Life Safety Code, 2003 edition, §20.3.2.2.

(5) Other flammable agents shall be stored in accordance with NFPA 99, Chapter 7, Materials.

(d) Alcohol-based hand rubs. Alcohol-based hand rubs (ABHRs) are considered flammable. When used, the ABHRs shall meet the following requirements.

(1) The dispensers may be installed in a corridor so long as the corridor width is six feet or greater. The dispensers shall be installed at least four feet apart.

(2) The maximum individual dispenser fluid capacity is 1.2 liters for dispensers in rooms, corridors, and areas open to corridors, and 2.0 liters for dispensers in suites of rooms.

(3) The dispensers shall not be installed over or directly adjacent to electrical outlets and switches.

(4) Dispensers installed directly over carpeted surfaces shall be permitted only in sprinklered smoke compartments.

(5) Each smoke compartment may contain a maximum aggregate of 10 gallons of ABHR solution in dispensers and a maximum of five gallons in storage.

(e) Gasoline and gasoline powered equipment. No motor vehicles including gasoline powered standby generators or any amount of gasoline shall be located within the ASC building. Other devices which may cause or communicate fire, and which are not necessary for patient treatment or care, shall not be stored within the ASC building. All such devices and materials when necessary shall be used within the building only with precautions ensuring a reasonable degree of safety from fire.

(f) Gas fired appliances. The installation, use, and maintenance of gas fired appliances and gas piping installations shall comply with the National Fire Protection Association 54, National Fuel Gas Code, 2002 Edition. The use of portable gas heaters and unvented open flame heaters is specifically prohibited.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806190
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER C. PHYSICAL PLANT AND CONSTRUCTION REQUIREMENTS FOR NEW AND EXISTING AMBULATORY SURGICAL CENTERS

25 TAC §§135.51 - 135.54

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

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Health and Safety Code, Chapters 243, 324, and 1001; and Government Code, Chapter 531.

§135.51. Construction Requirements for an Existing Ambulatory Surgical Center.
§135.52. Construction Requirements for New Ambulatory Surgical Centers.
§135.53. Preparation, Submittal, Review, and Approval of Plans.
§135.54. Construction Tables.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806191
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER C. PHYSICAL PLANT AND CONSTRUCTION REQUIREMENTS

25 TAC §§135.51 - 135.56

STATUTORY AUTHORITY

The proposed new rules are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each license; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new rules affect the Health and Safety Code, Chapters 243, 324, and 1001; and Government Code, Chapter 531.

§135.51. Construction Requirements for an Existing Ambulatory Surgical Center.

(a) Compliance.

(1) A licensed ambulatory surgical center (ASC) which is licensed prior to the effective date of these rules is considered to be an existing licensed ASC and shall continue, at a minimum, to meet the licensing requirements under which it was originally licensed.

(2) In lieu of meeting the requirements in paragraph (1) of this subsection, an existing licensed ASC may, instead, comply with National Fire Protection Association (NFPA) 101, Life Safety Code 2003 Edition (NFPA 101), Chapter 21, Existing Ambulatory Health Care Occupancies. All documents published by NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101 or (800) 344-3555.

(b) Remodeling and additions. All remodeling, renovations, additions and alterations to, or relocation of an existing ASC shall

be done in accordance with the requirements for new construction in §135.52 of this title (relating to Construction Requirements for a New Ambulatory Surgical Center). When existing conditions make such changes impractical, the department may grant a conditional approval of minor deviations from the requirements of §135.52 of this title, if the intent of the requirements is met and if the care, safety, and welfare of patients will not be jeopardized. The operation of the ASC, accessibility of individuals with disabilities, and safety of the patients shall not be jeopardized by a condition(s) which is not in compliance with these sections.

(1) Building equipment alterations or installations. Any alteration or any installation of new building equipment, such as mechanical, electrical, plumbing, fire protection, or piped medical gas system, shall comply with the requirements for new construction and shall not be replaced, materially altered, or extended in an existing ASC until complete plans and specifications have been submitted to the department, and the department has reviewed and approved the plans and specifications in accordance with §135.54 of this title (relating to Preparation, Submittal, Review and Approval of Plans, and Retention of Records).

(2) Minor remodeling or alterations. Minor remodeling or alterations within an existing ASC which do not involve alterations to load bearing members and partitions, change functional operation, affect fire safety, add or subtract services, or involve any of the major changes listed in paragraph (3) of this subsection are considered to be minor projects and require evaluation and approval by the department. An ASC shall submit a written request for evaluation, a brief description of the proposed changes, and sketches of the area being remodeled. Based on such submittal, the department shall evaluate and determine whether any additional submittals or inspections are required. The department shall notify the ASC of its decision.

(3) Major remodeling or alterations. All remodeling or alterations which involve alterations to load bearing members or partitions, change functional operation, affect fire safety, or add or delete services are considered major projects. An ASC shall comply with this paragraph prior to beginning construction of major projects.

(A) Submittal of plans. Plans shall be submitted in accordance with §135.54 of this title for all major remodeling or alterations.

(B) Phasing of construction in existing facilities.

(i) Projects involving alterations of or additions to existing buildings shall be programmed and phased so that on-site construction will minimize disruptions of existing functions.

(ii) Access, exit access, and fire protection shall be maintained so that the safety of the occupants will not be jeopardized during construction.

(iii) A noncombustible or limited combustible dust and vapor barrier shall be provided to separate areas undergoing demolition and construction from occupied areas. When a fire retardant plastic material is used for temporary daily usage, it shall be removed at the end of each day.

(iv) The air inside the construction area shall be protected by mechanical filtration that recirculates inside the space or is exhausted directly to the exterior.

(v) The area shall be properly ventilated and maintained. The area under construction shall have a negative air pressure differential to the adjoining areas and shall continue to operate as long as construction dust and odors are present.

(vi) Temporary sound barriers shall be provided where intense, prolonged construction noises will disturb patients or staff in the occupied portions of the building.

(c) Previously licensed ASCs. A previously licensed ASC which has been vacated or used for other purposes shall comply with all the requirements for new construction contained in §135.52 of this title in order to be licensed.

§135.52. Construction Requirements for a New Ambulatory Surgical Center.

(a) Ambulatory surgical center (ASC) location. Any proposed new ASC shall be easily accessible to the community and to service vehicles such as delivery trucks, ambulances, and fire protection apparatus. No building may be converted for use as an ASC which, because of its location, physical condition, state of repair, or arrangement of facilities, would be hazardous to the health and safety of the patients. An ASC may be a distinct separate part of an existing hospital, it may occupy an entire separate independent structure, or it may be located within another building such as an office building or commercial building.

(1) Means of egress. An ASC shall have at least two exits remotely located in accordance with National Fire Protection Association (NFPA) 101, Life Safety Code, 2003 Edition (NFPA 101), §20.2.4.1. When a required means of egress from the ASC is through another portion of the building, that means of egress shall comply with the requirements of NFPA 101 which are applicable to the occupancy of that other building. Such means of egress shall be open, available, unlocked, unrestricted, and lighted at all times during the ASC hours of operation. All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101 or (800) 344-3555.

(2) Hazardous location.

(A) Underground and above ground hazards. A new ASC or an addition(s) to an existing ASC shall not be constructed within 150 feet of easement boundaries or setbacks of hazardous underground locations including but not limited to liquid butane or propane, liquid petroleum or natural gas transmission lines, high pressure lines, and not within the easement of high voltage electrical lines.

(B) Fire hazards. A new ASC and an addition to an existing ASC shall not be built within 300 feet of above ground or underground storage tanks containing liquid petroleum or other flammable liquids used in connection with a bulk plant, marine terminal, aircraft refueling, bottling plant of a liquefied petroleum gas installation, or near other hazardous or hazard producing plants.

(3) Undesirable locations.

(A) Nuisance producing sites. A new ASC shall not be located near nuisance producing sites such as industrial sites, feed lots, sanitary landfills, or manufacturing plants which produce excessive noise or air pollution.

(B) Flood plains.

(i) New construction. Construction of a new ASC is prohibited in a designated 100-year flood plain.

(ii) Previously licensed ASC. An existing building or a portion of an existing building located in a designated 100-year flood plain which was previously licensed as an ASC but has been vacated or used for purposes other than an ASC, shall not be licensed as an ASC.

(iii) Existing ASC. Access and required functional ASC components shall be constructed above the designated flood plain in a new addition to an existing ASC located in a designated 100-year flood plain.

(b) ASC site. The ASC site shall include paved roads, walkways, and parking in accordance with the requirements set out in this subsection.

(1) Paved roads and walkways.

(A) Paved roads shall be provided within lot lines for access from public roads to the main entrance and to service entrances.

(B) Finished surface walkways shall be provided for pedestrians. When public transportation or walkways serve the site, finished surface walkways or paved roads shall extend from the public conveyance to the building entrance.

(2) Parking and disability requirements.

(A) Parking requirements. Off-street parking shall be provided at the minimum ratio of two spaces for each operating room, one space for each staff member, and one visitor's space for each operating room.

(B) Design for the handicapped. Special considerations benefiting handicapped staff, visitors, and patients shall be provided. Each ASC shall comply with the Americans with Disabilities Act (ADA) of 1990, Public Law 101 - 336, 42 United States Code, Chapter 126, and Title 36 Code of Federal Regulations, Part 1191, Appendix A, Accessibility Guidelines for Buildings and Facilities or 16 Texas Administrative Code, §68.20 (relating to Buildings and Facilities Subject to Compliance with the Texas Accessibility Standards), Texas Accessibility Standards (TAS), April 1, 1994 edition, issued by the Texas Department of Licensing and Regulation, under the Texas Architectural Barriers Act, Texas Government Code, Chapter 469.

(c) Building design and construction requirements. Every building and every portion thereof shall be designed and constructed to sustain all dead and live loads in accordance with accepted engineering practices and standards and local governing building codes. Where there is no local governing building code, the ASC shall be constructed in accordance with the International Building Code, 2003 edition, published by the International Code Council, 5203 Leesburg Pike, Falls Church, Virginia 22041, telephone (800) 786-4452.

(1) General architectural requirements. All new construction, including conversion of an existing building to an ASC or establishing a separately licensed ASC within another existing building, shall comply with NFPA 101, Chapter 20, New Ambulatory Health Care Occupancies, of the National Fire Protection Association 101, Life Safety Code, 2003 edition (NFPA 101), and Subchapters B and C of this chapter (relating to Fire Prevention and Safety Requirements, and Physical Plant and Construction Requirements, respectively). Construction documents shall be submitted to the department in accordance with §135.54 of this title (relating to Preparation, Submittal, Review and Approval of Plans, and Retention of Records).

(A) Construction types for multiple building occupancy.

(i) When an ASC is part of a larger building which complies with NFPA 101, §20.1.6, Minimum Construction Requirements for (fire resistance) construction type, the designated ASC shall be separated from the remainder of the building with a minimum of one-hour fire-rated construction.

(ii) When an ASC is located in a multistory building of two or more stories, the entire building shall meet the construction requirements of NFPA 101, §20.1.6.3. An ASC shall not be located in a multistory building which does not comply with the minimum construction requirements of NFPA 101, §20.1.6.3.

(iii) When an ASC is part of a one-story building that does not comply with the construction requirements of NFPA 101, §20.1.6.2, the ASC shall be separated from the remainder of the building with a two-hour fire-rated construction. The designated ASC portion shall have the construction type upgraded to comply with NFPA 101, §20.1.6.2.

(B) Special design provisions. Special provisions shall be made in the design of a facility if located in a region where local experience shows loss of life or extensive damage to buildings resulting from hurricanes, tornadoes, or floods.

(2) Physical environment. A physical environment that protects the health, welfare, and safety of patients, personnel, and the public shall be provided in each facility. The physical premises of the facility and those areas of the facility's physical structure that are used by the patients (including all stairwells, corridors, and passageways) shall meet the local building and fire safety codes and the requirements of this chapter.

(3) Other regulations. The more stringent standard, code or requirement shall apply when a difference in requirements for construction exists.

(4) Exceeding minimum requirements. Nothing in this subchapter shall be construed to prohibit a better type of building construction, more exits, or otherwise safer conditions than the minimum requirements specified in this subchapter.

(5) Equivalency. Nothing in this subchapter is intended to prevent the use of systems, methods, or devices of equivalent or superior quality, strength, fire resistance, effectiveness, durability, and safety to those prescribed by this subchapter, provided technical documentation which demonstrates equivalency is submitted to the department for approval.

(6) Freestanding buildings (not for patient use). Separate freestanding buildings for non-patient use such as the heating plant, boiler plant, laundry, repair workshops, or general storage may be of unprotected noncombustible construction, protected noncombustible construction, or fire-resistive construction and be designed and constructed in accordance with other occupancy classifications requirements listed in NFPA 101.

(d) Spatial requirements.

(1) Administration and public areas.

(A) Entrance. Entrances shall be located at grade level, be accessible to individuals with disabilities, and protected against inclement weather from the point of passenger loading/unloading to the building entrance. When an ASC is located on a floor above grade level, elevators shall be accessible and shall meet the requirements of §135.53 of this title (relating to Elevators, Escalators, and Conveyors).

(B) Waiting area. A waiting area or lobby shall be provided within the ASC and include having the following rooms and items:

(i) public toilet facilities;

(ii) telephone(s) for public use; and

(iii) access to potable drinking water.

(C) Reception area. A designated reception area with desk or counter shall be provided.

(D) Interview space(s). Space shall be provided for private interviews or family members, relating to social services, credit, or admission.

(E) General or individual office(s). An office(s) shall be provided for business transactions, records, and administrative and professional staff.

(F) Medical records area. The medical records area shall have adequate space for reviewing, dictating, sorting, or recording records. If electronic imaging devices are employed (i.e., microfilm, digital, or optical disc), the medical records area shall have adequate space for transcribing records in the electronic format. Medical record storage space shall be located within a secure designated area under direct visual supervision of administrative staff.

(G) General storage room.

(i) A minimum of 30 square feet per operating room shall be provided exclusive of soiled holding, sterile supplies, clean storage, drug storage, locker rooms, and surgical equipment storage. General storage may be located in one or more rooms or closets, and shall be located outside of the patient treatment areas.

(ii) General storage room(s) shall be separated from adjacent areas by fire-rated construction in accordance with the NFPA 101, §38.3.2.1 and §38.3.2.2.

(H) Wheelchair storage space or alcove. Storage space for wheelchairs shall be provided and shall be out of the direct line of traffic.

(2) Engineering services and equipment areas. Equipment rooms with adequate space shall be provided for mechanical and electrical equipment. These areas shall be separate from public, patient, and staff areas.

(3) Examination room. An examination room is not required, but when provided, the room shall have:

(A) a minimum clear floor area of at least 100 square feet exclusive of fixed or moveable cabinets, counters, or shelves; and

(B) a work counter with space for writing and a hand washing fixture with hands-free operable controls.

(4) Janitor's closet. In addition to the janitor's closet exclusive to the surgery suite, a sufficient number of janitor's closets shall be provided throughout the facility to maintain a clean and sanitary environment. The closet shall contain a floor receptor or service sink and storage space for housekeeping supplies and equipment.

(5) Laboratory.

(A) General. Laboratory services shall be provided within the ASC or through a contract or other arrangement with a hospital or accredited laboratory.

(B) Special requirements. When the laboratory is located on site the following minimum items shall be provided:

(i) a room with work counter, utility sink, and storage cabinets or closet(s); and

(ii) specimen collection facilities. For dip stick urinalysis, urine collection rooms shall be equipped with a water closet and lavatory. Blood collection facilities shall have space for a chair, work counter, and a hand washing fixture with hands-free operable controls.

(C) Code compliance. An on-site laboratory shall comply with the following codes.

(i) Construction for fire protection in laboratories employing quantities of flammable, combustible, or other hazardous material shall be in accordance with the National Fire Protection Association 99, Health Care Facilities, 2002 Edition, (NFPA 99).

(ii) Laboratories shall comply with the requirements of NFPA 99, Health Care Facilities, 2002 Edition, Chapter 11, as applicable and the requirements of NFPA 45, Standards on Fire Protection for Laboratories Using Chemicals, 2000 Edition, as applicable.

(6) Laundry and linen processing area(s). Laundry and linen processing may be done within the center or off site at a commercial laundry.

(A) On-site linen processing. When on-site linen processing is provided, soiled and clean processing operations shall be separated and arranged to provide a one-way traffic pattern from soiled to clean areas. The following rooms and items shall be provided:

(i) a soiled linen processing room which includes areas for receiving, holding, sorting, and washing;

(ii) a clean linen processing room which includes areas for drying, sorting, folding, and holding prior to distribution;

(iii) supply storage cabinets in the soiled and clean linen processing rooms;

(iv) a hand washing fixtures with hands-free operable controls within the soiled linen processing room; and

(v) a storage room for clean linen located within the surgical suite. Clean linen storage may be combined with the clean work room.

(B) Off-site linen processing. When linen is processed off site, the following rooms or items shall be provided:

(i) a storage room for clean linen located within the surgical suite. Clean linen storage may be combined with the clean work room; and

(ii) a soiled linen holding room or area located within the surgical suite. Soiled linen holding may be combined with the soiled workroom.

(7) Medical waste processing. Space and facilities shall be provided for the safe storage and disposal of waste as appropriate for the material being handled and in compliance with all applicable rules and regulations.

(8) Pharmacy. A pharmacy work room or alcove shall be provided and located separate from patient and public areas and under the direct supervision of staff. A work counter, refrigerator, medication storage, and locked storage for biologicals and drugs shall be provided. A hand washing fixture with hands-free operable controls shall be located in the pharmacy room or alcove.

(9) Postoperative recovery suite.

(A) General. A postoperative recovery suite shall be distinct and separate from preoperative areas. The postoperative recovery suite shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge.

(B) Postanesthesia care unit. A minimum of one patient station per operating room, plus one additional station, shall be provided.

(i) In a multiple-bed postoperative recovery area, the clearance between the side of a bed/gurney and a wall/partition shall be a minimum of three feet. The clearance between sides of beds/gurneys shall be a minimum of four feet six inches. The minimum distance at the foot of the bed/gurney shall not be less than six feet for single load area/room or nine feet for double load area/room. Four feet of the passage space at the foot of the bed may be shared between two beds/gurneys. The fixed and moveable cabinets and shelves shall not encroach upon the bed/gurney clear floor space/area.

(ii) The minimum clear floor space in a private postoperative recovery room shall be 100 square feet exclusive of aisles and fixed and moveable cabinets and selves. A minimum of nine feet width shall be provided for the head wall.

(C) Patient toilet. A toilet room with a water closet and a hand washing fixture with hands-free operable controls shall be provided. The toilet room may be shared with the preoperative patient holding area, if located conveniently between both areas.

(D) Hand washing fixture. One hand washing fixture with hands-free operable controls shall be provided for every four recovery beds or fraction thereof in open wards. Fixtures shall be uniformly distributed. One hand washing fixture shall be provided within each single-bed recovery room.

(E) Extended observation rooms. Separate supervised rooms or areas may be provided for patients who are sufficiently stabilized to leave the postanesthesia care unit, but require additional time in the facility for observation or comfort measures prior to being discharged.

(i) When individual rooms are provided for extended observation, the rooms shall have an area of at least 60 square feet. When such rooms include a bed or recliner, a minimum clearance of three feet at the foot and on each side of the bed or recliner shall be provided.

(ii) When an open or ward area for extended observation is provided, the minimum clearance from the bed or recliner to the side wall shall not be less than three feet; and a space of four feet shall be provided at the foot of each bed or recliner. The minimum clearance between beds or recliners shall not be less than three feet.

(iii) A toilet room with a water closet and a hand washing fixture with hands-free operable controls shall be provided. The toilet room may be shared with the postoperative recovery area, if located conveniently between both areas.

(10) Preoperative patient holding room.

(A) General. A preoperative holding area shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite. The holding area shall be separate from the postoperative recovery suite and the restricted corridor.

(B) Patient station. A minimum of one patient station per operating room shall be provided.

(i) When individual rooms are provided, the minimum clear floor space in a private preoperative holding room shall be 80 square feet exclusive of aisles and fixed and moveable cabinets and selves. The rooms shall include a bed or recliner with a minimum clearance of three feet at the foot and on each side of the bed or recliner.

(ii) In a multiple-bed preoperative holding area, a minimum area of 60 square feet shall be provided for each patient station. The minimum clearance from the gurney or bed to a sidewall shall not be less than three feet. A space of four feet shall be provided at the foot of the gurney or bed and the minimum clearance between gurneys or beds shall not be less than four feet six inches.

(iii) Space shall be made available for storing and securing patient's personal effects.

(iv) One hand washing fixture with hands-free operable controls shall be provided for every four preoperative beds or fraction thereof in open wards. Fixtures shall be uniformly distributed. One hand washing fixture shall be provided within each single-bed preoperative holding room.

(C) Patient toilet. A toilet room with handicapped accessible water closet and hand washing facilities shall be provided. The toilet room may be shared with the postoperative recovery suite, if located conveniently between both areas.

(D) Duty station. A hand washing fixtures with hands-free operable controls and a counter or shelf space for writing shall be provided for staff use within or convenient to the preoperative area. The staff hand washing fixture with hands-free operable controls shall be separate from and in addition to patient toilet accommodations.

(11) Radiology.

(A) Special requirements. When radiology services are provided on site, the following minimum facilities shall be provided:

(i) film processing facilities, if used;

(ii) viewing capabilities;

(iii) storage facilities for exposed film, if used, located in rooms or areas constructed in accordance with the NFPA 101, §38.3.2.1 and §38.3.2.2; and

(iv) dressing area(s) shall be required, depending on services provided, with convenient access to toilets, and may be shared with patient changing/preoperative rooms.

(B) Fluoroscopy room. When fluoroscopy services are provided on site in a dedicated fluoroscopy room, a toilet room with a water closet and a hand washing fixture with hands-free operable controls shall be directly accessible to the room.

(12) Soiled workroom. In addition to the soiled workroom provided in the surgical suite, a separate soiled workroom(s) shall be required when a treatment room is provided, except as allowed in subparagraph (B) of this paragraph.

(A) Special requirements. The workroom(s) shall contain a clinical sink or equivalent flushing type fixture, work counter, designated space for waste and linen receptacles, and a hand washing fixture with hands-free operable controls.

(B) Shared functions. The soiled workroom required in support of a treatment room may be combined with a surgical suite soiled work room with two means of entry. A separate door into the soiled workroom shall serve a treatment room located outside the surgical suite.

(13) Surgical staff clothing change area.

(A) Surgical staff changing rooms. Appropriately sized areas shall be provided for male and female personnel working within the surgical suite. These areas shall contain lockers, showers, toilets, hand washing fixtures with hands-free operable controls, and space to change into scrub suits and boots. Separate locker/changing rooms shall be provided for male and female staff. The shower and toilet room(s) may be unisex. These areas shall be arranged to provide a traffic pattern so that personnel entering from outside the surgical suite

can shower, change, and move directly into the restricted areas of the surgical suite.

(B) Surgical staff lounge. When a surgical staff lounge is provided, the lounge shall be located to permit the use without leaving the surgical suite and may be accessed from the clothing changing rooms. The surgical staff lounge shall not have direct access from outside the surgical suite. When the lounge is remote from the clothing change rooms, toilet facilities and a hand washing fixture with hands-free operable controls accessible from the lounge shall be provided.

(14) Sterilizing facilities. A system for sterilizing equipment and supplies shall be provided. Sterilizing procedures may be done on site or off site, or disposables may be used to satisfy functional needs.

(A) Off-site sterilizing. When sterilizing is provided off site and disposables and prepackage surgical supplies are used, the following rooms shall be provided near the operating room.

(i) Soiled holding room. A room for receiving contaminated/soiled material and equipment from the operating room shall be provided. The room shall be physically separate from all other areas of the suite. The room shall include a work counter(s) or a table(s), clinical sink or equivalent flushing type fixture, equipment for initial disinfection and preparation for transport to off-site sterilizing, and a hand washing fixture with hands-free operable controls. The soiled holding room may be combined with the surgical suite soiled workroom.

(ii) Clean workroom. A clean workroom shall be provided for the exclusive use of the surgical suite. The workroom shall contain a work counter with space for receiving, disassembling and organizing clean supplies, storage cabinets or shelving, and a hand washing fixture with hands-free operable controls.

(iii) Sterilizer equipment. Sterilizer equipment shall be located in a separate room convenient to the operating room(s), in an alcove adjacent to the restricted corridor, or in the clean workroom.

(B) On-site sterilizing facilities. When sterilizing facilities are provided on site they shall be located near the operating room and provide the following rooms.

(i) Receiving/decontamination room. The receiving/decontamination room shall be physically separate from all other areas of the surgical suite. The room shall include a work counter(s) or table(s), clinical sink or equivalent flushing type fixture, equipment for initial washing/disinfection, and a hand washing fixture with hands-free operable controls. Pass-through dutch doors, windows, and washer/sterilizer decontaminators shall serve in delivering material to the clean workroom. The receiving/decontamination room may be combined with the surgical suite soiled workroom.

(ii) Clean/assembly workroom. The clean/assembly workroom shall include a counter(s) or table(s) with space for organizing, assembling, and packaging of medical/surgical supplies and equipment, equipment for terminal sterilizing, and a hand washing fixture with hands-free operable controls. Clean and soiled work areas shall be physically separated.

(iii) Sterile storage. A storage room for clean and sterile supplies shall be provided. The storage room shall have adequate areas and counters for breakdown of manufacturers' clean/sterile medical/surgical supplies. This room may be combined with the clean assembly/workroom.

(iv) Cart storage room or alcove. The storage space for distribution carts shall be adjacent to clean and sterile storage area(s) and close to main distribution points.

(15) Surgical suite. The surgical suite shall be arranged to preclude unrelated traffic through the suite. The surgical suite shall contain at least one operating room and all surgical service areas required under subparagraph (B) of this paragraph.

(A) Operating room. The operating room(s) shall have a clear floor area of at least 240 square feet exclusive of fixed or moveable cabinets, counters, or shelves. The minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet.

(B) Surgical service areas.

(i) Restricted corridor. The restricted corridor shall serve as the primary passageway for staff and patients within the surgical suite. The following rooms and areas shall have direct access to the restricted corridor:

(I) preoperative patient holding area;

(II) operating room(s);

(III) postoperative recovery suite;

(IV) soiled workroom;

(V) clean workroom;

(VI) janitor's closet;

(VII) equipment storage;

(VIII) sterilizing facilities;

(IX) anesthesia workroom when provided; and

(X) area for emergency crash cart.

(ii) Soiled workroom. A soiled workroom shall be provided for the exclusive use of the surgical suite staff. The workroom shall contain a clinical sink or equivalent flushing type fixture, work counter, designated space for waste and linen receptacles, and a hand washing fixture with hands-free operable controls. The soiled workroom shall not have direct connection with operating room(s) or other sterile activity room(s).

(iii) Clean linen storage. A storage room or alcove shall be provided for storing clean linen.

(iv) Scrub facilities. A scrub station shall be located in the restricted corridor within five feet of the entrance of each operating room. One scrub station with dual faucets with hands free operable controls may serve two operating rooms if the scrub stations are located adjacent to the entrance of both operating rooms. Scrub facilities shall be arranged to minimize any incidental splatter on nearby personnel, medical equipment, or supply carts. Viewing panels shall be provided for observation of the surgical room interior. The scrub sinks shall be recessed out of the main traffic areas. The scrub sink alcove shall be located within the restricted areas of the surgical suite. Scrub sinks shall not be located inside the sterile area.

(v) Janitor's closet. A janitor's closet shall be provided for the exclusive use of the surgical suite. The closet shall contain a floor receptor or service sink and storage space for housekeeping supplies and equipment.

(vi) Equipment storage. A room, alcove, or designated area shall be provided for storing equipment and supplies used in the surgical suite. The storage room or area shall be a minimum of 50 square feet per operating room.

(vii) Medical gas storage room. When provided or required by NFPA 101, a medical gas storage room shall comply with the requirements of NFPA 99, 2002, Chapter 5, Gas and Vacuum Systems.

(viii) Area for emergency crash cart. An area or alcove located out of traffic and convenient to the operating room(s) shall be provided for an emergency crash cart.

(ix) Stretcher storage area. An area or alcove shall be located convenient for use and out of the direct line of traffic for the storage of stretchers as required. Stored stretchers shall not encroach on corridor widths.

(16) Treatment room.

(A) A treatment room is not required, but when provided, it shall be used only for minor procedures.

(B) If inhalation anesthesia is administered in the treatment room, the room shall comply with NFPA 99, §14.4.1 requirements for an anesthetizing location.

(C) The treatment room shall have a clear floor area of at least 120 square feet exclusive of fixed or moveable cabinets, counters, or shelves.

(D) The treatment room shall contain an examination table, a counter for writing, and a hand washing fixture with hands-free operable controls.

(e) General detail and finish requirements. Details and finishes in new construction projects, including additions and alterations, shall be in compliance with this subsection, with NFPA 101, Chapter 20, and with local building codes.

(1) General detail requirements.

(A) Fire safety. Fire safety features, including smoke compartmentation, means of egress, automatic extinguishing systems, inspections, smoking regulations, and other details relating to fire prevention and fire protection shall comply with NFPA 101, Chapter 20. The Fire Safety Evaluation System for Health Care Occupancies contained in the National Fire Protection Association 101A, Alternative Approaches to Life Safety, 2001 Edition, Chapter 3, shall not be used in new building construction, renovations, or additions to existing ASCs.

(B) Exits, corridors and doors.

(i) Number of exits. A facility shall provide two exits remote from each other in accordance with NFPA 101, §20.2.4.1. At least one exit door shall be accessible by an ambulance from the outside. This door may also serve as an entry for loading or receiving goods.

(ii) Encroachment into the means of egress. Items such as drinking fountains, telephone booths or stations, and vending machines shall be so located as to not project into and restrict exit corridor traffic or reduce the exit corridor width below the required minimum. Portable equipment shall not be stored so as to project into and restrict exit corridor traffic or reduce the exit corridor width below the required minimum.

(iii) Corridors.

(I) Public corridor. The minimum clear and unobstructed width of a public corridor shall be at least four feet.

(II) Communicating corridor. The communicating corridor shall be used to convey patients by stretcher, gurney, or bed.

(III) The communicating corridor shall link the preoperative holding area, operating room(s), and postoperative recovery suite, and shall be continuous to at least one exit.

(IV) The minimum clear and unobstructed width of the communicating corridor shall be eight feet.

(iv) Door types. Doors at all openings between corridors and rooms or spaces subject to occupancy shall be swing type. Elevator doors are excluded from this requirement.

(v) Door swing. Doors, except doors to spaces such as small closets which are not subject to occupancy, shall not swing into corridors in a manner that might obstruct traffic flow or reduce the required corridor width. Large walk-in type closets are considered as occupiable spaces.

(vi) Patient access doors. The minimum width of doors for patient access to examination, treatment, and consultation rooms shall be three feet. The minimum width of doors requiring access for beds and gurneys (preoperative holding area, operating room, postoperative recovery suite, treatment rooms) shall be three feet eight inches.

(vii) Emergency access. Rooms containing a water closet, intended for patient use, shall be provided with at least one door having hardware which will permit access from the outside in any emergency. Door leaf width of such doors shall not be less than 36 inches.

(viii) Sliding doors. Horizontal sliding doors serving an occupant load of fewer than 10 shall be permitted. The area served by the door shall have no high hazard contents. The door shall be readily operable from either side without special knowledge or effort. The force required to operate the door in the direction of door travel shall be not more than 30 pounds per foot to set the door in motion, and shall be not more than 15 pounds per foot to close the door or open in the minimum required width. The door assembly shall comply with any required fire protection rating, and, where rated, shall be self-closing or automatic closing. The sliding doors opening to the egress corridor doors shall have a latch or other mechanism that ensures that the doors will not rebound into a partially open position if forcefully closed. The sliding doors may have breakaway provisions and shall be installed to resist passage of smoke. The latching sliding panel shall have a minimum clear opening of 36 inches in the fully open position. The fixed panels may have recessed tracks.

(ix) Fire doors. All fire doors shall be listed by an independent testing laboratory and shall meet the construction requirements for fire doors in National Fire Protection Association 80, Standard for Fire Doors and Fire Windows, 1999 Edition. Reference to a labeled door shall be construed to include labeled frame and hardware.

(C) Glazing. Glass doors, lights, sidelights, borrowed lights, and windows located within 12 inches of a door jamb or with a bottom-frame height of less than 18 inches and a top-frame height of more than 36 inches above the finished floor which may be broken accidentally by pedestrian traffic shall be glazed with safety glass or plastic glazing material that will resist breaking and will not create dangerous cutting edges when broken. Similar materials shall be used for wall openings in activity areas such as recreation and exercise rooms, unless otherwise required for fire safety. Safety glass, tempered or plastic glazing materials shall be used for shower doors and bath enclosures, interior windows and doors. Plastic and similar materials used for glazing shall comply with the flame spread ratings of NFPA 101, §18.3.3.

(D) Grab bars. Grab bars shall be provided at patient toilets and showers. The bars shall be one and one-half inches in diameter, shall have either one and one-fourth or one and one-half inches

clearance to walls, and shall have sufficient strength and anchorage to sustain a concentrated vertical or horizontal load of 250 pounds. Grab bars intended for use by the disabled shall also comply with ADA requirements.

(E) Hand washing facilities. Location and arrangement of fittings for hand washing facilities shall permit their proper use and operation. Hand washing fixtures with hands-free controls shall be provided in each examination room, treatment room, preoperative area, postoperative recovery suite, extended observation room or area, soiled utility room, fluoroscopy room, clean work room, and toilet room. Particular care shall be given to the clearances required for blade-type operating handles. Lavatories and hand washing facilities shall be securely anchored to withstand an applied vertical load of not less than 250 pounds on the front of the fixture. In addition to the specific areas noted, hand washing facilities shall be conveniently located for staff use in rooms and areas noted under spatial requirements in subsection (d) of this section and throughout the center where patient care services are provided.

(F) Soap dispensers. A liquid or foam soap dispenser shall be located at each hand washing facility.

(G) Hand drying. Provisions for hand drying shall be included at all hand washing facilities. There shall be hot air dryers or individual paper or cloth units enclosed in such a way as to provide protection against dust or soil and ensure single-unit dispensing.

(H) Signage. A sign shall be posted at the entrance to each toilet/restroom to identify the facility for public, staff, or patient use.

(I) Ceiling heights. The minimum ceiling height shall be eight feet six inches with the following exceptions.

(i) Rooms containing ceiling-mounted light fixtures or equipment. Operating rooms or other rooms containing ceiling-mounted light fixtures or equipment shall have ceiling heights of not less than nine feet. Additional ceiling height may be required to accommodate special fixtures or equipment.

(ii) Minor rooms. Ceilings in storage rooms, toilet rooms, and other minor rooms shall be not less than seven feet six inches.

(iii) Boiler rooms. Boiler rooms shall have ceiling clearances not less than two feet six inches above the main boiler header and connecting piping.

(iv) Overhead clearance. Suspended tracks, rails, pipes, signs, lights, door closers, exit signs, and other fixtures that protrude into the path of normal traffic shall not be less than six feet eight inches above the finished floor.

(J) Areas producing impact noises. Recreation rooms, exercise rooms, and similar spaces where impact noises may be generated shall not be located directly over operating rooms or special procedure rooms unless special provisions are made to minimize noise.

(K) Rooms with heat-producing equipment. Rooms containing heat-producing equipment, such as mechanical and electrical equipment and laundry rooms, shall be insulated and ventilated to prevent floors of any occupied room located above it from exceeding a temperature differential of 10 degrees Fahrenheit above the ambient room temperature.

(L) Radiation protection. Shielding shall be designed, tested, and approved by a medical physicist licensed under the Medical Physics Practice Act, Occupations Code, Chapter 602. The ASC shall obtain a certificate of registration issued by the Radiation Safety Licensing Branch to use radiation machines.

(f) General finishes requirements.

(1) Privacy screens, cubicle curtains, and draperies.

(A) Cubicle curtains or privacy screens shall be provided to assure patient privacy when required or requested by a patient.

(B) Cubicle curtains, draperies and other hanging fabrics shall be noncombustible or flame retardant and shall pass both the small-scale and the large-scale tests of National Fire Protection Association 701, Standard Methods of Fire Tests for Flame-Resistant Textiles and Films, 1999 Edition. Copies of laboratory test reports for installed materials shall be submitted to the department at the time of the final construction inspection.

(2) Flame spread, smoke development and noxious gases. Flame spread and smoke developed limitations of interior finishes shall comply with Table 4 of §135.56(d) of this title (relating to Construction Tables) and NFPA 101, §10.2. The use of materials known to produce large or concentrated amounts of noxious or toxic gases shall not be used in exit accesses or in patient areas. Copies of laboratory test reports for installed materials tested in accordance with National Fire Protection Association 255, Standard Method of Test of Surface Burning Characteristics of Building Materials, 2000 Edition, and National Fire Protection Association 258, Standard Research Test Method for Determining Smoke Generation of Solid Materials, 2001 Edition, shall be provided.

(3) Floor finishes.

(A) Flooring shall be easy to clean and have wear resistance appropriate for the location involved. Floors that are subject to traffic while wet (such as shower and bath areas, and similar work areas) shall have a non-slip surface. In all areas frequently subject to wet cleaning methods, floor materials shall not be physically affected by germicidal and cleaning solutions. The following are acceptable floor finishes:

(i) painted concrete for mechanical, electrical, communication rooms, and janitor's closets;

(ii) vinyl and vinyl composition tiles and sheets tiles for offices, lobbies, administrative areas, storage, staff and public toilet rooms, examination rooms, support spaces, and non-treatment areas;

(iii) monolithic or seamless flooring shall be provided for all operating rooms, special procedure rooms, treatment rooms, patient toilet rooms, and sterilizing facility(ies). Seamless flooring shall be impervious to water, coved and installed integral with the base, tightly sealed to the wall, and without voids that can harbor insects or retain dirt particles. The base shall not be less then six inches in height. Welded joint flooring is acceptable;

(iv) marble, ceramic and quarry tile for offices, lobbies, staff and public toilet rooms, administrative areas, wet areas, and similar spaces;

(v) carpet flooring for offices, lobbies, and administrative areas. Carpeting shall not be installed in all preoperative holding, toilet rooms, treatment rooms, examination rooms, and similar spaces; and

(vi) terrazzo for offices, lobbies, administrative areas, and similar spaces.

(B) Threshold and expansion joint covers. Thresholds at doorways shall not exceed 3/4 inch in height for exterior sliding doors or 1/2 inch for other type doors. Raised thresholds and floor

level changes at accessible doorways shall be beveled with a slope no greater than 1:2. Expansion joint covers shall not exceed 1/2 inch in height and shall have beveled edges with a slope no greater than 1:2.

(4) Wall finishes. Wall finishes shall be smooth, washable, moisture resistant, and cleanable by standard housekeeping practices. Wall finishes shall be in compliance with the requirements of NFPA 101, §38.3.3, relating to flame spread.

(A) Finishes at plumbing fixtures. Wall finishes shall be water-resistant in the immediate area of plumbing fixtures.

(B) Wet cleaning methods. Wall finishes in areas subject to frequent wet cleaning methods shall be impervious to water, tightly sealed; and without voids.

(5) Ceiling finishes. All occupied rooms and spaces shall be provided with finished ceilings, unless otherwise noted. Ceilings which are a part of a rated roof/ceiling assembly or a floor/ceiling assembly shall be constructed of listed components and installed in accordance with the listing. Three types of ceilings that are required in various areas of the ASC are:

(A) ordinary ceilings. Ceilings are required in all areas or rooms in the ASC unless otherwise noted. This includes ceilings such as acoustical tiles installed in a metal grid which are dry cleanable with equipment used in daily housekeeping activities such as dusters and vacuum cleaners;

(B) washable ceilings. When ceilings that dictates this type of cleaning or protection for these spaces such as soil utility or soil workroom, the ceilings shall be made of washable, smooth, moisture impervious materials such as painted lay-in gypsum wallboard or vinyl faced acoustic tile in a metal grid; and

(C) monolithic ceilings. Ceilings which are monolithic from wall to wall (painted solid gypsum wallboard), smooth and without fissures, open joints, or crevices and with a washable and moisture impervious finish shall be provided in the operating rooms, special procedure rooms, and sterilizing facilities.

(D) Nonceiling requirements. Finished ceilings may be omitted in mechanical, electrical, communication rooms and equipment spaces, shops, and similar spaces unless required for fire-resistive purposes.

(6) Floor, wall, and ceiling penetrations. Floor, wall, and ceiling penetrations by pipes, ducts, and conduits, or any direct openings shall be tightly sealed to minimize entry of dirt particles, rodents, and insects. Joints of structural elements shall be similarly sealed.

(7) Materials finishes. Materials known to produce noxious gases when burned shall not be used for mattresses, upholstery, and wall finishes.

(g) General mechanical requirements. This subsection contains requirements for mechanical systems; air conditioning, heating and ventilating systems; steam and hot and cold water systems; and thermal and acoustical insulation.

(1) Cost. All mechanical systems shall be designed for overall efficiency and life cycle costing, including operational costs. Recognized engineering practices shall be followed to achieve the most economical and effective results except that in no case shall patient care or safety be sacrificed for conservation.

(2) Equipment location. Mechanical equipment may be located indoors or outdoors (when in a weatherproof enclosure), or in a separate building(s).

(3) Vibration isolation. Mechanical equipment shall be mounted on vibration isolators as required to prevent unacceptable structure-borne vibration. Ducts, pipes, etc. connected to mechanical equipment which is a source of vibration shall be isolated from the equipment with vibration isolators.

(4) Performance and acceptance. Prior to completion and acceptance of the facility, all mechanical systems shall be tested, balanced, and operated to demonstrate to the design engineer or his representative that the installation and performance of these systems conform to the requirements of the plans and specifications.

(A) Material lists. Upon completion of the contract, the owner shall obtain from the construction contractor parts lists and procurement information with numbers and description for each piece of equipment.

(B) Instructions. Upon completion of the contract, the owner shall obtain from the construction contractor instructions in the operational use and maintenance of systems and equipment as required.

(5) Heating, ventilating, and air conditioning (HVAC) systems.

(A) All central HVAC systems shall comply with and shall be installed in accordance with the requirements of NFPA 90A, Standard for the Installation of Air Conditioning and Ventilating Systems, 2002 Edition, or NFPA 90B, Standard for the Installation of Warm Air Heating and Air-Conditioning Systems, 2002 Edition, as applicable and the requirements contained in this paragraph. Air handling units serving two or more rooms are considered to be central units.

(B) Non-central air handling systems, i.e., individual room units that are used for heating and cooling purposes (e.g., fan-coil units, heat pump units, and packaged terminal air conditioning units) shall be equipped with permanent (cleanable) or replaceable filters. The filters shall have an average efficiency of 25 - 30% and an average arrestance of 85% based on American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE), Inc., Standard 52.2, 1999 edition, Method of Testing General Ventilation Air Cleaning Devices for Removal Efficiency by Particle Size. These units shall be used as air recirculating units only. All outdoor air requirements shall be met by a separate central air handling system with the proper filtration, as required in Table 1 of §135.56(a) of this title.

(C) General ventilation requirements. All rooms and areas in the ASC shall have provision for positive ventilation. Fans serving exhaust systems shall be located at the discharge end and shall be conveniently accessible for service. Exhaust systems may be combined, unless otherwise noted, for efficient use of recovery devices required for energy conservation. The ventilation rates shown in Table 1 of §135.56(a) of this title shall be used only as minimum requirements, since they do not preclude the use of higher rates that may be appropriate.

(i) Cost reduction methods. To reduce utility costs, facility design may utilize energy conserving procedures including recovery devices, variable air volume, load shedding, systems shutdown, or reduction of ventilation rates (when specifically permitted) in certain areas when unoccupied. In no case shall patient care be jeopardized.

(ii) Economizer cycle. Mechanical systems shall be arranged to take advantage of outside air conditions by using an economizer cycle when appropriate to reduce heating and cooling systems loads. Innovative design that provides for additional energy conservation while meeting the intent of this section for acceptable patient care may be presented to the department for consideration.

(iii) Areas requiring fully ducted systems. Fully ducted supply, return and exhaust air for HVAC systems shall be provided for all critical care areas, sensitive care areas, all patient care areas, all areas requiring a sterile regimen, clean storage rooms, and where required for fire safety purposes. Combination systems, utilizing both ducts and plenums for movement of air in these areas, shall not be permitted. Ductwork access panels shall be labeled.

(iv) Temperatures and humidities. The designed capacity of the systems shall be capable of providing the ranges of temperatures and humidities as shown in Table 1 of §135.56(a) of this title.

(v) Thermometers and humidity gauges. Each operating room, special procedure room, and postoperative recovery suite shall have temperature and humidity indicating devices mounted at eye level.

(vi) Outside air intake locations.

(I) Outside air intakes shall be located at least 25 feet from exhaust outlets of ventilating systems, combustion equipment stacks, medical-surgical vacuum system outlets, plumbing vents, or areas which may collect vehicular exhaust or other noxious fumes. (Prevailing winds and proximity to other structures may require other arrangements).

(II) Plumbing and vacuum vents that terminate five feet above the level of the top of the air intake may be located as close as 10 feet to the air intake.

(III) The bottom of outside air intakes serving central systems shall be located as high as practical but at least six feet above ground level, or if installed above the roof, three feet above the roof level

(vii) Contaminated air exhaust outlets. Exhaust outlets from areas (laboratory hoods, etc.) that exhaust contaminated air shall be above the roof and be arranged to exhaust upward unless the air has been treated by an appropriate means where sidewall exhaust will be allowed. Exhaust outlets from areas containing ethylene oxide sterilizers and other contaminants, e.g., glutaraldehyde, shall terminate not less than eight feet above the roof level (or be appropriately labeled as "hazardous exhaust") and arranged to exhaust upward.

(viii) Directional air flow. Ventilation systems shall be designed and balanced to provide pressure relationships contained in Table 1 of §135.56(a) of this title. For reductions and shut down of ventilation systems when a room is unoccupied, the provisions in Note 4 of Table 1 of §135.56(a) of this title shall be followed.

(ix) Air distribution devices. Design shall consider turbulence and other factors of air movement to minimize airborne particulate matter. Where extraordinary procedures require special designs, the installation shall be reviewed on a case-by-case basis.

(I) All supply diffusers grilles shall be located on the ceiling or on a wall near the ceiling.

(II) Air supply for the operating rooms and special procedure rooms shall be from ceiling outlets near the center of the work area to efficiently control air movement.

(III) A minimum of two return air inlets located diagonally opposite from one another and near floor level shall be provided. Bottoms of return air grilles in operating rooms and other anesthetizing locations shall be located not more than 12 inches above the finished floor nor less than six inches above the finished floor.

(x) Ventilation start-up requirements. Air handling systems shall not be started or operated without the filters installed in place. This includes the 90% and 99.97% efficiency filters where required. This includes during construction operations. Ducts shall be cleaned thoroughly and throughout by a National Air Duct Cleaners Association (NADCA) certified air duct cleaning contractor when the air handling systems have been operating without the required filters in place. When ducts are determined to be dirty or dusty, the department shall require a written report assuring cleanliness of duct and clean air quality.

(xi) Humidifier location. When duct humidifiers are located upstream of the final filters, they shall be located at least 15 feet from the filters. Duct work with duct-mounted humidifiers shall be provided with a means of removing water accumulation. An adjustable high-limit humidistat shall be located downstream of the humidifier to reduce the potential of condensation inside the duct. All duct takeoffs shall be sufficiently downstream of the humidifier to ensure complete moisture absorption. Reservoir-type water spray or evaporative pan humidifiers shall not be used.

(xii) Filtration requirements. All air handling units shall be equipped with filters having efficiencies equal to, or greater than, those specified in Table 2 of §135.56(b) of this title. Filter efficiencies shall be average dust spot efficiencies tested in accordance with American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE), Inc., Standard 52.2, 1999 edition, Method of Testing General Ventilation Air-Cleaning Devices for Removal Efficiency by Particle Size. All joints between filter segments, and between filter segments and the enclosing ductwork, shall have gaskets and seals to provide a positive seal against air leakage. Air handlers serving more than one room shall be considered as central air handlers. All documents published by ASHRAE as referenced in this section may be obtained by writing or calling the ASHRAE, Inc. at the following address or telephone number: ASHRAE, 1791 Tullie Circle, Northeast, Atlanta, Georgia 30329; telephone (404) 636-8400.

(I) Filtration requirements for air handling units serving single rooms requiring asepsis control. Dedicated air handlers serving only one room where asepsis control is required, such as, but not limited to, operating rooms, special procedure rooms, and treatment rooms shall be equipped with filters having efficiencies equal to, or greater than, those specified for patient care areas in Table 2 of §135.56(b) of this title.

(II) Filtration requirements for air handling units serving other single rooms. Dedicated air handlers serving all other single rooms shall be equipped with nominal filters installed at the return air system.

(III) Location of multiple filters. Where two filter beds are required by Table 2 of §135.56(b) of this title, filter bed number one shall be located upstream of the air conditioning equipment, and filter bed number two shall be downstream of the supply air blowers, cooling and heating coils.

(IV) Location of single filters. Where only one filter bed is required by Table 2 of §135.56(b) of this title, it shall be located upstream of the supply fan. Filter frames shall be durable and constructed to provide an airtight fit with the enclosing ductwork.

(V) Pressure monitoring devices. A manometer or draft gauge shall be installed across each filter bed having a required efficiency of 75% or more, including laboratory hoods requiring high efficiency particulate air (HEPA) filters. The pressure monitoring device shall be mounted below the ceiling line within the ASC such that it can be observed by staff.

(D) Thermal and acoustical insulation for air handling systems. Asbestos containing insulation materials shall not be used.

(i) Thermal duct insulation. Air ducts and casings with outside surface temperature below the ambient dew point or temperature above 80 degrees Fahrenheit shall be provided with thermal insulation.

(ii) Insulation in air plenums and ducts. When installed, linings in air ducts and equipment shall meet the Erosion Test Method described in Underwriters Laboratories (UL), Standard 181, relating to Factory-Made Duct Materials and Air Duct Connectors, April 4, 1996 edition. This document may be obtained from the Underwriters Laboratories, 333 Pfingsten Road, Northbrook, Illinois 60062-2096.

(iii) Insulation flame spread and smoke developed ratings. Interior and exterior insulation, including finishes and adhesives on the exterior surfaces of ducts and equipment, shall have a flame spread rating of 25 or less and a smoke developed rating of 50 or less as required by NFPA 90A, Chapters 4 and 5 and as determined by an independent testing laboratory in accordance with NFPA 255, A Standard Method of Test of Surface Burning Characteristics of Building Materials, 2000 Edition.

(iv) Linings and acoustical traps. Duct lining and acoustical traps exposed to air movement shall not be used in ducts serving critical care areas. This requirement shall not apply to mixing boxes and acoustical traps that have approved nonabrasive coverings over such linings.

(v) Frangible insulation. Insulation of soft and spray-on types shall not be used where it is subject to air currents or mechanical erosion or where loose particles may create a maintenance problem or occupant discomfort.

(vi) Existing duct linings. Internal linings shall not be used in ducts, terminal boxes, or other air system components supplying operating rooms and the postoperative recovery suite, unless terminal filters of at least 90% efficiency are installed downstream of linings.

(E) Ventilation for anesthetizing locations. When anesthesia is administered, ventilation for anesthetizing locations, as defined in NFPA 99, §3-3, shall comply with NFPA 99, §13.4.1.2 and any specific ventilation requirements of clauses (i) - (iii) of this subparagraph.

(i) Smoke removal systems for anesthetizing locations. Smoke removal systems shall be provided in all windowless anesthetizing locations in accordance with NFPA 99, §6.4.1.2. Supply and exhaust systems for windowless anesthetizing locations shall be arranged to automatically exhaust smoke and products of combustion, prevent recirculation of smoke originating within the surgical suite, and prevent the circulation of smoke entering the system intakes, without in either case interfering with the exhaust function of the system.

(ii) Smoke removal systems for surgical suites. Smoke removal systems shall be provided in all surgical suites in accordance with NFPA 99, §6.4.1.3.

(iii) Smoke exhaust grilles. Exhaust grilles for smoke evacuation systems shall be ceiling-mounted or wall-mounted within 12 inches of the ceiling.

(F) Location of return and exhaust air devices. The bottoms of wall-mounted return and exhaust air openings shall be at least four inches above the floor. Return air openings located less than six inches above the floor shall be provided with nominal filters. All exhaust air openings and return air openings located higher than six inches but less than seven feet above the floor shall be protected with grilles or screens having openings through which a one-half inch sphere will not pass.

(G) Ray protection. Ducts which penetrate construction intended for X-ray or other ray protection shall not impair the effectiveness of the protection.

(H) Fire damper requirements. Fire dampers shall be located and installed in all ducts at the point of penetration of a required two-hour or higher fire-rated wall or floor in accordance with the requirements of NFPA 101, §18.5.2.

(I) Smoke damper requirements. Smoke dampers shall be located and installed in accordance with the requirements of NFPA 101, §20.3.7.3, and NFPA 90A, Chapter 5.

(i) Protection of ducts penetrating fire and smoke partitions. Combination fire and smoke leakage limiting dampers (Class II) shall be installed in accordance with manufacturer's instructions for all ducts penetrating one and two-hour rated fire and smoke partitions required by NFPA 101, §20.3.7, Subdivision of Building Space (not required in ASCs meeting the provisions of NFPA 101, §20.3.7.2, Exception Number 1).

(ii) Fail-safe installation. Combination smoke and fire dampers shall close on activation of the fire alarm system by smoke detectors installed and located as required by National Fire Protection Association 72, National Fire Alarm Code, 2002 Edition (NFPA 72), Chapter 8; NFPA 90A, Chapter 6; and NFPA 101, §20.3.5; the fire sprinkler system; and upon loss of power. Smoke dampers shall not close by fan shutdown alone unless it is a part of an engineered smoke removal system.

(iii) Interconnection of air handling fans and smoke dampers. Air handling fans and smoke damper controls may be interconnected so that closing of smoke dampers will not damage the ducts.

(iv) Frangible devices. Use of frangible devices for shutting smoke dampers is not permitted.

(J) Acceptable damper assemblies. Only fire damper and smoke damper assemblies integral with sleeves and listed for the intended purpose shall be acceptable.

(K) Duct access doors. Unobstructed access to duct openings in accordance with NFPA 90A, §4.3, shall be provided in ducts within reach and sight of every fire damper, smoke damper and smoke detector. Each opening shall be protected by an internally insulated door which shall be labeled externally to indicate the fire protection device located within.

(L) Restarting controls. Controls for restarting fans may be installed for convenient fire department use to assist in evacuation of smoke after a fire is controlled, provided that provisions are made to avoid possible damage to the system because of closed dampers. To accomplish this, smoke dampers shall be equipped with remote control devices.

(M) Make-up air. If air supply requirements in Table 2 of §135.56(b) of this title do not provide sufficient air for use by exhaust hoods and safety cabinets, filtered make-up air shall be ducted to maintain the required air flow direction in that room. Make-up systems for hoods shall be arranged to minimize short circuiting of air and to avoid reduction in air velocity at the point of contaminant capture.

(h) Piping systems and plumbing fixture requirements. All piping systems and plumbing fixtures shall be designed and installed in accordance with the requirements of the National Standard Plumbing Code Illustrated published by the National Association of Plumbing-Heating-Cooling Contractors (PHCC), 2003 edition, and this para-

graph. The National Standard Plumbing Code may be obtained by writing or calling the PHCC at the following address or telephone number: Plumbing-Heating-Cooling Contractors, Post Office Box 6808, Falls Church, Virginia 22046; telephone (800) 533-7694.

(1) Piping systems.

(A) Water supply piping systems. Water service pipe to point of entrance to the building shall be brass pipe, copper tube (not less than type M when buried directly), copper pipe, cast iron water pipe, galvanized steel pipe, or approved plastic pipe. Domestic water distribution system piping within buildings shall be brass pipe, copper pipe, copper tube, or galvanized steel pipe. Piping systems shall be designed to supply water at sufficient pressure to operate all fixtures and equipment during maximum demand.

(i) Valves. Each water service main, branch main, riser, and branch to a group of fixtures shall be equipped with accessible and readily identifiable shutoff valves. Stop valves shall be provided at each fixture.

(ii) Backflow preventers. Backflow preventers (vacuum breakers) shall be installed on hose bibs, laboratory sinks, janitor sinks, bedpan flushing attachments, and on all other fixtures to which hoses or tubing can be attached. Connections to high hazard sources, e.g., X-ray film processors, shall be from a cold water hose bib through a reduced pressure principle type backflow preventer (RPBFP).

(iii) Flushing valves. Flush valves installed on plumbing fixtures shall be of a quiet operating type, equipped with silencers.

(iv) Capacity of water heating equipment. Water heating equipment shall have sufficient capacity to supply water for all clinical needs based on accepted engineering practices using actual number and type of fixtures and for heating, when applicable.

(v) Domestic hot water system. Hot water distribution system serving all patient care areas shall be under constant recirculation to provide continuous hot water at each hot water outlet.

(vi) Water temperature measurements. Water temperatures shall be measured at hot water point of use or at the inlet to processing equipment. Hot water temperature at point of use for patients, staff, and visitors shall be in the range of 105 to 120 degrees Fahrenheit

(vii) Water storage tanks. Domestic water storage tank(s) shall be fabricated of corrosion-resistant metal or lined with non-corrosive material. When potable water storage tanks (hot and cold) are used, the water shall be used and replenished. Water shall not be stored in tanks for future use unless the water is tested weekly for contaminates/bacteria.

(viii) Purified water supply system. Purified water distribution system piping shall be task specific and include, but not necessarily be limited to, polypropylene (PP), polyvinylidene fluoride (PVDF) or polyvinyl chloride (PVC) pipe. Final installed purified water system piping assemblies shall be UL approved and fully comply with applicable American Society for Testing and Materials (ASTM) Fire Resistant/Smoke Density requirements. The applicable documents are available from ASTM International, 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, Pennsylvania 19428-2959.

(ix) Dead-end piping. Dead-end piping (risers with no flow, branches with no fixture) shall not be installed. In any renovation work, dead-end piping shall be removed. Empty risers, mains and branches installed for future use are permitted.

(B) Fire sprinkler systems. When provided, fire sprinkler systems shall comply with the requirements of NFPA 101, §9.7, Automatic Sprinklers and Other Extinguishing Equipment, and the requirements of this subparagraph. All fire sprinkler systems shall be designed, installed, and maintained in accordance with the requirements of NFPA 13, Standard for the Installation of Sprinkler Systems, 2002 Edition, and shall be certified as required by §135.55(c)(1)(C) of this title (relating to Construction, Inspections, and Approval of Project).

(C) Piped nonflammable medical gas and clinical vacuum systems. When provided, piped nonflammable medical gas and clinical vacuum system installations shall be designed, installed, and certified in accordance with the requirements of NFPA 99, §5.1 for Level 1 Piped Systems and the requirements of this subparagraph.

(i) Outlets. Nonflammable medical gas and clinical vacuum outlets shall be provided in accordance with Table 3 of §135.56(c) of this title.

(ii) Installer qualifications. All installations of the medical gas piping systems including source tanks and related piping shall be done only by, or under the direct supervision of, a holder of a master plumber license or a journeyman plumber license with a medical gas piping installation endorsement issued by the Texas State Board of Plumbing Examiners.

(iii) Installer tests. Prior to closing of walls, the installer shall perform an initial pressure test, a blowdown test, a secondary pressure test, a cross-connection test, and a purge of the piping system as required by NFPA 99.

(iv) Qualifications for conducting verification tests and inspections. Verification testing shall be performed and inspected by a party, other than the installer, installing contractor, or material vendor. Testing shall be conducted by a medical gas system verifier registered with an acceptable organization by this department and is technically competent and experienced in the field of medical gas and vacuum pipeline testing and meets the requirements of The American Society of Safety Engineers (ASSE) Personnel Standard 6030, Professional Qualifications Standard for Medical Gas Systems. The document published by ASSE Personnel Standard 6030, Professional Qualifications Standard for Medical Gas Systems as referenced in this rule may be obtained by writing or calling The American Society of Safety Engineers (ASSE) at ASSE International Office, 901 Canterbury, Suite A, Westlake, Ohio 44145, telephone (440) 885-3040.

(v) Verification tests. Upon completion of the installer inspections and tests and after closing of walls, verification tests of the medical gas piping systems, the warning system, and the gas supply source shall be conducted. The verification tests shall include a cross-connection test, valve test, flow test, piping purge test, piping purity test, final tie-in test, operational pressure tests, and medical gas concentration test.

(vi) Verification test requirements. Verification tests of the medical gas piping system and the warning system shall be performed on all new piped medical gas systems, additions, renovations, or repaired portions of an existing system. All systems that are breached and components that are added, renovated, or replaced shall be inspected and appropriately tested. The breached portions of the systems subject to inspection and testing shall be all of the new and existing components in the immediate zone or area located upstream of the point or area of intrusion and downstream to the end of the system or a properly installed isolation valve.

(vii) Warning system verification tests. Verification tests of piped medical gas systems shall include tests of the source

alarms and monitoring safeguards, master alarm systems, and the area alarm systems.

(viii) Source equipment verification tests. Source equipment verification tests shall include medical gas supply sources (bulk and manifold) and the compressed air source systems (compressors, dryers, filters, and regulators).

(ix) ASC responsibility. Before new piped medical gas systems, additions, renovations, or repaired portions of an existing system are put into use, ASC medical personnel shall be responsible for ensuring that the gas delivered at the outlet is the gas shown on the outlet label and that the proper connecting fittings are checked against their labels.

(x) Written certification. Upon successful completion of all verification tests, written certification for affected piped medical gas systems and piped medical vacuum systems including the supply sources and warning systems shall be provided by a party technically competent and experienced in the field of medical gas pipeline testing stating that the provisions of NFPA 99 have been adhered to and systems integrity has been achieved. The written certification shall be submitted directly to the ASC and the installer. A copy shall be available at final department construction inspection.

(xi) Documentation of medical gas and clinical vacuum outlets. Documentation of the installed, modified, extended or repaired medical gas piping system shall be submitted to the department by the same party certifying the piped medical gas systems. The number and type of medical gas outlets (e.g., oxygen, vacuum, medical air, nitrogen, nitrous oxide) shall be documented and arranged tabularly by room numbers and room types.

(D) Medical gas storage facilities. Main storage of medical gases may be outside or inside the ASC in accordance with NFPA 99, §5.1. Provision shall be made for additional separate storage of reserve gas cylinders necessary to complete at least one day's procedures.

(E) Multiple gas outlets on one medical gas outlet. Y-connections, "twinning", or other similar devices shall not be used on any medical gas outlet.

(F) Waste anesthetic gas disposal (WAGD) systems. Each space routinely used for administering inhalation anesthesia shall be provided with a WAGD system as required by NFPA 99, §5.1.3.7.

(2) Steam and hot water systems.

(A) Boilers. When provided, the boilers shall have the capacity, based upon the net ratings as published in The I-B-R Ratings Book for Boilers, Baseboard Radiation and Finned Tube (commercial) by the Hydronics Institute Division of GAMA, to supply the normal heating, hot water, and steam requirements of all systems and equipment. The document published by the Hydronics Institute Division of GAMA as referenced in this rule may be obtained by writing or calling the Hydronics Institute Division of GAMA at 35 Russo Place, Post Office Box 218, Berkeley Heights, New Jersey 07922, telephone (908) 464-8200.

(i) Boiler accessories. Boiler feed pumps, heating circulating pumps, condensate return pumps, and fuel oil pumps shall be connected and installed to provide normal and standby service.

(ii) Valves. Supply and return mains and risers of cooling, heating, and process steam systems shall be valved to isolate the various sections of each system. Each piece of equipment shall be valved at the supply and return ends except that vacuum condensate returns need not be valved at each piece of equipment.

(B) Boiler certification. When required, the ASC shall ensure compliance with Texas Department of Licensing and Regulation, Boiler Section, Texas Boiler Law, (Health and Safety Code, Chapter 755, Boilers), which requires certification documentation for boilers to be posted on site at each boiler installation.

(3) Drainage systems. Building sewers shall discharge into a community sewage system. Where such a system is not available, a facility providing sewage treatment shall conform to applicable local and state regulations.

(A) Above ground piping. Soil stacks and roof drains installed above ground within buildings shall be drain-waste-vent (DWV) weight or heavier and shall be: copper pipe, copper tube, cast iron pipe, or Schedule 40 polyvinyl chloride (PVC) pipe. Buildings or portions of buildings remodeled to an ASC need not comply with this requirement.

(B) Underground piping. All underground building drains shall be cast iron soil pipe, hard temper copper tube (DWV or heavier), acrylonitrile-butodiene-styrene (ABS) plastic pipe (DWV Schedule 40 or heavier), or PVC pipe (DWV Schedule 40 or heavier. Underground piping shall have at least 12 inches of earth cover or comply with local codes. Existing buildings or portions of buildings that are being remodeled need not comply with this subparagraph.

(C) Drains for chemical wastes. Separate drainage systems for chemical wastes (acids and other corrosive materials) shall be provided. Materials acceptable for chemical waste drainage systems shall include chemically resistant borosilicate glass pipe, high silicone content cast iron pipe, polypropylene plastic pipe, or plastic lined pipe.

(D) Drainage and waste piping. Drainage and waste piping shall not be installed above or below ceilings in operating rooms, special procedure rooms, and sterile processing rooms unless precautions are taken to protect the space below from leakage and condensation from necessary overhead piping. Secondary protection shall be required to drain. Any required secondary protection shall be labeled, "code required secondary drain system" every 20 feet in a highly visible print or label.

(4) Thermal insulation for piping systems and equipment. Asbestos containing insulation materials shall not be used.

(A) Insulation. Insulation shall be provided for the following:

(i) boilers, smoke breeching, and stacks;

(ii) steam supply and condensate return piping;

(iii) hot water piping and all hot water heaters, generators, converters, and storage tanks;

(iv) chilled water, refrigerant, other process piping, equipment operating with fluid temperatures below ambient dew point, and water supply and drainage piping on which condensation may occur. Insulation on cold surfaces shall include an exterior vapor barrier; and

(v) other piping, ducts, and equipment as necessary to maintain the efficiency of the system.

(B) Insulation flame spread. Flame spread shall not exceed 25 and smoke development rating shall not exceed 50 for pipe insulation as determined by an independent testing laboratory in accordance with NFPA 255, Standard Method of Test of Surface Burning Characteristics of Building Materials, 2000 Edition.

(5) Plumbing fixtures. Plumbing fixtures shall be made of non-absorptive, acid-resistant materials and shall comply with the re-

quirements of the National Standard Plumbing Code, and this paragraph.

(A) Sink and lavatory controls. All lavatories used by medical and nursing staff and by patients shall be trimmed with valves or electronic controls which can be operated without the use of hands. Blade handles used for this purpose shall not be less than four inches in length. Single lever or wrist blade devices may also be used.

(B) Clinical sink traps. Clinical sinks shall have an integral trap in which the upper portion of a visible trap seal provides a water surface.

(C) Sinks for disposal of plaster of paris. Sinks that are used for the disposal of plaster of paris shall have a plaster trap.

(D) Back-flow or siphoning. All plumbing fixtures and equipment shall be designed and installed to prevent the back-flow or back-siphonage of any material into the water supply. The over-the-rim type water inlet shall be used wherever possible. Vacuum-breaking devices shall be properly installed when an over-the-rim type water inlet cannot be utilized.

(E) Drinking fountain. Each drinking fountain shall be designed so that the water issues at an angle from the vertical, the end of the water orifice is above the rim of the bowl, and a guard is located over the orifice to protect it from lip contamination.

(F) Sterilizing equipment. All sterilizing equipment shall be designed and installed to prevent not only the contamination of the water supply but also the entrance of contaminating materials into the sterilizing units.

(G) Sterilizing equipment. All sterilizing equipment shall be designed and installed to prevent not only the contamination of the water supply but also the entrance of contaminating materials into the sterilizing units.

(H) Hose attachment. No hose shall be affixed to any faucet if the end of the hose can become submerged in contaminated liquid unless the faucet is equipped with an approved, properly installed vacuum breaker.

(I) Bedpan washers and sterilizers. When provided, bedpan washers and sterilizers shall be designed and installed so that both hot and cold water inlets shall be protected against back-siphonage at maximum water level.

(J) Flood level rim clearance. The water supply spouts for lavatories and sinks required in patient care areas shall be mounted so that its discharge point is a minimum of five inches above the rim of the fixture.

(K) Scrub sink controls. Freestanding scrub sinks and lavatories used for scrubbing in procedure rooms shall be trimmed with foot, knee, or electronic hands-free controls. Single lever wrist blades are not acceptable at scrub sinks.

(L) Floor drains or floor sinks. Where floor drains or floor sinks are installed, they shall be of a type that can be easily cleaned by removal of the cover. Removable stainless steel mesh shall be provided in addition to a grilled drain cover to prevent entry of large particles of waste which might cause stoppages.

(M) Under counter piping. Under counter piping and above floor drains shall be arranged (raised) so as not to interfere with cleaning of the floor below the equipment.

(N) Ice machines. All ice-making machines used for human consumption shall be of the self-dispensing type. Copper tubing shall be provided for supply connections to ice machines.

(i) General electrical requirements. This paragraph contains common electrical and essential emergency system requirements.

(1) Electrical requirements. All electrical material and equipment, including conductors, controls, and signaling devices, shall be installed in compliance with applicable sections of the NFPA 70, National Electrical Code, 2002 Edition, §517; NFPA 99, Chapter 14; the requirements of this subsection; and as necessary to provide a complete electrical system. Electrical systems and components shall be listed by nationally recognized listing agencies as complying with available standards and shall be installed in accordance with the listings and manufacturer's instructions.

(A) All fixtures, switches, sockets, and other pieces of apparatus shall be maintained in a safe and working condition.

(B) Extension cords and cables shall not be used for permanent wiring.

(C) All electrical heating devices shall be equipped with a pilot light to indicate when the device is in service, unless equipped with a temperature limiting device integral with the heater.

(D) All equipment, fixtures, and appliances shall be properly grounded in accordance with NFPA 70.

(E) Under counter electrical installations shall be arranged (raised) to not interfere with cleaning of the floor below the equipment.

(2) Installation testing and certification.

(A) Installation testing. The electrical installations, including grounding continuity, fire alarm, nurses calling system and communication systems, shall be tested to demonstrate that equipment installation and operation is appropriate and functional. A written record of performance tests on special electrical systems and equipment shall show compliance with applicable codes and standards and shall be available to the department upon request.

(B) Grounding system testing. The grounding system shall be tested as described in NFPA 99, §4.3.3, for patient care areas in new or renovated work. The testing shall be performed by a qualified electrician or their qualified electrical testing agent. The electrical contractor shall provide a letter stating that the grounding system has been tested in accordance with NFPA 99, the testing device use complies with NFPA 99, and whether the grounding system passed the test. The letter shall be signed by the qualified electrical contractor, or their designated qualified electrical testing agent, certifying that the system has been tested and the results of the test are indicated.

(3) Electrical safeguards. Shielded isolation transformers, voltage regulators, filters, surge suppressors, and other safeguards shall be provided as required where power line disturbances are likely to affect fire alarm components, data processing, equipment used for treatment, and automated laboratory diagnostic equipment.

(4) Services and switchboards. Electrical service and switchboards serving the required ASC components shall be installed above the designated 100-year flood plain. Main switchboards shall be located in separate rooms, separated from adjacent areas with one-hour fire-rated enclosures containing only electrical switchgear and distribution panels and shall be accessible to authorized persons only. These rooms shall be ventilated to provide an environment free of corrosive or explosive fumes and gases, or any flammable and combustible materials. Switchboards shall be located convenient for use and readily accessible for maintenance as required by NFPA 70, Article 384. Overload protective devices shall operate properly in ambient temperatures.

(5) Panelboard. Panelboards serving normal lighting and appliance circuits shall be located on the same floor as the circuits they serve. Panelboards serving critical branch emergency circuits shall be located on each floor that has major users (operating rooms, special procedure room, etc.) and may also serve the floor above and the floor below. Panelboards serving life safety branch circuits may serve three floors, the floor where the panelboard is located, and the floors above and below.

(6) Wiring. All conductors for controls, equipment, lighting and power operating at 100 volts or higher shall be installed in metal or metallic raceways in accordance with the requirements of NFPA 70, Article 517. All surface mounted wiring operating at less than 100 volts shall be protected from mechanical injury with metal raceways to a height of seven feet above the floor. Conduits and cables shall be supported in accordance with NFPA 70, Article 300.

(7) Mechanical protection of the emergency system. The wiring of the emergency system shall be mechanically protected by installation in nonflexible metal raceways in accordance with NFPA 70, §517.30(C)(3).

(8) Lighting.

(A) Lighting intensity for staff and patient needs shall comply with guidelines for health care facilities set forth in the Illuminating Engineering Society of North America (IESNA) Handbook, 2000 edition, published by the IESNA, 120 Wall Street, Floor 17, New York, New York 10005.

(i) Consideration shall be given to controlling light intensity and wavelength to prevent harm to the patient's eyes.

(ii) Approaches to buildings and parking lots, and all spaces within buildings shall have fixtures that can be illuminated as necessary. All rooms including storerooms, electrical and mechanical equipment rooms, and all attics shall have sufficient artificial lighting so that all spaces shall be clearly visible.

(iii) Consideration shall be given to the special needs of the elderly. Excessive contrast in lighting levels that makes effective sight adaptation difficult shall be minimized.

(B) Means of egress and exit sign lighting intensity shall comply with NFPA 101, §§7.8, 7.9, and 7.10.

(C) Electric lamps, which may be subject to breakage or which are installed in fixtures in confined locations when near woodwork, paper, clothing, or other combustible materials, shall be protected by wire guards, or plastic shields.

(D) Ceiling mounted surgical and examination light fixtures shall be suspended from rigid support structures mounted above the ceiling.

(E) Operating rooms shall have general lighting in addition to local lighting provided by special lighting units at the surgical tables. Each fixed special lighting unit at the tables, except for portable units, shall be connected to an independent circuit.

(F) X-ray film illuminators for handling at least two films simultaneously shall be provided in each operating room and special procedure room. When the entire surgical suite is provided with digital imaging system capabilities the film illuminators may be omitted.

(9) Receptacles. Only listed hospital grade single-grounding or duplex-grounding receptacles shall be used in the operating rooms, special procedure rooms, postoperative recovery suite, and all patient care areas. This does not apply to special purpose receptacles.

(A) Installations of multiple-ganged receptacles shall not be permitted in patient care areas.

(B) Electrical outlets powered from the critical branch shall be provided in all patient care, procedure and treatment locations in accordance with NFPA 99, §4.4.2.2.2.3. At least one receptacle at each patient treatment or procedure location shall be powered from the normal power panel. All receptacles powered from the critical branch shall be colored red.

(C) Replacement of malfunctioning receptacles and installation of new receptacles powered from the critical branch in existing facilities shall be accomplished with receptacles of the same distinct color as the existing receptacles.

(D) All critical care area receptacles shall be identified. The face plate for the receptacle(s) shall have a non-removable label or be engraved indicating the panel and circuit number.

(E) In locations where mobile X-ray or other equipment requiring special electrical configuration is used, the additional receptacles shall be distinctively marked for the special use.

(F) Each receptacle shall be grounded to the reference grounding point by means of a green insulated copper equipment grounding conductor in accordance with NFPA 70, §517-13.

(G) Each operating room and special procedure room shall have at least four duplex receptacles located convenient to the head of the procedure table and one receptacle on the other walls.

(H) Each work table or counter shall have access to one duplex receptacle for every six feet of table or counter space or fraction thereof.

(I) A minimum of one duplex receptacle in each wall shall be installed in each work area or room other than storage or lockers.

(J) Appliances shall be grounded in accordance with NFPA 99, Chapter 9.

(K) Ground fault circuit interrupters (GFCI) receptacles shall be provided for all general use receptacles located within three feet of a wash basin or sink. When GFCI receptacles are used, they shall be connected to not affect other devices connected to the circuit in the event of a trip. Receptacles connected to the critical branch that may be used for equipment that should not be interrupted do not have to be GFCI protected. Receptacles in wet locations, as defined by NFPA 70, §517.20 and §517.21, shall be GFCI protected regardless of the branch of the electrical system serving the receptacle.

(10) Equipment.

(A) The following shall be powered from the Type I essential electrical system in accordance with the requirements of NFPA 99, §§3-4.2.2.3, when such a system is required for safe operation of the ASC referenced in paragraph (14) of this subsection.

(i) Boiler accessories including feed pumps, heat-circulating pumps, condensate return pumps, fuel oil pumps, and waste heat boilers shall be connected to the equipment system.

(ii) Ventilating system serving preoperative areas, operating rooms, and the postoperative recovery suite shall be connected to the equipment system in accordance with the requirements of NFPA 99, Chapter 3.

(B) Laser equipment shall be installed according to manufacturer recommendations and shall be registered with Department of State Health Services, Radiation Safety Licensing Branch, Post Office Box 149347, Austin, Texas 78714-9347.

(C) A "kill switch" shall be provided for disconnection of each HVAC serving the building in accordance with the requirements of NFPA 90A, §6.2.1.

(11) Wet patient care location. Wet patient care locations shall be protected against shock in accordance with the requirements of NFPA 99, §4.3.2.2.9.1.

(12) Grounding requirements. Fixed electrical equipment shall be grounded in accordance with the requirements of NFPA 99, §4.3.3.1, and NFPA 70, Article 517.

(13) Nurses calling systems.

(A) A nurse emergency calling system shall be installed in all toilets used by patients to summon nursing staff in an emergency. Activation of the system shall sound an audible signal which repeats every five seconds at a staffed location, and shall activate a distinct visible signal outside of toilet room where the call originated. The visible and audible signals shall be cancelable only at the patient calling station. Activation of the system shall also activate distinct visible signals in the clean workroom, in the soiled workroom, and if provided, in the nourishment station.

(B) A staff emergency assistance calling system station shall be located in each operating room, treatment room, examination room, postoperative recovery, and preoperative holding area to be used by staff to summon additional help in an emergency. Activation of the system shall sound an audible signal at a staffed location, indicate type and location of call on the system monitor, and activate a distinct visible signal in the corridor at the door. Additional visible signals shall be installed at corridor intersections in multi-corridor facilities. Distinct visible and audible signals shall be activated in the clean workroom, in soiled workroom, sterile processing room, equipment storage, and if provided, in the nourishment station.

(14) Essential electrical system. The essential electrical system shall comply with the requirements of NFPA 99, §4.4.

(A) A Type 1 essential electrical system shall be installed, maintained and tested in each ASC in accordance with requirements of NFPA 99, §4.4; NFPA 101, §20.2.9; and National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 2002 Edition.

(i) At least one autoclaving/sterilizing equipment shall be connected to the emergency electrical essential power system.

(ii) One electrical outlet connected to the life safety branch of the electrical system shall be provided adjacent to (or on) the emergency generator.

(iii) The battery charger for emergency lighting at the emergency generator shall be connected to the life safety branch of the electrical system.

(B) Fuel storage capacity for an on-site generator for a Type 1 essential electrical system shall allow continuous operation, under full load for eight hours of testing as required by NFPA 99, §4.4.4.1.1.2.

(C) When a vapor liquefied petroleum gas (LPG - natural gas) system is used, the 24-hour fuel capacity on-site is not required. The vapor withdrawal LPG system shall require a dedicated fuel supply.

(D) When the emergency generator(s) and electrical transformer(s) are located within the same area, they shall be located at least 10 feet apart.

(15) Fire alarm system. A fire alarm system which complies with NFPA 101, §20.3.4, and with NFPA 72, Chapter 6 requirements, shall be provided in each facility. The required fire alarm system components are as follows.

(A) A fire alarm control panel (FACP) shall be installed at a visual location such as the main lobby. A remote fire alarm annunciator listed for fire alarm service and installed at a continuously attended location and capable of indicating both visual and audible alarm, trouble, and supervisory signals in accordance with the requirements of NFPA 72 may be substituted for the FACP.

(B) Manual fire alarm pull stations shall be installed in accordance with NFPA 101, §20.3.4.

(C) Ceiling-mounted smoke detector(s) shall be installed in room containing the FACP when this room is not attended continuously by staff as required by NFPA 72, §4.4.5.

(D) Smoke detectors shall be installed in air ducts in accordance with NFPA 72, §5.14.4.2 and §5.14.5 and NFPA 90A, §6.4.2.

(E) Smoke detectors shall be installed in return air ducts in accordance with requirements of NFPA 72 §5.14.4.2.2 and §5.14.5 and NFPA 90A, §6.4.2.2.

(F) Fire sprinkler system water flow switches shall be installed in accordance with requirements of NFPA 101, §9.6.2; NFPA 13, §6.9; and NFPA 72, §8.5.3.3.3.4.

(G) Sprinkler system valve supervisory switches shall be installed in accordance with the requirements of NFPA 72, §6.8.5.5.

(H) A fire alarm signal notification which complies with NFPA 101, §9.6.3, shall be provided to alert occupants of fire or other emergency.

(I) Audible alarm indicating devices shall be installed in accordance with the requirements of NFPA 101, §20.3.4, and NFPA 72, §7.4.

(J) Visual fire alarm indicating devices which comply in accordance with the requirements of NFPA 72, §7.5.

(K) Devices for transmitting alarm for alerting the local fire brigade or municipal fire department of fire or other emergency shall be provided. The devices shall be listed for the fire alarm service by a nationally recognized laboratory, and be installed in accordance with such listing and the requirements of NFPA 72.

(L) Wiring for fire alarm detection circuits and fire alarm notification circuits shall comply with requirements of NFPA 70, Article 760.

§135.53. Elevators, Escalators, and Conveyors.

(a) Elevators. All buildings that have patient services located on other than the main entrance floor shall have electric or electrohydraulic elevators. The elevators shall be installed in sufficient quantity, capacity, and speed to ensure that the average interval of dispatch time will not exceed one minute, and average peak loading can be accommodated. Elevators shall also give access to all building levels normally used by the public. Escalators and conveyors are not required but, when provided, shall comply with these requirements and the requirement of §20.3 of the National Fire Protection Association 101, Life Safety Code, 2003 Edition (NFPA 101), published by the National Fire Protection Association. All documents published by the NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address and telephone number: Post Office Box 9101, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101, (800) 344-3555.

(b) Requirements for new elevators, escalators, and conveyors. New elevators, escalators and conveyors shall be installed in accordance with the requirements of Health and Safety Code, Chapter 754, Elevators, Escalators, and Related Equipment, and A17.1 Safety Code for Elevators and Escalators, 2000 edition, published by the American Society of Mechanical Engineers (ASME) and the American National Standards Institute (ANSI). All documents published by the ASME/ANSI as referenced in this section may be obtained by writing the ANSI, United Engineering Center, 345 East 47th Street, New York, New York 10017.

(1) Location. Elevators shall not open to an exit.

(2) Elevator car size. A facility located above the ground floor must have an elevator of sufficient size to accommodate a gurney available at all times. Minimum elevator car size shall be five feet wide and seven feet deep. When an operating room(s) is located on a different floor than the preoperative area or the postoperative recovery suite, a hospital-type elevator shall be provided. Cars of hospital-type elevators shall be at least five feet eight inches wide by eight feet six inches deep.

(3) Car door opening. The smallest elevator car door opening shall be at least three feet wide and seven feet high.

(4) Elevator and elevator shaft doors. When light beams are used for operating door opening devices, the beams shall be used in combination with door edge devices and shall be interconnected with a system of smoke detectors. The light control feature shall be disengaged when smoke is detected in any elevator lobby.

(5) Type of controls and alarms. Elevator call buttons, controls, and door safety stops shall be of a type that will not be activated by heat or smoke.

(6) Leveling. All elevators shall be equipped with an automatic leveling device of the two-way automatic maintaining type with an accuracy of one-half inch.

(7) Operation. All elevators, except freight elevators, shall be equipped with a two-way key operated service switch permitting cars to bypass all landing button calls and be dispatched directly to any floor.

(8) Accessibility of controls and alarms. Elevator controls, alarm buttons, and telephones shall be accessible to wheelchair occupants in accordance with the Americans with Disabilities Act.

(9) Smoke detection system. A smoke detection system for elevator recall shall be located in elevator lobbies, elevator machine rooms and at the top of elevator hoist ways as required by NFPA 72, §6.15.3.10.

(A) The elevator recall smoke detection system in new construction shall comply with requirements of American Society of Mechanical Engineers/American National Standards Institute (ASME/ANSI) A17.1, Safety Code for Elevators and Escalators, 2000 edition. The publications of the ASME/ANSI referenced in this section may be obtained by writing ASME/ANSI, United Engineering Center, 345 East 47th Street, New York, New York 10017.

(B) The elevator recall smoke detection system in existing ambulatory surgical centers (ASCs) shall comply with requirements of ASME/ANSI A17.3, Safety Code for Existing Elevators and Escalators, 2002 edition.

(10) Elevator machine rooms. Elevator machine rooms that contain solid-state equipment for elevators having a travel distance of more than 50 feet above the level of exit discharge or more than 30 feet below the level of exit discharge shall be provided with independent ventilation or air conditioning systems with the capability to maintain an operating temperature during fire fighter service operations. The operating temperature shall be established by the elevator equipment manufacturer's specifications and shall be posted in each such elevator machine room. When standby power is connected to the elevator, the machine room ventilation or air conditioning shall be connected to standby power. These requirements are not applicable to existing elevators.

(11) Testing. An ASC shall have all elevators and escalators routinely and periodically inspected and tested as specified in ASME/ANSI A17.1, Safety Code for Elevators and Escalators, 2000 edition. All elevators equipped with fire fighter service shall be subject to a monthly operation with a written record of the findings made and kept on the premises as required by NFPA 101, §9.4.6.

(12) Certification. An ASC shall obtain a certificate of inspection evidencing that the elevators, escalators, conveyors, and related equipment were inspected in accordance with the requirements in Health and Safety Code (HSC), Chapter 754, Subchapter B, and determined to be in compliance with the safety standards adopted under HSC, §754.014, administered by the Texas Department of Licensing and Regulation. The certificate of inspection shall be on record in each ASC.

(c) Requirements for existing elevators, escalators, and conveyors. Existing elevators and escalators shall comply with the ASME/ANSI A17.3, Safety Code for Elevators and Escalators, 1996 edition. All existing elevators having a travel distance of 25 feet or more above or below the level that best serves the needs of emergency personnel for fire fighting or rescue purposes shall conform to Fire Fighters' Service Requirements of ASME/ANSI A17.3 as required by NFPA 101, §9.4.3.

§135.54. Preparation, Submittal, Review and Approval of Plans, and Retention of Records.

(a) General.

(1) Ambulatory surgical center (ASC) owners/operators shall not begin construction of a new building, additions to or renovations or conversions of existing buildings until the department approves final construction documents.

(2) Plans and specifications describing the construction of new buildings and additions to or renovations and conversions of existing buildings shall be prepared by registered architects and/or licensed professional engineers and meet the requirements of this subchapter.

(3) The names of spaces used in the functional program narrative, preliminary documents, final construction documents and specifications shall be consistent with the names of the spaces used in this chapter.

(4) The department shall notify the ASC owner/operator of the result of its review of each type of submission discussed in this section.

(5) The ASC owner/operator shall respond to all department requests for additional information, including providing a plan of correction for deficiencies cited by the department.

(6) Once final construction documents are approved, the ASC owner/operator shall request inspections in accordance with §135.55 of this title (relating to Construction, Inspections, and Approval of Project).

(7) When construction is delayed for longer than one year from the plan approval or self-certification approval date, construction

documents shall be resubmitted to the department for review and approval. The plans shall be accompanied by a new application for plan review and functional program narrative.

(8) The ASC owner/operator shall provide written notification to the department when a project has been placed on hold, canceled, or abandoned.

(9) The department may close a project file after one year of assigning an application number to a project if the project has been placed on hold.

(b) Submission of projects and assignment of application number.

(1) The ASC owner/operator or representative shall submit the following items to the department in care of the mailing or overnight delivery address that appears on the application for plan review:

(A) a completed and signed application for plan review. The application for plan review may be obtained by calling the department's architectural review group by telephone at (512) 834-6649 or visit the Architectural Review at www.dshs.state.tx.us/hfp;

(B) a functional program narrative in accordance with subsection (d) of this section; and

(C) final construction documents in accordance with subsection (f) of this section.

(2) The cost of submitting documents/plans and specifications shall be borne by the sender.

(3) Once the department has determined that the submission required in paragraph (1) of this subsection is complete, the department shall assign an application number to the project that shall be referenced on all documents and correspondence related to the project. Final construction documents shall be reviewed in the chronological order received.

(4) All deficiencies noted in the final plan review shall be satisfactorily resolved before approval of project for construction will be granted.

(5) Construction shall not begin until the ASC owner/operator of the facility receives written notification from the department that the final construction documents have been approved.

(c) Feasibility conference. An ASC owner/operator or representative may request a feasibility conference. A feasibility conference is an informal meeting between a member of the department's architectural review group staff and the ASC owner/operator or representative to determine the feasibility of a project, for consultation and informational purposes, and to facilitate and establish understanding of compliance with the rules and codes.

(1) A feasibility conference is not a substitute for plan review.

(2) An ASC owner/operator or representative may schedule a feasibility conference by calling the department's architectural review group by telephone number (512) 834-6649.

(3) The ASC owner/operator or representative shall provide at the feasibility conference the items in subsection (b)(1)(A) - (C) of this section and a set of preliminary plans or final construction documents.

(4) The ASC owner/operator or representative is responsible for recording conference notes and shall submit the notes to the department.

(d) Functional program narrative. The ASC owner/operator shall submit a functional program narrative to the department with each new project in accordance with subsection (b)(1)(B) of this section. The functional program narrative shall be presented on facility letterhead, signed by ASC administration, include the functional description of each space, and the following:

(1) departmental relationships and other basic information relating to the fulfillment of the facility's objectives;

(2) a description of each function to be performed, approximate space needed for these functions, occupants of the various spaces, projected occupant load, types of equipment required, interrelationship of various functions and spaces, and any special design features;

(3) energy conservation measures, included in building, mechanical, and electrical designs;

(4) a description of the type of asepsis control in diagnostic and treatment areas; and

(5) the type of construction (existing or proposed) as stated in §20.1.6 of National Fire Protection Association 101, Life Safety Code, 2003 Edition (NFPA 101), published by the National Fire Protection Association. All documents published by the NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address and telephone number: 1 Batterymarch Park, Quincy, Massachusetts 02169-7471, (800) 344-3555.

(e) Preliminary documents. The department may request preliminary documents. If requested by the department, the submission shall consist of the items in subsection (b)(1)(A) - (C) of this section, preliminary plans, and outline specifications. The documents shall contain sufficient information to establish the project scope, description of functions to be performed, project location, required fire safety and exiting requirements, building construction type, compartmentation showing fire and smoke barriers, and the usage of all spaces, areas, and rooms on every floor level.

(f) Final construction documents. Final construction documents and specifications shall be submitted to the department for review and approval prior to start of construction. All final documents and specifications shall be appropriately sealed and signed by the project registered architect and professional engineer(s) licensed by the State of Texas.

(1) Submission of final construction documents. The ASC owner/operator shall submit to the department for review and approval the items in subsection (b)(1)(A) - (C) of this section (if not previously submitted with preliminary documents) and one set of final construction documents and specifications covering the construction of new buildings or alterations, additions, conversions, modernizations, or renovations to existing buildings.

(2) Preparation of final construction documents. Construction documents shall be well-prepared so that clear and distinct prints may be obtained, shall be accurately and adequately dimensioned, shall include all necessary explanatory notes, schedules, and legends, and shall be adequate for contract purposes. Compliance with model building codes and this chapter shall be indicated. The type of construction, as classified by National Fire Protection Association 220, Standard on Types of Building Construction, 1999 Edition, shall be provided for existing and new facilities. Final plans shall be drawn to a sufficiently large-scale to clearly illustrate the proposed design but not less than one-eighth inch equals one foot. All spaces shall be identified by usage (using the names of spaces used in this chapter) on all plans (architectural, fire safety, mechanical, electrical, etc.) submitted. Separate drawings shall be prepared for each of the following branches of work.

(A) Architectural plans. Architectural drawings shall include the following:

(i) a map of the area within a 500 foot radius of the facility site shall be provided and any hazardous and undesirable location noted in §135.52(a) of this title (relating to Construction Requirements for a New Ambulatory Surgical Center) shall be identified;

(ii) site plan showing all new topography, newly established levels and grades, existing structures on the site (if any), new buildings and structures, roadways, parking, walks, easement, overhead or underground utilities or service lines, and the extent of the areas to be landscaped. All structures which are to be removed under the construction contract and improvements shall be shown. A general description of the immediate area surrounding the site shall be provided;

(iii) plan of each floor and roof to include fire and smoke separation, means of egress, and identification of all spaces;

(iv) schedules of doors, windows, and finishes;

(v) elevations of each facade;

(vi) sections through building; and

(vii) scaled details as necessary.

(B) Fire safety plans. These drawings shall be provided for all newly constructed buildings, conversions of existing buildings for facilities, additions to existing licensed facilities, and remodeled portions of existing buildings containing licensed facilities. Fire safety plans shall be of a sufficiently large-scale to clearly illustrate the proposed design but not less than one-sixteenth inch equals one foot and shall include the following information:

(i) separate fire safety plans (preferably one floor plan per sheet) shall indicate location of fire protection rated walls and partitions, location and fire resistance rating of each fire damper, and the required means of egress (corridors, stairs, exits, exit passageways);

(I) when a new building is to contain a proposed facility, when an existing building is converted to a facility, or when an addition is made to an existing facility building, plans of each floor and roof shall be provided;

(II) when a portion of a building is remodeled or when a new service is added, only the plan of the floor where the remodeling will take place or new service will be introduced, and the plan of the floor of discharge shall be provided;

(ii) designated smoke compartments with floor areas of each compartment, location, and fire resistance rating (one or two hour) of each smoke partition, location, type, and fire resistance rating of each smoke damper;

(iii) location of all required fire alarm devices, including all fire alarm control panels, manual pull stations, audible and visual fire alarm signaling devices, smoke detectors (ceiling and duct-mounted), fire alarm annunciators, fire alarm transmission devices, fire sprinkler flow switches, and control valve supervisory switches on each of the floor plans; and

(iv) areas protected with fire sprinkler systems (pendant, sidewall or upright, normal or quick response, and temperature rating shall be indicated), stand pipe system risers and sizes with valves and inside and outside fire department connections, fire sprinkler risers and sizes, location and type of portable fire extinguishers.

(C) Equipment drawings. Equipment drawings shall include the following:

(i) all equipment necessary for the operation of the facility as planned. The design shall indicate provisions for the installation of large and special items of equipment and for service accessibility;

(ii) fixed equipment (equipment which is permanently affixed to the building or which must be permanently connected to a service distribution system designed and installed during construction for the specific use of the equipment). The term "fixed equipment" includes items such as laundry extractors, walk-in refrigerators, communication systems, and built-in casework (cabinets);

(iii) movable equipment (equipment not described in clause (ii) of this subparagraph as fixed). The term "moveable equipment" includes wheeled equipment, plug-in type monitoring equipment, and relocatable items; and

(iv) equipment which is not included in the construction contract but which requires mechanical or electrical service connections or construction modifications. The equipment described in this clause shall be identified on the drawings to ensure its coordination with the architectural, mechanical, and electrical phases of construction.

(D) Structural drawings. Structural drawings shall include:

(i) plans for foundations, floors, roofs, and all intermediate levels;

(ii) a complete design with sizes, sections, and the relative location of the various members;

(iii) a schedule of beams, girders, and columns;

(iv) dimensioned floor levels, column centers, and offsets;

(v) details of all special connections, assemblies, and expansion joints; and

(vi) special openings and pipe sleeves dimensioned or otherwise noted for easy reference.

(E) Mechanical drawings. Mechanical drawings shall include:

(i) complete ventilation systems (supply, return, exhaust), all fire and smoke partitions, locations of all dampers, registers, and grilles, air volume flow at each device, and identification of all spaces (e.g., corridor, patient room, operating room);

(ii) boilers, chillers, heating and cooling piping systems (steam piping, hot water, chilled water), and associated pumps;

(iii) cold and warm water supply systems, water heaters, storage tanks, circulating pumps, plumbing fixtures, emergency water storage tank(s) (if provided), and special piping systems such as for deionized water;

(iv) nonflammable medical gas piping (oxygen, compressed medical air, vacuum systems, nitrous oxide), emergency shutoff valves, pressure gages, alarm modules, gas outlets;

(v) drain piping systems (waste and soiled piping systems, laboratory drain systems, roof drain systems);

(vi) fire protection piping systems (sprinkler piping systems, fire standpipe systems, water or chemical extinguisher piping system for cooking equipment);

(vii) piping riser diagrams, equipment schedules, control diagrams or narrative description of controls, filters, and location of all duct-mounted smoke detectors; and

(viii) laboratory exhaust and safety cabinets.

(F) Electrical drawings. Electrical drawings shall include:

(i) electrical service entrance with service switches, service feeders to the public service feeders, and characteristics of the light and power current including transformers and their connections;

(ii) location of all normal electrical system and essential electrical system conduits, wiring, receptacles, light fixtures, switches, and equipment which require permanent electrical connections, on plans of each building level:

(I) light fixtures marked distinctly to indicate connection to critical or life safety branch circuits or to normal lighting circuits; and

(II) outlets marked distinctly to indicate connection to critical, life safety, or normal power circuits;

(iii) telephone and communication, fixed computers, terminals, connections, outlets, and equipment;

(iv) nurses calling system showing all stations, signals, and annunciators on the plans;

(v) in addition to electrical plans, single line diagrams prepared for:

(I) complete electrical system consisting of the normal electrical system and the essential electrical system including the on-site generator(s), transfer switch(es), emergency system (life safety branch and critical branch), equipment system, panels, subpanels, transformers, conduit, wire sizes, main switchboard, power panels, light panels, and equipment for additions to existing buildings, proposed new facilities, and remodeled portions of existing facilities. Feeder and conduit sizes shall be shown with schedule of feeder breakers or switches;

(II) complete nurses calling system with all stations, signals, annunciators, etc. with room number noted by each device and indicating the type of system (nurses regular calling system, nurses emergency calling system, or staff emergency assistance calling system);

(III) a single line diagram of the complete fire alarm system showing all control panels, signaling and detection devices and the room number where each device is located; and

(vi) schedules of all panels indicating connection to life safety branch, critical branch, equipment system or normal system, and connected load at each panel.

(3) Construction document changes. Any changes to the final construction documents which affect or change the function, design, or designated use of an area shall be submitted to the department for approval prior to authorization of the modifications.

(g) Special submittals.

(1) Self-certification.

(A) In an effort to shorten the plan review and approval process, the ASC owner/operator or representative may request approval of final construction documents under the self-certification review process.

(i) The owner/operator shall submit the items in subsection (b)(1)(A) - (C) of this section and a completed self-certification form, signed by the ASC owner/operator, architect of record, and engineer(s) of record attesting that the plans and specifications are based upon and comply with the requirements of this chapter.

(ii) By signing and submitting the self-certification form, the ASC owner/operator accepts the following conditions.

(I) The department retains the right to review the final construction documents, conduct inspections of the project, and withdraw its approval.

(II) The ASC owner/operator has a continuing obligation to make any changes the department requires to comply with the licensing rules whether or not physical plant construction or alterations have been completed.

(III) The ASC owner/operator is ultimately responsible for compliance with Health and Safety Code, Chapter 243, Texas Ambulatory Surgical Center Licensing Act, and this chapter.

(B) The department shall review the request for self-certification and notify the ASC owner/operator if the request is approved or denied. If denied, the department shall review the final construction documents in the chronological order in which the documents were received. Construction shall not begin until the final construction documents have been reviewed and approved.

(2) Minor project. If a ASC owner/operator believes that a proposed project is a minor project, the ASC owner/operator shall provide to the department a brief written description of the proposed project and floor plans of the areas of work. The minor project request shall be mailed or faxed.

(A) If it is determined that the proposed project is a minor project, the department shall notify the ASC owner/operator of the approval, and state the number of inspections that shall be required. A minimum of one inspection shall be conducted.

(B) The department shall notify the ASC owner/operator that a proposed project is not approved as a minor project, if the project involves any of the following:

(i) remodeling or alterations which involve alterations to load bearing members or partitions;

(ii) a change in functional operation;

(iii) affects fire safety (e.g., modifications to the fire, smoke, and corridor walls);

(iv) adds services for which the ASC is not currently licensed; and

(v) significantly changes the mechanical, electrical, plumbing, fire protection, or piped medical system.

(C) The ASC owner/operator shall submit final construction documents in accordance with subsection (f) of this section if the department determines the project is not a minor project.

(3) Fire sprinkler systems.

(A) When the sole purpose of a project is installation of a sprinkler system, whether a partial or complete system, the ASC owner/operator shall submit to the department for approval the items in subsection (b)(1)(A) - (C) of this section and sprinkler documents.

(B) Fire sprinkler systems shall comply with the requirements of National Fire Protection Association 13, Standard for the Installation of Sprinkler Systems, 2002 Edition (NFPA 13), and shall be designed or reviewed by an engineer who is registered by the

Texas Board of Professional Engineers in fire protection specialty or is experienced in hydraulic design and fire sprinkler system installation. A short resume shall be submitted if registration is not in fire protection specialty.

(i) Fire sprinkler working plans, complete hydraulic calculations and water supply information shall be prepared in accordance with NFPA 13, §§14.1, 14.2 and 14.3, for new fire sprinkler systems, alterations of and additions to existing ones.

(ii) One set of fire sprinkler working plans, calculations, and water supply information shall be forwarded to the department together with the professional engineer's (P.E. licensed in the State of Texas) certification letter stating that the sprinkler system design complies with the requirements of NFPA 13. Certification of the fire sprinkler system shall be submitted prior to system installation.

(iii) Upon completion of the fire sprinkler system installation and any required corrections, written certification by the engineer, stating that the fire sprinkler system is installed in accordance with NFPA 13 requirements, shall be submitted prior to or with the written request for the final construction inspection of the project.

(h) Retention of drawings, manuals, and design data.

(1) As built drawings. Upon occupancy of the building or portion thereof, the owner shall retain as part of the ASC's permanent records, a complete set of legible architectural plans of each building level, fire safety plans as described in subsection (f)(2)(B) of this section for each floor reflecting fire safety requirements, and all single line diagrams described in subsection (f)(2)(F)(v) of this section, drawings for fixed equipment, and mechanical and electrical systems, as installed or built.

(2) Manuals. Upon completion of the contract, the owner shall retain as part of the ASC's permanent records a complete set of manufacturers' operating, maintenance, and preventive maintenance instructions; parts lists; and procurement information with numbers and a description for each piece of equipment. Facility staff shall also be provided with instructions on how to properly operate systems and equipment. Required information shall include energy ratings as needed for future conservation calculations.

(3) Design data. The owner shall retain in the ASC's permanent records complete design data for the facility. This shall include structural design loadings; summary of heat loss assumption and calculations; estimated water consumption; medical gas outlet listing; list of applicable codes; and electric power requirements of installed equipment. All such data shall be supplied to facilitate future alterations, additions, and changes, including, but not limited to, energy audits and retrofit for energy conservation.

§135.55. Construction, Inspections, and Approval of Project.

(a) Construction.

(1) Major construction. Construction, of other than minor alterations, shall not commence until the final plan review deficiencies have been satisfactorily resolved, the appropriate licensing fee has been paid, and the department has issued a letter granting approval to begin construction. Such authorization does not constitute release from the requirements contained in this chapter. If the construction takes place in or near occupied areas, adequate provision shall be made for the safety and comfort of occupants.

(2) Construction commencement notification. The architect of record or the ambulatory surgical center (ASC) owner/operator shall provide written notification to the department when construction will commence. The department shall be notified in writing of any change in the completion schedules.

(3) Completion. Construction shall be completed in compliance with the construction documents including all addenda or modifications approved for the project.

(b) Construction inspections. All ASCs including those which maintain certification under Title XVIII of the Social Security Act (42 United States Code, §§1395 et seq), and those which maintain accreditation by a Centers for Medicare and Medicaid Services-approved organization are subject to construction inspections.

(1) Number of construction inspections. A minimum of two construction inspections of the project is generally required for the purpose of verifying compliance with Subchapters B and C of this chapter and the approved plans and specifications. The final plan approval letter or the self-certification approval letter shall inform the architect of record and the owner as to the minimum number of inspections required for the project.

(2) Requesting an inspection. The architect of record or the ASC owner/operator shall request an inspection by submitting, at least three weeks in advance of the requested inspection date, an application for inspection for each intermediate inspection, final inspection, and reinspection requested. Inspection requests by contractors shall not be honored.

(A) The architect of record or the ASC owner/operator shall request an intermediate construction inspection to occur at approximately 80% completion. All major work above the ceiling shall be completed at the time of the intermediate inspection, however, ceilings shall not be installed.

(B) The architect of record or the ASC owner/operator shall request a final construction inspection at 100% completion. One hundred percent completion means that the project is completed to the extent that all equipment is operating in accordance with specifications, all necessary furnishings are in place, and patients could be admitted and treated in all areas of the project.

(3) Reinspections. Depending upon the number and nature of the deficiencies cited during the final inspection, the inspector may require that a reinspection be conducted to confirm correction of all deficiencies cited. The inspector may also require a reinspection, if he determines that the project was not sufficiently complete to warrant a final inspection. The request for reinspection shall be submitted in accordance with paragraph (2) of this subsection.

(c) Approval of project. Patients and staff shall not occupy a new structure or remodeled or renovated space until approval has been received from the local building and fire authorities and the department.

(1) Documentation requirements. The ASC owner/operator shall submit the following documents to the department before the project will be approved:

(A) written approval of the project by the fire authority;

(B) a certificate of occupancy for the project issued by the local building authority;

(C) a copy of a letter or certification from a professional engineer (P.E.) licensed in the State of Texas indicating the fire sprinkler working plans, hydraulic calculation, the testing, and field inspection of the installation of the new or modified sprinkler system is in compliance with the requirements of NFPA 13, Standard for the Installation of Sprinkler Systems, 2002 Edition, if applicable. A copy of a letter or certification of changes in existing fire sprinkler system is not required, when relocation of not more than twenty sprinkler heads and hydraulic calculation is involved;

(D) fire alarm system certification (form FML-009A of the State Fire Marshal's Office), if applicable;

(E) a signed copy of a letter of certification from a qualified certification agency or individual for the piped-in medical gas system that was installed or modified and verification inspection testing in this project in accordance with §135.52(h)(6)(C)(iv), (x) and (xi) of this title (relating to Construction Requirements for a New Ambulatory Surgical Center), if applicable;

(F) a copy of the test and a letter from the electrical contractor certifying that the electrical system was tested and complies with the standards of NFPA 99, Health Care Facilities, 2002 Edition, §4.3.2.2.8 (Special Grounding) and §4.3.3.1 (Grounding System Testing), if applicable to the project;

(G) a copy of documentation indicating the flame spread rating and the smoke development rating of any wall covering installed in this project. A signed letter or statement corroborating the installation of the product in the project shall be provided;

(H) a copy of documentation indicating that draperies, curtains (including cubicle curtains), and other similar loosely hanging furnishings and decorations are flame-resistant as demonstrated by passing both the small and large-scale tests of NFPA 701, Standard Methods of Fire Tests for Flame-Resistant Textiles and Films, 1999 Edition, as required by NFPA 101, §18-7.5, and a signed letter or statement corroborating the installation of the product in the project;

(I) a written plan of correction signed by the ASC owner/operator for any deficiencies noted during the final inspection; and

(J) any other documentation or information required or requested due to the type of the project.

(2) Temporary occupancy approval

(A) If, during the final inspection, the inspector finds only a few minor deficiencies that do not jeopardize patient health, safety and welfare, the inspector may grant temporary approval for occupancy by staff only contingent upon the documents listed in paragraph (1)(A) - (E) of this subsection being provided to and approved by the inspector at the time of the final inspection. The inspector shall issue a completed signed final architectural inspection form as testament for temporary approval for occupancy by staff only. The ASC shall complete the licensing process and receive a license before patients may be admitted or treated.

(B) Temporary approval for occupancy allows the ASC owner/operator to occupy the project. However, the ASC owner/operator shall submit the documents required in paragraph (1)(F) - (J) of this subsection before the project receives final approval.

(3) Final approval. Upon its receipt and acceptance of the documents required in paragraph (1) of this subsection, the department shall issue written final approval of the project.

§135.56. Construction Tables.

(a) Table 1. Ventilation requirements for ambulatory surgical centers.
Figure: 25 TAC §135.56(a)

(b) Table 2. Filter efficiencies for central ventilation and air conditioning systems.
Figure: 25 TAC §135.56(b)

(c) Table 3. Station outlets for oxygen, vacuum, and medical air systems.
Figure: 25 TAC §135.56(c)

(d) Table 4. Flame spread and smoke production limitations for interior finishes.
Figure: 25 TAC §135.56(d)

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806192
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 458-7111 x6972

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER P. LICENSING AND EXAMINATION OF THIRD PARTY ADMINISTRATORS

28 TAC §§7.1601 - 7.1617

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

The Texas Department of Insurance proposes the repeal of Subchapter P, §§7.1601 - 7.1617, concerning licensing and examination of third party administrators. This repeal is necessary because the Department is proposing a new subchapter for adoption that implements House Bill (HB) 472, enacted by the 80th Legislature, Regular Session, effective September 1, 2007, which amends the Insurance Code Chapter 4151. The Insurance Code Chapter 4151 regulates administrators, entities which are delegated authority for claims adjustment and settlement and premium collection. HB 472 enacts significant changes to the Insurance Code Chapter 4151, including requiring persons providing administrative services in connection with workers' compensation benefits in this state to be regulated by the Department under the Insurance Code Chapter 4151 and increasing the reporting, contracting, and oversight requirements for all administrators regulated by the Department. As a result, the proposed new subchapter is necessary to implement these new statutory requirements. Specifically, the proposed new subchapter eliminates outdated and inapplicable requirements; defines the scope of the proposed new subchapter and updates the terms to be used in the proposed new subchapter; streamlines the application process for a certificate of authority under the Insurance Code Chapter 4151; prescribes new fingerprinting requirements; clarifies notification requirements related to changes in the ownership or control of an administrator or applicant and in the facts and circumstances affecting the issuance

of a certificate of authority under the Insurance Code Chapter 4151; prescribes requirements relating to fidelity bonds and annual reporting requirements; clarifies the format and content of financial statements required under the Education Code for certain administrators; prescribes requirements for the review and on-site audit of certain administrators; prescribes requirements related to fiduciary bank accounts; clarifies the content of written agreements required under the Insurance Code Chapter 4151; specifies certain prohibited transactions; prescribes requirements related to the transfer and maintenance of books and records; provides clarification of hazardous or injurious operating conditions; and establishes new application, annual report, and examination fees. The proposed new subchapter is also published in this issue of the *Texas Register.*

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner for the Financial Division, has determined that for each year of the first five years the proposed repeal will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposed repeal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that for each year of the first five years the proposed repeal is in effect, the anticipated public benefit will be the elimination of obsolete regulations. There will be no economic cost to any individuals, insurers, or other Department regulated entities, regardless of size, as a result of the proposed repeal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the Department has determined that the proposed repeal will not have an adverse economic effect on any small or micro business because the proposal simply repeals unnecessary and obsolete rules and does not impose any new requirements or costs with which small or micro businesses must comply. Therefore, in accordance with the Government Code §2006.002(c), the Department is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposed repeal and that this proposed repeal 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.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposed repeal must be submitted no later than 5:00 p.m. on January 5, 2009, 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 comments must be simultaneously submitted to Danny Saenz, Senior Associate Commissioner for the Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of §§7.1601 - 7.1617 is proposed pursuant to the Insurance Code §4151.006 and §36.001. The Insurance Code §4151.006 provides that the Commissioner may adopt, in the manner prescribed by Chapter 36, Subchapter A, rules that are fair, reasonable, and appropriate to augment and implement Chapter 4151, including rules establishing financial standards, reporting requirements, and required contract provisions. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by the proposed repeal: Insurance Code §4151.006

§7.1601. Definitions.

§7.1602. Forms Relating to Regulation and Exemption of Administrators under the Insurance Code, Article 21.07-6.

§7.1603. Application for Certificate of Authority.

§7.1604. Application Denial, Suspension, Cancellation, or Revocation.

§7.1605. Application Procedures.

§7.1606. Exemption from Department Licensing and Regulation for Certain Administrators.

§7.1607. Identification and Reporting Requirements for Certain Insurers and Health Maintenance Organizations.

§7.1608. Fees.

§7.1609. Prohibited Transactions.

§7.1610. On-Site Visits.

§7.1611. Cease and Desist Orders.

§7.1612. Supplemental Information/Annual Report.

§7.1613. Fidelity Bond.

§7.1614. Maintenance Tax.

§7.1615. Severability.

§7.1616. Limited Certificate of Authority for Non-Texas-Licensed Third Party Administrators for Multi-Jurisdictional Impaired Insurance Companies Estate Administration.

§7.1617. School District Group Health Coverage Contracts.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806109
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-6327

SUBCHAPTER P. ADMINISTRATORS

28 TAC §§7.1601 - 7.1618

The Texas Department of Insurance proposes new §§7.1601 - 7.1618, concerning administrators. The proposed new sections are necessary to implement House Bill (HB) 472, enacted by the 80th Legislature, Regular Session, effective September 1, 2007, which amends the Insurance Code Chapter 4151. The Department is simultaneously proposing the repeal of existing §7.1601 (relating to Definitions); §7.1602 (relating to Forms Relating to Regulation and Exemption of Administrators under the Insurance Code, Article 21.07-6); §7.1603 (relating to Application for Certificate of Authority); §7.1604 (relating to Application Denial, Suspension, Cancellation, or Revocation); §7.1605 (relating to Application Procedures); §7.1606 (relating to Exemption from Department Licensing and Regulation for Certain Administrators); §7.1607 (relating to Identification and Reporting Requirements for Certain Insurers and Health Maintenance Organizations); §7.1608 (relating to Fees); §7.1609 (relating to Prohibited Transactions); §7.1610 (relating to On-Site Visits); §7.1611 (relating to Cease and Desist Orders); §7.1612 (relating to Supplemental Information/Annual Report); §7.1613 (relating to Fidelity Bond); §7.1614 (relating to Maintenance Tax); §7.1615 (relating to Severability); §7.1616 (relating to Limited Certificate of Authority for Non-Texas-Licensed Third Party Administrators for Multi-Jurisdictional Impaired Insurance Companies Estate Administration); and §7.1617 (relating to School District Group Health Coverage Contracts). The proposed repeal of these sections is also published in this issue of the *Texas Register.* This proposal includes new proposed sections to replace the repealed sections.

The following paragraphs generally discuss the significant changes to the Insurance Code Chapter 4151 as a result of HB 472. They also address the Department's proposed implementation of the reporting, oversight, and contracting requirements of the Insurance Code Chapter 4151. This general discussion is followed by a detailed section-by-section overview of the proposal.

Applicability of Proposed New Rules

HB 472 enacts a significant change to the Insurance Code Chapter 4151 that specifically affects a person providing administrative services in connection with workers' compensation benefits in this state. HB 472 amends the definition of the term administrator in the Insurance Code §4151.001(1) to include a person that in connection with workers' compensation benefits: (i) collects premiums or contributions from residents of this state; and/or (ii) adjusts or settles claims for residents of this state. Consequently, a person that provides these workers' compensation administrative services that was previously excluded from the requirements of the Insurance Code Chapter 4151 may now be subject to the Chapter 4151 requirements. Since the enactment of HB 472, the Department has received several inquiries regarding the applicability of the Insurance Code Chapter 4151 and the implementing rules. As a result, the Department has determined that it is necessary to clarify who is subject to the requirements of the proposed new rules, while remaining consistent with the provisions of the Insurance Code Chapter 4151.

Proposed new §7.1601 specifies the scope and applicability of the proposed new rules. Proposed new §7.1601(a) provides that, except as otherwise provided by the Insurance Code Chapter 4151 or the proposed new rules, the proposed new rules apply to a person acting as or holding itself out as an administrator in any capacity. This applicability is regardless of whether the person holds another authorization pursuant to the Insurance Code or the Labor Code. The issue of whether a particular person is subject to the proposed new subchapter depends entirely upon whether the person is acting as or holding itself out as an administrator, as that term is defined in proposed new §7.1602(1). Proposed new §7.1602(1) incorporates the statutory definition of the term administrator that is in the Insurance Code §4151.001(1). Section 4151.001(1) defines an administrator as a person who, in connection with annuities or life benefits, health benefits, accident benefits, pharmacy benefits, or workers' compensation benefits, collects premiums or contributions from or adjusts or settles claims for residents of this state. Further, §4151.001(1) provides that the term includes: (i) a delegated entity under the Insurance Code Chapter 1272; and (ii) a workers' compensation health care network authorized under the Insurance Code Chapter 1305 that administers a workers' compensation claim for an insurer, including an insurer that establishes or contracts with the network to provide health care services. Lastly, §4151.001(1) states that the term does not include a person described by the Insurance Code §4151.002. Thus, in order to determine whether a person meets the definition of the term administrator in proposed new §7.1602(1), it is necessary to evaluate the functions or services that the person is: (i) performing or providing; or (ii) offering to perform or provide. If the person qualifies for a specific exemption in the Insurance Code §§4151.002, 4151.0021, or 4151.004, the person is not an administrator for the purpose of these proposed rules. However, if the person does not qualify for one of these exemptions, and the person collects or offers to collect premiums or contributions from residents of this state or adjusts, settles, or offers to adjust or settle claims for residents of this state, in connection with annuities or life, health, accident, pharmacy, or workers' compensation benefits, the person meets the definition of administrator in the Insurance Code §4001.001(1) and proposed new §7.1602(1). This is true, regardless of whether the person is also performing or providing other functions or services that subject the person to compliance with the Insurance Code and the Labor Code. Proposed new §7.1601(a) makes clear that a person acting as or holding itself out as an administrator may be simultaneously subject to the requirements of other provisions of the Insurance Code, the Labor Code, or rules adopted thereunder if the functions or services performed or offered by that person require such regulation. In such event, the person will be required to hold all appropriate authorizations pursuant to the Insurance Code or the Labor Code in order to perform or offer the regulated functions and services. This is because a single authorization issued pursuant to the Insurance Code or the Labor Code does not authorize a person to perform or offer any additional regulated functions or services than those specified by the authorization. Each authorization relates to specific functions or services regulated under specific Insurance Code or Labor Code provisions. Therefore, a person must hold the applicable authorizations in order to perform or offer the corresponding regulated functions or services. The following example is provided for illustrative purposes. A person holds an authorization pursuant to the Insurance Code to operate a workers' compensation network in this state under the Insurance Code Chapter 1305. The person acts as or holds itself out as an administrator by settling a claim on behalf of the insurer that established or contracted with the network to provide health care services. In this example, the person will be simultaneously subject to the requirements of the Insurance Code Chapters 1305 and 4151 and the implementing rules. The person will be required to hold a separate authorization under each of these chapters in order to perform or provide the functions and services of a workers' compensation network and an administrator. This is because the autho-

rization issued to the person under Chapter 1305 to operate a workers' compensation network in this state only authorizes the specific functions regulated under Chapter 1305. That specific authorization does not authorize the person to perform other activities that are regulated under other Insurance Code or Labor Code provisions. In order for the person to act as an administrator under the Insurance Code Chapter 4151, the person must hold a separate authorization issued pursuant to Chapter 4151. The person will be subject to the requirements of Chapter 1305 and the implementing rules for its functions related to operating a workers' compensation healthcare network. The person will also be simultaneously subject to the requirements of the Insurance Code Chapter 4151 and the implementing rules for acting as or holding itself out as an administrator. In order for the person to engage in each of these regulated activities, the person must hold separate authorizations issued under the applicable Insurance Code or Labor Code statutes and must comply with the rules adopted under each of those statutes. Proposed new §7.1601(c) further reinforces this requirement by providing that an administrator must meet the requirements of the Insurance Code Chapter 4151 and the proposed new rules in addition to any other requirements that apply to that person as: (i) a delegated third party of a health maintenance organization (HMO) under the Insurance Code Chapter 1272; (ii) a workers' compensation healthcare network under the Insurance Code Chapter 1305; (iii) a qualified claims servicing contractor under the Labor Code Chapter 407; or (iv) an administrator or service company under the Labor Code Chapter 407A.

Proposed new §7.1601(b) is necessary to effectuate the legislative intent of HB 472 by providing uniform application of the requirements of the Insurance Code Chapter 4151 to all administrators to which that chapter applies. As such, proposed new §7.1601(b) requires an administrator performing administrative services on behalf of an HMO pursuant to the Insurance Code Chapter 1272 or a workers' compensation self-insurance group (group) pursuant to the Labor Code Chapter 407A to comply with the same requirements under the Insurance Code Chapter 4151 and the proposed new rules as an administrator performing administrative services on behalf of an insurer or plan sponsor. This will ensure that, to the extent possible, all administrators are treated equally under the Insurance Code Chapter 4151.

Proposed new §7.1601(d) makes clear that the proposed new rules do not apply to a person acting as or holding itself out as an administrator for an ERISA (The Employee Retirement Income Security Act of 1974) qualified employee welfare benefit plan that is exempt from regulation by this state. However, this exemption only applies with respect to the particular employee welfare benefit plan the person is administering. The following two examples are offered for illustrative purposes. In the first example, a person acts as or holds itself out as an administrator for several ERISA qualified employee welfare benefit plans offered by self-insured employers. The person, however, does not act as or hold itself out as an administrator for any other entity. Under proposed new §7.1601(d), the person will not be subject to the proposed new subchapter in any capacity, provided that: (i) each of the ERISA qualified employee welfare benefit plans for which the person acts as or holds itself out as an administrator is exempt from regulation by this state; and (ii) the person does not act as or hold itself out as an administrator for any other entity. In the second example, a person acts as or holds itself out as an administrator on behalf of an insurer and a group and for several ERISA qualified employee welfare benefit plans offered by self-insured employers. In this example, proposed new §7.1601(d) clarifies that the person will not be subject to the proposed new rules with respect to the ERISA qualified employee welfare plans, provided that each of the ERISA qualified employee welfare benefit plans for which the person acts as or holds itself out as an administrator is exempt from regulation by this state. In this same example, however, the person will be subject to the requirements of the proposed new rules for acting as or holding itself out as an administrator on behalf of the insurer and the group. This is because, under proposed new §7.1601(d), the new rules are not applicable only to the extent that the administration of an ERISA qualified employee welfare plan that is exempt from state regulation is involved. The administration of any other type of plan offered, established, or maintained by any other type of entity is not exempt from compliance with the proposed new rules under §7.1601(d).

Administrator Contractors and Administrator Subcontractors

The term administrator contractor is defined in proposed new §7.1602(3). The term administrator subcontractor is defined in proposed new §7.1602(4). An administrator contractor may choose to delegate some or all of its administrative functions to an administrator subcontractor. Neither the Insurance Code Chapter 4151 nor the proposed new rules prohibit the delegation of an administrative service from one administrator to another. However, proposed new §7.1603(b) is necessary to clarify the responsibilities and obligations of an administrator contractor and an administrator subcontractor in situations where an administrative service is delegated. Under proposed new §7.1603(b), both an administrator contractor and an administrator subcontractor are required to hold a certificate of authority under the Insurance Code Chapter 4151. This proposed new requirement is necessary to ensure appropriate oversight of all administrators regulated under the Insurance Code Chapter 4151. The more times that a particular function is delegated from one administrator to another, the greater the risk of non-performance or inadequate performance of that function. Additionally, because administrators are authorized under Chapter 4151 to: (i) collect premium and contributions from Texas residents; and (ii) adjust and settle claims for Texas residents, administrators often have access to and control of fiduciary bank accounts and other accounts designated for claims payment. While the authority of an administrator is largely determined by the particular person for which the administrator performs services, many administrators have great discretion in carrying out their delegated duties. Further, administrators often directly interact with Texas consumers, providers, physicians, staff members, and adjusters. Requiring all administrators, including administrator contractors and administrator subcontractors, to comply with the requirements of the Insurance Code Chapter 4151 and the proposed new rules will ensure appropriate oversight and more efficient regulation of all administrators. This should better protect the interests of the public and insurance consumers in this state.

Proposed Reporting Requirements

The Department is proposing new §§7.1606, 7.1607, and 7.1609 to implement the reporting requirements enacted in HB 472. Proposed new §7.1606 and §7.1607 are necessary to implement the Insurance Code §4151.052(b). Section 4151.052(b) requires an applicant for a certificate of authority or a certificate holder (administrator) under the Insurance Code Chapter 4151 to notify the Department of a change of control in the applicant's or administrator's ownership or of any other fact or circumstance affecting the applicant's or administrator's qualifications for a certificate of

authority. Section 4151.211 requires a person to seek approval from the Department in order to acquire an ownership interest resulting in a change of control of an administrator under Chapter 4151. Section 4151.211 also grants the Department the authority to disapprove a request for an acquisition of control. Further, if the Commissioner has not proposed to deny a request for an acquisition of control before the 61st day after the date on which the Department receives the required information, the request is deemed approved.

Proposed new §7.1606 prescribes notification requirements related to a change in control of an applicant or administrator. In order to clarify how the notification requirements apply to a change in control of an applicant or administrator, proposed new §7.1606(a) defines the meaning of term control; illustrates the manner in which control may be possessed; and describes when control exists for purposes of proposed new §7.1606. Section 7.1606(a) is necessary because proposed new §7.1606(b) requires an applicant or administrator to notify the Department in writing of a change of control in the ownership of the applicant or administrator within a specified time frame. The §7.1606(b) notice requirement is triggered when there is a change in the control of an applicant or administrator, including a change in any of the circumstances specified in §7.1606(a). The additional guidance provided to applicants and administrators by proposed new §7.1606(a) should assist them in identifying reportable changes of control in their own organizations. Proposed new §7.1606(c) prohibits an applicant or administrator from filing the notification required by proposed new §7.1606(b) until a request for an acquisition of control has been approved under the Insurance Code §4151.211. This requirement is necessary to harmonize the provisions of the Insurance Code §4151.052(b) and §4151.211. Section 4151.052(b) requires an applicant or administrator to notify the Department of a change of control in the applicant's or administrator's ownership not later than the 30th day after the effective date of the change. However, §4151.211 prohibits a person from acquiring an ownership interest in an administrator unless the person has first filed specified information with the Department and the Department has approved the filed information. The harmonization provided by proposed new §7.1606(c) serves two important purposes. First, it provides the Department an opportunity to evaluate a requested acquisition of control of an applicant or administrator under the Insurance Code §4151.211 prior to the change taking place. The Department's review of a requested acquisition of control of an applicant or administrator is essential to ensure that the proposed change does not impede the ability of the applicant or administrator to comply with the requirements of the Insurance Code Chapter 4151 or the proposed new rules. Further, it ensures that the proposed acquisition of control is appropriate and in the best interest of the public and the insurance consumers of this state. Proposed new §7.1606(c) also provides an opportunity to confirm whether an approved acquisition of control of an applicant or administrator actually occurs. This is necessary in order for the Department to remain informed of the significant changes in the operations of the applicant or administrator. This should result in more effective regulation of the applicant or administrator.

Proposed new §7.1607 is necessary to emphasize the importance of reporting material changes in facts and circumstances to the Department and maintaining continued compliance with the requirements of the Insurance Code Chapter 4151 and the proposed new rules. First, proposed new §7.1607(a) defines the phrase material change in fact or circumstance. It also provides a non-exhaustive list of examples of certain material changes in facts or circumstances that require notification to the Department under proposed new §7.1607(b) and (c). This sample list is provided to assist applicants and administrators in identifying specific changes in the facts or circumstances of their own organizations that require notification to the Department. Proposed new §7.1607(b) requires an administrator to notify the Department in writing of a material change in fact or circumstance within a specified time frame. This required notification is necessary to provide the Department with the opportunity to evaluate the reported change in order to determine its likely effect on the administrator. Further, if the reported change in fact or circumstance adversely reflects upon the integrity of the administrator, the Department must be able to take any necessary action as quickly as possible in order to prevent any injury to the public and insurance consumers of this state. Except as provided by proposed new §7.1606(b), proposed new §7.1607(c) requires an applicant to continually update the information filed in its initial application for a certificate of authority. This includes notifying the Department in writing of a material change in fact or circumstance, while the application is pending with the Department. This required notification is necessary to allow the Department to accurately assess an applicant's fitness for licensure. Further, if a reported change in the information filed in an applicant's initial application for a certificate of authority prevents an applicant from fulfilling the minimum requirements necessary for the Department to approve its application, the Department must be able to identify and assess those situations quickly and accurately. Proposed new §7.1607(d) and (e) are necessary to address an applicant's or administrator's continued compliance with the requirements of the Insurance Code Chapter 4151 and the proposed new rules. Proposed new §7.1607(d) requires an applicant or administrator to meet the requirements of Chapter 4151 and the proposed new rules as those requirements apply to any material change in fact or circumstance identified by an administrator pursuant to proposed new §7.1607(b) and to any change in information identified by an applicant pursuant to proposed new §7.1606(c). Proposed new §7.1607(e) requires an applicant and an administrator to maintain the qualifications necessary to obtain a certificate of authority under Chapter 4151 at all times. These proposed new requirements ensure that an applicant and an administrator maintain the integrity of their organizations by meeting the minimum statutory and regulatory requirements applicable to their organizations at all times. This includes when certain facts and circumstances affecting those organizations change over time. Requiring all applicants and administrators to continually monitor their own organizations for compliance with applicable statutory and regulatory requirements will help ensure the financial health and integrity of the administrators in this state.

Proposed new §7.1609 is necessary to implement the annual reporting requirements of HB 472 and to clarify the Insurance Code §4151.205(f). Proposed new §7.1609(a), (b), and (c) are necessary to prescribe the general requirements that apply to annual report filings under the Insurance Code §4151.205. Proposed new §7.1609(d) is necessary to clarify the exemption provided by the Insurance Code §4151.205(f) and to establish the certification requirements prescribed by the Insurance Code §4151.205(f). HB 472 amends the Insurance Code §4151.205(a) to require an administrator to file an annual report no later than June 30 each year with the Commissioner. Pursuant to the Insurance Code §4151.205(a) - (d), the annual report must: (i) cover the preceding calendar year; (ii) include an audited financial statement performed by an independent public accountant; and (iii) include notes or attachments to the financial statement that reflect the complete name and address

of each insurer in this state with which the administrator had an agreement during the preceding fiscal year. The Insurance Code §4151.205(f) exempts an administrator who meets certain conditions from filing the audited financial statement required by §4151.205(c). Section 4151.205(c) requires the exempted administrator to file a financial statement with the Commissioner, certified in the manner prescribed by Commissioner rule.

After the enactment of HB 472, the Department received inquiries regarding the applicability of the exemption allowed by the Insurance Code §4151.205(f). As a result, the Department is proposing new §7.1609(d)(1) to clarify that the exemption in the Insurance Code §4151.205(f) applies only to compensation received by an administrator for providing administrative services in Texas during the preceding calendar year. Thus, an administrator may qualify for the exemption in proposed new §7.1609(d)(1) if the administrator earns less than $10 million in compensation for providing administrative services in Texas, regardless of the amount of compensation the administrator earns for providing administrative services in other jurisdictions. Proposed new §7.1609(d)(1) is necessary to provide small administrators and administrators with limited business in Texas the less costly option of filing a certified financial statement with the Department instead of an audited financial statement performed by an independent public accountant as part of their annual report. Of the 751 administrators currently licensed by the Department, the Department estimates that 734 may qualify for the exemption in proposed new §7.1609(d)(1) and may be eligible to utilize that option for the annual report filing due June 30, 2009. By providing a less costly filing option for these administrators, the Department anticipates that many of these administrators may be able to realize additional cost savings. Although proposed new §7.1609(d)(1) provides an exemption from the financial filing requirements of proposed new §7.1609(c) for certain qualifying administrators, the Department's ability to effectively regulate these qualifying administrators will not be negatively affected by the use of this exemption. In an effort to maintain effective regulation of these administrators and to ensure that all necessary financial information is timely filed with the Department, the Department is proposing new §7.1609(d)(2) and (3). Proposed new §7.1609(d)(2) requires an administrator qualifying for the exemption in §7.1609(d)(1) to file an alternative financial statement with the Department that includes a certification form and is verified by at least two officers or other comparable responsible persons of the administrator. The certification form is adopted by reference in proposed new §7.1609(b)(1)(D) as Form Number FIN 490, Certification of Financial Statement, and prescribes the text and format of the required certification: This proposed requirement is important for several reasons. First, proposed new §7.1609(d)(2) makes clear that no administrator is completely exempt from filing a financial statement with the Department. While compliance with the requirements of proposed new §7.1609(d)(2) may be less costly or less onerous than compliance with the requirements of proposed new §7.1609(c), an administrator qualifying for the exemption in proposed new §7.1609(d)(1) is nonetheless required to file a sufficient financial statement with the Department under proposed new §7.1609(d)(2). This minimum threshold enables the Department to exercise appropriate oversight over the financial health of an administrator qualifying for the exemption in proposed new §7.1609(d)(1). Second, proposed new §7.1609(d)(2) requires at least two officers or other comparable responsible persons of an administrator qualifying for the exemption to execute a notarized certification and to verify the financial statement filed with the Department. This proposed requirement helps to ensure that the financial statements submitted to the Department are properly prepared, reviewed, and verified. Additionally, proposed new §7.1609(d)(2) requires some involvement and oversight from the responsible persons of the administrator. This should result in more efficient management of the administrator. Further, proposed new §7.1609(d)(3) requires that an administrator qualifying for the exemption in proposed new §7.1609(d)(1) meet all other requirements of proposed new §7.1609. This proposed requirement enables the Department to appropriately review the overall operating condition of an administrator, including its financial strength, claims payment history, account management, and compliance with applicable statutes, rules, and contract provisions, regardless of the type of financial statement filed by the administrator as part of its annual report. Proposed new §7.1609(e) provides that the Commissioner may request additional information as necessary to determine if an administrator is operating or conducting business in a potentially hazardous or injurious manner. This proposed new requirement is necessary to enable the Department to earlier detect an administrator's potentially hazardous or injurious operating condition. HB 472 enacts §4151.301(8), which permits the Department to take appropriate action to address situations in which an administrator is in a financial condition or is operating or conducting business in a manner that would render further transaction of business in this state hazardous or injurious to the public or insurance consumers of this state. The proposed new requirement is important in ensuring that corrective actions can be taken to alleviate or prevent harm to the public and insurance consumers of this state as a result of an administrator's hazardous or injurious operating condition at the earliest possible point in time.

Proposed Oversight Requirements

While the use of administrators may provide insurers, HMOs, plan sponsors, and groups with cost savings and access to persons with specialized claims payment and management skills, it also presents special challenges. The authority of an administrator is largely determined by the particular insurer, HMO, plan sponsor, or group that has delegated duties to the administrator. As a result, many administrators are given wide discretion in carrying out their delegated duties. Depending upon each insurer's, HMO's, plan sponsor's, or group's individual preference, an administrator may perform a wide variety of statutorily required duties on behalf of the insurer, HMO, plan sponsor, or group. Administrators are often delegated the responsibility of timely paying medical benefits and workers' compensation benefits on behalf of insurers, HMOs, plan sponsors, and groups. Many administrators also have control over an insurer's, HMO's, plan sponsor's, or group's books and records and claims files. While such delegation of discretion may be appropriate in many instances, the monitoring and oversight of these administrators is essential in ensuring their compliance with applicable statutes, rules, and contract provisions for the functions they perform. New §§7.1611, 7.1612, 7.1615, and 7.1616 are proposed to address the monitoring and oversight of administrators.

First, proposed new §7.1611 is necessary to implement the review and on-site audit requirements of the Insurance Code §4151.1042. HB 472 enacts the Insurance Code §4151.1042, which requires an insurer to ensure competent administration of its programs. Further, the Insurance Code §4151.1042 requires an insurer to conduct a semi-annual review of the operations of each of its administrators that, on the insurer's behalf, administers benefits for more than 100 certificate holders, injured employees, plan participants, or policyholders. Additionally, the

Insurance Code §4151.1042 requires an insurer to conduct a biennial on-site audit of the operations of each of its administrators that, on the insurer's behalf, administers benefits for more than 100 certificate holders, injured employees, plan participants, or policyholders. The proposed new requirements of §7.1611 impose a minimal level of oversight and responsibility on each insurer that utilizes the services of an administrator. These proposed new requirements are significant because an insurer retains the ultimate responsibility and accountability for each function it delegates to an administrator. Thus, it is imperative that an insurer appropriately monitor the activities of its administrators to ensure their compliance with the Insurance Code, the Labor Code, and rules adopted thereunder. An insurer's regular oversight over its administrators is important. Therefore, proposed new §7.1611(a) requires an insurer, no less than two times each fiscal year, to review the operations of each of its administrators that, in the aggregate, administers benefits in Texas on its behalf for more than 100 certificate holders, injured employees, plan participants, or policyholders. Additionally, proposed new §7.1611(b) requires an insurer, no less than once every two fiscal years, to conduct an on-site audit of each of its administrators that, in the aggregate, administers benefits in Texas on its behalf for more than 100 certificate holders, injured employees, plan participants, or policyholders. Proposed new §7.1611(d) and (e) prescribe the minimum information that an insurer should review during the required review or on-site audit. This includes a review of an administrator's compliance with the contract between the administrator and the insurer and the administrator's performance of claims adjudication and payment. The proposed new requirements also require an insurer to develop a written summary of the objectives and scope of the review or on-site audit and a summary of the results of the review or on-site audit. Each summary must include a corrective action plan addressing any deficiencies found during the review or on-site audit. These proposed new requirements are important for several reasons. First, reviewing the prescribed information should enable an insurer to better assess its ability to meet its obligations under the Insurance Code, Labor Code, and rules adopted thereunder. Additionally, it is anticipated that an insurer's regular review of the required information will enable the insurer to foresee potential financial problems or solvency issues at a much earlier date, so that corrective action can be taken immediately. Further, proposed new §7.1611 emphasizes the importance of establishing performance goals for administrators and reviewing the performance of the administrators to determine if those goals are being met. By regularly monitoring and overseeing its administrators, an insurer should obtain a better idea of its own capabilities, strengths, and weaknesses. This should result in financially healthier insurers. Additionally, if an insurer already has an audit plan in place to oversee its administrators, it may already meet several of the proposed new requirements. In these situations, an insurer must only ensure that its current audit plan is modified to address the proposed new requirements that are not currently being addressed in its audit plan.

Administrative services are sometimes delegated from one administrator to another. Neither the Insurance Code Chapter 4151 nor the proposed new subchapter prohibits such a re-delegation of administrative services. However, an insurer remains ultimately responsible for the performance of all of its delegated functions, regardless of whether those functions are performed by an administrator contractor or by an administrator subcontractor. As is previously discussed in this proposal, in a situation where an administrator contractor further delegates the performance of its administrative functions to an administrator subcontractor, both the administrator contractor and the administrator subcontractor qualify as an administrator under proposed new §7.1602(1). In such situations, because the administrator contractor and the administrator subcontractor are both performing delegated functions on behalf of an insurer, it is necessary for the insurer to regularly monitor and oversee the activities of both the administrator contractor and the administrator subcontractor. An insurer remains responsible for monitoring and overseeing the activities of all of its administrators, including its administrator contractors and administrator subcontractors. However, it may be appropriate for the administrator contractor that delegates the performance of a specific function to an administrator subcontractor to oversee the performance of that administrator subcontractor on the insurer's behalf. Therefore, proposed new §7.1611(g) provides an insurer with the option of meeting the §7.1611 monitoring and oversight requirements for an administrator subcontractor by reviewing and auditing its administrator contractor only. However, an insurer may utilize this option only if two requirements are met. First, an administrator contractor must supply the insurer with all the necessary and relevant information relating to a particular administrator subcontractor. Second, the information provided to the insurer by the administrator contractor must indicate that no evidence of material non-compliance by the administrator subcontractor exists. If these two requirements are met, an insurer may utilize the option provided by proposed new §7.1611(g). However, if these two requirements are not met, an insurer must review and audit each of its non-compliant administrator subcontractors in accordance with the §7.1611 review and audit requirements for its administrator contractors. Proposed new §7.1611(g) serves two important purposes. First, the insurer is requiring its administrator contractors to take an active role in ensuring that each administrator subcontractor performs its delegated administrative functions professionally, competently, and in compliance with all applicable statutes, rules, and contract provisions. Second, the insurer may be able to realize the benefit of consolidating the review of all of its administrators. A consolidated review may result in cost savings for the insurer while still ensuring an appropriate level of oversight of all administrators.

Because administrators are authorized under the Insurance Code Chapter 4151 to collect premiums, contributions, return premiums, and return contributions (premiums) from residents of this state, proposed new §7.1612 prescribes requirements intended to provide additional oversight over the administrators that collect these premiums. First, pursuant to the Insurance Code §4151.106, proposed new §7.1612 requires an administrator to hold all premium in a fiduciary capacity. This proposed requirement is necessary to implement the fiduciary duty requirement imposed by the Insurance Code §4151.106(b) upon an administrator that collects premiums on behalf of an insurer, HMO, plan sponsor, or group. Second, proposed new §7.1612 prescribes the general requirements related to the establishment and maintenance of fiduciary accounts used to hold collected premiums. For example, proposed new §7.1612(e) requires an administrator to maintain a fiduciary bank account at a financial institution that is organized under the laws of the United States. It must also be regulated under the laws of United States federal or state authorities having regulatory authority over banks and trust companies. This proposed requirement is necessary to ensure that collected premiums are maintained in an accessible, stable, and secure environment at all times. Further, proposed new §7.1612(e) permits a fiduciary bank account to consist only of one or more of the following types of investments: (i) cash

and cash equivalents; (ii) non-assessable money market mutual funds that are primarily invested in United State government securities; and (iii) other investments of substantially similar quality, as approved by the Commissioner. This proposed requirement is necessary to preserve the integrity and stability of collected premiums and to ensure immediate access to those premiums, should such access be required.

The remaining provisions of proposed new §7.1612 generally relate to certain, specified administrator activities. Proposed new §7.1612(f) requires an administrator to properly maintain detailed accounting records documenting all deposits and withdrawals from a fiduciary account. This proposed requirement ensures that each collected premium is properly accounted for and transferred to the appropriate insurer, HMO, plan sponsor, or group. Proposed new §7.1612(g) requires an administrator to provide a copy of the records relating to the account activity of an insurer, HMO, plan sponsor, or group in a fiduciary bank account to the insurer, HMO, plan sponsor, or group, upon its reasonable request. This proposed requirement is necessary to provide an insurer, HMO, plan sponsor, or group with continuing access to a fiduciary account maintained by an administrator on its behalf. This enables the insurer, HMO, plan sponsor, or group to properly oversee the activities of the administrator and to ensure that the premiums collected on its behalf are properly accounted for and maintained. Finally, proposed new §7.1612(i) prohibits an administrator from paying a claim from a fiduciary bank account, which is consistent with the statutory prohibition in the Insurance Code §4151.109. It further ensures that all collected premiums are maintained in fiduciary accounts that are separate and distinguishable from any account used by an administrator to pay a claim on behalf of an insurer, HMO, plan sponsor, or group.

Depending upon the duties that an administrator performs on behalf of an insurer, HMO, plan sponsor, or group, an administrator may have access to, or control over, the books and records of an insurer, HMO, plan sponsor, or group. In such situations, it is necessary for the insurer, HMO, plan sponsor, or group to have continuing access to its books and records, even while the books and records are in the possession of an administrator. The Department is aware of situations where administrators have refused to timely return the books and records of an insurer or have denied an insurer access to its own books and records altogether. These situations typically involved an insurer that terminated the employment of one administrator in order to employ the services of another administrator. These situations also usually occurred when there was an inadequate written agreement between the parties, or where the written agreement between the parties did not sufficiently address transition and ownership issues. An administrator's refusal to provide an insurer, HMO, plan sponsor, or group with access to its own books and records can have disastrous and widespread results, especially with regard to the payment of claims. An insurer, HMO, plan sponsor, or group simply cannot comply with the requirements of the Insurance Code, the Labor Code, and rules adopted thereunder without knowing which of its claims has been paid and which of its claims remain outstanding. Additionally, an insurer, HMO, plan sponsor, or group may be put into a potentially hazardous financial condition if it is unable to access its financial books and records. New §7.1615 is proposed in an effort to prevent these situations from occurring. It addresses the continuity of services and ownership of books and records. Further, proposed new §7.1615 is necessary to implement the Insurance Code §4151.103(d). Section 4151.103(d) provides that the Commissioner shall adopt rules to address the transfer of records from one administrator to another. The proposed new requirements are also necessary to ensure that an insurer, HMO, plan sponsor, or group retains continual access to its own books and records following the termination of its relationship with an administrator. First, proposed new §7.1615(a) requires an administrator to provide a complete and accurate original set or a complete and accurate copy or image of the original set of an insurer's, HMO's, plan sponsor's, or group's books and records to a successor administrator. If there is not a successor administrator or the successor administrator is unknown at the time of the required transfer, then they must be provided to the insurer, HMO, plan sponsor, or group. In both cases, the books and records must be provided no later than 30 days from the date of the termination of the relationship or written agreement between the insurer, HMO, plan sponsor, or group and the administrator, unless otherwise approved by the Commissioner. Proposed new §7.1615(b) requires the books and records to be transferred in an organized and usable manner. These proposed new requirements are designed to prevent potentially hazardous financial conditions from occurring during transition periods and to alleviate delays in claims payments. Proposed new §7.1615(d) requires an administrator to provide written notice to the Department of the termination of a relationship or written agreement with an insurer, HMO, plan sponsor, or group no later than thirty days from the date the administrator first learns of the termination. This proposed new requirement provides the Department with the opportunity to monitor specific transition periods to ensure that claims are timely paid, premiums are appropriately collected and transferred, and the financial condition of insurers, HMOs, plan sponsors, groups, and administrators remain stable. Proposed new §7.1615(e) is necessary to address situations where an administrator contractor has further delegated the performance of its administrative duties to an administrator subcontractor. In these situations, it is likely that the administrator contractor will have provided the administrator subcontractor with a portion of the books and records of the insurer, HMO, plan sponsor, or group so that the administrator subcontractor may appropriately perform its delegated duties. As is previously discussed in this proposal, in a situation where an administrator contractor further delegates the performance of its administrative functions to an administrator subcontractor, both the administrator contractor and the administrator subcontractor qualify as an administrator under proposed new §7.1602(1). As such, the requirements of proposed new §7.1615 apply equally to the administrator contractor and the administrator subcontractor. However, the termination of the relationship between an administrator contractor and an administrator subcontractor may not necessarily affect the relationship between the administrator contractor and the insurer, HMO, plan sponsor, or group. In such situations, it may be appropriate for the administrator contractor to retain its relationship with the insurer, HMO, plan sponsor, or group and to re-delegate the performance of certain delegated functions to a new administrator subcontractor. Therefore, when an administrator subcontractor's relationship or written agreement with an administrator contractor terminates, proposed new §7.1615(e) provides the administrator subcontractor with an option. The administrator subcontractor may comply with the requirements of proposed new §7.1615 by providing a complete and accurate original set or a complete and accurate copy or image of the original set of the insurer's, HMO's, plan sponsor's, or group's books and records to the administrator contractor. The administrator subcontractor must also provide written notice to the Department of the termination of the relationship or written agreement with the administrator contractor, no later than thirty

days from the date the administrator subcontractor first learns of the termination. This proposed requirement serves two important purposes. First, it ensures that the administrator contractor maintains possession over the books and records that were originally provided to the administrator subcontractor on the insurer's, HMO's, plan sponsor's, or group's behalf. Second, it allows the administrator contractor the opportunity to re-delegate the performance of certain delegated functions to another administrator subcontractor, should it choose to do so. Should an administrator subcontractor choose not to utilize the option provided by proposed new §7.1615(e), then that administrator subcontractor is required to meet the requirements of proposed new §7.1615 in the same manner that an administrator contractor is required to meet the requirements of proposed new §7.1615.

Finally, proposed new §7.1616 addresses circumstances which may indicate that an applicant or administrator is operating in a potentially hazardous or injurious manner. HB 472 enacts the Insurance Code §4151.301(8). This statute permits the Department to take appropriate action if an applicant or administrator is in a financial condition or is operating or conducting business in a manner that would render further transaction of business in this state hazardous or injurious to the public or insurance consumers of this state. The proposed new requirements are important in identifying applicants' and administrators' potentially hazardous or injurious conditions so that corrective actions, if necessary, may be taken to alleviate or prevent harm to the public and insurance consumers of this state at the earliest point in time. Proposed new §7.1616(a) provides eight illustrative examples of conduct that may indicate that an applicant or administrator is operating or conducting business in a potentially hazardous or injurious manner. These examples, however, are not exhaustive. Proposed new §7.1616(b) makes clear that other facts and circumstances that are not specified in the eight examples may also indicate that an applicant or administrator is operating in a potentially hazardous or injurious manner. Further, the conditions specified in proposed new §7.1616(a) do not necessarily indicate that an applicant or administrator is operating in a potentially hazardous or injurious manner. Rather, they are conditions that may be considered by the Department in determining whether an applicant or administrator is operating in a potentially hazardous or injurious manner. For example, if an applicant or an administrator fails to file a financial statement with the Department as illustrated in proposed new §7.1616(a)(1), the Department may contact the applicant or administrator and request additional information. Based upon the applicant's or administrator's response to the Department, the Department may further investigate the situation to determine if any preventative or correction action is needed or the Department may determine that the issue has been resolved. A final determination of whether an applicant or administrator is operating in a potentially hazardous or injurious manner may depend upon many factors, including one or more factors enumerated in proposed new §7.1616. However, a final determination of whether an applicant or administrator is operating in a potentially hazardous or injurious manner is not necessarily dependent upon a factor enumerated in proposed new §7.1616. Proposed new §7.1616 is intended to provide applicants and administrators guidance in managing their own organizations. By providing applicants and administrators with illustrative examples of situations that may constitute or lead to potentially hazardous or injurious operating conditions, the Department anticipates that applicants and administrators will take preventative steps to avoid these types of situations. This should result in healthier and more stable applicants and administrators.

Proposed Contracting Requirements

Because an insurer retains ultimate responsibility and accountability for the functions performed by its administrators, it is imperative that each insurer monitor the activities of its administrators and maintain appropriate oversight over its administrators. Therefore, new §7.1613 is proposed to establish minimum contracting requirements between an insurer and an administrator. It requires each administrator performing administrative services in Texas on behalf of an insurer to enter into a written agreement with that insurer. Proposed new §7.1613(c), (d), (e), and (f) prescribe the minimum requirements, obligations, and provisions that must be included in each written agreement between an insurer and an administrator. These proposed new requirements are necessary for several reasons. First, under the proposed new requirements, insurers are required to establish written expectations for their administrators. This proposed requirement is necessary to ensure that each party clearly understands their responsibilities and obligations under the written agreement. Further, it is easier for an insurer to monitor its administrators to determine if they are performing their delegated functions in accordance with the expectations of the insurer once those expectations have been memorialized in a written agreement. Second, the proposed new requirements require insurers and administrators to address compliance with other important proposed new requirements of the subchapter in their written agreement. This includes the obligation of an insurer to review and audit its administrators under proposed new §7.1611 and the obligation of an administrator to notify the Department and timely transfer the books and records of an insurer upon the termination of the relationship with the insurer under proposed new §7.1615. It is especially important for an insurer and an administrator to address these matters in their written agreements because of the complexity and potential complications related to these issues. Finally, as previously discussed in this proposal, in a situation where an administrator contractor further delegates the performance of its administrative functions to an administrator subcontractor, both the administrator contractor and the administrator subcontractor qualify as an administrator under proposed new §7.1602(1). As such, the requirements of proposed new §7.1613 apply equally to the administrator contractor and the administrator subcontractor. However, an administrator contractor may delegate a few, specific duties to an administrator subcontractor and may retain a contractual responsibility for the performance of those duties, despite the delegation of those duties to the administrator subcontractor. Additionally, some insurers may permit their administrator contractors to further delegate duties to administrator subcontractors, provided that the administrator contractors retain responsibility for the performance of those duties. As previously stated, each insurer retains the ultimate responsibility for all of its delegated duties, regardless of whether they are performed by an administrator contractor or an administrator subcontractor. It may be appropriate, however, in some instances for an administrator contractor to enter into a written agreement with an administrator subcontractor for the performance of certain delegated duties without the insurer entering into a separate written agreement with that particular administrator subcontractor. In these instances, the insurer is required to enter into a written agreement with the administrator contractor pursuant to proposed new §7.1613(a). Therefore, proposed new §7.1613(b) provides an administrator subcontractor with the option of meeting the contracting requirements of proposed new §7.1613 by entering into a written agreement with an administrator contractor only. This is permissible only if the written agreement meets the requirements of the Insurance Code Chapter

4151 and proposed new §7.1613. This gives insurers the flexibility of entering into a written agreement with an administrator contractor and permits that administrator contractor to further delegate certain duties to an administrator subcontractor without the insurer having to enter into a separate agreement with the administrator subcontractor. This option is particularly useful when the duties performed by the administrator subcontractor are limited in scope. Because of the insurer-administrator contractor written agreement required under proposed new §7.1613(a), the insurer will be able to oversee the administrator contractor and monitor its activities. Further, proposed new §7.1613(b) will enable the administrator contractor to oversee and monitor the performance of each of its administrator subcontractors through the written agreement that the administrator contractor has with each administrator subcontractor. This approach is intended to ensure that each administrator, whether an administrator contractor or an administrator subcontractor, is properly monitored by another responsible person. Should an administrator subcontractor choose not to utilize the option provided by proposed new §7.1613(b), then that administrator subcontractor is required to meet the requirements of proposed new §7.1613 in the same manner that an administrator contractor is required to meet the requirements of proposed new §7.1613.

Application, Annual Report, and Exam Fees

Proposed new §7.1604(b)(2) proposes the adoption of a non-refundable application filing fee of $1,000. The Insurance Code §4151.206(a)(1) provides that an applicant or administrator shall pay, in an amount to be determined by the Commissioner, a filing fee not to exceed $1,000 for processing an original application for a certificate of authority. The Department has determined that the proposed new application fee amount is appropriate and necessary for the following reasons: (i) the proposed new application fee amount is needed to offset the Department's costs for processing and reviewing administrator applications, including the new applications that will be required annually as a result of HB 472; (ii) the Department has not increased the current application fee amount since 1990, although the Department's responsibilities for the general administration of Chapter 4151 and the costs for reviewing and processing administrator applications have increased since that time; and (iii) the new application fee amount is more consistent with other fee amounts charged by the Department for reviewing and processing other applications and issuing other authorizations.

Proposed new §7.1609(b)(2) proposes the adoption of a non-refundable annual report filing fee of $200. This fee must accompany the annual report required to be filed by the administrator no later than June 30 each year. The Insurance Code §4151.206(a)(3) provides that an administrator shall pay, in an amount to be determined by the Commissioner, a filing fee not to exceed $200 for an annual report. The Department has determined that the proposed new annual report fee amount is appropriate and necessary for the following reasons: (i) the proposed new annual report fee amount is needed to offset the Department's costs for processing and reviewing administrator annual reports, including the new reports that will be required annually as a result of HB 472; (ii) the Department has not increased the current annual report fee amount since 1990, although the Department's responsibilities for the general administration of Chapter 4151 and the Department's costs for reviewing and processing administrator annual reports have increased since that time; and (iii) the proposed new annual report fee amount is more consistent with other fees charged by the Department for reviewing and processing other entity's annual reports.

Proposed new §7.1617(a) proposes the adoption of a non-refundable examination fee of $500, as authorized by the Insurance Code §4151.206(a)(2). The Insurance Code §4151.206(a)(2) provides that an administrator shall pay, in an amount to be determined by the Commissioner, a fee not to exceed $500 for an examination under the Insurance Code §4151.201. The Department has determined that the proposed new examination fee amount is appropriate and necessary for the following reasons: (i) the proposed new exam fee amount is needed to offset the Department's costs for examining an administrator, including workers' compensation administrators that are now subject to examination under Chapter 4151; (ii) the Department has not increased the current exam fee amount since 1990, although the Department's costs for examining an administrator are likely to exceed that fee amount; and (iii) the proposed new exam fee amount is still substantially less than other examination fees charged by the Department for conducting examinations of other entities.

Section-by-Section Overview.

The following is a section by section overview of the proposal. Proposed new Subchapter P in Chapter 7 of Title 28 of the Texas Administrative Code consists of proposed new §§7.1601 - 7.1618.

§7.1601. Scope. Proposed new §7.1601(a) specifies that, except as otherwise provided by the proposed new subchapter or the Insurance Code Chapter 4151, the proposed new subchapter applies to a person acting as or holding itself out as an administrator in any capacity, regardless of whether the person holds another authorization under the Insurance Code or the Labor Code. In accordance with the Insurance Code §1272.058 and the Labor Code §407A.009, proposed new §7.1601(b) requires an administrator performing administrative services on behalf of an HMO or a group to meet the same requirements under the Insurance Code Chapter 4151 and the proposed new subchapter as an administrator performing administrative services on behalf of an insurer or plan sponsor. Proposed new §7.1601(c) requires a person acting as or holding itself out as an administrator to meet the requirements of the Insurance Code Chapter 4151 and the proposed new subchapter. This is in addition to any other requirements applicable to that person under the Insurance Code Chapters 1272 or 1305 or the Labor Code Chapters 407 or 407A and rules adopted thereunder. Proposed new §7.1601(d) clarifies that the proposed new subchapter does not apply to a person acting as or holding itself out as an administrator for an ERISA qualified employee welfare benefit plan that is exempt from regulation by this state with respect to that particular employee welfare benefit plan.

§7.1602. Definitions. Proposed new §7.1602 defines the terms used in the proposed new subchapter.

§7.1603. Certificate of Authority Required. Proposed new §7.1603(a) requires each person acting as or holding itself out as an administrator to hold a certificate of authority under the Insurance Code Chapter 4151, unless the person meets an exemption under that chapter. Proposed new §7.1603(b) requires an administrator contractor and an administrator subcontractor to hold a certificate of authority under the Insurance Code Chapter 4151.

§7.1604. Application for Certificate of Authority. Proposed new §7.1604(a) requires an applicant for a certificate of authority under Chapter 4151 to file an application with the Department, accompanied by a non-refundable fee of $1,000. Proposed new

§7.1604(a) also requires the applicant to verify the application by attesting to the truth and accuracy of the information in the application. Proposed new §7.1604(b)(1) adopts by reference the following forms, which comprise the application for a certificate of authority under the Insurance Code Chapter 4151. These forms are available at www.tdi.state.tx.us/forms/form5tpa.html: (i) Form Number FIN 489, Application for a Certificate of Authority; (ii) Form Number FIN 306, Officers and Directors; (iii) Form Number LHL 081, Biographical Affidavit; and (iv) Form Number LHL 082, Service of Process. Proposed new §7.1604(b)(2) specifies that as authorized by the Insurance Code §4151.206(a)(1), the Commissioner adopts a filing fee of $1,000 to be paid by an applicant for processing an original application for a certificate of authority for an administrator. Proposed new §7.1604(c) requires an applicant to register its official name with the Department and the Office of the Secretary of State, as applicable. Additionally, proposed new §7.1604(c) specifies that an applicant must register an alternative name with the Department and the Office of the Secretary of State, as applicable, if the Commissioner determines that an applicant's name is too similar to a name already registered with the Department. Proposed new §7.1604(d)(1) requires each executive officer or other comparable responsible person of an applicant to provide the Department with a completed Form Number LHL 081, Biographical Affidavit. Proposed new §7.1604(d)(1) also specifies that a biographical affidavit is not required if a biographical affidavit from the individual has been filed with the Department within the prior three years and contains substantially accurate information. Further, proposed new §7.1604(d)(1) clarifies that a biographical affidavit contains substantially accurate information if the responses given by the individual in the affidavit on file with the Department continue to indicate sufficient experience, ability, standing, and good record to make success of the applicant probable. Proposed new §7.1604(d)(2) requires each person filing a biographical affidavit under proposed new §7.1604(d)(1) to comply with the requirements of Chapter 1, Subchapter D of Title 28 of the Texas Administrative Code. Pursuant to the Insurance Code §4151.052(a)(5), proposed new §7.1604(e) provides that the Commissioner may require the submission of any other information the Commissioner reasonably requires in determining whether to approve or disapprove an application for a certificate of authority.

§7.1605. Notification Requirements. Proposed new §7.1605(a) specifies that an insurer or HMO that is acting as or holding itself out as an administrator and that is not exempt under the Insurance Code §4151.002(3) or (4) is subject to all provisions of the proposed new subchapter, except proposed new §§7.1603, 7.1604, and 7.1609(c) and (d)(1) and (2) (relating to Certificate of Authority Required, Application for Certificate of Authority, and Annual Report). Proposed new §7.1605(b) requires an insurer or HMO meeting the requirements of proposed new §7.1605(a) to submit written notice to the Department that it will be acting as or holding itself out as an administrator. Proposed new §7.1605(b) further requires such notice to include the insurer's or HMO's contact information. This includes: (i) the insurer's or HMO's TDI company number; (ii) a narrative describing the insurer's or HMO's facilities, personnel, and experience relating to the functions the insurer or HMO will be performing as an administrator; and (iii) a list of any other states in which the insurer or HMO will be acting as or holding itself out as an administrator.

§7.1606. Requirements Related to Ownership Interest and Change of Control. The provisions of proposed new §7.1606(a)(1) - (3) relate to a change in the control of an applicant or administrator. The three provisions are for purposes of proposed new §7.1606 only and for no other purposes. Proposed new §7.1606(a)(1) provides that control means the power to direct, or cause the direction of, the management and policies of a person, other than the power that results from an official position with or corporate office held by the person. Proposed new §7.1606(a)(2) provides that control may be possessed by various means, including through ownership of voting securities, ownership by contract, or direct or indirect control of one or more persons that control an administrator. Proposed new §7.1606(a)(3) provides that control exists if an individual or a member of an individual's immediate family, directly or indirectly, owns, controls, or holds with the power to vote 10 percent or more of the voting securities or authority of an administrator or another person that directly or indirectly controls an administrator, including when a person holds proxies representing 10 percent or more of the voting securities or authority of the person. Pursuant to the Insurance Code §4151.052(b), proposed new §7.1606(b) requires an applicant or an administrator to notify the Department in writing of a change of control in the ownership of the applicant or the administrator not later than the 30th day after the effective date of the change. The §7.1606(b) notice requirement applies to any instance in which there is a change in the control of an applicant or administrator, including a change in any of the circumstances specified in §7.1606(a). Proposed new §7.1606(c) provides that an applicant or administrator may not file the §7.1606(b) notification until a proposed acquisition of control has been approved under the Insurance Code §4151.211.

§7.1607. Facts and Circumstances Affecting Issuance of Certificate of Authority. Proposed new §7.1607(a) defines the phrase material change in fact or circumstance. The phrase is defined as any fact or circumstance that impacts the accuracy or completeness of the information filed in an applicant's or administrator's initial application for a certificate of authority under the Insurance Code Chapter 4151. It includes: (i) a change in an applicant's or administrator's mailing address; (ii) a felony conviction of any executive officer or other comparable responsible person of an applicant or administrator or of any other person who directly or indirectly controls the applicant or administrator; and (iii) any administrative action, order, or judgment issued against an applicant or administrator. Proposed new §7.1607(b) requires an administrator to notify the Department in writing of a material change in fact or circumstance not later than the 30th day from the date the administrator first becomes aware of the material change in fact or circumstance. Except as provided by proposed new §7.1606(b) (relating to Requirements Related to Ownership Interest and Change of Control), proposed new §7.1607(c) requires an applicant to continually update the information filed in its initial application for a certificate of authority under the Insurance Code Chapter 4151 while the application is pending with the Department. This includes notifying the Department in writing of a material change in fact or circumstance. Proposed new §7.1607(d) requires an applicant or administrator to meet the requirements of the Insurance Code Chapter 4151 and the proposed new subchapter as those requirements apply to any material change of fact or circumstance identified by an administrator or any change in information identified by an applicant. Finally, proposed new §7.1607(e) requires an applicant or an administrator to maintain the qualifications necessary to obtain a certificate of authority under Chapter 4151 at all times.

§7.1608. Fidelity Bond. Proposed new §7.1608(a) requires an applicant to obtain and an administrator to maintain a fidelity bond that complies with the requirements of the Insurance Code §4151.055 and proposed new §7.1608. Proposed new §7.1608(b) specifies that an applicant and an administrator may only obtain a fidelity bond from a surety company authorized to engage in business in this state as a surety or an eligible surplus lines insurer in compliance with the Insurance Code Chapter 981 and rules adopted thereunder. Proposed new §7.1608(c) requires an applicant or an administrator to immediately inform the Commissioner in writing if its fidelity bond is cancelled or terminated and not replaced with new coverage. The new coverage must meet the requirements of the Insurance Code §4151.055 and proposed new §7.1608 and be effective concurrently upon the date of the cancellation or termination. Finally, proposed new §7.1608(c) specifies that the required notification to the Commissioner must be given no later than ten business days from the date the applicant or the administrator first becomes aware of the cancellation or termination.

§7.1609. Annual Report. Proposed new §7.1609(a) requires an administrator to file an annual report with the Department no later than June 30 each year, accompanied by a non-refundable fee of $200. Proposed new §7.1609(b) adopts by reference the following forms: (i) Form Number FIN 486, Annual Report Form for Administrators Holding a Certificate of Authority under TIC 4151; (ii) Form Number FIN 487, Annual Report Form for Insurers and HMOs Subject to 28 TAC §7.1605; (iii) Form Number FIN 488, Annual Report Exhibits A-E; and (iv) Form Number 490, Certification of Financial Statement. These forms are available at www.tdi.state.tx.us/forms/form5tpa.html. Proposed new §7.1609(c) specifies that the annual report required by proposed new §7.1609(a) must also include an audit report on the financial statements prepared by an independent certified public accountant that reflects an audit conducted in accordance with generally accepted auditing standards or with the standards adopted by the Public Company Accounting Oversight Board, as applicable. It must also include a balance sheet, an income statement, a cash flow statement, and a statement of equity. Proposed new §7.1609(d)(1) exempts an administrator receiving less than $10 million in compensation for providing administrative services in Texas during the preceding year from complying with the requirements of proposed new §7.1609(c) for that year. Proposed new §7.1609(d)(2) requires an administrator qualifying for the exemption in §7.1609(d)(1) to file a financial statement with the Department that: (i) includes a completed Form Number FIN 490, Certification of Financial Statement, as referenced in §7.1609(b)(1)(D); and (ii) is verified by at least two officers or other comparable responsible persons of the administrator. Proposed new §7.1609(d)(3) clarifies that an administrator qualifying for the exemption in proposed new §7.1609(d)(1) must still meet the other requirements of proposed new §7.1609. Proposed new §7.1609(e) provides that the Commissioner may request additional information as necessary to determine if an administrator is operating or conducting business in a hazardous or injurious manner.

§7.1610. Financial Statements Under the Education Code. Proposed new §7.1610(a) provides that §7.1610 applies only to an insurer or HMO that: (i) meets the requirements of §7.1605 (relating to Notification Requirements) of this subchapter; and (ii) is subject to the requirements of the Education Code §22.004(g). Proposed new §7.1610(b) provides that an administrator meeting the requirements of §7.1610(a) may comply with the requirement for an audited financial statement under the Education Code §22.004(h) by providing a copy of the financial statement filed with the Department for the preceding calendar year that: (i) was prepared by an independent certified public accountant; and (ii) was filed in compliance with the requirements of §7.18 (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 (relating to Audited Financial Reports).

§7.1611. Operational Review and On-Site Audit. Proposed new §7.1611(a) requires an insurer, no less than two times each fiscal year, to review the operations of each of its administrators that, in the aggregate, administers benefits in Texas on behalf of the insurer for more than 100 certificate holders, injured employees, plan participants, or policyholders. Proposed new §7.1611(a) also provides that a review of an administrator may be conducted on the premises of the insurer or at another location designated by the insurer. The review may also be conducted by electronic means. Proposed new §7.1611(b) requires an insurer, no less than once every two fiscal years, to conduct an on-site audit of each of its administrators that, in the aggregate, administers benefits in Texas on behalf of the insurer for more than 100 certificate holders, injured employees, plan participants, or policyholders. Proposed new §7.1611(c) specifies that, notwithstanding the requirements of proposed new §7.1611(a), an insurer is not required to review the operations of an administrator under proposed new §7.1611(a) more than one time in the same fiscal year in which the insurer conducts an on-site audit of that administrator. Proposed new §7.1611(d) specifies that any review and on-site audit must assess the business practices and procedures of the administrator to ensure competent administration, including evaluating: (i) the administrator's compliance with the Insurance Code, the Labor Code, and rules adopted thereunder, as applicable; (ii) the administrator's compliance with the provisions of the written agreement with the insurer; (iii) the administrator's performance of claims adjudication and payment; (iv) the adequacy of the financial security maintained by the administrator, if any; and (v) the administrator's practices and procedures for establishing the adequacy of the insurer's reserves, if any. Proposed new §7.1611(d) also specifies that any review and on-site audit must include a written summary of the objectives and scope of the review or on-site audit and the results of the review or on-site audit. It must also include a corrective action plan addressing any deficiencies found during the review or on-site audit. Proposed new §7.1611(e) specifies that the purpose of the on-site audit is to verify the accuracy, integrity, and completeness of the information received during a review conducted by an insurer pursuant to proposed new §7.1611(a). Proposed new §7.1611(e) also requires that an on-site audit include: (i) a physical inspection of the administrator's place of business; and (ii) a written assessment of the reliability of the information provided to the insurer and relied upon by the insurer when conducting a review or on-site audit of the administrator. Proposed new §7.1611(f) authorizes an insurer or the insurer's designated representative to perform a review or an on-site audit. Proposed new §7.1611(g) permits an insurer to meet the requirements of proposed new §7.1611 for an administrator subcontractor by reviewing and auditing only the administrator contractor if two specified conditions are met: (i) the information supplied to the insurer by the administrator contractor includes all necessary and relevant information relating to the administrator subcontractor; and (ii) provided no evidence of material non-compliance by the administrator subcontractor exists. Proposed new §7.1611(h) requires all information and documentation related to a review or an on-site audit to remain on file with the insurer for at least five years from the date of the review or

on-site audit and to be made available to the Commissioner upon request.

§7.1612. Fiduciary Bank Accounts. Pursuant to the Insurance Code §4151.106(b), proposed new §7.1612(a) requires an administrator to hold all premium in a fiduciary capacity. Proposed new §7.1612(b) requires an administrator collecting or receiving any premium to comply with the Insurance Code §§4151.105, 4151.106, 4151.107, and 4151.108 and proposed new §7.1612. Proposed new §7.1612(b) also requires each administrator who receives any premium on behalf of an insurer, HMO, plan sponsor, or group to report the receipt of that premium to the insurer, HMO, plan sponsor, or group within a reasonable amount of time. Proposed new §7.1612(c) requires an administrator to establish at least one fiduciary bank account to hold any premium collected or received pursuant to proposed new §7.1612. Proposed new §7.1612(d) requires a fiduciary bank account required by proposed new §7.1612(c) to be established and styled as an escrow account. Proposed new §7.1612(e) requires an administrator to maintain each fiduciary bank account at a financial institution that is: (i) organized under the laws of the United States or any state thereof; and (ii) regulated, supervised, and examined by United States federal or state authorities having regulatory authority over banks and trust companies. Additionally, proposed new §7.1612(e) specifies that a fiduciary bank account may only consist of one or more of the following types of investments: (i) cash and cash equivalents, including savings accounts, checking accounts, money market accounts, and certificates of deposit; (ii) non-assessable money market mutual funds that are primarily invested in United States government securities; and (iii) other investments of substantially similar quality, as approved by the Commissioner. Proposed new §7.1612(f) requires an administrator to maintain detailed accounting records for each fiduciary bank account that separately record each deposit and withdrawal from the account. The accounting records must identify each insurer, HMO, plan sponsor, or group for whom the account is maintained. Proposed new §7.1612(g) requires that, upon the reasonable request of the insurer, HMO, plan sponsor, or group, an administrator must provide an insurer, HMO, plan sponsor, or group a copy of all records relating to the requesting entity's account activity in a fiduciary bank account established or maintained by the administrator on behalf of the insurer, HMO, plan sponsor, or group. Proposed new §7.1612(h) provides that all records maintained by an administrator relating to any premium shall be subject to examination by the Commissioner upon request. Pursuant to the Insurance Code §4151.109, proposed new §7.1612(i) prohibits an administrator from paying a claim from a fiduciary bank account. Finally, proposed new §7.1612(j) provides that proposed new §7.1612 does not authorize any transaction that is otherwise prohibited by law.

§7.1613. Written Agreements Between Administrators and Insurers. Proposed new §7.1613(a) prohibits an administrator from providing administrative services in Texas on behalf of an insurer unless the administrator has entered into a written agreement with the insurer that meets the requirements of the Insurance Code Chapter 4151 and proposed new §7.1613. Proposed new §7.1613(b) permits an administrator subcontractor to meet the requirements of proposed new §7.1613 by entering into a written agreement with the administrator contractor only. Section 7.1613(b) also requires that the written agreement meet the requirements of the Insurance Code Chapter 4151 and proposed new §7.1613, as applicable. Proposed new §7.1613(c) prohibits a written agreement entered into under proposed new §7.1613 from being construed to limit, in any way, an insurer's ultimate accountability and responsibility for compliance with all statutory and regulatory requirements under the Insurance Code, the Labor Code, and rules adopted thereunder. Proposed new §7.1613(d) requires a written agreement entered into under proposed new §7.1613 to include: (i) a requirement that an administrator comply with the requirements of the Insurance Code, the Labor Code, and rules adopted thereunder, including holding appropriate authorizations; (ii) a description of the administrative services the administrator is expected to provide and any applicable instructions related to the performance of those services, including references to an insurer's claims handling practices or procedures; (iii) a provision relating to the continuity of services and addressing the obligations of the administrator and the insurer under proposed new §7.1615 (relating to Transfer of Books and Records), including the method and manner in which the insurer and administrator will meet those requirements; and (iv) a provision addressing an insurer's obligation to review and audit the performance of its administrators under proposed new §7.1611 (relating to Operational Review and On-Site Audit), including the method and manner in which the insurer will meet those requirements. Proposed new §7.1613(e) also requires a written agreement entered into under proposed new §7.1613 to ensure that the books and records of the insurer remain the property of the insurer at all times and that the books and records of the insurer are available to the insurer or its designee at any time while in the custody of the administrator. Proposed new §7.1613(f), however, permits an administrator to retain a proprietary interest in the books and records of an insurer pursuant to the Insurance Code §4151.113(c) under one condition. Retention of a proprietary interest requires that the written agreement between the administrator and the insurer must specifically identify the items that will be subject to the administrator's proprietary interest. Further, proposed new §7.1613(f) prohibits an administrator from withholding, based upon a claim of proprietary interest, any portion of an insurer's books and records that would restrict the ability of the insurer to comply with statutory, regulatory, or contractual obligations. Proposed new §7.1613(g) permits a master services agreement to be used to meet the §7.1613 requirements. Proposed new §7.1613(h) permits any §7.1613 requirement that does not apply to an administrative service offered or performed by the administrator on behalf of the insurer to be omitted from the written agreement between the administrator and the insurer. Proposed new §7.1613(h) also requires the remainder of the written agreement between the administrator and the insurer to comply with the Insurance Code Chapter 4151 and proposed new §7.1613. Finally, proposed new §7.1613(i) requires a written agreement to meet the requirements of proposed new §7.1613 no later than September 1, 2009.

§7.1614. Prohibited Acts. Proposed new §7.1614(a) prohibits an administrator from: (i) misrepresenting the terms or nature of an agreement with an insurer, HMO, plan sponsor, or group; (ii) making false, misleading, or incomplete comparisons to the agreements of other administrators or persons in order to induce any person to enter into, continue, or discontinue an agreement; (iii) accepting or rejecting risk, other than under the authority of, and in accordance with, a written agreement with an insurer, HMO, plan sponsor, or group; (iv) publishing or circulating any advertising or informational material, benefit descriptions, certificates, booklets, or brochures pertaining to business underwritten by an insurer, HMO, plan sponsor, or group without advance written approval of the insurer, HMO, plan sponsor, or group; (v) pursuant to the Labor Code §415.0036, offering to pay, paying, soliciting, or receiving an improper inducement relating to the de-

livery of benefits to an injured employee, if the administrator performs administrative services on behalf of a person who is a participant in the workers' compensation system of this state; and (vi) pursuant to the Labor Code §415.0036, improperly attempting to influence the delivery of benefits to an injured employee, including through the making of improper threats, if the administrator performs administrative services on behalf of a person who is a participant in the workers' compensation system of this state. Proposed new §7.1614(b) provides that an administrator may be subject to other prohibitions under the Insurance Code, the Labor Code, and rules adopted thereunder that are not specified in proposed new §7.1614(a).

§7.1615. Transfer of Books and Records. Proposed new §7.1615(a) requires an administrator to provide books and records to a successor administrator no later than 30 days from the date of the termination of the relationship or written agreement with an insurer, HMO, plan sponsor, or group, unless otherwise provided by the Commissioner. If there is not a successor administrator, or if the successor administrator is unknown at the time of the required transfer, the set or copy of the books and records must be provided to the insurer, HMO, plan sponsor, or group. The books and records must be provided either as a complete and accurate original set or a complete and accurate copy or image of the original set of an insurer's, HMO's, plan sponsor's, or group's books and records. to a successor administrator. Proposed new §7.1615(b) requires the books and records to be transferred in an organized and usable manner. Proposed new §7.1615(c) requires the allocation of the payment of costs associated with providing the insurer's books and records to be addressed in the written agreement between the insurer and the administrator. Proposed new §7.1615(d) requires an administrator to provide written notice to the Department of the termination of a relationship or written agreement with an insurer, HMO, plan sponsor, or group no later than thirty days from the date the administrator first learns of the termination. Proposed new §7.1615(e) permits an administrator subcontractor to meet the requirements of proposed new §7.1615 when its relationship or written agreement with an administrator contractor terminates by providing a complete and accurate original set or a complete and accurate copy or image of the original set of the insurer's, HMO's, plan sponsor's, or group's books and records to the administrator contractor. The administrator subcontractor must also provide written notice to the Department of the termination of the relationship or written agreement with the administrator contractor no later than thirty days from the date the administrator subcontractor first learns of the termination.

§7.1616. Hazardous or Injurious Operating Conditions. Proposed new §7.1616(a) provides that an applicant or an administrator may be considered to be operating or conducting business in a hazardous or injurious manner if the administrator or applicant: (i) has failed to file financial statements, documents, records, or reports required under the Insurance Code Chapter 4151 or the proposed new subchapter within the time periods prescribed by the Insurance Code Chapter 4151, the proposed new subchapter, or as requested by the Department pursuant to law; (ii) has filed any false or misleading financial information; (iii) is unable to pay its obligations as they become due and payable; (iv) has not maintained records sufficient to permit examiners to determine its financial condition or compliance with the Insurance Code, the Labor Code, and rules adopted thereunder; (v) does not employ management staff with the experience, competence, or trustworthiness to conduct its operations in a safe or sound manner; (vi) employs management staff that has engaged in any unlawful activity; (vii) has not complied or is not complying with the terms of a written agreement with an insurer, HMO, plan sponsor, or group; (viii) has engaged or is engaging in a pattern of failing to settle claims in accordance with contractual, regulatory, or statutory requirements; or (ix) has engaged or is engaging in fraudulent or dishonest practices or acts. Proposed new §7.1616(b) provides that other facts and circumstances not specified in proposed new §7.1616(a) may also indicate that an applicant or administrator is operating in a hazardous or injurious manner.

§7.1617. Examinations. New §7.1617(a) proposes the adoption of a non-refundable fee of $500 for the expenses of an examination conducted under the Insurance Code §4151.201. Proposed new §7.1617(b) provides that, prior to an examiner entering the property of an administrator, written notice must be given to the administrator. The written notice must include the date and estimated time the examiner will enter the property of the administrator.

§7.1618. Severability. Proposed new §7.1618 provides that if any section or portion of a section of the proposed new subchapter is held to be invalid for any reason, all valid parts are severable from the invalid parts and remain in effect. Further, proposed new §7.1618 provides that if any section or portion of a section of the proposed new subchapter is held to be invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications. Finally, proposed new §7.1618 provides that all provisions of the proposed new subchapter are severable.

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner for the Financial Program, has determined that for each year of the first five years the proposed new sections will be in effect, there may be an approximate $87,250 - $88,750 total annual increase in revenue to state government as a result of the enforcement and administration of this proposal due to estimated additional applications for a certificate of authority, estimated additional annual report submissions, estimated additional examinations of administrators, and estimated additional fingerprint submissions to the Texas Department of Public Safety (DPS). These estimates are based on the following factors. First, the proposed new sections do not impose new application filing fees on administrators holding current authorizations from the Department. However, the proposed new sections impose a new $1,000 application filing fee on each person applying for a new authorization from the Department under the Insurance Code Chapter 4151. The Department anticipates that it will receive 50 new applications for a certificate of authority under the Insurance Code Chapter 4151 annually, resulting in an approximate $50,000 total annual increase in revenue to state government.

Second, the proposed new sections impose a new $200 filing fee on each person submitting an annual report to the Department pursuant to the Insurance Code §4151.205. Each person holding an authorization from the Department under the Insurance Code Chapter 4151 is required to file an annual report with the Department. As previously indicated, the Department estimates that it will receive 50 new applications for a certificate of authority under the Insurance Code Chapter 4151 annually. If the Department approves each of these applications, the Department estimates that it will receive 50 additional annual report filings from these new administrators, resulting in an approximate $10,000 total annual increase in revenue to state government.

Third, the proposed new sections impose a new $500 filing fee on each administrator that is examined by the Commissioner pursuant to the Insurance Code §4151.201. As previously indicated, the Department estimates that it will receive 50 new applications for a certificate of authority under the Insurance Code Chapter 4151 annually. If the Department approves each of these applications and examines each of these new administrators, there will be an approximate $25,000 total annual increase in revenue to state government.

Finally, the proposed amendments do not impose new fingerprinting costs on the executive officers or other comparable responsible persons of an administrator holding a current authorization from the Department. As a result, the Department generally does not anticipate that any executive officer or other comparable responsible person of an administrator holding an authorization under the Insurance Code Chapter 4151 on the effective date of the proposed new sections will be required to submit fingerprints to the DPS. This is applicable so long as the information submitted by the administrator with regard to its key management or decision making personnel at the time of application remains unchanged. However, the proposed new sections impose new fingerprinting fees on each executive officer or other comparable responsible person of an applicant applying for a new authorization from the Department under the Insurance Code Chapter 4151 and on any individual that has the right to control, direct, or manage the affairs of an applicant for a certificate of authority under the Insurance Code Chapter 4151. Of the 50 new applications for a certificate of authority that are anticipated, the Department anticipates that between 3 and 5 individuals per applicant will be required to submit fingerprints to the DPS under the proposed new sections. This results in an estimated total of 150- 250 new fingerprint submissions annually. The Government Code §411.088(a)(2) authorizes the DPS to charge a $15 fee for each criminal history record information inquiry. Therefore, this may result in a $2,250 - $3,750 total annual increase in revenue to state government. However, it is the Department's understanding based on information provided by the DPS that this fee is for the costs of processing fingerprints and maintaining the records and systems used by the DPS in processing fingerprint submissions. Therefore, anticipated additional fingerprint submissions may result in increased costs to the DPS, which may substantially offset or eliminate any additional revenue. Further, it is anticipated that most individuals within Texas will utilize the convenience and reliability offered by the authorized electronic fingerprint services. The Department, therefore, estimates that there will be no measurable fiscal impact to local governments from the capture of fingerprints on paper cards by local law enforcement agencies as a result of the enforcement or administration of this proposal.

There will be no anticipated effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz has also determined that for each year of the first five years the proposed new sections are in effect, there are several anticipated public benefits, and there will be potential costs for persons required to comply with the proposal.

Anticipated Public Benefits.

The anticipated public benefits include: (i) a more efficient and standardized process for regulating administrators, resulting in ease of operations and processes for the industry and the Department; (ii) increased oversight of administrators, resulting in increased accountability for compliance with the Insurance Code, the Labor Code, and rules adopted thereunder; and (iii) more efficient regulation of the industry by ensuring that persons receiving authorizations from the Department are honest, trustworthy, reliable, and fit to hold those authorizations.

The proposal streamlines the application process for applicants and clarifies certain requirements for applicants and administrators. It is anticipated that this will result in more efficient regulation of the industry and increased compliance with Department rules. Additionally, the proposal specifies the scope and applicability of the proposed new rules. First, the proposal provides necessary guidance to applicants and administrators regarding the applicability of the proposed new rules. HB 472 requires persons providing administrative services in connection with workers' compensation benefits in this state to comply with the requirements of the Insurance Code Chapter 4151. Prior to the enactment of HB 472, these persons were not subject to the requirements of Chapter 4151. As a result, many persons may be unfamiliar with the processes, procedures, and requirements of Chapter 4151 and the implementing rules. Providing additional guidance to these persons should increase their compliance with the requirements of the proposed new rules and should result in more efficient regulation. The proposal also clarifies the requirements of Chapter 4151 for persons holding other authorizations issued under the Insurance Code or the Labor Code. This clarification is particularly significant because a person may be simultaneously subject to the requirements of different provisions of the Insurance Code, the Labor Code, or rules adopted thereunder based upon the diversity of the functions performed by that person. In such situations, a person may be required to hold one or more authorizations issued under the Insurance Code or the Labor Code in order to perform those regulated functions. By providing additional guidance to applicants and administrators regarding their obligations under Chapter 4151, it is anticipated that a greater number of applicants and administrators will comply with the requirements of the Insurance Code, the Labor Code, and rules adopted thereunder. This should result in more efficient and consistent regulation of the industry.

The proposal also requires increased oversight of all administrators, which should result in increased accountability for compliance with the requirements of the Insurance Code, the Labor Code, and rules adopted thereunder. First, the proposal requires applicants and administrators to report: (i) changes in the control of their organizations; and (ii) changes affecting their compliance with Chapter 4151 and the proposed new rules. By requiring applicants and administrators to timely report these changes to the Department, the Department is better able to ensure that the reported changes will not adversely affect the ability of the applicant or administrator to comply with the requirements of Chapter 4151. The Department will also be able to ensure that the reported changes are in the best interest of the public and the insurance consumers of this state. Further, the proposal requires administrators to submit annual reports to the Department. This proposed requirement will enable the Department to better monitor the financial health of each administrator. It will also allow the Department to monitor each administrator's compliance with applicable statutory and regulatory requirements, such as timely claims payment and proper remittance of collected premiums. Additionally, because administrators often perform a wide variety of administrative duties on behalf of insurers, the proposal requires insurers to review and audit the performance of their administrators. This proposed requirement will assist in ensuring that administrators perform their delegated administrative functions in accordance with the requirements of the Insurance Code,

the Labor Code, and rules adopted thereunder. This is particularly important because an insurer retains ultimate responsibility and accountability for each function performed by an administrator. By requiring each insurer to properly oversee the performance of its administrators, an insurer should obtain a better idea of its own capabilities, strengths, and weaknesses, as well as any deficiencies in statutory or regulatory compliance. This should result in financially healthier and more compliant insurers. Further, requiring each insurer to properly oversee its administrators' performance, compliance with applicable statutes and rules, and overall health and integrity should result in financially healthier and more productive, efficient, and compliant administrators.

Finally, the proposal requires certain individuals to submit biographical affidavits and complete sets of fingerprints to the Department upon application for a certificate of authority. It is, therefore, anticipated that only those persons that are honest, trustworthy, reliable, and fit to hold a certificate of authority from the Department will be granted such authorization. This proposed requirement will assist in ensuring the safety of the public and the integrity of the persons holding authorizations from the Department.

Potential Costs for Persons Required to Comply with the Proposal.

Under the Insurance Code Chapter 4151 and the proposed new rules, a person may act as or hold itself out as an administrator. No person is required by law to act as or hold itself out as an administrator. However, for those persons that choose to act as or hold themselves out as an administrator, the proposal prescribes requirements for both applicants and administrators holding a certificate of authority under Chapter 4151.

Proposed New §§7.1606 - 7.1608 Requirements for Applicants for a Certificate of Authority and Persons Holding a Certificate of Authority.

There will be costs of compliance with proposed new §§7.1606 - 7.1608, both for applicants and for persons that currently hold a certificate of authority from the Department under Chapter 4151. These requirements apply to persons at the time of application, to persons newly receiving a certificate of authority, and to persons currently holding a certificate of authority. The Department anticipates that the types of costs of compliance with these proposed requirements will generally be the same for persons holding a current certificate of authority under Chapter 4151 as for applicants applying for and newly receiving a certificate of authority under Chapter 4151. These anticipated costs of compliance are as follows.

The probable costs associated with proposed new §§7.1606 - 7.1608 result from: (i) notification requirements for a change in control of ownership; (ii) notification requirements related to a material change in fact or circumstance that impacts the accuracy or completeness of the information filed in an applicant's or administrator's initial application for a certificate of authority; and (iii) fidelity bond requirements.

Proposed new §7.1606 prescribes notification requirements for applicants and administrators involved in a change of control of ownership. The requirements of proposed new §7.1606 only apply to applicants and administrators that experience a change of control of ownership. If there is no change of control, there will be no costs of compliance with §7.1606 for an applicant or administrator. The anticipated costs of compliance are related to the requirement in proposed new §7.1606(b) that an applicant or administrator must notify the Department in writing of a change of control in the ownership of the applicant or administrator. This notification must be submitted not later than the 30th day after the effective date of the change. The Department anticipates that the total probable cost of preparing and submitting the information required under proposed new §7.1606(b) will be less than $60. This is based upon a member of an applicant's or administrator's administrative staff preparing the necessary information in less than one hour. The salary for this staffer is estimated at the mean salary rate of $14.13 per hour, as set forth for similar office and administrative support positions in the May 2007 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm. This publication will hereafter be referred to in this Cost Note as the DOL May 2007 Texas Wage Estimates. The provided link is also applicable to all subsequent references. Additionally, the Department estimates that a member of an applicant's or administrator's management staff could review and approve the prepared information in less than one hour. The salary for this staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates.

Proposed new §7.1607 prescribes notification requirements related to a material change in fact or circumstance that impacts the accuracy or completeness of the information filed in an applicant or administrator's initial application for a certificate of authority under Chapter 4151. Proposed new §7.1607(b) requires an administrator to notify the Department of a material change in fact or circumstance not later than the 30th day from the date the administrator first becomes aware of the material change in fact or circumstance. Proposed new §7.1607(c) requires an applicant to continually update the information filed in its initial application for a certificate of authority, including notifying the Department in writing of a material change in fact or circumstance, while the application is pending with the Department. The requirements of proposed new §7.1607(b) only apply to administrators that experience a change in fact or circumstance that impacts the accuracy or completeness of the information filed in the administrator's initial application for a certificate of authority under Chapter 4151. If there is no such change in fact or circumstance, there will be no costs for compliance with §7.1607(b). The Department estimates that the total probable costs for complying with proposed new §7.1606(b) should be less than $60. This is based upon a member of an administrator's administrative staff preparing the necessary information in less than one hour. The salary for this staffer is estimated at the mean salary rate of $14.13 per hour, as set forth for similar office and administrative support positions in the DOL May 2007 Texas Wage Estimates. Additionally, the Department estimates that a member of an administrator's management staff could review and approve the prepared information in less than one hour. The salary for this staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates. The Department anticipates that the total probable cost to comply with proposed new §7.1607(b) will vary substantially among administrators depending upon how often a particular administrator experiences a material change in fact or circumstance that warrants notification to the Department. For example, if an administrator changes its mailing address, has a judgment issued against it, and learns that one of its executive officers is convicted of a felony, that particular administrator may incur higher compliance costs than an administrator that experiences fewer material changes. Proposed new §7.1607(c) requires an applicant to continually up-

date the information filed in its initial application for a certificate of authority. This includes notifying the Department in writing of a material change in fact or circumstance, while the application is pending with the Department. If an applicant does not experience such a change, there will be no costs of compliance with proposed new §7.1607(c) for the applicant. The Department anticipates that the total probable costs associated with complying with proposed new §7.1606(c) should be less than $60. This is based upon a member of an applicant's administrative staff preparing the necessary information in less than one hour. The salary for the staffer is estimated at the mean salary rate of $14.13 per hour, as set forth for similar office and administrative support positions in the DOL May 2007 Texas Wage Estimates. Additionally, the Department estimates that a member of an applicant's management staff could review and approve the prepared information in less than one hour. The salary for the staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates. The Department anticipates that the total probable compliance cost will vary substantially among applicants. The actual total costs will depend upon how often a particular applicant experiences a change in the information filed in its initial application while its application is pending with the Department. For example, if an applicant changes its mailing address or replaces one of its executive officers while its application is pending with the Department, that particular applicant may incur higher compliance costs than an applicant that experiences no such changes. Proposed new §7.1607(e) requires an applicant or administrator to maintain the qualifications necessary to obtain a certificate of authority under Chapter 4151 at all times. The total probable costs of compliance with proposed new §7.1606(e) will depend upon several factors, including: (i) how often an applicant experiences a change in the information filed in its initial application for a certificate of authority, including a material change in fact or circumstance; while its application is pending with the Department; (ii) how often an administrator experiences a material change of fact or circumstance that affects its manner of compliance with the requirements of Chapter 4151 and the proposed new rules; and (iii) how often an applicant or administrator chooses to change a factor affecting its manner of compliance with the requirements of Chapter 4151 and the proposed new rules. For example, if a person acquires a new ownership interest in an applicant or administrator, the person may incur additional costs in order to meet the requirements of Chapter 4151 and the proposed new rules related to that specific change. This could include: (i) applicable fingerprint and biographical affidavit requirements under proposed new §7.1604 (relating to Application for Certificate of Authority); (ii) notification requirements under proposed new §7.1606 (relating to Requirements Related to Ownership Interest and Change of Control); and (iii) notification requirements under proposed new §7.1607 (relating to Facts and Circumstances Affecting Issuance of Certificate of Authority). However, an applicant or administrator that does not experience such changes will not incur any compliance costs under proposed new §7.1606(e).

Proposed new §7.1608 prescribes requirements related to applicant and administrator fidelity bonds. First, proposed new §7.1608(a) requires an applicant to obtain, and an administrator to maintain, a fidelity bond that complies with the requirements of the Insurance Code §4151.055 and the proposed new rules. Proposed new §7.1608(b) requires applicants and administrators to obtain their fidelity bonds from a surety company authorized to engage in business in this state as a surety or an eligible surplus lines insurer in compliance with the Insurance Code Chapter 981 and rules adopted thereunder. Based upon the information available to the Department, the Department anticipates that the cost of a fidelity bond for an applicant or administrator meeting the requirements of proposed new §7.1608 should be between $150 - $550 per applicant or administrator. The actual cost to each applicant or administrator will depend on factors unique to each applicant or administrator, such as: (i) the structure of the applicant's or administrator's business organization; (ii) the applicant's or administrator's past claims history; and (iii) the size and complexity of the applicant or administrator. The Department, however, anticipates that all such costs will be passed on in the form of administrative fees. As a result, the total actual compliance costs should be significantly minimized. Proposed new §7.1608(c) requires an applicant or administrator to notify the Commissioner in writing if its fidelity bond is cancelled or terminated under certain specified circumstances. The written notice is required if the cancelled or terminated fidelity bond is not replaced with new coverage: (i) that meets the requirements of the Insurance Code §4151.055 and the proposed new rules; and (ii) that is effective concurrently upon the date of the cancellation or termination. The Department anticipates that the total probable costs for complying with proposed new §7.1608(c) should be less than $60. This is based upon a member of an applicant's or administrator's administrative staff preparing the necessary information in less than one hour. The salary for the staffer is estimated at the mean salary rate of $14.13 per hour, as set forth for similar office support and administrative positions in the DOL May 2007 Texas Wage Estimates. Additionally, the Department anticipates that a member of an applicant's or administrator's management staff could review and approve the prepared information in less than one hour. The salary for the staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates.

Each applicant or administrator has the information necessary to estimate its own compliance costs with proposed new §§7.1606 - 7.1608. Any other costs to comply with these proposed new rules result from the legislative enactment of Chapter 4151 and are not a result of the adoption, enforcement, or administration of the proposal.

Proposed New §7.1604 and §7.1605 Requirements for Applicants for a Certificate of Authority.

The proposal prescribes additional requirements for applicants applying for a certificate of authority under Chapter 4151. In addition to the costs of compliance with the requirements in §§7.1606 - 7.1608, there will be costs for compliance with the requirements in proposed new §7.1604 and §7.1605 for such applicants. Proposed new §7.1604 prescribes requirements for a certificate of authority under Chapter 4151. Proposed new §7.1604(a) requires an applicant who seeks a certificate of authority under Chapter 4151 to file an application with the Department. This must be accompanied by a non-refundable fee of $1,000. Proposed new §7.1604(a) also requires the applicant to verify the application by attesting to the truth and accuracy of the information in the application. Proposed new §7.1604(b) adopts four forms by reference that comprise the application for a certificate of authority under Chapter 4151. Proposed new §7.1604(c) requires an applicant to register its official name with the Department and the Office of the Secretary of State, as applicable. Further, if the Commissioner determines that an applicant's name is too similar to a name already registered with the Department, proposed new §7.1604(c) requires the applicant to register an alternative name with the Department

and the Office of the Secretary of State, as applicable. Proposed new §7.1604(d)(1) requires each executive officer or other comparable responsible person of an applicant to provide the Department a completed biographical affidavit. Proposed new §7.1604(d)(2) requires each person filing a biographical affidavit to comply with the requirements of Chapter 1, Subchapter D of Title 28 of the Texas Administrative Code (relating to Effect of Criminal Conduct). The Department anticipates that the total probable costs for complying with the §7.1604 identification, notification, and documentation requirements will be less than $2,300. This estimate is based upon the following factors. First, an applicant must submit a non-refundable $1,000 filing fee to the Department with its application for a certificate of authority. Second, the Department anticipates that a member of an applicant's administrative staff could prepare the information necessary to comply with the identification, notification, and documentation requirements of proposed new §7.1604 in less than eight hours. The salary for this staffer is estimated at the mean salary rate of $14.13 per hour, as set forth, as set forth for similar office support and administrative positions in the DOL May 2007 Texas Wage Estimates. Additionally, the Department anticipates that a member of an applicant's management staff could review and approve the prepared information in less than five hours. The salary for this staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates. Proposed new §7.1604(c) requires each applicant to register its official name with the Office of the Secretary of State, as applicable. Based upon information available to the Department, the Department estimates that a domestic applicant will be required to submit a $300 filing fee to the Office of the Secretary of State and that a foreign applicant will be required to submit a $750 filing fee to the Office of the Secretary of State. Proposed new §7.1604(d)(2) requires each executive officer or other comparable responsible person of an applicant to comply with the fingerprint requirements of Chapter 1, Subchapter D of Title 28 of the Texas Administrative Code (relating to Effect of Criminal Conduct. This requires the submission of a complete set of fingerprints and certain identifying information. The Department estimates that the probable costs of complying with the fingerprint requirements should be $45 - $55. The Department has been informed by the FBI and DPS that each individual who must provide fingerprints under 28 TAC §1.503(2) must pay a fingerprinting fee of $34.25. The $34.25 fingerprinting processing fee includes an FBI charge of $19.25 and a DPS charge of $15. Additionally, there is a $9.95 fingerprint collection fee charged by companies that take electronic fingerprints on behalf of the Department. While the Department anticipates that most individuals in the State of Texas will utilize the convenience and reliability offered by authorized electronic fingerprint services, an individual may choose to submit a paper fingerprint card instead of an electronic fingerprint submission. In those cases, the individual must submit payment in the amount of $44.20 payable to the DPS, which includes the fingerprinting processing fee of $34.25 and the fingerprint collection fee of $9.95. Additionally, an individual may have his or her fingerprints captured on a paper fingerprint card by a criminal law enforcement agency. The Human Resources Code §80.001(b) authorizes a charge for such service in an amount not to exceed $10. Lastly, any additional information that must be supplied by an individual at the time of fingerprinting is minimal. Therefore, the Department does not anticipate any cost for providing such required information. Further, the Department anticipates that an individual or applicant should only have to submit a complete set of fingerprints under the proposal one time. This is based on the applicant maintaining continuous licensure with the Department.

Proposed new §7.1605 prescribes notification requirements for certain qualifying insurers or HMOs that choose to act as or hold themselves out as administrators. Proposed new §7.1605(b) requires a qualifying insurer or HMO to submit written notice to the Department stating that it will be acting as or holding itself out as an administrator. Proposed new §7.1605(b) also requires the written notice to include: (i) the insurer's or HMO's contact information; (ii) a narrative; and (iii) a list of any other states in which the insurer or HMO will be acting as or holding itself out as an administrator. The Department anticipates that the total probable cost of preparing and submitting the information required under proposed new §7.1605(b) will be less than $60. This is based upon a member of an insurer's or HMO's administrative staff preparing the information necessary to comply with proposed new §7.1605 in less than one hour. The salary for the staffer is estimated at the mean salary rate of $14.13 per hour, as set forth for similar office support and administrative positions in the DOL May 2007 Texas Wage Estimates. Additionally, the Department estimates that a member of an insurer's or HMO's management staff could review and approve the information prepared by a member of the insurer's or HMO's administrative staff in less than one hour. The salary for the staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates.

Any other costs to comply with proposed new §7.1604 and §7.1605 result from the legislative enactment of Chapter 4151 and are not a result of the adoption, enforcement, or administration of the proposal.

Proposed New §§7.1609, 7.1612, 7.1613, 7.1615, and 7.1617 Requirements for Administrators.

There will be costs of compliance with proposed new §§7.1609, 7.1612, 7.1613, 7.1615, and 7.1617 for persons that hold a certificate of authority as an administrator under Chapter 4151. These costs will be incurred by persons upon receiving a certificate of authority under Chapter 4151. Such costs will also be incurred by persons currently holding a certificate of authority under Chapter 4151.

Proposed new §7.1609 prescribes requirements related to an administrator's annual report filing. First, proposed new §7.1609(a) requires an administrator to file an annual report with the Department each year. It must be accompanied by a non-refundable fee of $200. Proposed new §7.1609(b) adopts the Annual Report Forms, Annual Report Exhibits, and Certification Form by reference. Proposed new §7.1609(c) requires each annual report to include an audit report on the financial statements prepared by an independent certified public accountant (CPA) that meets certain specified requirements, unless an administrator is exempt from this requirement under proposed new §7.1609(d)(1). Proposed new §7.1609(d)(2) permits an administrator earning less than $10 million in compensation for providing administrative services in Texas to file a financial statement with the Department as part of its annual report in lieu of filing the audit report required by §7.1609(c). Proposed new §7.1609(d)(3) requires each administrator qualifying for the exemption in §7.1609(d)(1) to meet all the other requirements of §7.1609. The preparation and compilation costs associated with submitting an annual report filing will vary among administrators depending upon the amount and quality of data routinely

collected and maintained by the administrator. An annual report generally requires the submission of a minimal amount of information relating to the services performed by a particular administrator. This includes information such as the administrator's claims data or the amount of premium collected by the administrator on behalf of a particular insurer. The Department expects the majority of administrators to retain this type of information on a regular basis in order to appropriately perform their delegated duties and to satisfy their own business needs, such as filing federal income taxes. As a result, the Department anticipates that a member of an applicant's or administrator's management staff could compile, review, and approve the information necessary to comply with proposed new §7.1609 in 12-24 hours. The Department also anticipates that this estimated range of time would include the review and approval of any necessary financial information that is prepared by a CPA or a staff-level accountant, as applicable. The estimated costs associated with the preparation of the financial information required by proposed new §7.1609 are based on the following factors. First, proposed new §7.1609(c) requires each annual report to include an audit report on the financial statements performed by an independent CPA. However, proposed new §7.1609(d)(1) exempts certain administrators from this requirement. For administrators who qualify for the exemption and choose to file a certified financial statement as part of their annual report, the Department estimates that a staff-level accountant could prepare the appropriate financial statement in less than 14 hours. The salary for the staffer is estimated at the mean salary rate of $29.51 per hour, as set forth for similar accountant and auditor positions in the DOL May 2007 Texas Wage Estimates. Based upon information available to the Department, the Department estimates that 734 of the currently licensed 751 administrators may qualify for the exemption in proposed new §7.1609(d)(1) and may be eligible to file a certified financial statement as part of the annual report due June 30, 2009. Because the preparation of a certified financial statement is typically less costly than the preparation of an audit report on financial statements prepared by an independent CPA, the Department anticipates that the majority of eligible administrators may realize cost savings as a result of the §7.1609(d)(1) exemption. Second, for administrators that do not qualify for the exemption or who choose not to file a certified financial statement as part of their annual report, §7.1609(c) requires each annual report to include an audit report on the financial statements performed by an independent CPA. The Department estimates that these administrators will typically be larger in size and may include administrators whose securities are publicly traded. Therefore, the Department anticipates that many of these administrators will have already obtained independent CPA audit reports to satisfy their own business needs. For those entities that have not already obtained such audit reports as part of their routine business practices, the Department anticipates that an independent CPA will charge certain minimum engagement costs. The Department further anticipates that an adequate audit report will typically require no less than 80 hours to prepare, at the weighted-average hourly rate of $29.51 - $60.00 per hour. The Department bases this hourly salary rate estimate on the minimum mean hourly rate of $29.51 per hour for an accountant, as set forth in the DOL May 2007 Texas Wage Estimates, along with other factors considered by the Department, such as: (i) the experience level of the accountant; (ii) whether the accountant is employed by an independent accounting firm or a national accounting firm; (iii) the accountant's familiarity with the insurance industry in general; (iv) the accountant's prior relationship with the particular customer; and (v) the complexity of the task to be performed by the accountant. The Department anticipates that this estimated cost may increase substantially among administrators depending upon the following factors: (i) the number of hours an independent CPA needs to review a particular administrator's financial information; (ii) the size and complexity of the organization of a particular administrator; (iii) the adequacy of a particular administrator's books and records; and (iv) whether a particular administrator's internal controls are adequate. Further, the Department notes that this estimated cost may increase substantially among administrators if an administrator chooses to utilize the services of a national public accounting firm instead of the services of a particular, individual CPA.

Proposed new §7.1612 prescribes requirements related to administrator fiduciary bank accounts. Proposed new §7.1612(b) requires an administrator that receives a premium, contribution, return premium, or return contribution (premium) on behalf of an insurer, HMO, plan sponsor, or group to report the receipt of that premium to the insurer, HMO, plan sponsor, or group within a reasonable amount of time. Proposed new §7.1612(c) requires an administrator to establish at least one fiduciary bank account to hold a premium collected or received by the administrator pursuant to proposed new §7.1612. Proposed new §7.1612(d) requires each fiduciary bank account to be established and styled as an escrow account. Proposed new §7.1612(e) requires an administrator to maintain each fiduciary bank account at a financial institution that is organized under the laws of the United States or any state thereof. The financial institution must also be regulated, supervised, and examined by United States federal or state authorities having regulatory authority over banks and trust companies. Further, proposed new §7.1612(e) provides that a fiduciary bank account may only consist of one or more of the following types of investments: (i) cash and cash equivalents, including savings accounts, checking accounts, money market accounts, and certificates of deposit; (ii) non-assessable money market mutual funds that are primarily invested in United States government securities; and (iii) other investments of substantially similar quality, as approved by the Commissioner. Proposed new §7.1612(f) requires an administrator to maintain detailed accounting records for each fiduciary bank account it establishes or maintains. Proposed new §7.1612(g) requires an administrator to provide a copy of all records relating to the account activity of an insurer, HMO, plan sponsor, or group in a fiduciary bank account to that insurer, HMO, plan sponsor, or group, upon its reasonable request. The requirements of proposed new §7.1612 only apply to an administrator that collects a premium on behalf of an insurer, HMO, plan sponsor, or group. Thus, if an administrator does not collect such premium, there will be no compliance costs for the administrator. For administrators that must comply with proposed new §7.1612, the probable costs will vary substantially among administrators. This cost variation will be based upon the business decisions made by individual administrators, including the following factors: (i) the specific banking institution the administrator chooses for the establishment of a fiduciary account; (ii) whether the administrator uses more than one banking institution to establish a fiduciary account; (iii) the size of the amounts maintained in a fiduciary account; (iv) the number of other accounts held by the administrator at a particular banking institution; (v) whether an administrator currently utilizes an accounting system for premium collected; (vi) whether an administrator currently reports on a routine basis the collection of premium to particular insurers, HMOs, plan sponsors, or groups; (vii) whether an administrator currently provides ac-

counting records related to collected premium to a particular insurer, HMO, plan sponsor, or group; and (viii) in what manner an administrator currently maintains collected premium. The reporting, notification, and accounting requirements in proposed new §7.1612 are consistent with prudent business practices. Therefore, the Department does not anticipate that most administrators collecting premium will need to make significant changes to their current collection and accounting methods, systems, practices, and procedures. Additionally, certain administrators may already have fiduciary accounts established to hold premiums and may already provide accounting information to particular insurers, HMOs, plan sponsors, or groups related to the premium collected on their behalf. Further, §7.1612 does not dictate the precise methods or procedures that must be utilized by an administrator. This means that each administrator is free to choose the most economical means of complying with the §7.1612 requirements.

Proposed new §7.1613(a) requires each administrator providing administrative services in Texas on behalf of an insurer to enter into a written agreement with that insurer. Proposed new §7.1613(c), (d), (e), and (f) prescribe specific provisions that must be included in a written agreement entered into pursuant to proposed new §7.1613(a) and (b). Proposed new §7.1613(g) permits a master services agreement to be used to satisfy the requirements of proposed new §7.1613. Proposed new §7.1613(i) requires each such written agreement to meet the requirements of proposed new §7.1613 no later than September 1, 2009. Finally, proposed new §7.1613(b) provides an administrator subcontractor the option of meeting the requirements of proposed new §7.1613 by entering into a written agreement with an administrator contractor only. The written agreement, however, must meet the requirements of Chapter 4151 and proposed new §7.1613. The Department anticipates that the probable costs for complying with proposed new §7.1613 will vary substantially among administrators, depending upon: (i) the number of times a particular function is delegated; (ii) who a particular function is delegated to; (iii) the complexity of an administrator's plan of operation; (iv) how many insurers an administrator performs services on behalf of; and (v) whether an administrator already has existing written agreements with particular insurers or other administrators. The minimum contracting requirements in proposed new §7.1613 are consistent with prudent business practices. Therefore, the Department does not anticipate that most administrators will need to make significant changes to their current contracts with insurers or other administrators in order to comply with the §7.1613 requirements. For those administrators that have existing written agreements with particular insurers or other administrators, the Department anticipates that an attorney could, in less than three hours per written agreement, (i) review those written agreements, (ii) draft any new §7.1613 provisions, and (iii) finalize those written agreements. The maximum estimated cost for these functions is $168.00. This is based on a salary for an attorney at the mean salary rate of $57.73 per hour, as set forth in the DOL May 2007 Texas Wage Estimates. For those administrators that must execute a new written agreement in order to comply with proposed new §7.1613, the Department anticipates that the costs for an attorney to prepare such an agreement should be less than $230 per written agreement. This is based on the following factors. Proposed new §7.1613 requires minimal information to be included in a written agreement between an administrator and an insurer, such as a description of the functions to be performed by the administrator. As such, the Department anticipates that an attorney could draft a new written agreement that complies with proposed new §7.1613 and finalize each agreement in less than four hours. This is also based on the mean salary rate of $57.73 per hour for the attorney, as set forth in the DOL May 2007 Texas Wage Estimates. Additionally, because proposed new §7.1613 does not dictate the format of the written agreement, each administrator is free to choose the most economical means of compliance. This includes utilizing master services agreements. The Department anticipates that an administrator will pass on any costs associated with the contracting requirements to the insurer the administrator performs functions on behalf of or to another administrator. The Department further anticipates that this will significantly decrease the administrator's compliance costs.

Proposed new §7.1615 prescribes requirements related to the transfer of books and records upon the termination of a relationship with an administrator. Proposed new §7.1615(a) requires an administrator to provide books and records to a successor administrator no later than 30 days from the date of the termination of the relationship or written agreement with an insurer, HMO, plan sponsor, or group, unless otherwise provided by the Commissioner. If there is not a successor administrator, or if the successor administrator is unknown at the time of the required transfer, the set or copy of the books and records must be provided to the insurer, HMO, plan sponsor, or group. Proposed new §7.1615(b) requires the books and records to be transferred in an organized and usable manner. Proposed new §7.1615(c) requires the allocation of the payment of costs associated with providing the insurer's books and records to be addressed in the written agreement between the insurer and the administrator. Proposed new §7.1615(d) requires an administrator to provide notice to the Department of the termination of a relationship or written agreement with an insurer, HMO, plan sponsor, or group no later than thirty days from the date the administrator first learns of the termination. Proposed new §7.1615(e) allows an administrator subcontractor to comply with the requirements of §7.1615 by providing a complete and accurate original set or a complete and accurate copy or image of the original set of the insurer's, HMO's, plan sponsor's, or group's books and records to the administrator contractor. The administrator subcontractor must also provide written notice to the Department of the termination of the relationship or written agreement with the administrator contractor, no later than thirty days from the date the administrator subcontractor first learns of the termination. The Department anticipates that the total probable costs for complying with the §7.1615 notification requirements will be less than $60. This is based upon a member of an administrator's administrative staff preparing the necessary information in less than one hour. The salary for the staffer is estimated at the mean salary rate of $14.13 per hour, as set forth for similar office support and administrative positions in the DOL May 2007 Texas Wage Estimates. Additionally, the Department estimates that a member of an administrator's management staff could review and approve the prepared information in less than one hour. The salary of this staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates. The costs of compliance associated with the copying and transfer requirements of proposed new §7.1613 will vary substantially among administrators depending upon the following factors: (i) how often an administrator's relationship or written agreement with a particular insurer, HMO, plan sponsor, or group, or other administrator terminates; (ii) the volume of books and records that are in the possession of a particular administrator; (iii) the number of insurers, HMOs, plan sponsors, or groups that a particular administrator performs administrative services for; (iv) how often a particular administrator

further delegates its administrative duties to another administrator; (v) the technological capabilities of a particular administrator; and (vi) whether a particular administrator utilizes electronic record storage and maintenance. Proposed new §7.1615 does not require the copying or transferring of books and records in a specific manner. Therefore, each administrator has the flexibility to choose the most economical means of complying with the §7.1615 requirements. Proposed new §7.1615(c) requires the written agreement between the administrator and the insurer to address the costs associated with the transfer of the insurer's books and records. Therefore, each administrator has the flexibility to negotiate the most economical means of complying with the §7.1615 requirements. This provides each administrator the opportunity to significantly decrease its own compliance costs.

Proposed new §7.1617 requires an administrator to pay to the Department a non-refundable fee of $500 for the expenses of an examination conducted under the Insurance Code §4151.201. The costs associated with §7.1617 will vary substantially among administrators depending upon how often an administrator is examined by the Department. Whether or not the Department will examine a particular administrator will depend upon a variety of factors that will vary among administrators, including: (i) if there are indications that the administrator has not complied with regulatory requirements; (ii) if there is a substantial increase in complaints involving the administrator; or (iii) if there is any evidence of public harm caused by the administrator.

However, each administrator has the information necessary to estimate its own costs of compliance with proposed new §§7.1609, 7.1612, 7.1613, 7.1615, and 7.1617. Any other costs to comply with these proposed new rules result from the legislative enactment of Chapter 4151 and are not a result of the adoption, enforcement, or administration of the proposal.

Proposed New §7.1610 Requirements for Certain Administrators Subject to the Education Code §22.004(g) and (h).

Proposed new §7.1610 provides an option to an insurer or HMO that: (i) holds itself out as or acts as an administrator; and (ii) that is subject to the Education Code §22.004(g) and (h). Such as administrator may meet the audited financial statement requirements of the Education Code §22.004(g) and (h) by either: (i) filing an annual audited financial statement in accordance with generally accepted accounting principles, as provided by the Education Code §22.004(h); or (ii) by providing a copy of the financial statement for the preceding calendar year that was prepared by an independent certified public accountant and filed with the Department in compliance with the requirements of §7.18 (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 (relating to Audited Financial Reports). The Education Code §22.004(g) requires an insurer, a company subject to the Insurance Code Chapter 842, or an HMO that issues a policy or contract under this section and any person that assists the school district in obtaining or managing the policy or contract for compensation to provide an annual audited financial statement to the school district showing the financial condition of the insurer, company, organization, or person. The Education Code §22.004(h) requires the annual audited financial statement to be made in accordance with rules adopted by the Commissioner or with generally accepted accounting principles, as applicable. Proposed new §7.1610 only applies to insurers or HMOs that: (i) hold themselves out as or act as administrators; (ii) are subject to the Education Code §22.004(g) and (h); and (iii) opt to comply with the audited financial statement requirements of the Education Code §22.004(g) and (h) by providing a copy of the financial statement for the preceding calendar year that was prepared by an independent certified public accountant and filed with the Department in compliance with the requirements of §7.18 (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 (relating to Audited Financial Reports). There will be no §7.1610 compliance costs for any other administrator or for any insurer or HMO that holds itself out or acts as an administrator but chooses not to utilize the filing option provided by §7.1610. This is because the Commissioner has adopted special accounting rules that apply to insurers and HMOs, commonly referred to as statutory accounting principles. Further, insurers and HMOs may obtain an audit on their financial statements using either generally accepted accounting principles or statutory accounting principles. However, the Commissioner has not adopted accounting rules for any other administrator entity type. Generally accepted accounting principles are the only body of accounting rules that apply to other administrator entity types. There will be costs of compliance with §7.1610 for an insurer or HMO administrator that chooses to comply with its requirements. The Department has developed estimated costs for compliance with §7.1610 based on costs that have been previously used by the Department for similar compliance requirements. Individual administrators that identify, based on their own operations, differing costs for those cost components will be able to calculate their particular costs using the Department's cost analysis approach. The Department estimates the total §7.1610 copy costs should be less than $15 - $25 per financial statement filed. This is based on the following factors. The Department assumes that each copied page costs $0.10. The Department estimates that an average financial statement filed in compliance with §7.18 (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 (relating to Audited Financial Reports) will contain an average of 15 - 25 pages. The costs associated with the delivery of a financial statement to a school district will vary among administrators, depending on: (i) the number of school districts that an administrator delivers its financial statement to; and (ii) the administrator's chosen method of delivery. Each administrator has the information necessary to estimate its own compliance costs. Any other costs to comply with proposed new §7.1610 result from the legislative enactment of the Education Code §22.004 and are not a result of the adoption, enforcement, or administration of the proposal.

Proposed New §7.1611 Requirements for Certain Insurers.

Proposed new §7.1611 prescribes operational review and on-site audit requirements for certain insurers utilizing the services of an administrator. Proposed new §7.1611(a) requires an insurer to review the operations of each of its administrators that, in the aggregate, administers benefits in Texas on its behalf for more than 100 certificate holders, injured employees, plan participants, or policyholders. This review is required no less than two times each fiscal year. Also, §7.1611(a) allows a review to be conducted on the premises of the insurer or at another location designated by the insurer and through electronic means. Proposed new §7.1611(b) requires an insurer to conduct an on-site audit of each of its administrators that, in the aggregate, administers benefits in Texas on its behalf for more than 100 certificate holders, injured employees, plan participants, or policyholders. This on-site audit is required to be conducted no less than once every two year fiscal years. Proposed new §7.1611(c) permits an insurer to review the operations of an administra-

tor only one time in the same fiscal year in which the insurer conducts an on-site audit of the same administrator. Proposed new §7.1611(d) and (e) prescribe the specific requirements that an insurer review and on-site audit must meet. Proposed new §7.1611(f) permits a review or on-site audit to be performed by an insurer or the insurer's designated representative. Proposed new §7.1611(g) provides an insurer with the option of meeting the requirements of proposed new §7.1611 for an administrator subcontractor by reviewing and auditing the administrator contractor only. This, however, is permissible only under the following two circumstances: (i) the information supplied to the insurer by the administrator contractor includes all necessary and relevant information relating to the particular administrator subcontractor; and (ii) there is no evidence of material non-compliance by the particular administrator subcontractor. Lastly, proposed new §7.1611(h) requires an insurer to maintain all information and documentation related to a review or on-site audit for at least five years from the date of the review or on-site audit. The requirements of proposed new §7.1611 only apply to an insurer who utilizes the services of an administrator that, in the aggregate, administers benefits in Texas on the insurer's behalf for more than 100 certificate holders, injured employees, plan participants, or policyholders. There will be no compliance costs for an insurer that does not utilize an administrator that, in the aggregate, administers benefits in Texas on the insurer's behalf for more than 100 certificate holders, injured employees, plan participants, or policyholders. There will be associated compliance costs for an insurer that does utilize an administrator that, in the aggregate, administers benefits in Texas on the insurer's behalf for more than 100 certificate holders, injured employees, plan participants, or policyholders. The Department anticipates that the probable costs of compliance with proposed new §7.1611 will vary substantially among insurers depending upon the following factors: (i) the number of administrators the insurer is required to review and audit; (ii) the size and complexity of the organization of each administrator the insurer is required to review and audit; (iii) the number of hours an insurer needs to review a particular administrator's information; (iv) the adequacy of each administrator's books and records; (v) whether an administrator's internal controls are adequate; (vi) whether the insurer is already reviewing and auditing a particular administrator; (vii) whether the insurer is able to review the administrator through electronic means; and (viii) whether an insurer discovers substantial problems during a review or audit, including the depth and complexity of those problems. The §7.1611 review and auditing requirements are consistent with prudent business practices. Therefore, the Department does not anticipate that most insurers utilizing the services of an administrator will need to make significant changes to their current review and auditing methods, systems, practices, and procedures. Additionally, certain insurers may already have certain review or auditing procedures in place that meet all or the majority of the §7.1611 requirements. Proposed new §7.1611 does not dictate the precise methods, practices, systems, or procedures that must be utilized by an insurer during its review or audit of an administrator. Therefore, each insurer has the flexibility to use the most economical means of compliance with the §7.1611 requirements. In addition, §7.1611 provides options for compliance with the various requirements. Therefore, insurers are able to select options that will result in less costs being expended, such as performing the review through electronic means. First, proposed new §7.1611(a) permits an insurer to conduct a review of an administrator on its own premises or at another designated location. This allows an insurer to choose the most economical location for performing its review. Second, proposed new §7.1611(c) permits an insurer to forego one review of an administrator in the same fiscal year in which the insurer audits the same administrator. This will reduce the insurer's review costs. Third, proposed new §7.1611(f) permits an on-site audit to be conducted by an insurer or an insurer's designated representative. Because the proposed new requirements do not require an on-site audit to be conducted by an actuary or an independent CPA, an insurer may use its own employees to conduct an on-site audit. This also may result in costs savings. Lastly, proposed new §7.1611(g) allows an insurer to forego an additional review and audit of an administrator subcontractor under two specific circumstances: (i) the review and audit of the administrator contractor contains adequate information about the administrator subcontractor; and (ii) there is no evidence of material non-compliance by the administrator subcontractor. This provision will result in fewer reviews and audits. The Department estimates the following probable costs for insurers that are required to comply with proposed new §7.1611. The Department anticipates that a member of an insurer's management staff could complete a review of an administrator in less than four hours. An insurer's staffer could complete an on-site audit in a minimum of eight hours. The salary for the staffer is estimated at the mean salary rate of $44.87 per hour, as set forth for similar management positions in the DOL May 2007 Texas Wage Estimates. The Department anticipates that these estimated costs may increase substantially among administrators depending upon whether a particular insurer discovers problems during a particular review or on-site audit that requires additional review and attention. Each insurer has the information necessary to estimate its own compliance costs. Any other costs to comply with proposed new §7.1611 result from the legislative enactment of Chapter 4151 and are not a result of the adoption, enforcement, or administration of the proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. 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, partnership, 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.

Analysis of Economic Impact.

Administrators Subject to the Insurance Code Chapter 4151. These proposed rules will regulate administrators providing administrative services in Texas. Currently, 751 persons hold authorizations under the Insurance Code Chapter 4151. Of these, the Department estimates that approximately 38 percent may qualify as small or micro businesses under the Government Code §2006.001. In order to develop this estimate, the Department randomly sampled 5 percent of the currently licensed 751 persons holding authorizations under Chapter 4151 to

determine how many of those administrators collected less than $6 million in annual gross receipts in the previous year. The Department found that approximately 38 percent of the sampled administrators reported less than $6 million in annual gross receipts in the previous year. However, the Department estimates that this percentage may be higher than the actual number of administrators that qualify as small or micro businesses under the Government Code §2006.001 because the Department does not collect additional data that would indicate if a particular administrator is independently owned or operated. In addition to the 751 persons that currently hold authorizations under Chapter 4151, 120 insurers and HMOs are authorized to act as administrators under Chapter 4151. Of these, the Department estimates that approximately 12 may qualify as small or micro businesses under the Government Code §2006.001. The Department estimates that approximately 50 new administrator applications will be submitted annually for the next five years. Of these, the Department estimates that approximately 24 percent may qualify as small or micro businesses under the Government Code §2006.001. In order to develop this estimate, the Department randomly sampled 25 percent of the 104 applications that were submitted to the Department under Chapter 4151 over the past year. The Department found that approximately 24 percent qualify as small or micro businesses under the Government Code §2006.001. However, the Department estimates that this percentage may be higher or lower than the actual number of new applicants that will qualify as small or micro businesses under the Government Code §2006.001 because this estimate is based upon the organizational makeup of past applicants, derived from information reported in the applicant's applications. The Department considered different methodologies and determined that projecting a continuation of experience from the recent past was the best means available to the Department to provide an indication of the organizational makeup of applicants that may apply for a certificate of authority in the future. However, the Department can not assure that these recent historical trends will continue in the future. However, all small or micro business administrators that provide administrative services in Texas will be required to comply with the proposed new rules.

As required by the Government Code §2006.002(c), the Department has determined that the proposal may have an adverse economic effect on these small or micro businesses. Adverse economic impact may result from costs associated with the proposed requirements relating to: (i) application for a certificate of authority in §7.1604; (ii) notification, reporting, and maintenance of qualifications in §§7.1605 - 7.1607; (iii) fidelity bonds in §7.1608; (iv) annual reports in §7.1609; (v) fiduciary bank accounts in §7.1612; (vi) written contracts in §7.1613, (vii) book and record transfers in §7.1615; and (viii) application fees in §7.1604, annual report fees in §7.1609, and examination fees in §7.1617. All of these requirements are either wholly or partially the result of HB 472. HB 472 was enacted by the 80th Legislature, Regular Session, effective September 1, 2007. Therefore, any compliance costs and any resulting adverse economic impact are either wholly or partially the result of the enactment of HB 472. The Department's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal are equally applicable to these small or micro business administrators.

Insurers Utilizing the Services of an Administrator. The proposal in §7.1611 prescribes operational review and on-site audit requirements for certain insurers. Under the proposal, an insurer is required to review and audit each of its administrators that administer benefits in Texas, in the aggregate, for more than 100 certificate holders, injured employees, plan participants, or policyholders on behalf of the insurer. Currently, 1,379 insurers are authorized to write annuity, life, health, accident, pharmacy, or workers' compensation business in this state. The Department is unable to obtain information relating to the number of these insurers that qualify as a small business or a micro business under the Government Code §2006.001 because: (i) the Department does not collect information that enables the Department to determine whether an insurer utilizes the services of an administrator in Texas; and (ii) the Department does not collect information that enables the Department to determine if a particular administrator administers, in the aggregate, benefits for more than 100 certificate holders, injured employees, plan participants, or policyholders on behalf of an insurer. However, all small or micro business insurers that utilize the services of an administrator that administers benefits in Texas, in the aggregate, for more than 100 certificate holders, injured employees, plan participants, or policyholders on behalf of the insurer will be required to comply with the requirements of §7.1611.

As required by the Government Code §2006.002(c), the Department has determined that the proposal may have an adverse economic effect on these small or micro businesses. Adverse economic impact may result from costs associated with the proposed review and on-site audit requirements in §7.1611. These requirements are either wholly or partially the result of HB 472. HB 472 was enacted by the 80th Legislature, Regular Session, effective September 1, 2007. Therefore, any compliance costs and any resulting adverse economic impact are also either wholly or partially the result of the enactment of HB 472. The Department's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal are equally applicable to these small or micro businesses.

Certain Administrators Subject to the Education Code §22.004(g) and (h). This proposal provides an option to an insurer or HMO that: (i) holds itself out as or acts as an administrator; and (ii) that is subject to the Education Code §22.004(g) and (h). Such an administrator may meet the audited financial statement requirements of the Education Code §22.004(g) and (h) by either: (i) filing an annual audited financial statement in accordance with generally accepted accounting principles, as provided by the Education Code §22.004(h); or (ii) by providing a copy of the financial statement for the preceding calendar year that was prepared by an independent certified public accountant and filed with the Department in compliance with the requirements of §7.18 (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 (relating to Audited Financial Reports). Currently, 120 insurers and HMOs are authorized to act as administrators under Chapter 4151. Of these, the Department estimates that approximately 12 may qualify as small or micro businesses under the Government Code §2006.001. Further, the Department estimates that approximately 50 new administrator applications will be submitted annually for the next five years. Of these, the Department estimates that approximately 24 percent may qualify as small or micro businesses under the Government Code §2006.001. In order to develop this estimate, the Department randomly sampled 25 percent of the 104 applications that were submitted to the Department under Chapter 4151 over the past year. The Department found that approximately 24 percent qualify as small or micro businesses under the Government Code §2006.001. However, the Department estimates that this percentage may be higher or lower than the actual number of new applicants that will qualify as small or micro businesses

under the Government Code §2006.001 because this estimate is based upon the organizational makeup of past applicants, derived from information reported in the applicant's applications. The Department considered different methodologies and determined that projecting a continuation of experience from the recent past was the best means available to the Department to provide an indication of the organizational makeup of applicants that may apply for a certificate of authority in the future. However, the Department can not assure that these recent historical trends will continue in the future. However, all small or micro business administrators that: (i) are insurers or HMOs; (ii) are subject to the requirements of the Education Code §22.004(g) and (h); and (iii) opt to comply with §7.1610 to satisfy the audited financial statement requirements of the Education Code §22.004(h) will be required to meet the requirements of §7.1610.

As required by the Government Code §2006.002(c), the Department has determined that the proposal may have an adverse economic effect on these small or micro businesses. Adverse economic impact may result from costs associated with the proposed requirements in §7.1610 relating to providing a copy of the financial statement for the preceding calendar year that was prepared by an independent certified public accountant and filed with the Department in compliance with the requirements of §7.18 (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 (relating to Audited Financial Reports). This requirement is either wholly or partially the result of the Education Code §22.004(g) and (h). Therefore, any costs to comply with this requirement and any adverse economic impact is either wholly or partially the result of the Education Code §22.004(g) and (h). The Department's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal are equally applicable to these small or micro business administrators.

Regulatory Flexibility Analysis

Analysis of Whether Regulatory Flexibility Alternatives are Required. In accordance with the Government Code §2006.002(c-1), the Department has determined that the Department is not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code even though proposed new §§7.1604 - 7.1609, 7.1611 - 7.1613, 7.1615, and 7.1617 may have an adverse economic effect on small or micro businesses that are required to comply with the proposed requirements and proposed new §7.1610 may have an adverse economic effect on small or micro businesses that choose to comply with that proposed requirement. Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to 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.

Administrators Subject to the Insurance Code Chapter 4151. The general purpose of Chapter 4151 is to regulate administrators performing administrative services in Texas. Under Chapter 4151, an administrator is authorized to collect premium or contributions from and adjust and settle claims for residents of this state in connection with annuity, life, health, accident, pharmacy, and workers' compensation benefits. In authorizing an administrator to perform these functions, Chapter 4151 requires administrators to competently perform their delegated duties, including adjusting and settling claims timely and in accordance with the requirements of the Insurance Code, the Labor Code, and rules adopted thereunder. In order to accomplish these purposes, Chapter 4151 prescribes specific licensing, reporting, bonding, and contracting requirements. The Insurance Code §4151.051 and §4151.052 prescribe the licensing requirements applicable to a person seeking to act as or hold itself out as an administrator under Chapter 4151. Further, §4151.052(b) requires an applicant or administrator to notify the Department of a change in control of ownership and of a change in material fact or circumstance that affects the applicant's or administrator's qualifications for a certificate of authority under Chapter 4151. Section 4151.055 requires an applicant to obtain, and an administrator to maintain, a fidelity bond that protects against acts of fraud or dishonesty. Section 4151.101 requires an administrator to enter into a written agreement with an insurer in order for the administrator to provide administrative services to the insurer. Sections 4151.102, 4151.253, 4151.254, and 4151.256 address specific provisions and requirements that must be met by the written agreement entered into by an administrator. Section 4151.106 requires an administrator that collects a premium to hold that premium in a fiduciary capacity. Section 4151.113 provides that an insurer shall have continuing access to its books and records so it may fulfill a contractual obligation to an insured. Finally, the Insurance Code §4151.205 requires an administrator to file an annual report with the Department, including a financial statement. The common purpose of these requirements is to: (i) ensure that an administrator properly complies with all applicable statutes and rules; (ii) ensure that an administrator is properly monitored and held accountable for any deficiencies in its performance of delegated functions; (iii) protect the financial solvency of insurers, HMOs, plan sponsors, and groups that delegate functions to administrators; (iv) ensure the timely payment of benefits; (v) protect the public and insurance consumers of this state from the fraudulent acts of an administrator; (vi) ensure the overall health of an administrator, including the integrity of its ownership and management and its financial strength; (vii) ensure that the obligations and responsibilities of an administrator are clearly defined; and (viii) ensure that the contractual obligations to the insurance consumers of this state are timely and properly fulfilled. All of these requirements will inure to the health and economic benefit and protection of Texas health insurance consumers who are covered under a plan of an insurer, HMO, plan sponsor, or group that contracts with an administrator.

The purpose of proposed new §§7.1604 - 7.1609, 7.1612, 7.1613, 7.1615, and 7.1617 is to protect the health, safety, and economic welfare of the public, insurance consumers of this state, and the state of Texas generally by ensuring: (i) that applicants and administrators are honest, trustworthy, and reliable and have sufficient experience, ability, standing, and good record to make success of an administrator probable; (ii) increased accountability and compliance with the requirements of the Insurance Code, the Labor Code, and rules adopted thereunder; (iii) that benefits are available on a timely basis and in a sufficient amount; (iv) that an insurer's, HMO's, plan sponsor's, and group's obligations to its consumers are timely and properly fulfilled; (v) the overall operational health and integrity of each administrator; (vi) greater protection of the solvency

of insurers, HMOs, plan sponsors, and groups that utilize the services of administrators; and (vii) that each administrator is aware of its obligations under a written agreement with an insurer.

The proposal requires the executive officers and other comparable responsible persons of an applicant for a certificate of authority under Chapter 4151 to submit biographical affidavits to the Department and to submit complete sets of fingerprints. Because administrators often have control over or access to an insurer's, HMO's, plan sponsor's, and group's financial accounts, claims files, books and records, and premium collections, it is important that these persons are honest, trustworthy, reliable, and have the necessary qualifications to make the success of the administrator probable. By requiring the key personnel of an applicant to submit their fingerprints and criminal history to the Department, the Department is better able to protect the interests of the public and the insurance consumers of this state. Further, the proposal implements the statutory bond requirements of Chapter 4151 for an administrator. This added security helps ensure that an administrator may be made whole as a result of any malfeasance by one of its officers or employees, thus protecting the administrator's economic viability. This should, in turn, provide an insurer, HMO, plan sponsor, or group that contracts with an administrator an additional safeguard in the event that the administrator does not properly execute its delegated functions due to the acts of one of its officers or employees. If needed, this added security should provide an administrator with the necessary tools to remedy the situation, especially where the payment of benefits or collection of premium are involved, so that the ultimate interests of the insurer, HMO, plan sponsor, or group are protected. The proposal also requires an administrator to enter into a written agreement with an insurer. These proposed contracting requirements help ensure that all parties understand their responsibilities and obligations with respect to delegated functions and establish an insurer's expectations related to the performance of a delegated duty. It is especially important for insurers to properly oversee their administrators because an insurer retains ultimate responsibility and accountability for all delegated functions under the Insurance Code, the Labor Code, and rules adopted thereunder. The more times that a particular function is delegated from one administrator to another, the greater the risk of non-performance or inadequate performance of that function. The proposed requirements are necessary to protect the interests of insurance consumers by ensuring that claims are handled appropriately and paid timely, regardless of whether an insurer engages the services of an administrator or performs the required functions itself. Additionally, the proposal addresses the transfer of an insurer's, HMO's, plan sponsor's, and group's books and records. This is particularly important because an administrator will have access to or control of an insurer's, HMO's, plan sponsor's, or group's books and records at various times. Because an insurer, HMO, plan sponsor, or group cannot comply with the requirements of the Insurance Code, the Labor Code, or rules adopted thereunder with regard to the payment of benefits without knowing which of its claims has been paid or which of its claims remain outstanding, an insurer, HMO, plan sponsor, or group must have continuing access to its books and records. This is necessary even if the books and records are physically in the possession of one of its administrators. Additionally, an insurer, HMO, plan sponsor, or group may be placed at financial risk if it is unable to timely access its financial books and records. The proposed requirements are essential to prevent situations in which an insurer, HMO, plan sponsor, or group is denied continuous access to its own books and records upon the termination of a relationship or written agreement with an administrator. The proposal requires an administrator to submit annual reports to the Department. The submission of this information is fundamental to the Department's assessment of an administrator's ability to meet its obligations under the Insurance Code, the Labor Code, and rules adopted thereunder on a regular basis. Additionally, the regular review of an administrator will enable the Department to foresee potential financial problems or solvency issues at a much earlier date, so that corrective action can be taken as necessary.

Insurers Utilizing the Services of an Administrator. As previously stated, the general purpose of Chapter 4151 is to regulate administrators performing administrative services in Texas. In order to accomplish this purpose, Chapter 4151 requires insurers to properly oversee and monitor their administrators and to ensure competent administration of their programs. Specifically, §4151.1042 requires an insurer to conduct periodic reviews and on-site audits of each of its administrators that, in the aggregate, administers benefits in Texas on behalf of the insurer for more than 100 certificate holders, injured employees, plan participants, or policyholders.

The purpose of proposed new §7.1611 is to protect the health, safety, and economic welfare of the public, insurance consumers of this state, and the state of Texas generally by ensuring: (i) appropriate oversight of the administrators performing administrative services on behalf of insurers in Texas; (ii) increased accountability and compliance with the requirements of the Insurance Code, the Labor Code, and rules adopted thereunder; (iii) that benefits are available on a timely basis and in a sufficient amount; and (iv) that an insurer's obligations to its consumers are timely and properly fulfilled. It is especially important for insurers to properly oversee their administrators because an insurer retains ultimate responsibility and accountability for all delegated functions under the Insurance Code, the Labor Code, and rules adopted thereunder. The more times that a particular function is delegated from one administrator to another, the greater the risk of non-performance or inadequate performance of that function. The proposed requirements are necessary to: (i) enable an insurer to better assess its ability to meet its obligations under the Insurance Code, Labor Code, and rules adopted thereunder; and (ii) protect the interests of insurance consumers by ensuring that claims are handled appropriately and paid timely, regardless of whether an insurer engages the services of an administrator or performs the required functions itself. Additionally, it is anticipated that an insurer's regular review of its administrators will enable the insurer to foresee potential financial problems or solvency issues at a much earlier date, so that appropriate corrective action can be taken. Further, it is anticipated that each insurer will establish performance goals for its administrators and review the performance of its administrators to determine if those goals are being met. This should result in financially healthier insurers, as well as more productive, efficient, and compliant administrators.

Certain Administrators Subject to the Education Code §22.004(g) and (h). The general purpose of the Education Code §22.004(g) and (h) is to: (i) ensure the financial health and integrity of an insurer, a company subject to the Insurance Code Chapter 842, or an HMO that issues a policy or contract under the Education Code §22.004 and any person that assists a school district in obtaining or managing a policy or contract issued under the Education Code §22.004; and (ii) to protect the employees of a school district covered under a group health policy purchased by the school district. The Education

Code §22.004(g) requires an insurer, a company subject to the Insurance Code Chapter 842, or an HMO that issues a policy or contract under the Education Code §22.004 and any person that assists the school district in obtaining or managing the policy or contract for compensation to provide an annual audited financial statement to the school district showing the financial condition of the insurer, company, organization, or person. The Education Code §22.004(h) provides that the audited financial statement must be made in accordance with rules adopted by the Commissioner or with generally accepted accounting principles, as applicable.

The purpose of proposed new §7.1610 is to protect the health, safety, and economic welfare of the public, insurance consumers of this state, and the state of Texas generally by providing an optional mechanism for insurers or HMOs that hold themselves out or act as administrators and are subject to the requirements of the Education Code §22.004(g) and (h) to comply with the audited financial statement requirements of the Education Code §22.004(h). The proposal provides that an insurer or HMO that is subject to: (i) the requirements of §7.1605 (relating to Notification Requirements); and (ii) the requirements of the Education Code §22.004(g) may meet the requirement for an audited financial statement under the Education Code §22.004(h) by providing a copy of the financial statement for the preceding calendar year that was prepared by an independent certified public accountant and filed with the Department in compliance with the requirements of §7.18 (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 (relating to Audited Financial Reports).

Determination that No Regulatory Flexibility Alternatives Are Required. In order to protect the citizens of this state, it is necessary that: (i) all administrators, regardless of size, comply with the requirements of Chapter 4151 and the requirements in proposed new §§7.1604 - 7.1609, 7.1612, 7.1613, 7.1615, and 7.1617; and (ii) all qualifying insurers, regardless of size, comply with the review and on-site audit requirements of Chapter 4151 and the new requirements imposed under §7.1611. The Department has determined that the legislative intent of Chapter 4151 is that all insurance consumers benefit from the Chapter 4151 requirements, and not just those insurance consumers: (i) covered under a plan administered by larger administrators that do not qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2); or (ii) under a plan provided by larger insurers, HMOs, plan sponsors, or groups that do not qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2). The proposed rules are intended to assure that all administrators, regardless of their size, have the organizational and financial capacity to perform their delegated duties in a competent manner. This is especially important because administrators: (i) are often delegated the responsibility of timely paying medical benefits and workers' compensation benefits on behalf of insurers, HMOs, plan sponsors, and groups; and (ii) often have control over an insurer's, HMO's, plan sponsor's, or group's books and records and claims files. Therefore, if an administrator fails to perform one of these delegated duties, an insurer, HMO, plan sponsor, or group may not know what actions to take to correct the deficiency and statutory requirements may go unfulfilled. This could have a negative effect on the insurance consumers of this state. Additionally, the Department carefully reviews: (i) an application for a certificate of authority under Chapter 4151; (ii) an administrator's annual report; and (iii) any applicant or administrator notification related to a change in control, a change in the facts and circumstances affecting the issuance of a certificate of authority, or the transfer of books and records to ensure that all applicants and administrators, regardless of size, are capable of performing their delegated functions in compliance with Chapter 4151 and the proposed rules. The Department's review of these items will require the same amount of time, effort, and cost for an applicant or administrator qualifying as a small or micro business under the Government Code §2006.001(a)(1) and (2) as an applicant or administrator not qualifying as a small or micro business under the Government Code §2006.001(a)(1) and (2). Therefore, the requirements proposed by these new rules are consistent with the legislative intent that the requirements of Chapter 4151 apply to all administrators providing administrative services in Texas and to all qualifying insurers utilizing the services of an administrator. For these reasons, 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 4151 of the Insurance Code, is to protect the health, safety, and economic welfare of the public, insurance consumers of this state, and the state of Texas, there are no additional regulatory alternatives to the proposed requirements that will sufficiently protect the health, safety, and economic interests of the public, insurance consumers of this state, and the welfare of the state of Texas.

Additionally, in order to protect the health, safety, and economic interests of the public, insurance consumers of this state, and the welfare of the state of Texas, it is necessary that all insurers or HMOs, regardless of size, that: (i) hold themselves out as or act as administrators; (ii) are subject to the Education Code §22.004(g) and (h), and (iii) choose to comply with §7.1610 to satisfy the audited financial statement requirements of the Education Code §22.004(h) meet the new requirements imposed under §7.1610. The Department has determined that the legislative intent of the Education Code §22.004(g) and (h) is to ensure the financial health and integrity of an insurer, a company subject to the Insurance Code Chapter 842, or an HMO that issues a policy or contract under the Education Code §22.004 and any person that assists a school district in obtaining or managing a policy or contract issued under the Education Code §22.004; and to protect the employees of a school district covered under a group health policy purchased by the school district. The Department has also determined that the legislative intent of the Education Code §22.004 is that all school districts and employees benefit from the §22.004 requirements, and not just those school districts or employees that are assisted in the purchase or management of a group health insurance policy or contract by larger administrators that do not qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2). Therefore, the requirements in proposed §7.1610 are consistent with the legislative intent that the audited financial statement requirements of the Education Code §22.004(g) and (h) apply, regardless of size, to all: (i) insurers; (ii) group hospital service corporations subject to the Insurance Code Chapter 842; (iii) HMOs that issue a policy or contract under the Education Code §22.004; and (iv) any person that assists a school district in obtaining or managing a policy or contract issued under the Education Code §22.004, including insurers or HMOs acting as or holding themselves out as administrators. The Department has, therefore, determined, in accordance with §2006.002(c-1) of the Government Code, that because the purpose of §7.1610 and the authorizing statute, Chapter 22 of the Education Code, is to protect the health, safety, and economic welfare of the public, insurance consumers of this state, and the state of Texas, there are no additional regulatory alternatives to the proposed §7.1610 require-

ment that will sufficiently protect the health, safety, and economic interests of the public, insurance consumers of this state, and the welfare of the state of Texas.

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

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 5, 2009, 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 comments must be simultaneously submitted to Danny Saenz, Senior Associate Commissioner for the Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption of the proposed new sections in a public hearing under Docket Number 2701, at 9:30 a.m. on January 21, 2009, in Room 100 at 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.

STATUTORY AUTHORITY. The new sections are proposed under the Insurance Code, the Labor Code, and the Education Code.

The Insurance Code Chapter 1272 regulates the delegation of certain functions by health maintenance organizations. The Insurance Code §1272.058 provides that a delegation agreement required by the Insurance Code §1272.052 must require the delegated entity to provide the license number of a delegated third party performing a function that requires a license as a third-party administrator under the Insurance Code Chapter 4151 or utilization review agent under Article 21.58A or another license under this code or another insurance law of this state.

The Insurance Code Chapter 1305 regulates workers' compensation health care networks. The Insurance Code §1305.008 requires a person that performs the functions of an administrator under the Insurance Code Chapter 4151 to hold a certificate of authority issued under that chapter to provide those functions under the Insurance Code Chapter 1305 for an insurance carrier.

The Insurance Code Chapter 4151 regulates administrators. The Insurance Code §4151.001 defines the terms that are used in Chapter 4151, including the terms administrator, insurer, person, plan, and plan sponsor. The Insurance Code §4151.002 and §4151.0021 provide exemptions from the requirements of the Insurance Code Chapter 4151 for certain persons meeting specified conditions. The Insurance Code §4151.004 provides that an insurer or health maintenance organization that is not exempt under §4151.002(3) or (4) is subject to all provisions of the Insurance Code Chapter 4151 other than the Insurance Code §§4151.005, 4151.051 - 4151.054, 4151.056, and 4151.206(a)(1). The Insurance Code §4151.006 provides that the Commissioner may adopt rules that are fair, reasonable, and appropriate to augment and implement the Insurance Code Chapter 4151, including rules establishing financial standards, reporting requirements, and required contract provisions. The Insurance Code §4151.051(a) provides that an individual, corporation, organization, trust, partnership, or other legal entity may not act as or hold itself out as an administrator unless the entity is covered by and is engaging in business under a certificate of authority issued under the Insurance Code Chapter 4151. The Insurance Code §4151.052(a) provides that an application for a certificate of authority to engage in business as an administrator must be in a form prescribed by the Commissioner. Additionally, the Insurance Code §4151.052(a) specifies the items that must be included in an application for a certificate of authority, including basic organizational documents of the applicant; a description of the applicant and the applicant's services, facilities, and personnel; an audited financial statement of the applicant covering the preceding three calendar years or any lesser period that the applicant and any predecessors of the applicant have been in existence; and any other information the Commissioner reasonably requires. The Insurance Code §4151.052(b) requires an applicant for a certificate of authority or a certificate holder under the Insurance Code Chapter 4151 to notify the Department in the manner prescribed by Commissioner rule of a change of control in the applicant's or certificate holder's ownership not later than the 30th day after the effective date of the change. Additionally, the Insurance Code §4151.052(b) requires an applicant for a certificate of authority or a certificate holder under the Insurance Code Chapter 4151 to notify the Department of any other fact or circumstance affecting the applicant's or certificate holder's qualifications for a certificate of authority in this state as required by Commissioner rule. The Insurance Code §4151.053 provides that the Commissioner shall approve an application for a certificate of authority to engage in business in this state as an administrator if the Commissioner is satisfied that granting the application would not violate a federal or state law; the financial condition of the applicant or of each person who would operate or control the applicant is such that granting a certificate of authority would not be adverse to the public interest; the applicant has not attempted to obtain the certificate of authority through fraud or bad faith; the applicant has complied with the Insurance Code Chapter 4151 and rules adopted by the Commissioner under the Insurance Code Chapter 4151; and the name under which the applicant will engage in business in this state is not so similar to that of another administrator or insurer that it is likely to mislead the public. Before the Commissioner issues an applicant a certificate of authority, the Insurance Code §4151.055(a) requires an applicant to obtain and maintain a fidelity bond that complies with the Insurance Code §4151.055 and to submit to the Commissioner proof that the applicant has obtained the fidelity bond. The Insurance Code §4151.101(a) provides that an administrator may provide services only under a written agreement with an insurer or plan sponsor. The Insurance Code §4151.101(b) provides that the Commissioner by rule may prescribe provisions that must be included in the written agreement. The Insurance Code §4151.102(a) provides that the written agreement must include each requirement prescribed by the Insurance Code Chapter 4151, Subchapter C, except for a requirement that does not apply to any function the administrator performs. The Insurance Code §4151.102(a-1) provides that the written agreement must include a statement of the duties that the administrator is expected to perform on behalf of the insurer, and the lines, classes, or types of insurance that the administrator is authorized to administer. Additionally, under the Insurance Code §4151.102(a-1), the agreement must include, as applicable, provisions regarding claims handling and other standards relating to the business underwritten by the insurer. The Insurance Code §4151.103(a) requires an administrator and the insurer, plan, or plan sponsor to retain a

copy of the written agreement as part of their official records during the term of the agreement and until the fifth anniversary of the date on which the agreement expires. The Insurance Code §4151.103(d) provides that the Commissioner shall adopt rules to address the transfer of records from one administrator to another. The Insurance Code §4151.1042(a) provides that if an insurer uses the services of an administrator, the insurer is responsible for determining the benefits, premium rates, reimbursement procedures, and claims payment procedures applicable to the coverage and for securing reinsurance, if any. Further, under the Insurance Code §4151.1042(a), an insurer is required to provide a copy of the written requirements relating to those matters to the administrator. Additionally, the responsibilities of the administrator as to any of those matters must be set forth in the written agreement between the administrator and the insurer. The Insurance Code §4151.1042(b) provides that an insurer shall ensure competent administration of its programs. The Insurance Code §4151.1042(c) provides that if an administrator administers benefits for more than 100 certificate holders, injured employees, plan participants, or policyholders on behalf of an insurer, the insurer shall, at least semiannually, conduct a review of the operations of the administrator. Additionally, under the Insurance Code §4151.1042(c), an insurer is required to conduct an on-site audit of the operations of the administrator at least biennially. The Insurance Code §4151.105(a) provides that if an insurer, plan, or plan sponsor uses the services of an administrator, a payment of a premium or contribution to the administrator by or on behalf of an insured or plan participant is considered to have been received by the insurer, plan, or plan sponsor, and a payment of a return premium, contribution, or claim to the administrator by the insurer, plan, or plan sponsor is not considered payment to the insured, plan participant, or claimant until the insured, plan participant, or claimant receives the payment. The Insurance Code §4151.105(b) provides that the Insurance Code §4151.105 does not limit a right of an insurer, plan, or plan sponsor against the administrator resulting from the administrator's failure to make a payment to an insured, plan participant, or claimant. The Insurance Code §4151.106(a) provides that an administrator who collects funds must identify and state separately in writing the amount of any premium or contribution specified by the insurer, plan, or plan sponsor for the coverage and provide the information to any person who pays to the administrator a premium or contribution. The Insurance Code §4151.106(b) provides that an administrator holds in a fiduciary capacity a premium or contribution the administrator collects on behalf of an insurer, plan, or plan sponsor and a return premium the administrator receives from an insurer, plan, or plan sponsor. The Insurance Code §4151.107(a) provides that, upon receiving a premium, contribution, or return premium, an administrator shall timely deliver the funds to the person entitled to the funds according to terms of the written agreement or promptly deposit the funds in a fiduciary bank account established and maintained by the administrator. The Insurance Code §4151.107(b) provides that if premiums or contributions deposited in a fiduciary bank account were collected on behalf of more than one insurer, plan, or plan sponsor, the administrator shall maintain records that clearly record separately the deposits to and withdrawals from the account on behalf of each insurer, plan, or plan sponsor, and, upon request of an insurer, plan, or plan sponsor, provide to the insurer, plan, or plan sponsor a copy of the records relating to deposits and withdrawals on behalf of that insurer or plan. The Insurance Code §4151.107(c) provides that the requirements of the Insurance Code §4151.107(b) are in addition to requirements of any other federal or state law and do not authorize the commingling of funds if otherwise prohibited by law. The Insurance Code §4151.108(a) provides that a withdrawal from a fiduciary bank account established under the Insurance Code §4151.107 may be made only as provided in the written agreement for the purposes of delivery to an insurer, plan, or plan sponsor entitled to payment; deposit in an account controlled and maintained in the name of the insurer, plan, or plan sponsor; transfer to and deposit in a claims payment account for payment of a claim as provided by the Insurance Code §4151.111; payment to a group policyholder for delivery to the insurer entitled to payment; payment to the administrator of the administrator's commission, fees, or charges; delivery of a return premium to any person entitled to payment, or payment of a premium for stop-loss or excess loss insurance. The Insurance Code §4151.109 prohibits an administrator from paying a claim from a fiduciary bank account established under the Insurance Code §4151.107. The Insurance Code §4151.110 provides that if an administrator has the authority to accept or reject a risk, the written agreement must address underwriting or other standards of the insurer or plan. The Insurance Code §4151.112(a) requires an administrator to maintain, at the administrator's principal administrative office, adequate books and records of each transaction in which the administrator engages with an insurer, plan, plan sponsor, insured, or plan participant. The Insurance Code §4151.112(b) requires an administrator to maintain the books and records until the fifth anniversary of the end of the term of the written agreement to which the books and records relate and in accordance with prudent standards of insurance recordkeeping. The Insurance Code §4151.113(a) provides that, for the purpose of examination, audit, and inspection, an administrator shall provide to the Commissioner and the Commissioner's designee access to the books and records maintained as required by the Insurance Code §4151.112. The Insurance Code §4151.113(b) makes a trade secret, including the identity and address of a policyholder, certificate holder, or injured employee, confidential. The Insurance Code §4151.113(b) also permits the Commissioner to use a trade secret, including the identity and address of a policyholder, certificate holder, or injured employee in a proceeding against an administrator. The Insurance Code §4151.113(c) provides that an insurer, plan, or plan sponsor is entitled to continuing access to the books and records sufficient to permit the insurer, plan, or plan sponsor to fulfill a contractual obligation to an insured or plan participant. Further, the Insurance Code §4151.113(c) provides that the right provided by the Insurance Code §4151.113(c) is subject to any restriction included in the written agreement relating to the parties' proprietary rights to the books and records. The Insurance Code §4151.114 provides that, upon termination of the written agreement, an administrator may fulfill the requirements of the Insurance Code §4151.112 and §4151.113 by delivering the books and records to a successor administrator, or if there is not a successor administrator, to the insurer, plan, or plan sponsor, and by giving written notice to the Commissioner of the location of the books and records. The Insurance Code §4151.116 requires an insurer, plan, or plan sponsor to approve the use of any advertising relating to the business underwritten by the insurer, plan, or plan sponsor before an administrator uses such advertising. The Insurance Code §4151.201(a) provides that the Commissioner may examine an administrator with regard to its business in this state. The Insurance Code §4151.201(b) provides that the Commissioner may designate one or more employees to perform an examination. The Insurance Code §4151.201(b)

provides that the Commissioner also may have examiners conduct an on-site evaluation of the administrator's personnel and facilities and any books and records of the administrator relating to the transaction of business by and the financial condition of the administrator. The Insurance Code §4151.201(c) provides that before an examiner enters an administrator's property, the Commissioner shall give notice to the administrator of the examiner's intent to conduct an on-site evaluation. Further, under the Insurance Code §4151.201(c), the notice must be in the form required by rule adopted by the Commissioner and include the date and estimated time that the examiner will enter the administrator's property. The Insurance Code §4151.201(d) provides that an examiner shall comply with operational rules of an administrator while on the administrator's property. The Insurance Code §4151.202(a) provides that an examination under the Insurance Code §4151.201 must include a review of each existing written agreement between the administrator and an insurer or plan sponsor and the administrator's financial statements. The Insurance Code §4151.203 provides that the cost of an examination under the Insurance Code §4151.201 shall be paid from the fee collected under the Insurance Code §4151.206(a)(2) and with revenue from the maintenance tax levied under the Insurance Code Chapter 259. The Insurance Code §4151.205(a) requires an administrator, not later than June 30, to annually file with the Commissioner a report on a form prescribed by the Commissioner. Further, under the Insurance Code §4151.205(a), the report must contain any information required by the Commissioner and must be verified by at least two officers of the administrator. The Insurance Code §4151.205(b) requires the annual report to cover the preceding calendar year. Except as provided by the Insurance Code §4151.205(f), the Insurance Code §4151.205(c) requires the annual report to include an audited financial statement performed by an independent certified public accountant. Further, under the Insurance Code §4151.205(c), an audited financial statement prepared on a consolidated basis must include a columnar consolidating or combining worksheet that shall be filed with the annual report. Additionally, the amounts shown on the consolidated audited financial report must be shown on the worksheet, the amounts for each entity must be stated separately, and explanations of consolidating and eliminating entries must be included. The Insurance Code §4151.205(d) requires the annual report to include notes to the financial statement or attachments that reflect the complete name and address of each insurer in this state with which the administrator had an agreement during the preceding fiscal year. The Insurance Code §4151.205(e) provides that information derived from an audited financial statement contained in an annual report under the Insurance Code §4151.205 is confidential and is not subject to disclosure under the Government Code Chapter 552. The Insurance Code §4151.205(f) provides that an administrator who receives less than $10 million annually as compensation for performing administrative services and operates under written agreements subject to the Insurance Code Chapter 4151 with insurers or plan sponsors in this state is not required to file an audited financial statement under the Insurance Code §4151.205(c), but must file a financial statement certified in the manner prescribed by Commissioner rule. The Insurance Code §4151.206(a) provides that the Commissioner shall collect and an applicant or administrator shall pay to the Commissioner, in an amount to be determined by the Commissioner, a filing fee not to exceed $1,000 for processing an original application for a certificate of authority for an administrator, a fee not to exceed $500 for an examination under the Insurance Code §4151.201, and a filing fee not to exceed $200 for an annual report. The Insurance Code §4151.211(a) provides that a person may not acquire an ownership interest in an entity that holds a certificate of authority under the Insurance Code Chapter 4151 if the person is, or after the acquisition would be, directly or indirectly in control of the certificate holder, or otherwise acquire control of or exercise any control over the certificate holder, unless the person has filed with the Department under oath a biographical form for each person by whom or on whose behalf the acquisition of control is to be effected; a statement certifying that no person who is acquiring an ownership interest in or control of the certificate holder has been the subject of a disciplinary action taken by a financial or insurance regulator of this state, another state, or the United State; a statement certifying that, immediately on the change of control, the certificate holder will be able to satisfy the requirements for the issuance of a certificate of authority; and any additional information that the Commissioner by rule may prescribe as necessary or appropriate to the public interest and the protection of the insurance consumers of this state. The Insurance Code §4151.211(b) provides that the Department may require a partnership, syndicate, or other group that is required to file a statement under the Insurance Code §4151.211(a) to provide the information required under the Insurance Code §4151.211(a) for each partner of the partnership, each member of the syndicate or group, and each person who controls the partner or member. Further, under the Insurance Code §4151.211(b), if the partner, member, or person is a corporation or the person required to file the statement under the Insurance Code §4151.211(a) is a corporation, the Department may require that the information required under the Insurance Code §4151.211(a) be provided regarding the corporation, each individual who is an executive officer or director of the corporation, and each person who is directly or indirectly the beneficial owner of more than 10 percent of the outstanding voting securities of the corporation. The Insurance Code §4151.211(c) provides that the Department may disapprove an acquisition of control if, after notice and opportunity for hearing, the Commissioner determines that immediately on the change of control the certificate holder would not be able to satisfy the requirements for the certificate of authority; the competence, trustworthiness, experience, and integrity of the persons who would control the operation of the certificate holder are such that it would not be in the interest of the insurance consumers of this state to permit the acquisition of control; or the acquisition of control would violate the Insurance Code or another law of this state, another state, or the United States. Notwithstanding the Insurance Code §4151.211(c), the Insurance Code §4151.211(d) provides that a change in control is considered approved if the Commissioner has not proposed to deny the requested change before the 61st day after the date on which the Department receives all information required by the Insurance Code §4151.211. The Insurance Code §4151.212 provides that the Department may, in the manner prescribed by the Insurance Code §4151.056 and by the Insurance Code Chapter 4151, Subchapter G revoke, suspend, or refuse to renew the certificate of authority of a certificate holder who does not maintain the qualifications necessary to obtain a certificate of authority issued under the Insurance Code Chapter 4151. The Insurance Code §4151.253(a) provides that an administrator shall enter into a contract in connection with workers' compensation benefits for collecting premium or contributions, adjusting claims, or settling claims with the insurance carrier responsible for those claims, including the insurance carrier responsible for claims arising under policies authorized

under the Insurance Code §2053.202(b). Further, a contract required by the Insurance Code §4151.253(a) may be in the form of a master services agreement. The Insurance Code §4151.253(b) requires a contract required by the Insurance Code §4151.253(a) to provide that the contract does not limit in any way the insurance carrier's authority or responsibility, including financial responsibility, to comply with each statutory or regulatory requirement and that the administrator shall comply with each statutory or regulatory requirement relating to a function assumed by or carried out by the administrator. The Insurance Code §4151.257 provides that the Commissioner shall adopt rules to implement the requirements of the Insurance Code Chapter 4151, Subchapter F, including rules prescribing requirements for contracts and master services agreements and requirements for the payment of claims. Further, under the Insurance Code §4151.257, the rules must provide for compliance with the requirements of the Insurance Code Chapter 4151 for any contract that takes effect or has an annual anniversary date on or after January 1, 2008. The Insurance Code §4151.301 provides that the Department may deny an application for a certificate of authority or discipline the holder of a certificate of authority under the Insurance Code Chapter 4151, Subchapter G if the Department determines that the applicant or holder, individually, or through an officer, director, or shareholder has willfully violated an insurance law of this state; has intentionally made a material misstatement in the application for a certificate of authority; has obtained or attempted to obtain a certificate of authority by fraud or misrepresentation; has misappropriated, converted to the applicant's or holder's own use, or illegally withheld money belonging to an insurance carrier, as that term is defined by the Labor Code §401.011, an insurer, as that term is defined by the Insurance Code §4001.003, a health maintenance organization, or an insured, enrollee, injured employee, or beneficiary; has engaged in fraudulent or dishonest acts or practices; has materially misrepresented the terms and conditions of an insurance policy, certificate, evidence of coverage, or contract; has been convicted of a felony; is in a financial condition, or is operating or conducting business in a manner, that would render further transaction of business in this state hazardous or injurious to insured persons or the public; has failed to comply with any judgment rendered against the applicant or holder before the 60th day after the date on which the judgment becomes final; has willfully violated a Commissioner rule; has refused to be examined or to produce accounts, records, and files for examination as required by the Insurance Code Chapter 4151 or Commissioner rule; at any time fails to meet a qualification for which issuance of the certificate of authority could have been denied had the failure then existed and been known to the Commissioner; has had a certificate of authority, license, or other authority issued by this state, another state, or the United States suspended or revoked; or has failed to timely file the annual report required by the Insurance Code §4151.205.

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 Labor Code Chapter 407 regulates workers' compensation self insurance. The Labor Code §407.001(5) defines a qualified claims servicing contractor as a person who provides claims service for a certified self-insurer, who is a separate business entity from the affected certified self-insurer, and who holds a certificate of authority under the Insurance Code Chapter 4151.

The Labor Code Chapter 407A regulates workers' compensation group self insurance. The Labor Code §407A.009(a) requires an administrator or service company under the Labor Code Chapter 407A that performs the acts of an administrator as defined in the Insurance Code Chapter 4151 to hold a certificate of authority under that chapter. The Labor Code §407A.009(b) provides that an entity is required to hold only one certificate of authority under the Insurance Code Chapter 4151 if the entity acts as an administrator and a service company as defined in the Labor Code Chapter 407A and performs the acts of an administrator as that term is defined in the Insurance Code Chapter 4151. The Labor Code §407A.009(c) provides that the exemptions in the Insurance Code §4151.002(18), (19), and (20), apply to an administrator or service company under the Labor Code §407A.009. The Labor Code §415.0036(a) provides that the Labor Code §415.0036 applies to an insurance adjuster, case manager, or other person who has authority under the Labor Code, Title 5 to request the performance of a service affecting the delivery of benefits to an injured employee or who actually performs such a service, including peer reviews, performance of required medical examinations, or case management.

The Labor Code Chapter 415 addresses Texas Workers' Compensation Act administrative violations. The Labor Code §415.0036(b) provides that a person described by the Labor Code §415.0036(a) commits an administrative violation if the person offers to pay, pays, solicits, or receives an improper inducement relating to the delivery of benefits to an injured employee or improperly attempts to influence the delivery of benefits to an injured employee, including through the making of improper threats. The Labor Code §415.0036(b) provides that §415.0036 applies to each person described by §415.0036(a) who is a participant in the workers' compensation system of this state and to an agent of such a person.

The Education Code Chapter 22 regulates school district employees, including group health benefits for school employees. The Education Code §22.004(g) provides that an insurer, a company subject to the Insurance Code Chapter 842, or a health maintenance organization that issues a policy or contract under the Education Code §22.004 and any person that assists the school district in obtaining or managing the policy or contract for compensation shall provide an annual audited financial statement to the school district showing the financial condition of the insurer, company, organization, or person. The Education Code §22.004(h) provides that an audited financial statement provided under §22.004 must be made in accordance with rules adopted by the Commissioner of Insurance or with generally accepted accounting principles, as applicable.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Education Code §22.004(g) and (h); Labor Code §§407.001(5), 407A.009, and 415.0036(a) and (b); Insurance Code §§1272.058, 1305.008, 4151.001, 4151.002, 4151.0021, 4151.004, 4151.006, 4151.051(a), 4151.052, 4151.053, 4151.055(a), 4151.101, 4151.102(a) and (a-1), 4151.103(a) and (d), 4151.1042, 4151.105, 4151.106, 4151.107, 4151.108, 4151.109, 4151.110, 4151.112, 4151.113, 4151.114, 4151.116, 4151.201, 4151.202, 4151.203, 4151.205, 4151.206(a), 4151.211, 4151.212, 4151.253, 4151.257, and 4151.301

§7.1601. Scope.

(a) Except as otherwise provided by this subchapter or the Insurance Code Chapter 4151, this subchapter applies to a person acting as or holding itself out as an administrator in any capacity, regardless

of whether the person holds another authorization under the Insurance Code or the Labor Code.

(b) In accordance with the Insurance Code §1272.058 and the Labor Code §407A.009, an administrator performing administrative services on behalf of an HMO or a workers' compensation self-insurance group shall meet the same requirements under the Insurance Code Chapter 4151 and this subchapter as an administrator performing administrative services on behalf of an insurer or plan sponsor.

(c) A person acting as or holding itself out as an administrator must meet the requirements of the Insurance Code Chapter 4151 and this subchapter in addition to any other requirements applicable to that person under the Insurance Code Chapters 1272 or 1305 or the Labor Code Chapters 407 or 407A and any rules adopted thereunder.

(d) This subchapter does not apply to a person acting as or holding itself out as an administrator for an ERISA qualified employee welfare benefit plan that is exempt from regulation by this state with respect to that particular employee welfare benefit plan.

§7.1602. Definitions.

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

(1) Administrator--As defined in the Insurance Code §4151.001(1). The term includes administrator contractors and administrator subcontractors. The term does not include a person described by the Insurance Code §4151.002 or §4151.0021.

(2) Administrative services--Services offered or performed by an administrator.

(3) Administrator contractor--An administrator as defined in the Insurance Code §4151.001(1) who contracts or enters into an agreement with an administrator subcontractor for the performance of all or a portion of the administrative services the administrator contractor previously agreed to perform on behalf of an insurer, HMO, plan sponsor, or group. The term does not include a person described by the Insurance Code §4151.002 or §4151.0021.

(4) Administrator subcontractor--An administrator as defined in the Insurance Code §4151.001(1) who contracts or enters into an agreement with an administrator contractor for the performance of all or a portion of the administrative services the administrator contractor previously agreed to perform on behalf of an insurer, HMO, plan sponsor, or group. The term does not include a person described by the Insurance Code §4151.002 or §4151.0021.

(5) Authorization--A license, permit, certificate of authority, certificate of approval, certificate of registration, or other authorization issued by the department or the division of workers' compensation to engage in an activity regulated under the Insurance Code or the Labor Code.

(6) Claim--A demand for payment, services, or benefits under a plan.

(7) ERISA--The Employee Retirement Income Security Act of 1974, 29 United States Code §1001, et seq., including all implementing federal regulations.

(8) Fiduciary bank account--An account used to hold a premium.

(9) Generally Accepted Accounting Principles--As defined in §7.85(a)(6) of this chapter (relating to Audited Financial Reports).

(10) Generally Accepted Auditing Standards--As defined in §7.85(a)(7) of this chapter.

(11) Group--A workers' compensation self-insurance group under the Labor Code Chapter 407A.

(12) Health maintenance organization (HMO)--As defined in the Insurance Code §843.002(14).

(13) Independent Certified Public Accountant--A person meeting the standards prescribed in the Insurance Code §401.011(a) and (d).

(14) Insurer--As defined in the Insurance Code §4151.001(2).

(15) Master services agreement--A written agreement between an administrator and an insurer that generally describes the administrative services to be performed by the administrator on behalf of the insurer but which also addresses additional or customized administrative services to be provided by the administrator for certain specified clients of the insurer.

(16) Person--As defined in the Insurance Code §4151.001(3).

(17) Plan--A plan, fund, or program established, adopted, or maintained by an insurer, HMO, plan sponsor, or group to the extent that the plan, fund, or program is established, adopted, or maintained to provide:

(A) indemnification or expense reimbursement for any type of life, health, accident, or pharmacy benefit, including health care benefits, health care services, or health insurance;

(B) an individual or group annuity benefit; or

(C) workers' compensation benefits, including a medical benefit, an income benefit, a death benefit, or a burial benefit.

(18) Plan sponsor--A person, other than an insurer, HMO, or group who establishes, adopts, or maintains a plan that covers residents of this state, including a plan established, adopted, or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, an association, a committee, a joint board of trustees, or any similar group of representatives who establish, adopt, or maintain a plan.

(19) Premium--A premium, contribution, return premium, or return contribution.

(20) Records--Books, accounts, records, documents, written agreements, contracts, papers, correspondence, claims files, receipts, bills, accounting and financial information, notes, pleadings, investigatory files, trading partner agreements, or any other written or electronic material directly or indirectly relating to the business of an administrator.

§7.1603. Certificate of Authority Required.

(a) Unless a person meets an exemption under the Insurance Code §§4151.002, 4151.0021, or 4151.004, a person acting as or holding itself out as an administrator must hold a certificate of authority under the Insurance Code Chapter 4151.

(b) An administrator contractor and an administrator subcontractor must hold a certificate of authority under the Insurance Code Chapter 4151.

§7.1604. Application for Certificate of Authority.

(a) Filing of Application. An applicant who seeks a certificate of authority under the Insurance Code Chapter 4151 must file an application with the department, accompanied by the non-refundable fee of $1,000. The applicant must verify the application by attesting to the truth and accuracy of the information in the application.

(b) Forms and Fee.

(1) The commissioner adopts by reference the following forms, which comprise the application for a certificate of authority under the Insurance Code Chapter 4151, and which are available at http://www.tdi.state.tx.us/forms/form5tpa.html:

(A) Form Number FIN 489, Application for a Certificate of Authority;

(B) Form Number FIN 306, Officers and Directors Form;

(C) Form Number LHL 081, Biographical Affidavit; and

(D) Form Number LHL 082, Service of Process Form.

(2) As authorized by the Insurance Code §4151.206(a)(1), the commissioner adopts a filing fee of $1,000 to be paid by an applicant for processing an original application for a certificate of authority for an administrator. The fee is non-refundable.

(c) Registration of Name. An applicant must register its official name with the department and the Office of the Secretary of State, as applicable. If the commissioner determines that an applicant's name is too similar to a name already registered with the department, the applicant must register an alternative name with the department and the Office of the Secretary of State, as applicable.

(d) Biographical Affidavit.

(1) Each executive officer or other comparable responsible person of an applicant shall provide the department with a completed Form Number LHL 081, Biographical Affidavit, as referenced in subsection (b)(1)(C) of this section. A biographical affidavit is not required if a biographical affidavit from the individual has been filed with the department within the prior three years and contains substantially accurate information. A biographical affidavit contains substantially accurate information if the responses given by the individual in the affidavit on file with the department continue to indicate sufficient experience, ability, standing, and good record to make success of the applicant probable.

(2) Each person filing a biographical affidavit under paragraph (1) of this subsection shall comply with the requirements of Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct).

(e) Other Information. Pursuant to the Insurance Code §4151.052(a)(5), the commissioner may require the submission of any other information the commissioner reasonably requires in determining whether to approve or disapprove an application for a certificate of authority.

§7.1605. Notification Requirements.

(a) An insurer or HMO that is acting as or holding itself out as an administrator and that is not exempt under the Insurance Code §4151.002(3) or (4) is subject to all provisions of this subchapter, except §§7.1603, 7.1604, and 7.1609(c) and (d)(1) and (2) of this subchapter (relating to Certificate of Authority Required, Application for Certificate of Authority, and Annual Report).

(b) An insurer or HMO meeting the requirements of subsection (a) of this section must provide written notification to the department that it will be acting as or holding itself out as an administrator. The notice must include:

(1) the insurer's or HMO's contact information, including its TDI company number;

(2) a narrative describing the insurer's or HMO's facilities, personnel, and experience relating to the functions the insurer or HMO will be performing as an administrator; and

(3) a list of any other states in which the insurer or HMO will be acting as or holding itself out as an administrator.

§7.1606. Requirements Related to Ownership Interest and Change of Control.

(a) For purposes of this section only, control:

(1) means the power to direct, or cause the direction of, the management and policies of a person, other than the power that results from an official position with or corporate office held by the person;

(2) may be possessed by various means, including through:

(A) ownership of voting securities;

(B) ownership by contract; or

(C) direct or indirect control of one or more persons that control an administrator; and

(3) exists if an individual or a member of an individual's immediate family, directly or indirectly, owns, controls, or holds with the power to vote 10 percent or more of the voting securities or authority of:

(A) an administrator; or

(B) another person that directly or indirectly controls an administrator, including when a person holds proxies representing 10 percent or more of the voting securities or authority of the person.

(b) Pursuant to the Insurance Code §4151.052(b), an applicant or an administrator shall notify the department in writing of a change of control in the ownership of the applicant or administrator not later than the 30th day after the effective date of the change.

(c) An applicant or administrator may not file the notification required by subsection (b) of this section until a proposed acquisition of control has been approved under the Insurance Code §4151.211.

§7.1607. Facts and Circumstances Affecting Issuance of Certificate of Authority.

(a) For purposes of this section only, a material change in fact or circumstance means any fact or circumstance that impacts the accuracy or completeness of the information filed in an applicant's or administrator's initial application for a certificate of authority under the Insurance Code Chapter 4151, including:

(1) a change in an applicant's or administrator's mailing address;

(2) a felony conviction of any executive officer or other comparable responsible person of an applicant or administrator or of any other person who directly or indirectly controls the applicant or administrator; and

(3) any administrative action, order, or judgment issued against an applicant or administrator.

(b) An administrator shall notify the department in writing of a material change in fact or circumstance not later than the 30th day from the date the administrator first becomes aware of the material change in fact or circumstance.

(c) Except as provided by §7.1606(b) of this subchapter (relating to Requirements Related to Ownership Interest and Change of Control), an applicant shall continually update the information filed in its initial application for a certificate of authority under the Insurance

Code Chapter 4151, including notifying the department in writing of a material change in fact or circumstance, while the application is pending with the department.

(d) An applicant or administrator must meet the requirements of the Insurance Code Chapter 4151 and this subchapter as those requirements apply to any material change of fact or circumstance identified by an administrator pursuant to subsection (b) of this section and to any change in information identified by an applicant pursuant to subsection (c) of this section.

(e) An applicant or administrator is required to maintain the qualifications necessary to obtain a certificate of authority under the Insurance Code Chapter 4151 at all times.

§7.1608. Fidelity Bond.

(a) An applicant must obtain, and an administrator must maintain, a fidelity bond that complies with the requirements of the Insurance Code §4151.055 and this section.

(b) Applicants and administrators may only obtain a fidelity bond from a surety company authorized to engage in business in this state as a surety or an eligible surplus lines insurer in compliance with the Insurance Code Chapter 981 and rules adopted thereunder.

(c) An applicant or administrator whose fidelity bond is cancelled or terminated and not replaced with new coverage that meets the requirements of the Insurance Code §4151.055 and this section and that is effective concurrently upon the date of the cancellation or termination shall immediately inform the commissioner in writing, which in no event shall be later than ten business days from the date the applicant or administrator first becomes aware of the cancellation or termination.

§7.1609. Annual Report.

(a) Filing of Annual Report. An administrator must file an annual report with the department no later than June 30 each year, accompanied by the non-refundable fee of $200.

(b) Forms and Fee.

(1) The commissioner adopts by reference the following forms, which are available at www.tdi.state.tx.us/forms/form5tpa.html:

(A) Form Number FIN 486, Annual Report Form for Administrators Holding a Certificate of Authority under TIC 4151;

(B) Form Number FIN 487, Annual Report Form for Insurers and HMOs Subject to 28 TAC §7.1605;

(C) Form Number FIN 488, Annual Report Exhibits A-E; and

(D) Form Number FIN 490, Certification of Financial Statement.

(2) As authorized by the Insurance Code §4151.206(a)(3), the commissioner adopts a fee of $200 to be paid with the filing of the annual report. The fee is non-refundable.

(c) Audit Report. The annual report required by subsection (a) of this section must also include an audit report on the financial statements prepared by an independent certified public accountant that:

(1) reflects an audit conducted in accordance with generally accepted auditing standards or with the standards adopted by the Public Company Accounting Oversight Board, as applicable; and

(2) includes a balance sheet, an income statement, a cash flow statement; and a statement of equity.

(d) Exemption.

(1) An administrator who receives less than $10 million in compensation for providing administrative services in Texas during the preceding calendar year is exempt from complying with subsection (c) of this section for that year.

(2) An administrator qualifying for the exemption in paragraph (1) of this subsection must file a financial statement with the department that:

(A) includes a completed Form Number FIN 490, Certification of Financial Statement, as referenced in subsection (b)(1)(D) of this section; and

(B) is verified by at least two officers or other comparable responsible persons of the administrator.

(3) An administrator qualifying for the exemption in paragraph (1) of this subsection must meet all other requirements of this section.

(e) The commissioner may request additional information as necessary to determine if an administrator is operating or conducting business in a hazardous or injurious manner.

§7.1610. Financial Statements Under the Education Code.

(a) This section applies only to an insurer or HMO that:

(1) meets the requirements of §7.1605 of this subchapter (relating to Notification Requirements); and

(2) is subject to the requirements of the Education Code §22.004(g).

(b) An administrator meeting the requirements of subsection (a) of this section may comply with the requirement for an audited financial statement under the Education Code §22.004(h) by providing a copy of the financial statement filed with the Department for the preceding calendar year that:

(1) was prepared by an independent certified public accountant; and

(2) was filed in compliance with the requirements of §7.18 of this chapter (relating to the National Association of Insurance Commissioners Accounting Practices and Procedures Manual) and §7.85 of this chapter (relating to Audited Financial Reports).

§7.1611. Operational Review and On-Site Audit.

(a) No less than two times each fiscal year, an insurer shall review the operations of each of its administrators that, in the aggregate, administers benefits in Texas on behalf of the insurer for more than 100 certificate holders, injured employees, plan participants, or policyholders. A review may be conducted on the premises of the insurer or at another location designated by the insurer and may be conducted by electronic means.

(b) No less than once every two fiscal years, an insurer shall conduct an on-site audit of each of its administrators that, in the aggregate, administers benefits in Texas on behalf of the insurer for more than 100 certificate holders, injured employees, plan participants, or policyholders.

(c) Notwithstanding subsection (a) of this section, an insurer is not required to review the operations of an administrator under subsection (a) of this section more than one time in the same fiscal year in which the insurer conducts an on-site audit of that administrator pursuant to subsection (b) of this section.

(d) Both a review and on-site audit required under subsections (a) and (b) of this section must:

(1) assess the business practices and procedures of the administrator to ensure competent administration, including evaluating:

(A) the administrator's compliance with the Insurance Code, the Labor Code, and any rules adopted thereunder, as applicable;

(B) the administrator's compliance with the provisions of the written agreement with the insurer;

(C) the administrator's performance of claims adjudication and payment;

(D) the adequacy of the financial security maintained by the administrator, if any; and

(E) the administrator's practices and procedures for establishing the adequacy of the insurer's reserves, if any; and

(2) include a written summary of the objectives and scope of the review or on-site audit and the results of the review or on-site audit, including a corrective action plan addressing any deficiencies found during the review or on-site audit.

(e) The purpose of the on-site audit required by subsection (b) of this section is to verify the accuracy, integrity, and completeness of the information received during a review conducted by the insurer pursuant to subsection (a) of this section. In addition to the requirements of subsection (d) of this section, an on-site audit conducted by an insurer pursuant to subsection (b) of this section must also:

(1) include a physical inspection of the administrator's place of business; and

(2) include a written assessment of the reliability of the information provided to the insurer and relied upon by the insurer when conducting a review or on-site audit of the administrator under this section.

(f) A review or on-site audit required under this section may be performed by an insurer or the insurer's designated representative.

(g) An insurer may meet the requirements of this section for an administrator subcontractor by reviewing and auditing the administrator contractor only, provided that:

(1) the information supplied to the insurer by the administrator contractor includes all necessary and relevant information relating to the administrator subcontractor; and

(2) no evidence of material non-compliance by the administrator subcontractor exists.

(h) All information and documentation related to a review or on-site audit shall be made available to the commissioner upon request and must remain on file with the insurer for at least five years from the date of the review or on-site audit.

§7.1612. Fiduciary Bank Accounts.

(a) Pursuant to the Insurance Code §4151.106(b), an administrator shall hold all premium in a fiduciary capacity.

(b) An administrator collecting or receiving any premium shall comply with the Insurance Code §§4151.105, 4151.106, 4151.107, and 4151.108 and this section. An administrator who receives any premium on behalf of an insurer, HMO, plan sponsor, or group shall report the receipt of that premium to the insurer, HMO, plan sponsor, or group within a reasonable amount of time.

(c) An administrator shall establish at least one fiduciary bank account to hold any premium collected or received pursuant to this section.

(d) A fiduciary bank account required by subsection (c) of this section must be established and styled as an escrow account.

(e) An administrator shall maintain each fiduciary bank account at a financial institution that is organized under the laws of the United States or any state thereof, and is regulated, supervised, and examined by United States federal or state authorities having regulatory authority over banks and trust companies. A fiduciary bank account may only consist of one or more of the following types of investments:

(1) cash and cash equivalents, including savings accounts, checking accounts, money market accounts, and certificates of deposit;

(2) non-assessable money market mutual funds that are primarily invested in United States government securities; and

(3) other investments of substantially similar quality, as approved by the commissioner.

(f) An administrator shall maintain detailed accounting records for each fiduciary bank account that separately:

(1) record each deposit and withdrawal from the account; and

(2) identify each insurer, HMO, plan sponsor, or group for whom the account is maintained.

(g) Upon the reasonable request of an insurer, HMO, plan sponsor, or group, an administrator shall provide the insurer, HMO, plan sponsor, or group a copy of all records relating to the account activity of the insurer, HMO, plan sponsor, or group in a fiduciary bank account established or maintained by the administrator on behalf of the insurer, HMO, plan sponsor, or group.

(h) All records maintained by an administrator relating to any premium shall be subject to examination by the commissioner upon request.

(i) Pursuant to the Insurance Code §4151.109, an administrator may not pay a claim from a fiduciary bank account.

(j) This subsection does not authorize any transaction that is otherwise prohibited by law.

§7.1613. Written Agreements Between Administrators and Insurers.

(a) An administrator may not provide administrative services in Texas on behalf of an insurer unless the administrator has entered into a written agreement with the insurer that meets the requirements of the Insurance Code Chapter 4151 and this section.

(b) An administrator subcontractor may meet the requirements of this section by entering into a written agreement with the administrator contractor only, provided the written agreement meets the requirements of the Insurance Code Chapter 4151 and this section, as applicable.

(c) A written agreement entered into under this section may not be construed to limit, in any way, an insurer's ultimate accountability and responsibility for compliance with all statutory and regulatory requirements under the Insurance Code, the Labor Code, and rules adopted thereunder.

(d) A written agreement entered into under this section shall include:

(1) a requirement that the administrator must comply with the requirements of the Insurance Code, the Labor Code, and any rules adopted thereunder, including holding appropriate authorizations;

(2) a description of the administrative services the administrator is expected to provide and any applicable instructions related to

the performance of those services, including references to an insurer's claims handling practices or procedures;

(3) a provision relating to the continuity of services and addressing the obligations of the administrator and the insurer under §7.1615 of this subchapter (relating to Transfer of Books and Records), including the method and manner in which the insurer and administrator will meet those requirements; and

(4) a provision addressing an insurer's obligation to review and audit the performance of its administrators under §7.1611 of this subchapter (relating to Operational Review and On-Site Audit), including the method and manner in which the insurer will meet those requirements.

(e) A written agreement entered into under this section shall also ensure that the books and records of the insurer:

(1) remain the property of the insurer at all times; and

(2) are available to the insurer or its designee at any time while in the custody of the administrator.

(f) Notwithstanding subsection (e) of this section, an administrator may retain a proprietary interest in the books and records of an insurer pursuant to the Insurance Code §4151.113(c), provided that the written agreement between the administrator and the insurer specifically identifies the items that will be subject to the administrator's proprietary interest. An administrator may not withhold, based upon a claim of proprietary interest, any portion of an insurer's books and records that would restrict the ability of the insurer to comply with statutory, regulatory, or contractual obligations.

(g) A master services agreement may be used to meet the requirements of this section.

(h) If a particular requirement under this section does not apply to an administrative service offered or performed by an administrator on behalf of an insurer, that particular requirement may be omitted from the written agreement between the administrator and the insurer. However, the remainder of the written agreement between the administrator and the insurer must comply with the Insurance Code Chapter 4151 and this section.

(i) A written agreement required under this section shall meet the requirements of this section no later than September 1, 2009.

§7.1614. Prohibited Acts.

(a) An administrator is prohibited from:

(1) misrepresenting the terms or nature of an agreement with an insurer, HMO, plan sponsor, or group;

(2) making false, misleading, or incomplete comparisons to the agreements of other administrators or persons in order to induce any person to enter into, continue, or discontinue an agreement;

(3) accepting or rejecting risk, other than under the authority of, and in accordance with, a written agreement with an insurer, HMO, plan sponsor, or group;

(4) publishing or circulating any advertising or informational material, benefit descriptions, certificates, booklets, or brochures pertaining to business underwritten by an insurer, HMO, plan sponsor, or group without advance written approval of the insurer, HMO, plan sponsor, or group;

(5) pursuant to the Labor Code §415.0036, offering to pay, paying, soliciting, or receiving an improper inducement relating to the delivery of benefits to an injured employee, if the administrator performs administrative services on behalf of a person who is a participant in the workers' compensation system of this state; and

(6) pursuant to the Labor Code §415.0036, improperly attempting to influence the delivery of benefits to an injured employee, including through the making of improper threats, if the administrator performs administrative services on behalf of a person who is a participant in the workers' compensation system of this state.

(b) An administrator may be subject to other prohibitions under the Insurance Code, the Labor Code, and rules adopted thereunder that are not specified in subsection (a) of this section.

§7.1615. Transfer of Books and Records.

(a) Unless otherwise approved by the commissioner, no later than 30 days from the date of the termination of the relationship or written agreement between an insurer, HMO, plan sponsor, or group and an administrator, the administrator shall provide a complete and accurate original set or a complete and accurate copy or image of the original set of the insurer's, HMO's, plan sponsor's, or group's books and records:

(1) to a successor administrator; or

(2) if there is not a successor administrator or if the successor administrator is unknown at the time of the required transfer, to the insurer, HMO, plan sponsor, or group.

(b) The books and records must be transferred in an organized and usable manner.

(c) The allocation of the payment of costs associated with providing a complete and accurate original set or a complete and accurate copy or image of the original set of an insurer's books and records shall be addressed in the written agreement between the insurer and the administrator under §7.1613 of this subchapter (relating to Written Agreements Between Administrators and Insurers).

(d) An administrator shall provide written notice to the department of the termination of a relationship or written agreement with an insurer, HMO, plan sponsor, or group no later than 30 days from the date the administrator first learns of the termination.

(e) If a relationship between an administrator subcontractor and an administrator contractor terminates, the administrator subcontractor may meet the requirements of this section by:

(1) providing a complete and accurate original set or a complete and accurate copy or image of the original set of the insurer's, HMO's, plan sponsor's, or group's books and records to the administrator contractor; and

(2) providing written notice to the department of the termination of the relationship or written agreement with the administrator contractor no later than 30 days from the date the administrator subcontractor first learns of the termination.

§7.1616. Hazardous or Injurious Operating Conditions.

(a) An applicant or administrator may be considered to be operating or conducting business in a hazardous or injurious manner if the administrator or applicant:

(1) has failed to file financial statements, documents, records, or reports required under the Insurance Code Chapter 4151 or this subchapter within the time periods prescribed by the Insurance Code Chapter 4151, this subchapter, or as requested by the department pursuant to law;

(2) has filed any false or misleading financial information;

(3) is unable to pay its obligations as they become due and payable;

(4) has not maintained records sufficient to permit examiners to determine its financial condition or compliance with the Insurance Code, the Labor Code, and rules adopted thereunder;

(5) does not employ management staff with the experience, competence, or trustworthiness to conduct its operations in a safe or sound manner;

(6) employs management staff that has engaged in any unlawful activity;

(7) has not complied or is not complying with the terms of a written agreement with an insurer, HMO, plan sponsor, or group;

(8) has engaged or is engaged in a pattern of failing to settle claims in accordance with contractual, regulatory, or statutory requirements; or

(9) has engaged or is engaged in fraudulent or dishonest practices or acts.

(b) Other facts and circumstances not specified in subsection (a) of this section may also indicate that an applicant or administrator is operating in a hazardous or injurious manner.

§7.1617. Examinations.

(a) As authorized by the Insurance Code §4151.206(a)(2), the commissioner adopts a fee of $500 to be paid by an administrator for an examination under the Insurance Code §4151.201. The fee is nonrefundable.

(b) Pursuant to the Insurance Code §4151.202, prior to an examiner entering the property of an administrator, written notice shall be given to the administrator. The written notice shall include the date and estimated time the examiner will enter the property of the administrator.

§7.1618. Severability.

If any section or portion of a section of this subchapter is held to be invalid for any reason, all valid parts are severable from the invalid parts and remain in effect. If any section or portion of a section is held to be invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications. To this end, all provisions of this subchapter (relating to Administrators) are declared to be severable.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806110
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-6327

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TEXAS HIGHWAY PATROL

SUBCHAPTER D. TRAFFIC SUPERVISION

37 TAC §3.51

The Texas Department of Public Safety proposes an amendment to §3.51, concerning Traffic Supervision on Interstate Highways in Cities of 50,000 Population or Less. The proposed amendment changes the word "accident" to "crash" and is necessary in order to bring the rule into compliance with national standards.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The Department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Major Ron Joy, Texas Department of Public Safety, Texas Highway Patrol Division, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2115.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.006(4), which authorizes the Director to adopt rules, subject to commission approval, considered necessary for control of the department.

Texas Government Code, §411.004(3) and §411.006(4) are affected by this proposal.

§3.51. Traffic Supervision on Interstate Highways in Cities of 50,000 Population or Less.

Police traffic supervision activities.

(1) (No change.)

(2) Crash [~~Accident~~] investigation and traffic law enforcement will be conducted on the main lanes and the on-ramps and off-ramps, but not as a matter of routine on the service roads.

(3) Copies of crash [~~accident~~] reports will be furnished to cities by the investigating officer.

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

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806127
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER C. COMMERCIAL VEHICLE REGISTRATION AND INSPECTION ENFORCEMENT

37 TAC §4.37

The Texas Department of Public Safety proposes amendments to §4.37, concerning Acceptance of Out-of-State Commercial Vehicle Inspection Certificate. The first amendment to §4.37 is necessary in order to remove the State of Oklahoma from the list of jurisdictions certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23. A second amendment is necessary in order to add the State of Massachusetts to the list of jurisdictions certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23. The final amendment to §4.37 is necessary in order to clarify that only the bus inspection programs in the States of Connecticut and Wisconsin have been certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state.

The Department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The Department has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to David Palmer, Captain, Texas Department of Public Safety, Texas Highway Patrol Division, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2728.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 are affected by this proposal.

§4.37. Acceptance of Out-of-State Commercial Vehicle Inspection Certificate.

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

(c) Jurisdictions certified under the provisions of Title 49, Code of Federal Regulations, §396.23(b)(1). The following jurisdictions have been certified by the Federal Motor Carrier Safety Administration as meeting the requirements of Title 49, Code of Federal Regulations, §396.23(b)(1): Alabama (LPG Board), California, Connecticut (Bus Inspection Program), District of Columbia, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio (Bus Inspection Program), [~~Oklahoma,~~] Pennsylvania, Rhode Island, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin (Bus Inspection Program), or any of the ten Canadian Provinces and the Yukon Territory.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806128
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

CHAPTER 14. SCHOOL BUS SAFETY STANDARDS

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §14.1, §14.2

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

The Texas Department of Public Safety proposes the repeal of Chapter 14, Subchapter A, §14.1 and §14.2, concerning General Provisions of the School Bus Safety Standards. Repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. This repeal is filed simultaneously with a proposal for a new Subchapter A, §14.1 which promulgates revised general provisions for the school bus safety standards.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.1. Appendix.

§14.2. Definitions.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806129
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

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SUBCHAPTER B. SCHOOL BUS DRIVER ELIGIBILITY AND APPLICATION PROCEDURES

37 TAC §§14.11 - 14.14

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

The Texas Department of Public Safety proposes the repeal of Chapter 14, Subchapter B, §§14.11 - 14.14, concerning School Bus Driver Eligibility and Application Procedures. Repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. This repeal is filed simultaneously with a proposal for a new Subchapter B, §§14.11 - 14.14, which promulgates revised regulations for school bus driver qualifications.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a

rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.11. School Bus Driver Employment Qualifications.

§14.12. Medical Qualifications.

§14.13. Request for Special Consideration.

§14.14. Minimum Driving Record Qualifications.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806130
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

SUBCHAPTER C. SCHOOL BUS DRIVER SAFETY TRAINING PROGRAM

37 TAC §§14.31 - 14.36

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

The Texas Department of Public Safety proposes the repeal of Chapter 14, Subchapter C, §§14.31 - 14.36, concerning School Bus Driver Safety Training Program. Repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. This repeal is filed simultaneously with a proposal for a new Subchapter C, §§14.31 - 14.36, which promulgates revisions to the school bus driver safety program.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards

and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.31. Administrative Procedure.

§14.32. Curriculum.

§14.33. Instructor Certification.

§14.34. School Bus Driver Certification.

§14.35. Enrollment Certificates.

§14.36. Maximum Training Fee.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806131
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

SUBCHAPTER D. SCHOOL BUS SAFETY STANDARDS

37 TAC §§14.51 - 14.53

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

The Texas Department of Public Safety proposes the repeal of Chapter 14, Subchapter D, §§14.51 - 14.53, concerning School Bus Safety Standards. Repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. This repeal is filed simultaneously with a proposal for a new Subchapter D, §§14.51 - 14.54, which promulgates revised regulations for the school bus safety standards.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.51. Applicability.

§14.52. Lighting and Warning Device Equipment.

§14.53. Texas School Bus Specifications.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806132
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

SUBCHAPTER E. ADVERTISING GENERAL PROVISIONS

37 TAC §§14.61 - 14.67

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

The Texas Department of Public Safety proposes the repeal of Chapter 14, Subchapter E, §§14.61 - 14.67, concerning Advertising General Provisions. Repeal of the sections is necessary in order to delete obsolete language and because the text of the sections no longer reflect current statute and practices. This repeal is filed simultaneously with a proposal for a new Subchapter E, §§14.61 - 14.65 which promulgates revised regulations for the advertising requirements on school buses.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §547.701(d), which authorizes the department to adopt rules to regulate the display of advertising on the exterior of a school bus.

Texas Government Code, §411.004(3) and Texas Transportation Code, §547.701(d) are affected by this proposal.

§14.61. Definitions.

§14.62. Applicability.

§14.63. Material and Attachment.

§14.64. Location.

§14.65. Permitted Space.

§14.66. Exemption.

§14.67. Reporting.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806133
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

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SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §14.1

The Texas Department of Public Safety proposes new Chapter 14, Subchapter A, §14.1, concerning General Provisions. The new section establishes definitions for certain terms that are used throughout Chapter 14, School Bus Safety Standards. The new section is filed simultaneously with a proposal for the repeal of current Subchapter A, §14.1 and §14.2 and is necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the new section is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new section as proposed. There are no anticipated economic costs to individuals who are required to comply with the new section as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the new section is in effect, the public benefit anticipated as a result of enforcing the new section will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this new section. Accordingly, the Department is not required to complete a takings impact assessment regarding this new section.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.1. Definitions.

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

(1) Advertisement--Any communication brought to the attention of the public by paid announcement or in return for public recognition in connection with an event or offer or sale of a product or service, except for a single-line listing of a carrier name or manufacturer logo approved by the department.

(2) Department--The Texas Department of Public Safety.

(3) Director--The director of the Texas Department of Public Safety or the designee of the director.

(4) Enrollment certificate--A valid provisional certificate issued by a training agency under the authority of the director indicating a person has enrolled in the School Bus Driver Safety Training Program as described in §14.36 of this title (relating to Enrollment Certificates) and meets the requirements designated therein.

(5) Medical advisory board--The Medical Advisory Board of the Texas Department of State Health Services.

(6) Medical examiner--A person who is licensed, certified, and/or registered, in accordance with applicable State laws and regulations, to perform physical examinations. The term includes, but is not limited to, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic.

(7) Multifunction school activity bus--A motor vehicle that was manufactured in compliance with the federal motor vehicle safety standards for school buses in effect on the date of manufacture other than the standards requiring the bus to display alternately flashing red lights and to be equipped with movable stop arms, and that is used to transport preprimary, primary, or secondary students on a school-related activity trip other than on routes to and from school. The term does not include a school bus, a school activity bus, a school-chartered bus, or a bus operated by a mass transit authority.

(8) School activity bus--A bus designed to accommodate more than 15 passengers, including the operator, that is owned, operated, rented, or leased by a school district, county school, open-enrollment charter school, regional education service center, or shared services arrangement and that is used to transport public school students on a school-related activity trip, other than on routes to and from school. The term does not include a chartered bus, a bus operated by a mass transit authority, a school bus, or a multifunction school activity bus.

(9) School bus--A motor vehicle that was manufactured in compliance with the federal motor vehicle safety standards for school buses in effect on the date of manufacture and that is used to transport pre-primary, primary, or secondary students on a route to or from school or on a school-related activity trip other than on routes to and from school. The term does not include a school-chartered bus or a bus operated by a mass transit authority.

(10) School bus driver--A driver transporting school children and/or school personnel on routes to and from school or on a school-related activity trip while operating a multifunction school activity bus, school activity bus, or school bus.

(11) Training agency--The twenty Regional Education Service Centers of the Texas Education Agency approved by the department to teach the School Bus Driver Safety Training Program.

(12) Training certificate--A document issued under the authority of the director to a person indicating successful completion of the School Bus Driver Safety Training Program approved by the department.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806134
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

SUBCHAPTER B. SCHOOL BUS DRIVER QUALIFICATIONS

37 TAC §§14.11 - 14.14

The Texas Department of Public Safety proposes new Chapter 14, Subchapter B, §§14.11 - 14.14, concerning School Bus Driver Qualifications. The new sections set forth employment qualification requirements for drivers of school buses, school activity buses, and multifunction school activity buses. The new sections are filed simultaneously with a proposal for the repeal of current Subchapter B, §§14.11 - 14.14 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the new sections are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new sections as proposed. There are no anticipated economic costs to individuals who are required to

comply with the new sections as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the new sections are in effect, the public benefit anticipated as a result of enforcing the new section will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these new sections. Accordingly, the Department is not required to complete a takings impact assessment regarding these new sections.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.11. School Bus Driver Employment Qualifications.

At a minimum, to become employed and maintain employment status as a school bus driver, a person must meet the following requirements:

(1) be at least 18 years of age;

(2) possess a valid driver license designating a class appropriate (with applicable endorsement, if commercial driver license) for the gross vehicle weight rating and manufacturer's designed passenger capacity of vehicle to be operated;

(3) meet the medical qualifications as specified in §14.12 of this title (relating to Medical Qualifications);

(4) maintain an acceptable driving record in accordance with the minimum standards established under §14.14 of this title (relating to Minimum Driving Record Qualifications);

(5) maintain an acceptable criminal history record, secured from any law enforcement agency or criminal justice agency, and reviewed in accordance with the provisions of current state statute (see Chapter 22 of the Texas Education Code); and

(6) possess a valid Texas School Bus Driver Safety Training Certificate as specified in §14.35 of this title (relating to School Bus Driver Certification) or a valid Enrollment Certificate as specified in §14.36 of this title (relating to Enrollment Certificate).

§14.12. Medical Qualifications.

A person shall not drive a school bus, school activity bus, or multifunction school activity bus unless he/she is physically qualified to do so. Each school bus driver shall undergo and successfully complete an annual physical examination in accordance with the requirements of Title 49, Code of Federal Regulations, Parts 391.41 and 391.43, which list those physical and mental conditions for which the medical examiner is directed to disqualify an applicant. The results of the examination shall be noted on the Medical Examination Report for Commercial Driver Fitness Determination form as published by the United States Department of Transportation (DOT), Federal Motor Carrier Safety Administration in Title 49, Code of Federal Regulations, Part 391.43 according to the figure in this section. A driver shall not operate a school bus, school activity bus, or multifunction school activity bus unless he/she has in their possession the original, or a photographic copy, of a valid medical examiner's certificate stating that he/she is physically qualified to drive a school bus, school activity bus, or multifunction school activity bus.
Figure: 37 TAC §14.12

§14.13. Request for Special Consideration.

(a) Except as provided in subsection (c) of this section, any person disqualified on the basis of the medical examination may request special consideration from the director, or designee, for a waiver of medical disqualification in accordance with the following procedure:

(1) The form, Texas Medical Advisory Board Release Authorization for School Bus Drivers (see the figure in this paragraph), must be properly completed and signed by both the person applying for the waiver (applicant) and each examining physician that provides medical records and/or a medical opinion referring to the applicant, and must accompany each request for special consideration.
Figure: 37 TAC §14.13(a)(1)

(2) In requesting special consideration, the applicant must submit in writing to the director or designee clear and convincing evidence supporting that his or her functions are not impaired to such an extent as to reduce the applicant's physical and mental capabilities to safely operate a school bus, school activity bus, or multifunction school activity bus; or endanger the safety and welfare of school children. The director or designee may require the applicant to submit additional supporting evidence or other related information.

(3) The following documents must be delivered to the department for each waiver request:

(A) A written request for Special Consideration;

(B) Medical Examination Report for Commercial Driver Fitness Determination, as specified in §14.12 of this title (relating to Medical Qualifications);

(C) Texas Medical Advisory Board Release Authorization; provide one copy for each physician that submits a medical opinion and/or medical records referring to the applicant;

(D) Letter from the prospective employer; and

(E) Letter(s) containing medical opinion(s) and/or medical records from any examining physicians that applicant requests the Medical Advisory Board to review.

(4) The director or designee shall forward the Request for Special Consideration, along with all submitted supporting evidence/documentation submitted by the applicant, to the Medical Advisory Board for official review and recommendation/opinion.

(5) Following receipt of the recommendation of the Medical Advisory Board, the director or designee shall review the findings and recommendation and may grant or deny the applicant's request for special consideration. In no event will the director or designee grant a request for special consideration in the absence of a report or statement from the Medical Advisory Board indicating approval.

(6) The Department may impose appropriate restrictions on the license of the applicant as authorized in Texas Transportation Code, §521.221.

(b) Eligibility verifications. Requests for Special Consideration will include a review for satisfactory compliance as described in §14.11 of this title (relating to School Bus Driver Employment Qualifications) and §14.14 of this title (relating to Minimum Driving Record Qualifications). A waiver shall not be granted if these standards are not also met.

(c) In accordance with Texas Transportation Code, §521.022(g), the department will grant a medical waiver to an otherwise qualified person with a hearing disability allowing that person to serve as a school bus driver when transporting hearing-impaired students.

§14.14. Minimum Driving Record Qualifications.

(a) Pre-employment Inquiries. Each employer shall make the following investigations and inquiries with respect to each school bus driver it employs:

(1) An applicant for employment as a school bus driver must disclose to the employer any violations of motor vehicle laws or ordinances (other than violations involving only parking) of which the applicant was convicted or forfeited bond or collateral during the three years preceding the date the application is submitted; any serious traffic violations, as defined in Texas Transportation Code, §522.003(25), of which the applicant was convicted during the ten years preceding the date the application is submitted; and any suspension, revocation, or cancellation of any driving privilege that the applicant has ever received.

(2) An inquiry into the school bus driver's driving record for the preceding three years to the department and also to any other state(s) in which the school bus driver applicant held a motor vehicle operator's license or permit during those three years. If no previous driving record is found to exist, the employer must document their efforts to obtain such information, and certify that no previous driving record exists for that individual.

(b) Annual inquiry and review of driving record.

(1) Each employer shall, at least once every twelve months, make an inquiry into the driving record of each school bus driver it employs, covering at least the preceding twelve months, to the department and also to any other state(s) in which the individual held a motor vehicle operator's license or permit during that time period.

(2) Each employer shall, at least once every twelve months review the driving record of each school bus driver it employs to determine whether that school bus driver meets minimum requirements for safe driving or is disqualified to drive a school bus while transporting school children pursuant to subsection (d) of this section. While conducting this review, the employer must consider the school bus driver's accident record and any evidence that the school bus driver has violated laws governing the operation of motor vehicles, and must give great weight to violations, such as speeding, reckless driving, and operating while under the influence of alcohol or a controlled substance, that indicate that the school bus driver has exhibited a disregard for the safety of the public.

(c) Disqualifications. A school bus driver who is disqualified shall not drive a school bus, school activity bus, or multifunction school activity bus. An employer shall not require or permit a driver who is disqualified to drive a school bus, school activity bus, or multifunction school activity bus.

(1) A school bus driver is disqualified for the duration of the driver's loss of his/her privilege to operate a motor vehicle either temporarily or permanently, by reason of the revocation, suspension, withdrawal, or denial of an operator's license, permit, or privilege until that operator's license, permit, or privilege is restored by the authority that revoked, suspended, withdrew, or denied it.

(2) A school bus driver who receives a notice that his/her license, permit, or privilege to operate a motor vehicle has been revoked, suspended, or withdrawn shall notify the employer that employs him/her of the contents of the notice before the end of the business day following the day the driver received it.

(d) Mandatory Disqualifying Offenses. A person shall be considered disqualified from operating a school bus, school activity bus, or multifunction school activity bus for the following:

(1) Within the 10-year period preceding the date of the check of the person's driving record for a conviction of the following offenses:

(A) Texas Penal Code, §49.04; or

(B) Texas Penal Code, §49.045; or

(C) Texas Penal Code, §49.07; or

(D) Texas Penal Code, §49.08.

(2) A suspension, disqualification, or prohibition order issued as a result of any alcohol-related or drug-related enforcement contact, as defined in the Texas Transportation Code, §524.001, during the ten years preceding the date of the check of the person's driving record.

(e) Credit for concurrent suspension arising from same drug or alcohol-related incident. If a criminal conviction occurs that arises out of the same arrest as the Administrative License Revocation suspension/disqualification, the disqualification period arising out of the same arrest shall not be longer than ten years.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806135
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

SUBCHAPTER C. SCHOOL BUS DRIVER SAFETY TRAINING PROGRAM

37 TAC §§14.31 - 14.36

The Texas Department of Public Safety proposes new Chapter 14, Subchapter C, §§14.31 - 14.36, concerning School Bus Driver Safety Training Program. The new sections set forth the requirements of the driver safety training program for drivers of school buses, school activity buses, and multifunction school activity buses. The new sections are filed simultaneously with a proposal for the repeal of current Subchapter C, §§14.31 - 14.36 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the new sections are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new sections as proposed. There are no anticipated economic costs to individuals who are required to comply with the new sections as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the new sections are in effect, the public benefit anticipated as a result of enforcing the new section will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these new sections. Accordingly, the Department is not required to complete a takings impact assessment regarding these new sections.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.31. Applicability of School Bus Driver Safety Training Program.

(a) The School Bus Driver Safety Training Program is applicable to all school bus drivers.

(b) This subchapter is not applicable to a mechanic or other occasional driver who only operates an empty school bus, school activity bus, or multifunction school activity bus.

§14.32. School Bus Driver Safety Training Program.

The school bus driver safety training program shall be provided in accordance with the following requirements:

(1) the school bus driver safety training program shall be administered by the approved training agency;

(2) the department shall have primary responsibility for program content, monitoring, and regulation; and for providing technical assistance to the training agency;

(3) program standards for providing school bus driver safety training shall include the following:

(A) the initial certification safety training course, Course Guide for School Bus Driver Training in Texas, shall consist of twenty clock-hours of instruction;

(B) the recertification safety training course, Texas School Bus Driver Safety Training Recertification Course, shall consist of eight clock-hours of instruction;

(C) individual class sessions shall be limited in duration to a maximum of four hours of instruction on a workday and eight hours of instruction on a non-workday. Rest breaks of no more than ten minutes are permitted between each consecutive hour of instruction;

(D) enrollment for individual classes shall be limited to a maximum of 35 trainees per certified instructor. A minimum of one certified instructor shall be in attendance during any class session;

(E) when scheduling and registering for classes, priority shall be given to those persons holding an enrollment certificate;

(F) reasonable accommodations may be requested for persons with certain disabilities who attend training classes and need auxiliary aids or services, such as an interpreter for the deaf or hearing impaired. Such requests should be directed to the appropriate training agency at least two business days prior to the start of course instruction so that appropriate arrangements can be made;

(G) each trainee shall be given the opportunity to complete a course evaluation report at the end of each session. A copy of each course evaluation submitted shall be forwarded to the department by the training agency within fourteen calendar days following completion of each training course; and

(H) any modifications to the program standards for the School Bus Driver Safety Training Program shall not be implemented by the training agency without prior approval of the department.

§14.33. School Bus Driver Safety Training Program Curriculum.

(a) The curriculum for the school bus driver safety training program will be developed by the department and approved by the director, or designee.

(b) The certification course shall include instruction in each of the ten units comprising the current Course Guide for School Bus Driver Training in Texas as developed by Southwest Texas Quality Institute (SWTQI) and approved by the department. At least four hours of each course shall be devoted to relevant and appropriate laboratory activities, and each unit shall be taught in accordance with the following class time allocations:

(1) Introduction--1 hour;

(2) Student Management--2.0 hours;

(3) Know Your Bus--2.0 hours;

(4) Traffic Regulations--1.5 hours;

(5) Responsible Driving--4.0 hours;

(6) Emergency Evacuation--2.0 hours;

(7) First Aid--1.5 hours;

(8) Procedures for Loading and Unloading Students--2.5 hours;

(9) Special Needs Transportation--1.5 hours;

(10) Awareness of the Effects of Alcohol and Other Drugs--1.5 hours; and

(11) Summary and Written Test--0.5 hours.

(c) The recertification course shall include safety training material developed by Texas Engineering Extension Service Transportation Training Division of the Texas AM University System, (TEEX) and approved by the department or Units II, IV, V, VIII, and X of the current Course Guide for School Bus Driver Training in Texas. If teaching Units II, IV, V, VIII, and X, at least one hour of instruction must be allocated to each of these five units, with any remaining or additional time devoted to other relevant and appropriate topics or activities.

(d) A test regarding course content will be administered to each trainee. A minimum score of 80% open book shall be required for satisfactory completion of both the twenty-hour certification course and the eight-hour recertification course.

(e) Any modifications to the School Bus Driver Safety Training Program curriculum shall not be implemented by the training agency without prior approval of the department.

§14.34. Instructor Certification.

(a) To be eligible for instructor certification, an applicant must possess at least one of the following prerequisites:

(1) a valid "Texas Teacher Certificate";

(2) a minimum of two years of administrative or supervisory experience in school transportation; or

(3) a minimum of two years of work experience or study in driver training, traffic safety education, or a related field.

(b) In addition to the prerequisite(s) in subsection (a) of this section, an applicant may qualify for instructor certification only after meeting all of the following requirements:

(1) complete the certification course;

(2) serve as a student instructor for a certification course while practice teaching under the direct supervision of a currently certified instructor; and

(3) receive official approval from the sponsoring training agency.

(c) Upon satisfactory completion of all requirements, the training agency shall issue a qualified applicant an "Instructor's Certificate for School Bus Driver Safety Training in Texas", and properly submit the necessary verification information electronically to the department no later than the 15th calendar day after issuance.
Figure: 37 TAC §14.34(c)

(d) Except as approved by the department, each instructor must teach a minimum of one certification course and one recertification course each calendar year in order to maintain current instructor certification status.

§14.35. School Bus Driver Certification.

(a) To obtain full initial school bus driver certification, a person must satisfactorily complete the certification course. The training agency shall issue a "Texas School Bus Driver Safety Training Certificate," within fourteen calendar days of course completion, and submit the necessary verification information electronically to the department, by the 15th of each month for all certifications issued the previous month.
Figure: 37 TAC §14.35(a)

(b) Driver certification will remain valid for a period of three years as indicated by the expiration date on the certificate.

(c) Every school bus driver must hold a valid certificate stating that they have completed, or are enrolled in, the approved school bus driver safety training course.

(d) Any school bus driver whose certification has expired shall not operate a school bus, school activity bus, or multifunction school activity bus until such time as they become recertified or obtain an enrollment certificate. The following rules shall apply to certification renewals:

(1) To avoid a lapse in certification, the recertification course must be completed prior to expiration. The recertification course shall be completed during the six-month (180 day) period immediately preceding certification expiration. If the required training is completed within this preferred time interval, certification will then be renewed for a period of three years from the upcoming expiration date indicated on the current certificate.

(2) If the recertification course is completed more than 180 days prior to certification expiration, certification will then be renewed for a period of three years from the actual date of course completion.

(3) During the 12-month interval immediately following certification expiration, the recertification course may be completed for certification renewal. Certification will then be renewed for a period of three years from the actual date of course completion. Failure to satisfactorily complete the recertification course during this time frame will require completion of the certification course to reinstate certification status. During this time period, a person shall not drive a school bus, school activity bus, or multifunction school activity bus unless he/she has received an enrollment certificate. Issuance of an enrollment certificate during this dormant time interval will require the successful completion of the certification course in order to reinstate full certification status.

(e) Regardless of the reason, any course instruction missed must be completed by arrangement with the training agency. Except as approved by the department, all course requirements for certification

must be completed within the 180-day period immediately following the start of instruction, otherwise no credit will be given for any class sessions previously attended. The entire course must be completed prior to awarding certification.

§14.36. Enrollment Certificate.

(a) A training agency may grant a qualified applicant temporary and provisional certification status in the form of an "Enrollment Certificate" upon receipt of a completed application from the requesting employer stating that this person has fulfilled all of the following eligibility requirements:

(1) at least 18 years of age;

(2) possess a valid driver's license designating a class appropriate (with applicable endorsements, if commercial driver license) for the gross vehicle weight rating and manufacturer's designed passenger capacity of motor vehicle to be operated;

(3) an acceptable driving record determined in accordance with §14.14 of this title (relating to Minimum Driving Record Qualifications);

(4) an acceptable criminal history record, secured from any law enforcement agency or criminal justice agency, and reviewed in accordance with the provisions of current state statute (see Chapter 22 of the Texas Education Code);

(5) meets the medical qualifications as specified in §14.12 of this title (relating to Medical Qualifications) and any pre-employment testing in accordance with current federal law; and

(6) each employer must ensure that all school bus drivers have an acceptable level of knowledge and skill regarding the safe operation of school buses, school activity buses, and/or multifunction school activity buses. It is the employer's inherent responsibility to ensure that the driver understands the contents of Units II, IV, V, VIII and X of the current Course Guide for School Bus Driver Training in Texas.
Figure: 37 TAC §14.36(a)(6)

(b) In addition to the prerequisites listed in subsection (a) of this section, the following rules shall apply to the issuance of all enrollment certificates:

(1) recipients must register for the first available twenty-hour certification course as determined by the training agency. Except as approved by the training agency, failure to satisfactorily complete the school bus driver certification course as scheduled shall result in revocation of the enrollment certificate;

(2) enrollment certificates shall be dated to expire no later than 180 days past the date issued. Except as approved by the department, a minimum of five years must elapse between the issuance of enrollment certificates;

(3) an enrollment certificate shall be similar to the standard school bus driver safety training certificate and contain the words, "Enrollment Certificate" either stamped or printed diagonally across the face of the training certificate; and

(4) the training agency shall submit to the department by the 15th of each month, the necessary verification information electronically for all enrollment certifications issued the previous month.
Figure: 37 TAC §14.36(b)(4)

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806136
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

SUBCHAPTER D. SCHOOL BUS SAFETY STANDARDS

37 TAC §§14.51 - 14.54

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 37 TAC §14.52(b) is not included in the print version of the Texas Register. The figure is available in the on-line version of the December 5, 2008, issue of the Texas Register.)

The Texas Department of Public Safety proposes new Chapter 14, Subchapter D, §§14.51 - 14.54, concerning School Bus Safety Standards. The new sections set forth the vehicle equipment specifications for school buses, school activity buses, and multifunction school activity buses operated in the State of Texas. The new sections also implement the requirements of House Bill 3190, as passed by the 80th Texas Legislature, pertaining to school bus emergency evacuation training. The new sections are filed simultaneously with a proposal for the repeal of current Subchapter D, §§14.51 - 14.53 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the new sections are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new sections as proposed. There are no anticipated economic costs to individuals who are required to comply with the new sections as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the new sections are in effect, the public benefit anticipated as a result of enforcing the new section will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these new sections. Ac-

cordingly, the Department is not required to complete a takings impact assessment regarding these new sections.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and §34.0021, which authorizes the department to adopt rules for implementation of school bus emergency evacuation training; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules to administer restrictions on operators of certain school buses; §545.426, which authorizes the department to adopt rules to administer the operation of a school bus; §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3); Texas Education Code, §34.002 and §34.0021; and Texas Transportation Code, §§521.005, 545.426, 547.102, and 547.7015 are affected by this proposal.

§14.51. Applicability.

(a) This subchapter is applicable to all school districts and county transportation systems that own, operate, rent, contract or lease school buses and those commercial transportation companies which contract with a public school or county transportation system to transport public school students in school buses.

(b) In this subchapter, the term "school district" also means an open enrollment charter school authorized by the Texas Education Code, Chapter 12, Subchapters D and E that is providing transportation according to Texas Education Code, §34.003.

(c) A private school, defined as a non-profit entity that provides elementary or secondary education that incorporates an adopted curriculum designed to meet basic educational goals and which conducts formal reviews and documentation of student progress, must only comply with §14.52 of this title (relating to Texas School Bus Specifications) and §14.53 of this title (relating to Purchases of Used School Buses) as applicable.

§14.52. Texas School Bus Specifications.

(a) In this section, the term "school bus" also includes a school activity bus and a multifunction school activity bus.

(b) All school bus chassis and body manufacturers shall certify to the department, in the form of a letter, that all school buses offered for sale to or use by the public school systems in Texas meet or exceed all standards, specifications, and requirements as specified in the department's publication Texas School Bus Specifications. The department hereby adopts the Texas School Bus Specifications for 2008 Model School Buses. Previously published Texas School Bus Specifications remain in effect for earlier model year school buses until the department repeals these publications.
Figure: 37 TAC §14.52(b)

(c) All school bus chassis and body manufacturers shall certify to the department, in the form of a letter, that all multifunction school activity buses offered for sale to or use by the public school systems in Texas meet or exceed all federal standards, specifications, and requirements of a multifunction school activity bus as specified in the Title 49, Code of Federal Regulations, Part 571.

(1) A multifunction school activity bus may be painted any color except National School Bus Glossy Yellow.

(2) A multifunction school activity bus cannot be used for home to school or school to home transportation. Before delivery of a multifunction school activity bus, the manufacturer must place a label in the direct line of site of the driver while seated in the driver's seat stating: "This vehicle is not to be used for home to school or school to home transportation".

(d) Any new school bus found out of compliance with the specifications that were in effect in Texas on the date the vehicle was manufactured will be placed out of service by the vehicle's owner until it is brought into compliance with the applicable specifications.

§14.53. Purchases of Used School Buses.

(a) Used school buses purchased or operated by a public school system in Texas shall meet or exceed all Federal and State requirements for public school buses that were in effect in Texas on the date the vehicle was manufactured. Prior to the sale, the dealer selling the used school bus must provide the buyer (school district) with:

(1) Documentation of their "Dealer General Distinguishing Number" which is required by Texas Transportation Code, §503.029.

(2) Documentation of what state the used school bus was originally manufactured.

(3) A copy of the specifications the school bus was originally manufactured to.

(4) Documentation of all modifications that were made to each school bus to bring it into compliance with Texas School Bus Specifications that were in place on the date the school bus was originally manufactured.

(b) Public school districts or contractors must notify the department in writing within 30 days of purchasing any used school bus. The notification must include:

(1) The date of purchase and delivery.

(2) The name of the dealer and the dealer's General Distinguishing Number from whom the used school bus was purchased.

(3) Who manufactured the school bus, date of manufacture, and to which states' specifications the school bus was manufactured.

(c) Used school buses purchased by school districts that were not originally manufactured to Texas specifications at the time the school bus was manufactured may be inspected by the department to verify compliance with the applicable federal and state specifications.

(d) Any used school bus, as described in subsection (a) of this section, found out of compliance with the specifications that were in effect in Texas on the date the vehicle was manufactured will be placed out of service by the vehicle's owner until it is brought into compliance with the applicable specifications.

(e) A private school must comply with this subsection except for requirements to report the purchase of a used school bus to the department.

§14.54. School Bus Emergency Evacuation Training.

(a) School districts and charter schools will be responsible for developing the school bus emergency evacuation training curriculum based on the most recent edition of the National School Transportation

Specifications and Procedures, as adopted by the National Congress on School Transportation, or a similar school transportation safety manual.

(b) For purposes of conducting school bus emergency evacuation training, the term "spring" shall be defined as January 1 to June 30 and the term "fall" shall be defined as July 1 to December 31.

(c) School districts and charter schools should make a good faith effort to ensure that all students, teachers, and appropriate staff receive the required school bus emergency evacuation training twice each school year. School districts and charter schools shall prepare and maintain a record of each student and teacher that did not receive the required training as well as the reason(s) that the individual was not able to attend the training.

(d) Reporting Requirements.

(1) A record of each school bus emergency evacuation training session conducted must be submitted on a form prescribed by the department that is available at the following Internet web site address: http://www.txdps.state.tx.us/forms. All information requested on the form must be completed. The completed form must be mailed to School Bus Transportation, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525 or submitted via electronic mail to sbt@txdps.state.tx.us.

(2) Reports must be submitted not later than the 30th day after the date each training session is completed.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806137
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

SUBCHAPTER E. ADVERTISING REQUIREMENTS

37 TAC §§14.61 - 14.65

The Texas Department of Public Safety proposes new Chapter 14, Subchapter E, §§14.61 - 14.65, concerning Advertising Requirements. The new sections set forth the advertising display requirements for school buses. The new sections also establish a traffic crash reporting requirement for school buses that are displaying exterior advertising. The new sections are filed simultaneously with a proposal for the repeal of current Subchapter E, §§14.61 - 14.67 and are necessary in order to delete obsolete language and because the text of the current sections no longer reflect current statute and practices.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the new sections are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new sections as proposed. There are no anticipated economic costs to individuals who are required to comply with the new sections as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the new sections are in effect, the public benefit anticipated as a result of enforcing the new section will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to these new sections. Accordingly, the Department is not required to complete a takings impact assessment regarding these new sections.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §547.701(d), which authorizes the department to adopt rules to regulate the display of advertising on the exterior of a school bus.

Texas Government Code, §411.004(3) and Texas Transportation Code, §547.701(d) are affected by this proposal.

§14.61. Applicability.

This subchapter is applicable to all school buses, school activity buses, and multifunction school activity buses used to transport preprimary, primary, and secondary public school students.

§14.62. Material and Attachment.

(a) Advertisements must be of a durable material or paint.

(b) If the advertisement is removed or substantially damaged to the point that it is no longer in a serviceable condition, the bus shall be returned to its original color or the advertisement shall be replaced.

(c) The advertisement shall not extend from the body intentionally or due to damage so as to allow a handhold or present a danger to pedestrians.

(d) No brackets or hardware shall be applied to the exterior of a bus to hold advertisements.

§14.63. Location.

(a) The location of an advertisement(s) on the exterior of a bus shall be limited to:

(1) the left rear quarter-panel of the bus, beginning at least three inches behind the rear wheel and not closer than four inches from the lower edge of the window line; and

(2) above the windows on the right and left sides of the bus, near the rear of the vehicle, not to extend forward of the rear axle.

(b) Advertisement(s) shall be at least three inches from any required lettering, lamp, wheel well, reflector, or emergency exit location.

(c) Advertisement(s) shall not be placed on or interfere with the operation of any door, window, lamp, reflector, or other device.

(d) Any reflective tape between the floorline and beltline of the bus which is covered by an advertisement should be replaced above or below the advertisement.

§14.64. Permitted Space.

(a) The maximum covered area allowed for advertising on the left rear quarter panel of a bus shall be contained within a block 30 inches in height and 90 inches in length.

(b) The maximum covered area allowed for advertising above the windows on the left and right sides of the bus shall be contained within a block 18 inches in height and 108 inches in length, per side.

§14.65. Reporting.

(a) It shall be the responsibility of the school district to provide the School Bus Transportation Program at the department written notification of:

(1) the number of buses displaying exterior advertising or another paid announcement operated by or for the school district; and

(2) any crash directly or indirectly involving a bus operated by or for the school district which bears advertising or another paid announcement on the exterior of the vehicle.

(A) A bus directly involved in a crash is a motor vehicle crash in which a bus, with or without a pupil on board, is involved as a contact vehicle.

(B) A bus indirectly involved in a crash is a motor vehicle crash in which a bus, with or without a pupil on board, is involved as a non-contact vehicle. Some examples of a school bus as a non-contact vehicle indirectly involved in a crash include:

(i) a crash involving a motor vehicle passing a school bus which is stopped with its red lights flashing; or

(ii) a crash in which a child approaching or leaving a school bus, stopped with its red lights flashing, is struck; or

(iii) a crash involving a motor vehicle lawfully stopped for a school bus which is stopped with its red lights flashing.

(b) Notice shall be received by the department on or before September 1 of each year reporting the number of buses bearing advertising or another paid announcement on the exterior of the vehicle. Only school districts involved in an advertising program are required to report.

(c) Notice shall be received by the department not more than five days from the date of the crash. Notice shall include the following:

(1) the name and address of the owner of the bus;

(2) the name and driver license number of the school bus driver;

(3) the date of the crash;

(4) the city or county where the crash occurred; and

(5) the investigating police agency.

(d) Notice shall be delivered by one of the following methods:

(1) facsimile at (512) 424-2238;

(2) electronic mail at sbt@txdps.state.tx.us; or

(3) mailed to School Bus Transportation, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806138
Stanley E. Clark
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 424-2135

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT
SUBCHAPTER C. OTHER ENTITIES' INTERNAL ETHICS AND COMPLIANCE PROCEDURES

43 TAC §1.8, §1.9

The Texas Department of Transportation (department) proposes new §1.8 and §1.9, concerning internal ethics and compliance programs.

EXPLANATION OF PROPOSED NEW SECTIONS

The department has a long standing reputation for integrity and ethical behavior. To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) in November, 2007 ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The commission strengthened the requirement in May, 2008 by ordering the department to develop and implement for the commission and commission staff, the department's executive director, deputy executive director, and assistant executive directors a training program that is to include training on ethics law and policies and the department's ICP.

The next step is for the commission to take action to discourage fraudulent and illegal activity by persons who receive financial assistance from or contract with the department. A purpose of the proposed rule changes is to require that an entity that receives financial assistance from the department have and enforce an ethics and compliance program that is recognized by the department. The proposed rule changes also provide that a contractor's adoption and enforcement of an ethics and compliance program is a potential mitigating factor for the imposition of sanctions on the contractor.

New §1.8, Internal Ethics and Compliance Program, establishes a framework for the internal ethics and compliance program of an entity that receives financial assistance from the department

and that is required under another rule of the commission to establish such a program. The section establishes the minimum requirements of the internal ethics and compliance program and requires the entity to certify that it has adopted and enforces compliance with the program.

New §1.9, Effect of Contractor's Internal Ethics and Compliance Program, provides that a contractor's adoption and enforcement of compliance with an internal ethics and compliance program that meets the requirements of §1.8 may be considered in determining a sanction that may be imposed on the contractor as the result of a violation of federal or state law, including regulations.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Suzanne Mann, Interim Director, Internal Compliance Program Office, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Mann has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to establish a framework for discouraging fraudulent and illegal activity by persons with whom the department has interactions. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new §1.8 and §1.9 may be submitted to Suzanne Mann, Interim Director, Internal Compliance Program Office, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 5, 2009.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§1.8. Internal Ethics and Compliance Program.

(a) Various sections of this title require an entity to adopt and enforce an internal ethics and compliance program. To comply with that requirement, the entity must provide the department with written evidence of the internal ethics and compliance program and must certify to the department that the entity:

(1) has adopted an internal ethics and compliance program that:

(A) is designed to detect and prevent violations of the law, including regulations, and ethical standards applicable to the entity or its officers or employees; and

(B) satisfies the requirements of this section; and

(2) enforces compliance with its internal ethics and compliance program.

(b) An entity's internal ethics and compliance program must be in writing and must provide compliance standards and procedures that the entity's employees and agents are expected to follow. The program must be recognized by the department as a qualifying compliance program. At a minimum, the program must provide that:

(1) high-level personnel are responsible for oversight of compliance with the standards and procedures;

(2) appropriate care is being taken to avoid the delegation of substantial discretionary authority to individuals whom the organization knows, or should know, have a propensity to engage in illegal activities;

(3) compliance standards and procedures are effectively communicated to all of the organization's employees by requiring them to participate in training and disseminating to them information that explains, in understandable language, the requirements of the program;

(4) the governing body or individuals of the organization have periodic training in ethics and in the compliance program;

(5) compliance standards and procedures are effectively communicated to all of the organization's agents;

(6) reasonable steps are being taken to achieve compliance with the compliance standards and procedures by:

(A) using monitoring and auditing systems that are designed to reasonably detect noncompliance; and

(B) providing and publicizing a system for the organization's employees and agents to report suspected noncompliance without fear of retaliation;

(7) consistent enforcement of compliance standards and procedures is administered through appropriate disciplinary mechanisms;

(8) reasonable steps are being taken to respond appropriately to detected offenses and to prevent future similar offenses; and

(9) the organization has a written employee code of conduct that, at a minimum, addresses:

(A) record retention;

(B) fraud;

(C) equal opportunity employment;

(D) sexual harassment and sexual misconduct;

(E) conflicts of interest;

(F) personal use of the organization's property; and

(G) gifts and honoraria.

§1.9. Effect of Contractor's Internal Ethics and Compliance Program.

The adoption by a contractor, as defined by §9.101 of this title, of an internal ethics and compliance program that satisfies the requirements of §1.8 of this subchapter applicable to an internal ethics and compliance program and the contractor's enforcement of compliance with that program may mitigate the imposition of a sanction on the contractor or the level of a sanction that is imposed.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806097
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-8683

CHAPTER 2. ENVIRONMENTAL POLICY
SUBCHAPTER A. ENVIRONMENTAL REVIEW AND PUBLIC INVOLVEMENT FOR TRANSPORTATION PROJECTS
43 TAC §2.1

The Texas Department of Transportation (department) proposes amendments to §2.1, concerning the applicability of the department's environmental review and public involvement requirements to transportation projects that are not on the state highway system.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §228.012 requires the department to create a separate account in the state highway fund to hold payments received by the department under a comprehensive development agreement (CDA), the surplus revenue of a toll project or system, and payments received under Transportation Code, §228.0111(g)(2) and (i)(2). The department is required to create subaccounts in the account for each project, system, or region, and to hold money in a subaccount in trust for the benefit of the region in which a project or system is located. The department may assign the responsibility for allocating money in a subaccount to a metropolitan planning organization (MPO) in which the region is located.

Money in a subaccount must be allocated to projects authorized by Transportation Code, §228.0055 or §228.006 or, for money deposited into a subaccount in connection with a project for which a county acting under Transportation Code, Chapter 284 has the first option, to transportation projects located in the county and the counties contiguous to that county. The projects for which money in a subaccount may be allocated include transportation projects that are not on the state highway system.

The department has created subaccounts in the state highway fund to hold the payments received from the North Texas Tollway Authority (NTTA) for the right to develop, finance, design, construct, operate, and maintain the SH 121 toll project from Business SH 121 in Denton County to US 75 in Collin County (SH 121 subaccounts). Responsibility for allocating money in the SH 121 subaccounts has been assigned to the Regional Transportation Council (RTC), the transportation policy council of the North Central Texas Council of Governments (NCTCOG), under an agreement which provides that the selection of projects to be financed using those funds shall be made by the RTC, subject to Texas Transportation Commission (commission) concurrence.

The commission has authorized the executive director of the department to enter into an agreement with the NCTCOG under which the department will transfer funds from the SH 121 subaccounts to pay for the costs of projects that are not on the state highway system. The department may create additional subaccounts and may enter into agreements under which funds in those subaccounts are used to pay the costs of projects.

For some projects to be funded with money in the SH 121 subaccounts, the local governmental entities implementing those projects have been complying with environmental review, permitting, and other approval and public notice requirements applicable to those entities. The environmental review and public involvement for those projects may need to recommence if those projects are subject to the requirements of 43 TAC Chapter 2, Subchapter A. Other projects to be funded with money in the SH 121 subaccounts are anticipated to require a more limited environmental review focused on permitting and other approvals. All of the approved projects were selected by the RTC using a competitive evaluation process, resulting in the selection of projects that need to be built quickly. The RTC has determined that the approved projects will mitigate or prevent air pollution caused by the construction, maintenance, or use of other proposed or existing public roads in the area.

Amendments to §2.1, General; Emergency Action Procedures, provide that the environmental review and public involvement requirements of 43 TAC Chapter 2, Subchapter A do not apply to a project that is not on the state highway system the department funds solely with money held in a project subaccount created under Transportation Code, §228.012. The amendments require a project agreement entered into by the department ensure that the entity responsible for implementing such a project complies with all environmental review and public involvement requirements applicable to that entity under state and federal law in connection with the project.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state government as a result of enforcing or administering the amendments. Mr. Bass has determined that there will be fiscal implications for local governments as a result of enforcing or administering the amendments. The fiscal implications cannot be quantified with any certainty as it will depend on the number and type of projects funded with money in the SH 121 subaccounts, and the amount of funding approved for each project.

Dianna Noble, P.E., Director, Environmental Affairs Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Noble has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to facilitate the completion of needed transportation projects, thereby reducing congestion, enhancing safety, and improving air quality. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §2.1 may be submitted to Dianna Noble, P.E., Director, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 5, 2009.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.604, which require the commission by rule to provide for the commission's environmental review of the department's transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.).

CROSS REFERENCE TO STATUTE

Transportation Code, §201.604 and Transportation Code, §228.012.

§2.1. General; Emergency Action Procedures.

(a) (No change.)

(b) Applicability; Exception.

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

(3) Exception. Notwithstanding paragraph (1) of this subsection, the requirements of this subchapter do not apply to a project that is not on the state highway system and that the department funds solely with money held in a project subaccount created under Transportation Code, §228.012. A project agreement entered into by the department shall ensure that the entity responsible for implementing such a project complies with all environmental review and public involvement requirements applicable to that entity under state and federal law in connection with the project.

(c) - (h) (No change.)

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806098
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-8683

CHAPTER 5. FINANCE

SUBCHAPTER B. COLLECTION OF DEBTS

43 TAC §5.10

The Texas Department of Transportation (department) proposes amendments to §5.10, concerning collection of debts.

EXPLANATION OF PROPOSED AMENDMENTS

Government Code, §2107.002, requires a state agency that collects delinquent obligations owed to it to establish by rule procedures for collecting the obligations and further requires that the rules establishing those procedures conform to the guidelines established by the Office of Attorney General. Title 1, Texas Administrative Code (TAC), §59.2, sets out those guidelines.

The department's rules relating to the collection of debts are set out in 43 TAC §5.10, Collection of Debts, which was adopted in October 1995 and has not been changed since its adoption. The department has identified some changes to §5.10 that need to be made to conform the department's debt collection procedures to the Office of Attorney General guidelines. The proposed amendments make those changes and make some additional technical corrections.

The amendments make several changes to §5.10(a). In the definition of "debtor," the words "or entity" are deleted from the phrase "person or entity" as unnecessary, because the definition of "person" includes "entity." In the definition of "delinquent," "payment" is substituted for the phrase "when a payment" so that the definition coincides with the definition of that term in the Office of Attorney General guidelines. The definition of "demand letter" is deleted because the definition has been integrated into the substance of new §5.10(c)(4), and the subsequent paragraphs have been renumbered accordingly. Amendments to the definition of "division" clarify that the term includes "office" which is also an organizational unit at Austin headquarters.

The amendments delete §5.10(b) because the substance of the subsection is repeated in current subsection (d).

The amendments re-letter current §5.10(c) as new §5.10(b) and clarify that the department will subtract the amount of contractor's obligation to the department from payments due to a contractor if such an action is practical.

The amendments re-letter current §5.10(d) as new §5.10(c) and amend paragraph (1) to provide that the division or district that determines that an obligation is owed to the department will send the debtor a written notice of the obligation. The notice must state the amount owed and due date. Amendments to paragraph (2) provide that if the department does not receive a satisfactory response, the obligation becomes delinquent on the 31st day after the date that notice is sent and that a first demand letter will be sent not later than 30 days after the date on which the obligation becomes delinquent. This amendment is necessary to establish a definite date that an obligation becomes delinquent, which also clarifies the date on which formal demand letters for payment are to be sent, if necessary. Amendments to paragraph (3) provide that if the department does not receive a satisfactory response to the first demand letter, the division or district will send a final demand letter not later than 60 days after the date on which the first demand letter was sent. New paragraph (4) clarifies the content of, and procedure for sending, the demand letters.

Amendments re-letter current §5.10(e) as new §5.10(d) and clarify the information that the department will retain in the records of a delinquent obligation. The amendments make no substantive change to the current rules.

Amendments re-letter current §5.10(f) as new §5.10(e) and provide that before referring a delinquent obligation to the Office of Attorney General, the department will send two demand letters to the person obligated on the debt. The amendments also make technical, non-substantive changes to the section. The amendments are necessary to clarify the procedural steps that will be taken before making a referral to the Office of Attorney General.

Amendments re-letter current §5.10(g) as new §5.10(f) with no other changes.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Brian Ragland, Director, Finance Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Ragland has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be conformity of the department's debt collection rules with the Office of Attorney General guidelines, as provided in 1 TAC §59.2, and a clearer understanding of the department's procedures for the collection of delinquent obligations.

There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §5.10 may be submitted to Brian Ragland, Director, Finance Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 5, 2009.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, §2107.002(b), requiring state agencies to adopt rules that establish procedures for collecting a delinquent obligation.

CROSS REFERENCE TO STATUTE

Government Code, §2107.002.

§5.10. Collection of Debts.

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

(1) Attorney general--The Office of the Attorney General of Texas.

(2) Debtor--Any person [~~or entity~~] liable for an obligation owed to the department or against whom a claim or demand for payment has been made.

(3) Delinquent--Payment [~~When a payment~~] is past due by law or by customary business practice, and all conditions precedent to payment have occurred or been performed.

(4) Department--The Texas Department of Transportation.

[~~(5) Demand letter--A writing setting forth the nature and amount of an obligation owed to the department that is delivered by United States certified mail, first class.~~]

(5) [~~(6)~~] District--A subdivision of the department responsible for the day-to-day operations of the department in a specific geographically defined area.

(6) [~~(7)~~] Division --An organizational unit in the department's Austin headquarters. The term includes an organizational unit that is designated as an office.

(7) [~~(8)~~] Obligation--A debt, judgment, claim, account, fee, fine, tax, penalty, interest, loan, charge, or grant.

(8) [~~(9)~~] Person--An individual, corporation, organization, business trust, estate, trust, partnership, association, and any other legal entity.

(9) [~~(10)~~] Security--Any right to have property owned by an entity with an obligation to the department sold or forfeited in satisfaction of the obligation, and any instrument granting a cause of action in favor of the department against another entity or that entity's property, such as bond, letter of credit, or other collateral that has been pledged to the department to secure an obligation.

[~~(b) Determination of liability. When a person who is responsible for an obligation to the department has failed or refused to make payments, the department will deem the obligation delinquent.~~]

(b) [~~(c)~~] Collection from contractors. If an obligation of a contractor of the department is delinquent and the department owes payment to that contractor, [~~then~~] the department will subtract the [~~delinquent~~] amount of the obligation from the payment if practical.

(c) [~~(d)~~] Notification of obligation and demand [~~Demand~~] letters.

(1) The division or district responsible for determining that an obligation is owed to the department will send to the debtor written notice of the obligation that contains the amount owed and the date payment is due [~~issue a first demand letter no later than 30 days after the obligation becomes delinquent~~].

(2) If no satisfactory response is received within 30 days after the date that the notice is sent under paragraph (1) of this subsection, the obligation becomes delinquent on the 31st day after the date that notice is sent. The district or division will send a first demand letter not later than the 30th day after the date on which the obligation becomes delinquent. [~~of the first letter, the division or district will send a second and final demand letter no later than 60 days after the obligation becomes delinquent. The second demand letter will include a deadline to respond and a notation, where practicable, that a copy is being sent to the attorney general who may file a lawsuit on the account.~~]

(3) If no satisfactory response is received within 30 days after the day on which the first demand letter was sent, the division or district will send a final demand letter no later than 60 days after the date on which the first demand letter was sent. The final demand letter will include a deadline by which the debtor must respond and, if the department determines in accordance with subsection (e) of this section that the obligation should be referred to the attorney general, a statement that the obligation, if not paid, will be referred to the attorney general.

[~~(3) Demand letters will be mailed in an envelope bearing the notation "address correction requested" in conformity with 39 Code of Federal Regulations §265(d). If an address correction is provided by the United States Postal Service, the division or district will resend the demand letter to that address prior to referral to the attorney general.~~]

(4) Each demand letter will set forth the nature and amount of the obligation owed to the department and will be mailed by first class United States mail, in an envelope bearing the notation "address correction requested." If an address correction is provided by the United States Postal Service, the division or district will resend the demand letter to that address prior to referral to the attorney general.

(d) [~~(e)~~] Records. The department will retain records of a delinquent obligation. A record shall contain documentation of the following information:

(1) the identity of each [~~the~~] person [~~or entity~~] liable on all or any part of the obligation;

(2) the physical address of the debtor's place of business;

(3) the physical address of the debtor's residence, where applicable;

(4) a post office box address where it is impractical to obtain a physical address, or when the post office box address is in addition to a correct physical address;

(5) attempted contacts with the debtor;

(6) the substance of communications with the debtor;

(7) efforts to locate the debtor and the assets of the debtor;

(8) state warrants that may be issued to the debtor;

(9) current contracts with the department;

(10) security interests that the department has against any assets of the debtor;

(11) notices of bankruptcy, proofs of claim, dismissals and discharge orders received from the United States bankruptcy courts; and

(12) other information relevant to collection of the delinquent account.

(e) [~~(f)~~] Referrals of a delinquent obligation to the attorney general.

(1) Prior to referral of a delinquent obligation to the attorney general, the department will:

(A) verify the debtor's address and telephone number;

(B) send a first and final demand letter [~~transmit no more than two demand letters~~] to the debtor in accordance with subsection (c) of this section;

(C) verify that the obligation is not considered uncollectible under paragraph (2) of this subsection;

(D) prepare and file a proof of claim in the case of a bankruptcy unless the department is represented by the attorney general; and

(E) file a claim in the probate proceeding if the debtor is deceased unless the department is represented by the attorney general.

(2) The department will consider a delinquent obligation uncollectible and will make no further effort to collect if the obligation:

(A) has been dismissed or discharged in bankruptcy;

(B) is subject to an applicable limitations provision that would prevent collection as a matter of law;

(C) is owed by a corporation which has been dissolved, is in liquidation under Chapter 7 of the United States Bankruptcy Code, has forfeited its corporate privileges or charter, or, in the case of a foreign corporation, had its certificate of authority revoked unless circumstances indicate that the account is nonetheless collectible or that fraud was involved;

(D) is owed by an individual who is located out-of-state, or outside the United States, unless a determination is made that the domestication of a Texas judgment in the foreign forum would more likely than not result in collection of the obligation, or that the expenditure of department funds to retain foreign counsel to domesticate the judgment and proceed with collection attempts is justified;

(E) is owed by a debtor who is deceased, where probate proceeding have concluded, and where there are no remaining assets available for distribution; or

(F) is owed by a debtor whose circumstances demonstrate a permanent inability to pay or make payments toward the obligation.

(3) In making a determination of whether to refer a delinquent obligation [~~matter~~] to the attorney general, the department will consider:

(A) the expense of further collection procedures;

(B) the size of the debt;

(C) the existence of any security;

(D) the likelihood of collection through passive means such as the filing of a lien;

(E) the availability of resources to collect the obligation; and

(F) policy reasons or other good cause.

(4) The department will refer a delinquent obligation to the attorney general for further collection efforts if [~~not later than the 30th day after the date~~] the department determines in accordance with this subsection that the delinquent obligation should be referred [~~that normal department collection procedures for a delinquent obligation have failed~~].

(f) [~~(g)~~] Supplemental and alternative collection procedures.

(1) Liens. The department, unless represented by the attorney general, will record a lien securing the delinquent obligation in the appropriate records of the county where the debtor's principal place of business, or, where appropriate, the debtor's residence, is located or in such county as may be required by law as soon as is practicable. Unless the delinquent obligation has been paid in full, any lien securing the indebtedness may not be released without the approval of the attorney representing the department after the matter has been referred to the attorney general.

(2) Warrants. The department will utilize the "warrant hold" procedures of the Comptroller of Public Accounts authorized by Government Code, §403.055, to ensure that no treasury warrants are issued to debtors until the debt is paid.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806099
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-8683

CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING
SUBCHAPTER H. TRANSPORTATION CORPORATIONS

43 TAC §15.92

The Texas Department of Transportation (department) proposes amendments to §15.92, concerning transportation corporations.

EXPLANATION OF PROPOSED AMENDMENTS

To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The proposed rule changes expand the use of that concept to require transportation corporations to have and enforce compliance with an internal ethics and compliance program. The purpose of the proposed changes is to discourage fraudulent and illegal activity by persons who receive financial assistance from or contract with the department.

Amendments to §15.92, Miscellaneous Powers and Duties of Corporations, add new subsection (c) to require a transportation corporation formed under the Texas Transportation Corporation Act (Transportation Code, Chapter 431) for the promotion and development of public transportation facilities and systems to adopt an ethics and compliance program that satisfies new 43 TAC §1.8, Internal Ethics and Compliance Program. The amendments give a transportation corporation approximately one year to satisfy the requirement. The amendments also add new subsection (d), which requires the transportation corporation to enforce compliance with the program.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Suzanne Mann, Interim Director, Internal Compliance Program Office, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Mann has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to discourage fraudulent and illegal activity by transportation corporations. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §15.92 may be submitted to Suzanne Mann, Interim Director, Internal Compliance Program Office, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 5, 2009.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 431.

§15.92. Miscellaneous Powers and Duties of Corporations.

(a) Open Meetings and Public Information.

(1) A corporation is subject to the Open Meetings Act, Government Code, Chapter 551.

(A) Except as provided in subparagraph (B) of this section, the Board shall file notice of each meeting of the board in the same manner and in the same location as is required of a state governmental body under Chapter 551, Government Code.

(B) If the commission designates an area of the state in which a corporation may act on behalf of the commission, the board shall file notice of each meeting of the board in the same manner and the same location as is required of a governmental body under Government Code, §551.053.

(2) The Board is subject to the Public Information Act, Government Code, Chapter 552.

(b) Texas Non-Profit Corporation Act. The Texas Non-Profit Corporation Act applies to a transportation corporation to the extent that the provisions of that Act are not inconsistent with provisions of the Transportation Corporation Act, Transportation Code, Chapter 431, and this subchapter.

(c) Internal ethics and compliance program. A corporation shall adopt an internal compliance and ethics program that satisfies the requirements of §1.8 of this title (relating to Internal Ethics and Compliance Program) before the later of:

(1) January 1, 2010; or

(2) the first anniversary of the date on which the corporation is created.

(d) Enforcement of compliance program. A corporation shall enforce compliance with the internal compliance and ethics program adopted under subsection (c) of this section.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806100
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-8683

CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) proposes amendments to §§21.142, 21.149, 21.150, 21.151, 21.155, 21.160, 21.411, 21.431, 21.441, 21.521, 21.531, 21.541, 21.561, and 21.572, concerning regulation of signs along interstate and primary highways and rural roads.

EXPLANATION OF PROPOSED AMENDMENTS

The department is in the process of restructuring department duties and responsibilities. With these changes, the department is looking for ways to streamline work processes and increase efficiency in specific programs such as the outdoor advertising program. The department believes that moving from a de-centralized, district-based management system to a central or regional administration process will achieve more uniformity in the

program and will be a more efficient use of the state's limited resources. In order to make any changes to the structure of the program, the department must eliminate references to district offices and district engineers throughout the outdoor advertising rules.

All references to district offices and district engineers are replaced with either the department or the executive director. These changes will allow the department the flexibility to restructure the program in a manner that is most efficient. The department believes that these changes will also improve the consistency of the program.

Amendments to §21.142, Definitions, delete the definition of director and district engineer. These rules propose the removal of all references to director and district engineer; therefore, the definitions are no longer needed. These amendments add the definition of executive director, which is defined as the executive director of the Department of Transportation or the executive director's designee not below the level of regional manager, division director, or office director. The executive director replaces the district engineer throughout these amendments in references to decision authority. The inclusion of the designee language allows the executive director to designate another staff member the responsibilities under the program as long as the selected staff is of a level of regional manager, division director, or office director or higher. The amendments to the definitions are needed to correspond with other proposed amendments.

Amendments to §21.149, Licenses, replace director with executive director for the approval of license applications, revocations, or suspensions of the license, and the filing of appeal requests. By eliminating the reference to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program. The amendments also make a grammatical correction, changing "outdoor advertisers surety bond" to "outdoor advertiser's surety bond."

Amendments to §21.150, Permits, replace district engineer with the department for the receipt of permit applications and renewals and requests for replacement permit plates. On these issues, the district engineer is not exercising decision authority. The term is used to provide the location for the documents to be sent and reviewed. The language of the current rule limited the department's ability to review additional submission alternatives such as a web-based system. By this change, the department has the flexibility to review and determine the most efficient manner to receive and review applications. The department will provide submission location information on application forms and other correspondence so that the applicants and affected parties will know where and how to submit documents to the department.

Amendments to §21.150 also replace the district engineer with the executive director for the approval of permit applications, the notification for the removal of signs or cancellation of a permit, and the approval of non-profit sign applications. This substitution provides the executive director or his designee of a level not below regional manager, division director, or office director decision authority for outdoor advertising issues. By removing references to a particular position, these changes allow the department flexibility in structuring the outdoor advertising program into either a regional or centralized program.

Amendments to §21.151, Local Control, delete the term director of the right of way division and replace it with the executive director as the position to receive information from political subdivisions regarding the local certification program. The amendments also substitute the executive director as the party responsible for consulting with the Federal Highway Administration as it relates to the department's opinion that the political subdivision has adequate sign and zoning ordinances. The amendments also move the authority to de-certify a political subdivision to the executive director. By the new definition, the executive director can designate another employee of a level of regional manager, division director, or office director or higher to carry out these duties. By eliminating the reference to the Right of Way Division Director the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

Amendments to §21.155, Directional Signs, delete reference to district engineer and replace it with the executive director in the determination of whether a particular sign advertises an activity or attraction which is nationally or regionally known and of outstanding interest to the traveling public. By moving this authority to the executive director the department can be more consistent throughout the state in making these types of decisions. This change also allows the department to restructure the outdoor advertising program into either a central or regional program.

Amendments to §21.160, Relocation, delete the references to district engineer and replace it with the executive director as the approval authority for determining the necessity and approval of the relocation permit application. Changing to the executive director will improve the consistency throughout the state and will allow the department the flexibility in structuring the outdoor advertising program into either a regional or centralized program.

Amendments to §21.411, Definitions, add the definition of executive director. The term is defined as the executive director of the Department of Transportation or the executive director's designee not below the level of regional manager, division director, or office director. The inclusion of the designee language allows the executive director to designate another staff member the responsibilities under the program as long as the selected staff is of a level of regional manager, division director, or office director or higher. By other amendments, the term has been added throughout the subchapter so it is necessary that the definition be included.

Amendments to §21.431, Registration of Existing Off-Premise Sign, delete the district engineer and the district office as the location and person in which an applicant submits required permit applications. This change allows the department to review alternative methods for the submission of documents and allows for the flexibility of a central or regional program to accommodate the department's current restructuring efforts. The department will provide submission location information on application forms and other correspondence so that the applicants and affected parties will know where and how to submit documents to the department.

Amendments to §21.441, Permit for Erection of Off-Premise Sign, replace the district engineer with the executive director regarding who has the authority to approve permit applications and transfers. By designating the executive director, the rules will provide the department the flexibility to establish a central or regional program. This section is also amended by deleting references to the district office to allow the department the ability to review alternative methods for the submission of documents. The department will provide submission location information on application forms and other correspondence so that the applicants and affected parties will know where and how to

submit documents to the department. The changes to this section will also provide for more consistent application of the rules throughout the state and also allows for either a central or regional program to accommodate the department's current restructuring efforts.

Amendments to §21.521, On-Premise Sign Erectors, replace the director of right of way with the executive director with all decision authority regarding on-premise signs. By eliminating the references to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

Amendments to §21.531, Board of Variance, replace the term engineer-director of the department with the executive director. The engineer-director is considered the executive director so there is no transfer of duty under this amendment. The change is only to correct the terminology to the more current term used by the department.

Amendments to §21.541, Revocation of Permits, replace the director of right of way with the executive director regarding the authority to revoke permits. By eliminating the reference to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

Amendments to §21.561, Removal of Sign, transfer the authority to the executive director to determine whether to order a sign to be removed. This change will provide for more consistent application of this rule throughout the state and will also allow for either a central or regional program to accommodate the department's current restructuring efforts.

Amendments to §21.572, Notice and Appeal, replace the director of right of way with the executive director regarding the authority to issue revocation notices. The executive director must also receive the requests for the administrative hearing. By eliminating the references to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

John Campbell, Director, Right of Way Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Campbell has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be more efficient use of state resources and more consistent application of the rules throughout the state. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on Tuesday, December 16, 2008, in the Ric Williamson Hearing Room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§21.142, 21.149, 21.150, 21.151, 21.155, 21.160, 21.411, 21.431, 21.441, 21.521, 21.531, 21.541, 21.561, and 21.572 may be submitted to John Campbell, Director, Right of Way Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 5, 2009.

SUBCHAPTER I. REGULATION OF SIGNS ALONG INTERSTATE AND PRIMARY HIGHWAYS

43 TAC §§21.142, 21.149 - 21.151, 21.155, 21.160

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads, Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, Transportation Code, §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.142. Definitions.

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

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

[~~(6) Director--The director of the Right of Way Division of the department.~~]

[~~(7) District engineer--The chief administrative officer in charge of a district of the department.~~]

(6) [~~(8)~~] Electronic sign--A sign, display, or device that changes its message or copy by programmable electronic or mechanical processes.

(7) [~~(9)~~] Erect--To construct, build, raise, assemble, place, affix, attach, embed, create, paint, draw, or in any other way bring into being or establish.

(8) Executive Director--The executive director of the department or the executive director's designee not below the level of regional manager, division director, or office director.

(9) [~~(10)~~] Freeway--A divided highway with frontage roads or full control of access. A proposed freeway is designated a freeway for the purposes of this subchapter when the construction contract is awarded, regardless of whether the main-traveled way is open to the public.

(10) [~~(11)~~] Interchange--A system of interconnecting roadways in conjunction with one or more grade separations that provides for the movement of traffic between two or more roadways or highways on different levels. A proposed interchange is designated an interchange for the purposes of this subchapter when the construction contract is awarded, regardless of whether it is open to the public.

(11) [~~(12)~~] Intersection--The common area at the junction of two roadways as defined in Transportation Code, §541.303.

(12) [~~(13)~~] Interstate highway system--That portion of the national system of interstate and defense highways located within the State of Texas which now or hereafter may be so designated officially by the commission and approved pursuant to 23 United States Code §103.

(13) [~~(14)~~] License--An outdoor advertising license issued by the department pursuant to the provisions of Subchapter C of the Act.

(14) [~~(15)~~] Main-traveled way--The traveled way of a highway that carries through traffic. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

(15) [~~(16)~~] National Highway System--That portion of connected main highways located within the State of Texas which now or hereafter may be so designated officially by the commission and approved pursuant to 23 United States Code §103.

(16) [~~(17)~~] Nonconforming sign--A lawfully erected sign that does not comply with the provisions of a law or rule promulgated at a later date, or which later fails to comply with a law or rule due to changed conditions.

(17) [~~(18)~~] Nonprofit sign--A sign erected and maintained by a nonprofit organization in a municipality or the extraterritorial jurisdiction of a municipality if the sign advertises or promotes only the municipality or another political subdivision whose jurisdiction is in whole or in part concurrent with the municipality.

(18) [~~(19)~~] Outdoor advertising or sign--An outdoor sign, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo or symbol, or other thing which is designed, intended, or used to advertise or inform, if any part of the advertising or information contents is visible from any place on the main-traveled way of a regulated highway.

(19) [~~(20)~~] Permit--The authorization granted for either the erection and/or maintenance, of an outdoor advertising sign as provided in the Act, §391.068.

(20) [~~(21)~~] Person--An individual, association, partnership, limited partnership, trust, corporation, or other legal entity.

(21) [~~(22)~~] Primary system or federal-aid primary system--That portion of connected main highways which were designated by the commission as the federal-aid primary system in existence on June 1, 1991 and any highway which is not on that system but which is on the National Highway System.

(22) [~~(23)~~] Public park--A public park, forest, playground, nature preserve, or scenic area designated and maintained by a political subdivision or governmental agency.

(23) [~~(24)~~] Regulated highway--A highway on the interstate highway system or primary system.

(24) [~~(25)~~] Removed--The dismantling and removal of a substantial portion of the parts and materials of a sign or sign structure from the view of the motoring public. The term shall not include the temporary removal of a sign face for operational reasons.

(25) [~~(26)~~] Rest area--An area of public land designated by the department as a rest area, comfort station, picnic area, or roadside park.

(26) [~~(27)~~] Sign face--The part of the sign that contains the message or informative contents and is distinguished from other parts of the sign and other sign faces by separation borders or decorative trim. It does not include lighting fixtures, aprons, and catwalks unless they display part of the message or informative contents of the sign.

(27) [~~(28)~~] Sign structure--All of the interrelated parts and materials, such as beams, poles, braces, apron, catwalk, and stringers, that are used, designed to be used, or are intended to be used to support or display a sign face.

(28) [~~(29)~~] Traveled way--That portion of the roadway used for the movement of vehicles, exclusive of shoulders.

(29) [~~(30)~~] Turning Roadway--A connecting roadway for traffic turning between two intersection legs of an interchange.

(30) [~~(31)~~] Unzoned commercial or industrial area--

(A) An area along the highway right of way which has not been zoned under authority of law, which is not predominantly used for residential purposes, and which is within 800 feet, measured along the edge of the highway right of way, of, and on the same side of the highway as, the principal part of at least two adjacent recognized commercial or industrial activities. To be considered an unzoned commercial or industrial area, the following requirements must be met.

(i) A portion of the regularly used buildings, parking lots, storage or processing areas where each respective business activity is conducted must be within 200 feet of the highway right of way and the permanent building where the activity is conducted must be visible from the main-traveled way.

(ii) To be considered adjacent, there must be no separation of the regularly used buildings, parking lots, storage or process-

ing areas of the two activities by vacant lots, undeveloped areas over 50 feet wide, roads, or streets.

(iii) Two activities may occupy one building as long as each has 300 square feet of floor space dedicated to that activity and otherwise meets the definition of a commercial or industrial activity. There must be separation of the two activities by a dividing wall, separate ownership, or other distinctive characteristics. A separate product line offered by one business will not be considered two activities.

(B) An unzoned commercial or industrial area is more specifically identified as follows.

(i) The area to be considered, based upon the qualifying activities, is 1,600 feet (800 feet on each side) plus the actual or projected frontage of the commercial or industrial activities, measured along the highway right of way by a depth of 660 feet in accordance with §21.144(b) of this title (relating to Measurements).

(ii) The area shall be located on the same side of the highway as the principal part of the qualifying activities.

(iii) The area must be considered as a whole prior to the application of the test for predominantly residential.

(iv) An area shall be considered to be predominantly residential if more than 50% of the area is being used for residential purposes. Roads and streets with residential property on both sides shall be considered as being used for residential purposes. Other roads and streets will be considered nonresidential.

(31) [~~(32)~~] Visible--Capable of being seen, whether legible or not, without visual aid by a person with normal visual acuity.

(32) [~~(33)~~] Zoned commercial or industrial area--An area designated, through a comprehensive zoning action, for general commercial or industrial use by a political subdivision with legal authority to zone. The following areas are not zoned areas:

(A) areas that permit limited commercial or industrial activities incident to other primary land uses;

(B) areas designated for and created primarily to permit outdoor advertising structures along a regulated highway;

(C) unrestricted areas; and

(D) small parcels or narrow strips of land that cannot be put to ordinary commercial or industrial use and are designated for a use classification different from and less restrictive than that of the surrounding area.

§21.149. Licenses.

(a) Application and issuance.

(1) Except as provided in §21.147 of this title (relating to Exempt Signs), and except as provided in subsection (h) of this section, a person may not erect or maintain a sign as outlined in §21.146 of this title (relating to Signs Controlled), until the person has obtained a license covering the county in which the sign is to be erected or maintained. Licenses are issued by the executive director and are valid for one year. An applicant for a license must file an application in a form prescribed by the department, which shall include, but not be limited to:

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

(2) The application must be signed, notarized, and filed with the department [~~director~~] in Austin and shall be accompanied by:

(A) a fully executed outdoor advertiser's [~~advertisers~~] surety bond:

(i) - (iii) (No change.)

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

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

(b) License renewals.

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

(3) The application must be signed by the license holder and filed with the department [~~director~~] in Austin, and shall be accompanied by the renewal fee as prescribed by subsection (c) of this section.

(4) (No change.)

(c) (No change.)

(d) Temporary Suspension. In the event the executive director is notified by a surety company that a bond is being canceled, the executive director will notify the license holder that a new bond must be obtained and filed with the executive director within 30 days of receipt of the notice or prior to the bond cancellation date, whichever occurs later. Notice shall be presumed to be received five days after mailing. From the bond termination date until continuing bond coverage is provided, the executive director will suspend the issuance of additional permits and the transfer of existing permits.

(e) Permanent revocation or permanent suspension. The executive director may suspend the issuance of additional permits or the transfer of existing permits, or revoke a license if:

(1) a valid outdoor advertiser's [~~advertisers~~] surety bond is not provided within the time specified by the department in accordance with subsection (d) of this section; or

(2) (No change.)

(f) Notice and appeal. When actions for permanent revocation or permanent suspension are taken by the executive director, notice will be sent by certified mail to the address of record provided by the license holder. Notice shall be presumed to be received five days after mailing. The recipient of the notice may provide proof that the notice was not received five days from mailing, in which case, the executive director [~~of right of way~~] may extend the time for requesting a hearing.

(1) (No change.)

(2) A request for an administrative hearing under this subsection must be made in writing to the executive director in Austin within 10 days of the receipt of the notice.

(3) (No change.)

(g) - (h) (No change.)

§21.150. Permits.

(a) (No change.)

(b) Application and issuance.

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

(3) The application must be signed under oath by the sign owner and filed with the department [~~district engineer in whose district the sign is to be erected or maintained,~~] and shall be accompanied by the prescribed fee or fees and, if the sign is located within the jurisdiction of a municipality with a population of more than 1.9 million that is exercising its authority to regulate outdoor advertising, a certified copy of the permit issued by the municipality.

(4) (No change.)

(5) If approved, a copy of the application, endorsed by the executive director [~~district engineer, or designee,~~] and a Texas sign per-

mit plate will be issued to the applicant. Not later than 30 days after erection of the permitted sign, or after the issuance of a permit if the sign is lawfully in existence when the highway along which it is located becomes subject to control by the department, the sign owner shall cause the permit plate to be securely attached to that portion of the sign structure nearest the highway and visible from the main-traveled way. If the permit plate becomes illegible, the department may require that a replacement plate be obtained in accordance with subsection (f) of this section. The plate must be attached and may not be removed from the sign described in the application.

(6) (No change.)

(c) (No change.)

(d) Renewals.

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

(4) If a sign continues to meet all applicable requirements, a permit holder may renew a permit by filing with the department a written request in a form prescribed by the department and the prescribed renewal fee [~~at the district office serving the county where the sign is located~~].

(e) Transfer.

(1) A permit may only be transferred with the written approval of the executive director [~~district engineer~~]. At the time of the transfer, both the transferor and the transferee must hold a valid outdoor advertising license issued pursuant to §21.149 of this title (relating to Licenses), except as provided in subparagraphs (3) - (5) of this subsection.

(2) A permit holder who desires to transfer one or more permits must file a written request in a form prescribed by the department and the prescribed transfer fee at the department [~~district office serving the county where the sign is located~~]. The transferor and transferee will each be issued a copy of the approved permit transfer form.

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

(5) The executive director will approve the transfer of one or more sign permits from a lapsed outdoor advertising license to a valid outdoor advertising license, with or without the signature of the transferor, if:

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

(6) (No change.)

(f) Replacement. In the event a permit plate is lost or stolen, is missing from the sign structure, or becomes illegible, the sign owner must submit [~~to the district engineer~~] a request for a replacement plate in a form prescribed by the department, together with the prescribed replacement plate fee.

(g) - (h) (No change.)

(i) Cancellation. The executive director may cancel a permit if the sign structure:

(1) - (11) (No change.)

(j) Removal. If a permit expires without renewal, is canceled without reinstatement, or if a sign other than an exempt sign is erected or maintained without a permit, the owner of the involved sign and sign structure shall, upon written notification by the executive director [~~district engineer~~], remove the sign at no cost to the state.

(k) Notice and appeal. Upon determination that a permit should be canceled, the executive director shall mail by certified mail a notice of cancellation to the address of the record license holder. Notice shall be presumed to be received five days after mailing. The recipient of the notice may provide proof that the notice was not received five days from mailing, in which case, the executive director [~~of right of way~~] may extend the time for requesting a hearing.

(1) (No change.)

(2) A request for an administrative hearing under this subsection must be made in writing to the executive director within 10 days of the receipt of the notice of cancellation.

(3) (No change.)

(l) Nonprofit signs.

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

(3) An application for a permit under this section must include, in detail, the content of the message to be displayed on the sign. Prior to changing the message, the permit holder must obtain the approval of the executive director [~~district engineer in whose district the sign is maintained~~].

(4) - (6) (No change.)

(m) - (n) (No change.)

§21.151. Local Control.

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

(c) Certification process. The executive director, after consulting with the Federal Highway Administration, shall determine whether a political subdivision has an adequate sign and zoning ordinance in compliance with subsection (a) of this section. In order to be considered, the political subdivision must submit the following information to the department [~~director~~]:

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

(d) Department review. The department may meet with a political subdivision to ensure that it is enforcing the standards and criteria in accordance with subsection (a) of this section. In addition, the political subdivision shall provide the department [~~applicable district office~~] with:

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

(e) Decertification process. The executive director may decertify a political subdivision if it does not have an effective control program, in the opinion of the executive director. The executive director may consider whether:

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

(f) (No change.)

§21.155. Directional Signs.

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

(d) Selection method and criteria.

(1) (No change.)

(2) Privately owned attractions or activities must be of national or regional interest to the traveling public. Examples of these sites may be found in the National Register of Historic Places, the National Registry of Natural Landmarks published by the U.S. Department of Interior, and the "Texas State Travel Guide" published by the State of Texas. The executive director [~~Each district engineer~~] is authorized to determine whether a particular sign advertises an activity or attraction which is nationally or regionally known and of outstanding interest to the traveling public.

(e) - (h) (No change.)

§21.160. Relocation.

(a) (No change.)

(b) Permit. When a sign within the proposed highway right of way is to be relocated to accommodate a regulated highway project, [~~the district engineer of~~] the department [~~within whose jurisdiction the sign is located~~] may issue a permit under the conditions set forth in subsections (c) and (d) of this section.

(c) Requirements.

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

(3) The executive director [~~district engineer~~] shall initially determine whether the permit is necessary to avoid excessive project costs and/or a delay in the completion of the project.

(4) (No change.)

(5) The sign must be situated after its relocation according to the following priority:

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

(E) to another location within 50 miles of the original sign location, within another district of the department, with the approval of the executive director [~~district engineer where the sign is to be relocated~~].

(6) - (9) (No change.)

(10) Except in accordance with subsection (g) of this section, the sign replacement site is to be approved by the executive director [~~district engineer or his designee~~] prior to the removal of the existing sign.

(11) - (12) (No change.)

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

(f) Bisection. An existing permit may be amended by the department [~~district office (serving the county where the sign is located)~~] to authorize:

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

(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 November 21, 2008.

TRD-200806101
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-8683

SUBCHAPTER K. CONTROL OF SIGNS ALONG RURAL ROADS

43 TAC §§21.411, 21.431, 21.441, 21.521, 21.531, 21.541, 21.561, 21.572

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads, Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, Transportation Code, §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.411. Definitions.

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

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

(5) Executive Director--The executive director of the department or the executive director's designee not below the level of regional manager, division director, or office director.

(6) [~~(5)~~] Governmental entity--The state, an agency of the state, or a political subdivision of the state, including a county, municipality, public school district, or special purpose district.

(7) [~~(6)~~] Main traveled way--The through traffic lanes exclusive of frontage roads, auxiliary lanes, and ramps.

(8) [~~(7)~~] Normal maintenance--The process of keeping a sign in good repair. When the sign is being converted from a multiple pole structure to a monopole structure or is being repaired at a cost in excess of 50% of the cost of erecting a new sign of the same type at the same location, each such action constitutes a replacement rather than normal maintenance and a sign permit will be required if the sign is an off-premise sign. No sign required to be registered or permitted may be enlarged more than 10% of the size shown on the permit or registration without first obtaining a permit authorizing such enlargement. Lighting may not be added to any sign nor may more intense lighting be added to any sign without first obtaining a permit authorizing such addition. No person shall erect, repair, or maintain a sign while such person or the equipment being used is on any road right-of-way.

(9) [~~(8)~~] Off-premise sign--A sign displaying advertising copy that pertains to a business, person, organization, activity, event, place, service, or product not principally located or primarily manufactured or sold on the premises on which the sign is located.

(10) [~~(9)~~] On-premise sign--A freestanding sign identifying or advertising a business, person, or activity, and installed and maintained on the same premises as the business, person, or activity.

(11) [~~(10)~~] Permit--The authorization granted pursuant to action by the Texas Transportation Commission for the erection of a sign, subject to these sections and the Act.

(12) [~~(11)~~] Person--An individual, association, corporation, or other legal entity.

(13) [~~(12)~~] Portable sign--A sign designed to be mounted on a trailer, bench, wheeled carrier, or other nonmotorized mobile structure or on skids or legs.

(14) [~~(13)~~] Recognized commercial or industrial activities--Those activities customarily permitted only in zoned commercial or

industrial areas except that none of the following shall be considered recognized commercial or industrial activities:

(A) outdoor advertising structures;

(B) agricultural, forestry, ranching, grazing, farming, and related activities, including, but not limited to, temporary wayside fresh produce stands;

(C) activities not housed in a permanent building or structure having functioning water and sewage connections and functioning electrical connections;

(D) activities conducted in a building primarily used as a residence;

(E) railroad right-of-way;

(F) activities more than 200 feet from the edge of the right-of-way of a rural road;

(G) activities conducted only seasonally or which are not conducted an average of at least 30 hours per week or at least five days per week;

(H) activities conducted in a building having less than 300 square feet of floor space devoted to such activities;

(I) activities not conducted by human beings;

(J) activities which have not existed at least 90 days.

(15) [~~(14)~~] Rural road--A road, street, way, highway, thoroughfare, or bridge that is located in an unincorporated area and is not privately owned or controlled, any part of which is open to the public for vehicular traffic, and over which the state or any of its political subdivisions have jurisdiction.

(16) [~~(15)~~] Sign--An outdoor structure, sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing that is designed, intended, or used to advertise or inform and that is visible from the main-traveled way of a rural road.

(17) [~~(16)~~] Small business--A legal entity, including a corporation, partnership, or sole proprietorship that:

(A) is formed for the purpose of making a profit;

(B) is independently owned and operated;

(C) is not a publicly held corporation; and

(D) has fewer than 100 employees or less than $1 million in annual gross receipts in a fiscal year.

§21.431. Registration of Existing Off-Premise Signs.

(a) (No change.)

(b) In order to register a sign, the owner shall first provide [~~the district engineer of~~] the department [~~district office serving the county in which the sign is located~~] with sufficient information [~~in duplicate and~~] in writing or pictorially, such as a photograph or sketch, to positively identify the sign and its location, including the name or number of the road along which it is located, how to locate the road and the sign location, the direction the sign can be found from the road, the overall height and length of the sign, a description of the material of which it is constructed, the number of supporting poles, whether it is illuminated or not, the current message on display, the name and mailing address of the sign owner, and the name and mailing address of the site owner. Such registration shall include a statement under oath that each sign being registered was erected prior to September 1, 1985. No particular form shall be necessary, but a form prescribed by the department may be used. The nonrefundable fee of $25 per sign must be submitted with the registration request. The fee may be paid by the registrant's check or by cashier's check or money order supplied by the registrant in an amount sufficient to cover all signs sought to be registered in that submission.

(c) (No change.)

(d) The registration of an off-premise sign in existence before September 1, 1985, may be renewed for an additional period of up to five years upon written request to [~~the district engineer of~~] the department by providing [~~district office serving the county in which the sign is located provided~~] identification of the sign and the required nonrefundable fee of $10 per sign for each year the renewal is requested are submitted with such request and provided that such request may not be for a single renewal period in excess of five years and that such request and the required fee shall be received by the department [~~such district engineer~~] before the existing registration expires.

(e) Other than an exempt sign, any off-premise sign which was in existence before September 1, 1985, and not duly registered or for which the registration is not kept renewed as provided in these sections shall be removed by the owner thereof at the owner's expense upon written notification by [~~a district engineer of~~] the department [~~district office serving the county in which the sign is located~~].

(f) The registration of a sign may be transferred upon filing with [~~the district engineer of~~] the department [~~district office serving the county where the sign is located~~] three duly executed copies of the form prescribed by the department, and upon payment of a nonrefundable transfer fee of $25 for each sign registration being transferred. One copy of each approved transfer shall be sent to the transferor, one copy shall be sent to the transferee, and one copy shall be retained by the department [~~district engineer~~].

§21.441. Permit for Erection of Off-Premise Sign.

(a) Applicability. A person shall not erect or cause to be erected an off-premise sign, other than an exempt sign, that is visible from the main-traveled way of a rural road without first having obtained a permit to do so from the commission acting by and through the executive director [~~district engineer of the department district office serving the county in which the proposed sign is to be located~~].

(b) Application and issuance.

(1) (No change.)

(2) The application must be signed under oath by the sign owner and filed with the department [~~district engineer in whose district the sign is to be erected,~~] and shall be accompanied by:

(A) - (C) (No change.)

(3) Before approving a permit application, the department [~~district engineer~~] shall determine that the proposed sign will:

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

(4) If approved, a copy of the application will be endorsed by the executive director [~~district engineer~~] and returned to the applicant along with a permit number. Within 30 days after it is received, the permit number shall be displayed on the sign structure in the following manner:

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

(c) Permit renewals.

(1) (No change.)

(2) To renew a permit under this subsection, a permit holder must file with the department [~~district engineer~~] a written request in a form prescribed by the department, together with the prescribed re-

newal fee; and further provided that the sign continues to meet all applicable requirements.

(d) Permit transfer.

(1) A permit may only be assigned with the written approval of the executive director [~~district engineer~~].

(2) The holder of a permit or permits who desires to transfer one or more permits must file [~~with the district engineer~~] a request in a form prescribed by the department, together with the prescribed transfer fee. The transferor and transferee will each be issued a copy of the approved permit transfer form.

(e) (No change.)

§21.521. On-Premise Sign Erectors.

(a) Any person engaged primarily in the business of erecting signs that advertise companies located or products sold on the premises on which the signs are erected must file with the executive director [~~of the right of way division~~] on behalf of the commission a surety bond in the amount of at least $100,000 and payable to the commission to reimburse it for the cost of removing a sign unlawfully erected or maintained by the person; a person may not be exempted from this requirement. The form of such bond shall be as provided in a form prescribed by the department. Such bond shall be kept in force so long as such person remains primarily engaged in such business.

(b) In the event a person files with the executive director [~~of the right of way division of the department~~] an affidavit to the effect that such person is not engaged primarily in the business of erecting on-premise signs, the statement in such affidavit shall be accepted as fact until probative evidence to the contrary has been received by the executive director [~~of the right of way division~~].

§21.531. Board of Variance.

(a) A board of variance is hereby established. It shall be composed of those persons appointed thereto by the executive director [~~engineer-director of the department~~]. A majority of the members of such board shall constitute a quorum.

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

§21.541. Revocation of Permits.

The commission, acting by and through the executive director [~~of the right of way division~~], may suspend and revoke a permit which was issued under these sections if the permittee:

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

§21.561. Removal of Sign.

(a) Upon written notification by the executive director [~~a district engineer of the department~~], any off-premise sign, other than an exempt sign, erected on or after September 1, 1985, must be removed if:

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

(b) (No change.)

§21.572. Notice and Appeal.

Upon determination that a permit should be revoked or administrative penalties sought, the executive director [~~of right of way~~] shall mail a notice of revocation or imposition of administrative penalties to the last known address of the holder of the permit by certified mail.

(1) (No change.)

(2) A request for an administrative hearing under this section must be made in writing to the executive director [~~of right of way~~] within 10 days of the receipt of the notice of revocation or the imposition of administrative penalties.

(3) (No change.)

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806102
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-8683

CHAPTER 27. TOLL PROJECTS
SUBCHAPTER E. FINANCIAL ASSISTANCE FOR TOLL FACILITIES

43 TAC §27.53

The Texas Department of Transportation (department) proposes amendments to §27.53, concerning financial assistance for toll facilities.

EXPLANATION OF PROPOSED AMENDMENTS

To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The proposed rule changes expand the use of that concept to require that to be eligible to receive funds from the department for the financing of a toll facility that is not under the jurisdiction of the department, an entity must have an internal ethics and compliance program and enforce compliance with that program. The purpose of the proposed changes is to discourage fraudulent and illegal activity by persons who receive financial assistance from the department.

Amendments to §27.53, Request, add new subsection (a)(3) to provide that, to be eligible for financing by the department of a toll facility that is not under the jurisdiction of the department, an entity must have adopted, and must enforce compliance with, an ethics and compliance program that satisfies new 43 TAC §1.8, Internal Ethics and Compliance Program. While most entities that apply for financial assistance for toll facilities currently have ethics and compliance programs in place, the commission recognizes that some potential applicants may not have those programs. It is the intent of the commission that the requirements of this new paragraph will apply only for applications for financial assistance submitted to the department after January 1, 2010, and the application forms for the assistance will contain such a provision.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state government as

a result of enforcing or administering the amendments. Mr. Bass has determined that there will be fiscal implications for local governmental entities that apply for financial assistance as a result of enforcing or administering the amendments. The fiscal implications cannot be quantified with any certainty as they will depend on whether the entity has a program in place, the approach taken to satisfy the rule requirements, the type of program in place or to be developed, and the size of the governmental entity.

Suzanne Mann, Interim Director, Internal Compliance Program Office, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Mann has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to discourage fraudulent and illegal activity by persons who receive financial assistance from the department for toll projects. There are no anticipated economic costs for persons required to comply with the amendments as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §27.53 may be submitted to Suzanne Mann, Interim Director, Internal Compliance Program Office, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 5, 2009.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.103, which provides the commission with the authority to establish rules to finance the cost of a toll facility of a public or private entity.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 222, Subchapter E.

§27.53. Request.

(a) Eligibility.

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

(3) To be eligible to receive funds under this subchapter, an entity must have adopted an internal ethics and compliance program that satisfies the requirements of §1.8 of this title (relating to Internal Ethics and Compliance Program) and must enforce compliance with that program.

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

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806103
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 4, 2009
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES
SUBCHAPTER H. STRUCTURAL PEST CONTROL SERVICE
DIVISION 3. COMPLIANCE AND ENFORCEMENT

4 TAC §7.150

The Texas Department of Agriculture withdraws the proposed repeal of §7.150 which appeared in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5152).

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806150
Delores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: November 21, 2008
For further information, please call: (512) 463-4075

4 TAC §7.150, §7.153

The Texas Department of Agriculture withdraws the proposed new §7.150 and the amendments to §7.153 which appeared in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5152).

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806151
Delores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: November 21, 2008
For further information, please call: (512) 463-4075

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS
SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION
DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.218

The Public Utility Commission of Texas withdraws the proposed new §25.218 which appeared in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9039).

Filed with the Office of the Secretary of State on November 20, 2008.

TRD-200806085
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 20, 2008
For further information, please call: (512) 936-7223

TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 280. THERAPEUTIC OPTOMETRY

22 TAC §280.8

The Texas Optometry Board withdraws the proposed amendment to §280.8 which appeared in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7663).

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806032
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: November 18, 2008
For further information, please call: (512) 305-8502

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 229. FOOD AND DRUG

SUBCHAPTER B. DONATION OF UNUSED DRUGS

25 TAC §229.21

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services, withdraws the amendment to 25 TAC §229.21, (DSHS-08-0027), which appeared in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4112). New rules will be proposed in the future that will reflect all of the impacts of the requirement of pedigrees for prescription drug distribution in Texas.

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806113
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: November 21, 2008
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER W. LICENSING OF WHOLESALE DISTRIBUTORS OF PRESCRIPTION DRUGS--INCLUDING GOOD MANUFACTURING PRACTICES

25 TAC §§229.421, 229.423 - 229.425, 229.427 - 229.429

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services, withdraws the amendments to 25 TAC §§229.421, 229.423 - 229.425, and 229.427 - 229.429, (DSHS-08-0027), which appeared in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4112). New rules will be proposed in the future that will reflect all of the impacts of the requirement of pedigrees for prescription drug distribution in Texas.

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806114
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: November 21, 2008
For further information, please call: (512) 458-7111 x6972

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 §§15.2, 15.3, 15.8, 15.16

Proposed amended §§15.2, 15.3, 15.8, and new §15.16, published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3885), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806019

SUBCHAPTER B. COASTAL EROSION PLANNING AND RESPONSE

31 TAC §15.41

Proposed amended §15.41, published in the May 16, 2008, issue of the *Texas Register* (33 TexReg 3885), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806020

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 8. TEXAS JUDICIAL COUNCIL

CHAPTER 175. COLLECTION IMPROVEMENT PROGRAM

SUBCHAPTER A. GENERAL COLLECTION IMPROVEMENT PROGRAM PROVISIONS

1 TAC §175.3

The administrative director of the Office of Court Administration of the Texas Judicial System adopts amendments to 1 TAC Chapter 175, §175.3, concerning its collection improvement program. The amendments are adopted without change to the text as proposed in the October 3, 2008, issue of the *Texas Register* (33 TexReg 8277).

Justification for Rule Action

The adopted amendments clarify the calculation of deadline dates for compliance with program requirements.

How the Rule Will Function

The amendments add language to §175.3(a) that deadline dates falling on weekends, holidays or other days on which the office is closed for business will be advanced to the next day the office is open for business. The need for this change is to be consistent with normal government business practice allowing an extension of deadlines to the next day the office is open for business.

The amendments to §175.3(c)(1) and (4) - (7) change the calculation of deadline dates from days to months. The need for this change is to be consistent with normal collection processes, in which deadlines and due dates are set to the same day of each month. For example, a payment that is due on the fifteenth of the first month will be due on the fifteenth of successive months. The amendments also add language to §175.3(c)(7) to clarify that if a capias pro fine will be sought, another contact must be made within one month of the later of the previous telephone or mail contacts regarding the past-due payments. Clarification is needed because different offices make the telephone and send the mail contacts in different sequences.

Summary of Comments

No comments were received regarding adoption of these amendments.

Statutory Authority

The amendments are adopted under Article 103.0033 of the Code of Criminal Procedure.

No other statutes, articles, or codes are affected by the adopted amendments.

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

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806017
Margaret Bennett
General Counsel
Texas Judicial Council
Effective date: December 8, 2008
Proposal publication date: October 3, 2008
For further information, please call: (512) 463-6321

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS--STANDARDS

1 TAC §§251.1, 251.3 - 251.5, 251.8, 251.9, 251.11 - 251.13

As part of its statutory review of Chapter 251 rules pursuant to Texas Government Code §2001.039, the Commission on State Emergency Communications (CSEC) adopts amendments to §§251.1, 251.3 - 251.5, 251.8, 251.9, and 251.11 - 251.13, concerning the guidelines that govern the relationship between CSEC and the Regional Planning Commissions regarding the submission of regional strategic plans and amendments; use of revenue; procurement, management, and disposition of 9-1-1 equipment and controlled assets; use of funds for database maintenance; monitoring policies; and emergency notification services, without changes to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6481).

In a separate submission to the *Texas Register*, as part of CSEC's Rule Review, CSEC readopted without amendment §251.2 and §251.7, concerning the guidelines for changing or extending 9-1-1 service and implementing integrated services.

In a separate submission to the *Texas Register,* CSEC is proposing to repeal §251.14 concerning general provisions and definitions and proposing new §252.7, concerning definitions.

Notice of CSEC's statutory review of its Chapter 251 rules was published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 951).

SECTION-BY-SECTION EXPLANATION

Each amended rule omits or shortens the Purpose and Definitions subsection.

The amendments to §251.1 serve to clarify the minimum requirements for submitting and amending regional strategic plans.

The amendments to §251.3 serve to establish a timeframe for submitting requests for use of revenue and remove the Approval subsection which restates CSEC's statutory obligation to approve regional strategic plans.

The amendments to §251.4 serve to considerably shorten the rule by eliminating the Definitions subsection, removing repeat references to the Americans with Disabilities Act, and shortening the subsections on Testing and Training.

The amendments to §251.5 serve to rename the rule to include "Controlled Assets" and to shorten and clarify the requirements for managing and disposing of 9-1-1 equipment and controlled assets.

The amendments to §251.8 serve to rename the rule to include "9-1-1" to clarify the type of equipment subject to the rule and to shorten the rule to clarify the requirements and eliminate redundant or unnecessary language.

The amendments to §251.9 serve to shorten the rule to clarify the requirements and eliminate redundant or unnecessary language.

The amendments to §251.11 serve to make clear CSEC's authority to do compliance monitoring of the Regional Planning Commissions and their performing local governments or public safety answering points.

The amendments to §251.12 serve to incorporate CSEC's standard form contract between CSEC and the Regional Planning Commissions.

The amendments to §251.13 serve to delete redundant or unnecessary language.

No comments were received regarding the notice of review or proposed amendments to the foregoing rules.

CSEC has determined that the reasons for initially adopting the rules continue to exist.

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

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805985
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Effective date: December 7, 2008
Proposal publication date: August 15, 2008
For further information, please call: (512) 305-6930

CHAPTER 252. ADMINISTRATION

1 TAC §252.6

The Commission on State Emergency Communications (CSEC) adopts amendments to §252.6, concerning the administration, including distribution, of the wireless emergency service fee, without changes to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6489).

The amendments to §252.6 consist of the addition of language to allow CSEC to address boundary issues and changes not reflected in the state demographer's population estimates and clarification of the process for informing Regional Planning Commissions and Emergency Communication Districts of the wireless fee distribution percentages.

No comments were received regarding adoption of amendments to §252.6.

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

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805989
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Effective date: December 7, 2008
Proposal publication date: August 15, 2008
For further information, please call: (512) 305-6930

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES

SUBCHAPTER H. STRUCTURAL PEST CONTROL SERVICE

DIVISION 1. GENERAL PROVISIONS

The Texas Department of Agriculture (the department) adopts the repeal of §§7.101 - 7.113 and §7.115, amendments to Chapter 7, Subchapter H, Division 1, §7.114, and new §7.112 and §7.113, all concerning regulation of structural pest control. Section 7.114 is adopted with changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5141). The repeal of §§7.101 - 7.113 and §7.115 and new §7.112 and §7.113 are adopted without changes and will not be republished.

The amendments, repeals and new sections are adopted to eliminate unnecessary sections and to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill (HB) 2458, 80th Legislative Session, 2007, which transferred the responsibilities for the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951.

Section 7.114 is amended to add definitions for "Commissioner", "Committee", "Department", "Service" and "Suspend". Existing definitions are amended for clarification and to make those consistent with the transfer of the regulation of structural pest control to the department. The definition for "Board" is deleted. The department is adopting the definition of "Document" with changes to the proposal, based on comment received. The department is taking out the proposed new language "contract, purchase invoice". The terms "contract" and "invoice" are already included in the definition of "Document" and the inclusion of those terms as new language is confusing. New §7.112 provides the department's policy and procedures for settlements of contested cases. New §7.113 sets forth the department's policy in encouraging the resolution of consumer complaints against structural pest control businesses through informal settlements. Sections 7.101 - 7.113 and §7.115 are no longer needed due to the transfer of structural pest control regulation to the department and the abolishment of the Structural Pest Control Board. In addition, §§7.110 - 7.113 and §7.115 are no longer needed because the subjects of these sections are covered by other department rule or policy.

One comment was received on new §7.113(d) from a pest control operator to suggest that the pest control company and pest control operator be added to the consultation for proposed consumer complaint settlements prior to the final approval of the agreement. The department holds the position that the current practice, as outlined in §7.113(b), adequately authorizes the department to engage in informal settlement negotiations with the structural pest control business on behalf of structural pest control consumers. Numerous comments were received regarding §7.114(12) from pest control operators. The comments were opposed to the addition of the words "contract, purchase invoice" or other "business" paperwork in the definition of "document". The department agrees with the comments pertaining to the words" contract" and "purchase invoice" and has deleted those words, as previously noted, since they are already included in the definition of "document". However, the department believes that the inclusion of the word "business" further identifies paperwork associated with the business of structural pest control and adopts the proposed language in that regard. Comments were also received stating that the keeping of contracts and purchase invoices would result in more costs to persons required to keep them. The department has taken out the proposed terms "contract" and "purchase invoice" for the reasons stated previously. Because these items are already included in the definition of "document", the department believes that there are no new costs associated with the rule as adopted.

Some comments were also received on language that was not proposed for change, regarding the definition of license in §7.114(16) and requesting a definition for integrated pest management. The department will review and consider these changes for future rule revisions. In addition, the Texas Pest Control Association (TPCA) submitted a comment in objection to all of the proposed changes and a request that the department shelve its proposal and rework the process utilizing the Structural Pest Control Advisory Committee and the TPCA. The process used to develop the proposal was inclusive of input from the Advisory Committee and the TPCA was also given an opportunity to provide input at the Advisory Committee meeting that took place to discuss the proposal prior to the publication of the proposal in the *Texas Register*, as well as several direct meetings with department management. TPCA followed up with more detailed comments with respect to the specific rule changes which were considered as the final rule was formulated.

4 TAC §§7.101 - 7.113, 7.115

The repeal of §§7.101 - 7.113 and §7.115 is adopted under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal 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.

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806145
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

4 TAC §§7.112 - 7.114

The amendments to §7.114 and new §7.112 and §7.113 are adopted under Occupations Code, §1951.504, which provides that the department by rule shall establish guidelines for the settlement of a contested cases, and shall establish guidelines for the informal settlement of consumer complaints.

§7.114. Definition of Terms.

In addition to the definitions set out in the Structural Pest Control Act the following words, names, and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Structural Pest Control Act, Occ. Code, Chpt. 1951, as amended.

(2) Apprentice--A sales or service employee who has been registered with the department, but has not yet passed a technician examination.

(3) Bait Process--The use of food or other requisite that may be treated with a pesticide and/or other mitigating agent that will adversely affect the pest.

(4) Barrier--For the purposes of a termite treatment, an area of soil or other material which has been treated with a termiticide.

(5) Category--The type of service or services a person or business entity is authorized to perform.

(6) Chairman--An individual elected by members of the committee, who presides over the Structural Pest Control Advisory Committee meetings.

(7) Commissioner--The Commissioner of the Texas Department of Agriculture, or his designee.

(8) Committee--The Structural Pest Control Advisory Committee. A nine member committee appointed by the commissioner, whose responsibility is to gather information and advise the commissioner and staff on the business of structural pest control.

(9) Contract--A binding agreement between two or more persons or parties that spell out in writing, the terms and conditions or such agreement, and will include, but not limited to, warranties or guarantees for structural pest control work.

(10) Department--The Texas Department of Agriculture.

(11) Director--The person employed by the department who serves as administrator of the Structural Pest Control Service.

(12) Document--Any original or official application for technician exam, application for technician license, application for exam and certified applicator license, contract, electronic forms, drawing, guarantee, invoice, map, notice of pre- construction treatment, report, service agreement, termination notice, termite pre-treatment disclosure document, training records, Wood Destroying Insect report, warranty, or other business paperwork required by the department.

(13) Inactive license--License that maintains certification, but which prohibits the technician or certified applicator from doing any pest control services for compensation.

(14) Infest--The presence of one or more obnoxious or unwanted animal(s) or plant(s) in, on or around a structure, trees, shrubs, or other plantings adjacent to or in a residence, business establishment, industrial plant, institutional building, or street.

(15) Inspector--A structural pest control inspector employed by the department.

(16) License--A document issued by the department to a person authorizing the practicing and/or supervising of the professional service or services indicated thereon.

(17) Licensee--The holder of a valid license.

(18) Obnoxious and unwanted animals or plant--Animals or weeds as defined in §1951.003 of the Occupations Code that limit the use or enjoyment or cause harm or damage of any type to people, pets, structures, landscapes, or the environment. Animals excluded from this definition are members of the Order Primates, hoofed mammals, members of the Family Ursidea, members of the Genus Felis, members of the Genus Canis, domestic livestock, ratites, gallinaceous birds, and alligators.

(19) Personal Contact--Physical presence at a work location.

(20) Revoke--To cancel a license issued under authority of the Structural Pest Control Act. When a business license is revoked, the holder of said license must acquire a new license by completing a new application, and paying the required fee. In the case of the certified applicator, the holder of such certified applicator's license must acquire a new license by completing a new application, paying a required fee, and being re-examined in each category desired by said person.

(21) Service--The Structural Pest Control Service.

(22) Suspend--To cease operations for a period of time as specified by the department.

(23) Unit--One hour of time.

(24) Vice-Chairman--An individual Advisory Committee member elected by the committee who presides at the committee meeting in the absence of the Chairman.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806144
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

DIVISION 2. LICENSES

The Texas Department of Agriculture (the department) adopts amendments to Chapter 7, Subchapter H, Division 2, §§7.121 - 7.123, 7.125 - 7.129 and 7.133 - 7.135 and the repeal of §§7.130, 7.132 and 7.136, all concerning the regulation of structural pest control. Sections 7.125, 7.126 and 7.133 - 7.135 are adopted with changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5143) and will be republished. The amendments to §§7.121 - 7.123, 7.127 - 7.129, 7.131 and 7.132 and the repeals of §§7.130, 7.132 and 7.136 are adopted without changes and will not be republished. The amendments and repeals are adopted to eliminate unnecessary sections and to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill (HB) 2458, 80th Legislative Session, 2007, which transferred the responsibilities for the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Changes are made throughout the sections for purposes of clarification and to make the sections consistent with the transfer of the regulation of structural pest control to the department.

Section 7.121 is amended to provide the department requirements for licenses to conduct structural pest control. This section has also been amended to eliminate the requirement that certified applicators and technicians obtain a license for each branch location. Section 7.122 is amended to change the term "board" to "department" and to clarify that both licensees and registrants are covered by this section. Section 7.123 is amended to require that the department be notified within 10 days instead of the current 30 days if the insurance coverage drops below the required coverage. Section 7.125 is amended to conform to new statutory requirements of HB 2458: to specify that an applicant must submit, not later than 30 days prior to the scheduled examination date, an application for the examination and pay the required fee; to specify that passing the appropriate category exam is a requirement of obtaining a license in addition to experience criteria; to provide exam standards and requirements allowing the department to schedule more frequent examination sessions and clarify what actions the department will take when an applicant for examination is discovered receiving or giving additional assistance during the examination; and to establish the

framework for the development of an examination policy. Section 7.125 is adopted with changes to the proposal. The proposed changes to §7.125(b)(3) and (d)(12) are adopted with changes based on comment. Subsection (b)(3), regarding requirements to qualify for a certified commercial applicator license, has been changed back to existing language. Subsection (d)(12) has been changed to add calculators as acceptable devices to use during testing. Section 7.126 is adopted with changes to the proposal. The proposed deletion of existing language in subsection 7.126(b) is withdrawn, based on comment, and the existing language in subsection (b) is readopted, with the exception of the last sentence. Subsection (c) is deleted, as a licensee's failure to maintain adequate insurance will be addressed in the department's administrative penalty matrix. Section 7.126(g) is amended to clarify that each certified commercial and noncommercial applicator and technician may not be renewed if the licensee has not met the continuing education unit requirement in the prior calendar year, and is adopted with changes to the proposal. The language "on the renewal application" has been deleted. Section 7.127 is amended to make this section consistent with changes made to Occupations Code, Chapter 1951 by HB 2458. The amendments provide that a late renewal fee will be charged equal to 1-1/2 times of the renewal fee for renewal applications received between 1 and 30 days of the expiration date, and that a late renewal fee will be charged equal to two times the renewal fee for renewal applications received between 31 and 60 days of the expiration date. Section 7.128 is amended to clarify the actions that may be taken upon the loss of a responsible certified applicator or business license holder. Section 7.129 is amended to add new language providing that any person submitting a request to take an examination or to receive a license may be delayed or may not receive a license if the applicant has been arrested or charged with a crime that if convicted may disqualify the person from receiving a license. Section 7.133 is amended to clarify the requirements for apprentices and technicians to include strengthening the requirement of the oversight of the responsible certified applicator in training of apprentices and technicians. Section 7.133(i)(1) and (p) is adopted with changes, based on comment, to require that verifiable training records be maintained for the current 2 years instead of the proposed 5 years. Section 7.134 is amended to specify that the business licensee and responsible certified commercial applicator is responsible for the proper certification and training of employees. Section 7.134(g) is adopted with changes, based on comment, to require that course completion records be maintained for the current 2 years instead of the proposed 5 years. Section 7.135 is amended to modify the criteria for the approval of self-study or electronic courses for continuing education, and to remove from this section the penalty designations for sponsors and speakers that will be addressed in the department's administrative penalty matrix. Section 7.135 (l) and (r)(1) is adopted with changes, based on comment, to require that course completion and examination records be maintained for the current 2 years instead of the proposed 5 years. Section 7.135(g) is adopted with changes made to correct an incorrect rule citation. Section 7.130, relating to licensing of persons with delinquent student loans, and §7.132, relating to right-of-way certification are repealed because they are unnecessary. Requirements addressing delinquent student loans are addressed in the Education Code, and right-of-way certification requirements are addressed in the Agriculture Code. Section 7.136 is repealed because provisional licenses for Louisiana and Mississippi Certified Pest Control Applicators affected by Hurricane Katrina are no longer needed and dates that pertain to this emergency provision have expired.

Many written comments were received on the proposal from individuals, employed or operating business locations for ABC Pest and Lawn Services, Termimesh, and Chemfree, from other individual pest control operators and from the Texas Pest Control Association. Numerous comments were received in support of the changes to §7.121(d), concerning not requiring certified commercial applicators, noncommercial applicators and technicians to obtain a license for each branch of the same business where they are employed. Comment was received on §7.123(c), suggesting to delete the proposed ten-day notification requirement for an insurance carrier to notify the department and the licensee when the total aggregate of insurance coverage is reduced below the required minimum amount as a result of payment of claims. The department believes that more expedient notification is required in order to insure that the licensee obtains additional coverage as required to protect consumers. Therefore, no change was made to the proposal on this section.

Numerous comments were received on §7.125(b)(3), opposed to the deletion of a degree or certificate in an area of the biological sciences, related to pest control, from an accredited two or four year college or university, in order for an applicant to be eligible to obtain a certified commercial applicator license. The commenters believe this would lessen the requirements of assuring a high level of professional standards in the industry and that the proposed addition of a six-hour training course would imply that this would be all that is needed to obtain a license. The change was proposed to accomplish the same goal of these commenters of strengthening the requirements by no longer allowing a college degree in and of itself to qualify a person for this license. However, the department understands the comments, withdraws the proposed language, and readopts the current language, as noted previously. Comment was received on §7.125(12), recommending that language be added to clarify that the use of electronic devices such as calculators are allowed during an examination to reflect current practice in the examination administration process. The department agrees with the comments and this section was changed, as noted previously, to include this clarification.

Comment was received on §7.126(b), suggesting that the proposed deletion of language concerning that certified applicators and technicians who change employers may also pay additional license fees to the new expiration date of the business or other entity under which they are operating would mean that the license renewal date would not be able to coincide with the business license renewal date. Although the department believes that the proposed change will not in any way change the current business practice allowing certified applicators or technicians to have the expiration license date coincide with the business license expiration date, the deletion of existing language in subsection (b) has been withdrawn, as noted previously, and the existing language readopted, with the exception of the last sentence, to avoid confusion. Comment was received on §7.128(c), concerning the loss of a responsible certified applicator or certified applicator by a business, to replace the words "may only apply to general use pesticides" to state that "does not apply restricted use or state-limited-use pesticides". The department disagrees with this comment because the proposed language is stating the same thing as the suggested language and will be less confusing. Subsection (c) is adopted without changes to the proposal.

Comment was received on §7.129(b), objecting to allowing incarcerated persons to obtain or renew a license. The department believes that the commenter did not understand the proposed change that prohibits a currently incarcerated person from being eligible to obtain or renew a pest control license. Therefore, this section is adopted as proposed. Comment was received on §7.133(n)(1)(J), in support of the proposed addition of integrated pest management to list of verifiable training topics for technicians. Comment was received on §7.135(r)(1), objecting to the five-year proposed time in which course sponsors must maintain examinations taken by attendees to verify their knowledge of the material provided in the course, as being burdensome and unnecessary. The department generally agrees with the objection to the extension of record keeping time frames proposed throughout this subchapter, and, as noted previously, readopts the current language of a two-year recordkeeping requirement.

The following comments were also received on language that was not proposed for change. The department will review and consider these changes for future rule revisions. Comment was received on §7.121(a), recommending that new language be added to require a certified applicator have two years of experience before being eligible to be issued a business license. Comment was received on §7.125(b)(1) and (2) recommending a change to the experience requirement to five years before an applicant is eligible to obtain a certified commercial applicator license. Comment was received on §7.125(d)(20) recommending that a new category for wood destroying insect inspectors be added. Comment was received on §7.113(d), objecting to requiring an apprentice to submit an application for a technician license and pay a fee within ten days of being employed. Comment was received on §7.133(e)(5) suggesting that the requirement of a driver's license number submitted as part of the information in the application for a technician license be changed to government issued identification. Comment was received on §7.133(h) recommending to delete the requirement that a certified applicator be physically present for providing personal instruction to an apprentice three days a week. Comment was received on §7.133(n)(1)(J) recommending that integrated pest management should be required to apply to hospitals, child care centers, charter schools, nursing homes, and municipalities. Comment was received on §7.134(g) suggesting that the wording concerning the certified applicator certificates of completion of courses attended being subject to inspection by the department at anytime is not reasonable and gives the department autocratic authority.

In addition, the Texas Pest Control Association (TPCA) submitted a comment in objection to all of the proposed changes and a request that the department shelve its proposal and rework the process utilizing the Structural Pest Control Advisory Committee and the TPCA. The process used to develop the proposal was inclusive of input from the Advisory Committee and the TPCA was also given an opportunity to provide input at the Advisory Committee meeting that took place to discuss the proposal prior to the publication of the proposal in the *Texas Register*, as well as several direct meetings with department management. TPCA followed up with more detailed comments with respect to the specific rule changes which were considered as the final rule was formulated.

4 TAC §§7.121 - 7.123, 7.125 - 7.129, 7.133 - 7.135

The amendments to §§7.121 - 7.123, 7.125 - 7.129, and 7.133 - 7.135 are adopted under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicators, conducting structural pest control activities; §1951.310, which establishes fees for late renewal of structural pest control licenses and provides that a person must be reexamined by the department to obtain a license if the person applies for a renewal license after the 60th day after the date the person's license expires; §1951.312, which provides that the department by rule may adopt insurance requirements for structural pest control licensees; §1951.315, which provides the department to establish by rule continuing education requirements for licensees; §1951.406, which provides that the department shall develop a written policy governing licensing examinations for persons licensed under Chapter 1951, including procedures for administering the examinations; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

§7.125. Examinations.

(a) To take an appropriate examination administered by the department, an applicant must submit to the department not later than thirty (30) days prior to the scheduled examination session the appropriate form specifying the examination category desired and pay the fee for each exam requested. An individual who has previously qualified by written examination in a category shall receive a certified applicators license for the qualified category without reexamination upon renewal of a certified applicator license and meeting all requirements of these regulations. Each individual not previously qualified by written examination in the category or categories for which the license is requested must secure a certified applicator license by passing an appropriate examination administered by the department.

(b) In addition to passing the appropriate category examination, and in order to be eligible to obtain a certified commercial applicator license, the applicant must meet one of the following requirements:

(1) Have verifiable employment in the pest control industry under the supervision of a licensed certified applicator for at least twelve (12) months out of the past twenty-four (24) months and must have possessed a technician license for at least six (6) months.

(2) Furnish proof of previous verifiable employment, experience in the pest control industry, including out-of-state experience in pest control of at least twelve (12) months out of the past twenty-four (24) months from a previous occupation. The proof of experience must be provided by the applicant in the form of a notarized statement or a letter from the appropriate licensing entity.

(3) Have a degree or certificate in an area of the biological sciences, related to pest control, from an accredited two (2) or four (4) year college or university;

(4) An applicant with equivalent technical pest or pesticide field experience from a previous occupation; and

(5) Qualifies under the hardship clause outlined in §7.128 of this title (relating to Loss of Responsible Certified Applicator or Business License Holder).

(6) Each applicant testing for a certified applicator license must pass the general standards examination administered by the department to be eligible to be licensed in any of the categories in subsection (d)(12) of this section, Categories of Examinations.

(c) In addition to passing the appropriate category examination, and in order to be eligible to obtain a certified noncommercial

applicators license, the applicant must meet one of the following requirements:

(1) Have a degree or certificate in an area of the biological sciences related to pest control from an accredited two (2) or four (4) year college or university;

(2) Have verifiable employment experience in the pest control industry, including out-of-state experience in pest control of at least twelve (12) months out of the past twenty-four (24) months from a previous occupation. The proof of experience must be provided by the applicant in the form of a notarized statement or a letter from the appropriate licensing entity.

(3) Complete a Board approved minimum six (6) hour certified noncommercial technician training course;

(4) Have verifiable employment in the pest control industry under the supervision of a licensed certified applicator for at least twelve (12) months out of the past twenty-four (24) months and must have possessed a technician license for at least six (6) months.

(d) Examination standards and requirements.

(1) Examinations will be given at least once each quarter based on the calendar year. The department may schedule more frequent examinations as resources permit.

(2) A fee shall be charged for each examination administered by the department.

(3) All examination fees are to be paid by the method determined by the department and payment must be submitted with the completed application.

(4) Applicants must present a photo identification from the Texas Department of Public Safety or its equivalent from another state prior to taking an examination.

(5) All examinations shall be maintained and administered by the department.

(6) The applicant must take an examination, which may be in written or electronic form and in general, cover the subject of the categories designated on the application.

(7) A grade of 70% will be the minimum grade required for passing.

(8) Examinations shall only be administered in English.

(9) Examinations are closed book.

(10) Cheating is prohibited. Cheating consists of giving or receiving unauthorized assistance in answering examination questions, bringing unauthorized materials into the exam room or using unauthorized materials to answer examination questions, copying answers or using answers from another examinee, copying questions or answers to examination questions to take from the examination room, removing an examination booklet, answer sheet, or scratch paper from the examination room, or any other action which undermines the integrity of the examination process or that has the intent or effect of providing answers to examination questions that do not reflect each examinee's own work or knowledge.

(11) "Unauthorized assistance" means the use of any written or electronic information or communication during the examination, unless expressly permitted by written instruction or rule, or the receipt or provision of any verbal or written communication, that has the intent or effect of providing answers to examination questions that do not reflect the examinee's own work or knowledge.

(12) No written materials, scratch paper, or electronic devices, other than calculators, may be brought into the examination room or used during the examination.

(13) Scratch paper will be provided by the department as necessary and must be returned to the examination proctor at the end of each examination.

(14) The hands, arms, other body parts, or clothing or other possessions of the examinee may not contain any notes, formulas, or other markings, except for permanent tattoos which do not reproduce any information necessary for answering examination questions.

(15) If an examinee is caught cheating, the examination proctor will confiscate or require the removal of any prohibited materials or information and will mark all answer sheets of the examinee to identify the examination as potentially tainted. The examinee will be asked to leave the examination room and will not be allowed to continue with the examination.

(16) The examination proctor will file a report with the Structural Pest Control Service, along with all potentially tainted examination answer sheets, and a final determination will be made regarding the alleged cheating. The Service's determination will be communicated to the examinee in writing. If the Service determines that cheating occurred, the examinee will have 30 days to file a written appeal on the decision. If the appeal is denied, the examinee will not be allowed to take an examination again during the 12-month period immediately following the date of the exam in question and all examination fees will be forfeited. If the appeal is upheld or if the Service determines that no cheating occurred, the examinee will be allowed to retake any tests scheduled for the date of the alleged cheating at no additional cost.

(17) Upon a final determination that an examinee has cheated, any existing license of any type currently held by the licensee is subject to suspension or revocation.

(18) Applicants who do not take a scheduled examination may not receive a refund of their examination fee unless they notify the department in writing at least ten (10) business days in advance of the examination date. Exceptions may be granted if there is an emergency such as a death or serious illness in the family.

(19) Persons who make a passing grade and qualify for a certified applicator license must obtain a license within (12) twelve months of the grade notification date or be retested.

(20) Examinations will be administered, maintained, and evaluated on a routine basis as determined by department examination policy in the following categories.

(A) Pest Control--This category includes persons engaged in the inspection or control of pests in and around structures or pest animals which may invade homes, restaurants, stores, and other buildings, attacking their contents or furnishings or being a general nuisance, but do not normally attack the building itself. Examples of such pests are cockroaches, silverfish, ants, fleas, ticks, flies, mosquitoes, rats, mice, skunks, raccoons, opossums, etc.

(B) Termite and Wood Destroying Insect Control--This category includes persons engaged in the inspection or control of termites, beetles, or other wood destroying insects and wood preservation by means other than fumigation in buildings, including homes, warehouses, stores, docks, or any other structures. This category includes the treatment of termites in trees in and around structures.

(C) Lawn and ornamental--This category includes persons engaged in the inspection or control of pests or diseases of trees, shrubs, or other plantings in a park or in and around structures, business establishments, industrial parks, institutional buildings or streets.

(D) Weed Control--This category includes persons engaged in the inspection or control of weeds around homes and industrial environs.

(E) Structural Fumigation--This category includes persons engaged in pest inspection or control through fumigation of structures not primarily intended to contain food, feed or grains.

(F) Commodity Fumigation--This category includes persons engaged in pest inspection or control through fumigation of commodities or structures normally used to contain commodities. This category does not include raw agricultural commodities.

(G) Wood Preservation--This category includes persons engaged in that phase of pest control that involves the addition of preservatives to wood products to extend the life of the wood products by protecting them from damage caused by insects, fungi, and marine borers. Examples of wood products may include, crossties, poles, and posts. This includes the retreatment of power-line poles with wood preservative pesticide including fumigants.

(21) Each applicant testing for a certified applicator license must pass the general standards examination administered by the department to be eligible to be licensed in any of the categories in this section.

§7.126. License Expiration and Renewal.

(a) Each license(s) shall expire twelve (12) months from the date issued or immediately upon the date that the business liability insurance expires, whichever comes first. The insurance expiration date will be determined by the date on the certificate provided to the department by the business licensee, and any policy amendments or cancellation notices issued after the effective date.

(b) Businesses and certified noncommercial applicators that change insurance coverage during a licensed period may have the license expiration extended to the new policy date, if there has not been a lapse in coverage, by paying additional fees for each license to the new expiration date. Certified applicators and technicians who change employers may also pay additional license fees to the new expiration date of the business or other entity under which they are operating.

(c) Licenses must be renewed by submitting a renewal application to the department, paying the required fee, and meeting any additional requirements of the department under §7.123 of this title (Insurance Requirement) and subsection (g) of this section, 30 days prior to the license expiration date. Submitting a renewal application after the license expiration date makes the license renewal application subject to late fees. A renewal application is not considered to be submitted unless it is entirely completed and correct, submitted with the correct fees, and satisfying any additional requirements determined by department rules. Applicants who apply for a renewal license more than 60 days after the license expiration date will be required to be reexamined to obtain a license.

(d) Licenses issued by the department may not be transferred, borrowed, rented, leased or loaned

(e) Whenever a licensee changes the mailing address, business location address or telephone number, the licensee must notify the department in a written or electronic manner within ten (10) business days of the effective date of the change. A license may be reprinted upon payment of a fee.

(f) The department, in determining whether additional testing or training must be required of current licensees before renewal of their license, may consider changes in technology, pesticide related problems, the performance of individual licensees or competency of individual licensees. If general retraining or retesting is required for all applicators in a category or subcategory, the department will publish notice at least six months in advance of the license renewal date. If individual retraining or testing is required as a result of the applicator's performance or inability to perform, the department may give notification and set a time and place of retraining.

(g) All certified applicators are required to certify to the department the number of continuing education credits they have accumulated in each category during the prior calendar year, running from January 1 to December 31, pursuant to §7.134 of this title (relating to Continuing Education Requirements for Certified Applicators). Failure to do so will prevent the license from being renewed.

(h) Certified noncommercial applicators who have been licensed for a minimum of two years may become certified commercial applicators by requesting an additional license or change of license and paying the required license fee. Certified commercial applicators may become certified noncommercial applicators by requesting an additional license or change of license and paying the required license fee.

§7.133. Technician License Requirements.

(a) An apprentice is a beginning employee, whose training program is the responsibility of the responsible certified applicator and who may be trained by and work under the direct supervision of licensed applicators and technicians.

(b) An apprentice must be at least 16 years of age.

(c) An apprentice must be able to demonstrate proficiency in reading U.S. Environmental Protection Agency approved pesticide labels and warnings.

(d) An apprentice must submit an application for technician license within ten (10) days of beginning employment.

(e) The application must include the following information:

(1) legal name;

(2) physical home address;

(3) date employment began in licensed activity;

(4) social security number;

(5) driver's license number; and

(6) date of birth.

(f) A fee shall be charged for each application.

(g) An apprentice card will be issued by the department for one (1) year from the date employment began when all of the above requirements are met and processed.

(h) Apprentices must not perform any pest control work without the physical presence of a licensed technician or a certified applicator. Upon completion of and documentation of the required study and on-the-job training and demonstrating competency in each area, the apprentice may work alone so long as a certified applicator is physically present for personal instruction three (3) days a week. The studies and job training required for an apprentice are as follows:

(1) complete at least two hours of classroom training in each of the following subjects:

(A) federal and state laws that regulate the industry;

(B) recognition of pests and pest damage;

(C) pesticide labels and label comprehension;

(D) pesticide safety;

(E) environmental protection;

(F) application equipment and techniques;

(G) pesticide formulations and actions;

(H) emergency procedures, pesticide cleanup and procedures for immediate reporting of spills and misapplication;

(I) basic principles of mathematics, chemistry, toxicology and entomology; and

(J) non-chemical pest control techniques, including biological, mechanical and integrated pest management techniques.

(2) complete forty (40) hours of verifiable on-the-job training and eight (8) hours of classroom training in each category in which the apprentice is to provide pest control services. The responsible certified commercial applicator or certified noncommercial applicator must certify in the training records of each apprentice that the apprentice has completed the required training and has demonstrated competency in each category in which the apprentice is to provide service.

(3) a student currently enrolled in or who has attended or graduated within the past twelve months from an accredited school or university studying relevant materials may be credited with those courses for classroom training hours for apprenticeship, if those hours have been provided by the school or university.

(4) an apprentice may maintain an apprentice card for a maximum of twelve (12) months. If an apprentice has not passed the requirements to become a licensed technician in the twelve (12) month period, the individual may be re-registered as an apprentice and complete all training requirements for an apprentice. Previous training credit may not be applied to this requirement.

(i) Apprentice Records.

(1) The responsible certified commercial applicator or certified noncommercial applicator must maintain the verifiable training records and certification for each apprentice in the business files. These are to be kept at least two (2) years from the training or certification date.

(2) The above records are to be kept on a form prescribed by the department and must include, but are not limited to the following:

(A) date training records received;

(B) number of hours of training;

(C) subject of training;

(D) printed name, signature and license number of trainer;

(E) designation of on-the-job training or classroom training;

(F) competency evaluation by the certified applicator; and

(G) printed name, signature and license number of evaluator.

(j) When an apprentice changes employers, the employer who maintains the verifiable training records must make the verifiable training records available to the apprentice or the new employer within twenty (20) days of written request.

(k) It is a violation of this section for a business licensee or certified noncommercial applicator to allow an apprentice to perform work in a category in which the apprentice has not been properly trained. The certified applicator must be physically present to give personal instructions to an apprentice at least three (3) days a week.

(l) An apprentice becomes a licensed technician by;

(1) completing a department approved technician training course in general training at least one time prior to taking the examination.

(2) making a passing grade on the technician examination.

(A) The examination may be taken as many times as necessary in the twelve (12) month period the employee is holding an apprentice card.

(B) There shall be a fee charged per examination.

(C) The Technician Training Manual may be obtained from the Texas AgriLife Extension Service.

(D) An individual must pass each category examination in which the apprentice applies to become licensed. Re-examination is not necessary if the license is renewed annually.

(3) Persons making a passing grade and who qualify for a technician license will be issued a license upon issuance of the grades.

(m) All testing procedures shall be governed by §7.125 of this title (relating to Examinations).

(n) The department shall require as a condition to the renewal of each commercial or non-commercial technician's license granted pursuant to the provisions of this section, the responsible certified applicator of record to certify on the verifiable training records form that the technician has completed eight (8) hours of verifiable training for the preceding calendar year running from January 1 to December 31 preceding the renewal date except that no additional training will be required in the first calendar year in which a technician is first licensed. This certification must be verified upon each annual renewal of the technician license. Failure to do so will prevent the license from being issued. Licensees must obtain the appropriate number of verifiable training hours in the preceding 12-month calendar year period. Changing employers or moving to an inactive status does not alleviate this responsibility or add time to the continuing education requirements.

(1) The eight (8) hours of verifiable training must be selected from the following subject areas:

(A) Federal and state laws regulating structural pest control and pesticide application

(B) Recognition of pest and pest damage

(C) Pesticide labels and label comprehension

(D) Pesticide safety

(E) Environmental protection

(F) Application equipment and techniques

(G) Pesticide formulations and actions

(H) Emergency procedures and pesticide cleanup, and procedures for the immediate reporting of spills and misapplications

(I) Basic principles of mathematics, chemistry, toxicology, and entomology

(J) Non-chemical pest control techniques including biological, mechanical and integrated pest management techniques.

(2) Two (2) hours of the eight (8) hours of training may be on-the-job training or hands-on-training verified by the responsible certified applicator.

(3) Internet training or videotape training may be used if the certified applicator certifies that the training is the appropriate training.

(4) A technician will receive an hour for hour credit if a department approved continuing education unit course is completed.

(5) No courses may be repeated for credit within the same recertification year.

(o) Upon written request, the Director may grant a hardship extension to a technician due to extenuating circumstances.

(p) All verifiable training records must be made available to the department upon request. These verifiable training records must be kept on a format provided by the department in the business file for at least two (2) years after completion of training.

(q) The verifiable training records forms will be made available to the licensee within twenty (20) days of written request.

§7.134. Continuing Education Requirements for Certified Applicators.

(a) Except as provided in subsections (e) and (f) of this section, the department shall require as a condition to the renewal of each certified applicator license granted pursuant to the provisions of this section, that the holder thereof certify to the department that the licensee has completed courses of continuing education approved by the department that cover the applicator's category(ies) of certification for the preceding calendar year running from January 1 to December 31. This certification must be completed each calendar year for renewal of the certified applicator's license in the following calendar year. Certified applicators who do not meet the recertification requirements will not be eligible to renew their licenses until all deficiencies are corrected, and they re-take and pass the appropriate category examination. Licensees must obtain the appropriate number of continuing education units in each 12-month calendar year period as specified in this section. Changing employers or moving to an inactive status does not alleviate this responsibility or add time to the continuing education unit requirement.

(b) Each certified applicator is required to obtain two (2) units in general training and one (1) unit in each category in which the applicator is certified. General training is defined to include the topics included in the Texas Structural Pest Control Act, Section 1951.351(c). Of the two (2) general training units required for recertification, at least one (1) must be in federal and state laws, pesticide safety, environmental protection, or integrated pest management. The other may be in any general topic.

(c) No approved course may be repeated for credit within the same recertification year.

(d) No more than one (1) unit each year may be obtained through a self-study or electronic course.

(e) Applicators will not be required to obtain units during the first calendar year in which their license is issued. Applicators who become certified in additional categories during any calendar year period will not be required to obtain units in those categories for that period.

(f) Upon written request, the Director may grant a hardship extension to a certified applicator due to extenuating circumstances. The length of the hardship is at the discretion of the Director.

(g) Each certified applicator must keep a certificate of completion for each course attended for a period of two years, and submit such records to the department on request. These records are subject to inspection by department personnel at any time. Continuing education certificates will be made available to the licensee within twenty (20) days of the written request to a training provider. A copy of employee training records shall be made available to a licensee within twenty (20) days upon written request to the employer.

(h) The business licensee, responsible certified commercial applicator and certified noncommercial applicator shall be responsible for the proper certification and maintenance of employee training records in accordance with this subchapter.

(i) Certified applicators found not able to certify their required training on the renewal application will have twenty (20) days to produce the required certificates of completion for courses previously attended prior to the initiation of enforcement proceedings. Certified applicators who do not meet the recertification requirements will have their licenses suspended in all deficient categories for one (1) year or until all deficiencies are corrected, and they must then re-qualify by taking the certification examination.

§7.135. Criteria and Evaluation of Continuing Education.

(a) The department shall evaluate continuing education programs, and assign the number of category units for each one. No more than one unit will be assigned for any fifty (50) minutes of net actual instruction time. A course may be approved for a maximum of two (2) consecutive years. After a maximum of two (2) years, any previously approved course must have substantial changes in order to qualify for continuing education credit. The department will consider the learning objectives, technical information given, the accuracy of the information, the relevance of the information to structural pest control, the qualifications of the instructor, and the amount of actual training or self-study time devoted to each program in the process of evaluation. Each continuing education program, including self-study and electronic courses submitted for approval must contain the following:

(1) a copy of handout materials, if any, which will be distributed to participants during the course;

(2) inclusive length of time of the course stated in hours, and minutes except electronic and self-study courses;

(3) date, time, physical address, and city of presentation or examination for self-study courses or electronic courses or if unknown, agreement to provide two (2) weeks notice of each date of presentation or examination;

(4) category(ies) and number of units in which continuing education units are requested;

(5) a detailed course outline which will indicate the scope of the course and learning objectives; and

(6) additional information as requested.

(b) If the speaker, self-study course provider or electronic provider has not been previously approved, the minimum requirements to qualify as a speaker, course presenter, self-study or electronic course provider are:

(1) a degree from a recognized institution of higher learning which pertains to the course being taught; or

(2) five (5) years experience as an applicator certified by the department with a current license in the category to be taught; or

(3) verifiable proof of training and teaching experience within the preceding three (3) years; or

(4) a combination of education, work related training, and teaching experience which, in the opinion of the department, would be equivalent to two of the three requirements as previously stated.

(c) Any person seeking approval of a training course must submit the information required at least thirty (30) days prior to the first

day of presentation or first offering of an electronic or self-study course. The department may waive this requirement due to special circumstances. The department must evaluate and recommend credits within thirty (30) days from the date submitted.

(d) Parts of courses, which focus on promotion of products, policies, or procedures of a company, cannot be included for units. Courses and instructors may be re-evaluated at the discretion of the department. Any changes to courses must be submitted to the department thirty (30) days prior to the date of presentation.

(e) The department may re-evaluate its approval of a course or speaker under the provisions of subsection (a) and (b) of this section.

(f) The department may enter into a memorandum of agreement with a state or professional society or association to recognize the state's pesticide applicator recertification of the society's professional applicator recertification or satisfaction of the requirements of this section for commercial and noncommercial applicator recertification only if:

(1) the standards for recertification meet or exceed the standards of the recertification period as set out in this section;

(2) the agreement reduces duplication of effort and does not increase the recordkeeping burden of the department.

(g) A certified applicator may submit the information required in subsection (a)(2), (4) and (5) of this section, the names of instructors and verification of attendance for any course attended by the certified applicator which was not previously approved within thirty (30) days of attendance of the course. The department will notify the certified applicator of any units awarded.

(h) Each continuing education program, including self-study and electronic courses submitted for approval must be accompanied by the following information on each speaker, self-study course or electronic course:

(1) name, address, telephone number and company, organization, or institution of higher learning affiliation;

(2) a resume which includes, but is not limited to, the following information;

(A) formal education-degrees held and granting institutions;

(B) industry-related technical experience which relates to the subject matter to be taught;

(C) industry-related teaching experience which relates to the subject matter to be taught;

(D) address and telephone number of at least three references;

(E) membership in trade associations and/or professional organizations; and

(F) publications as sole or junior author.

(i) The sponsor's name, physical address and telephone number will accompany each continuing education program submitted for approval.

(j) Each sponsor must institute a means or system that verifies that participants attended the training program throughout its stated length or completed self-study program. These systems may include, but are not limited to, sign-in-sign-out rosters, course completion certificates, or the system may be incorporated into the means to verify the participant's comprehension of a subject matter presented. The sponsor or instructor must be alert and actively monitor the participants in the course.

(k) The sponsor must issue a certificate of completion within twenty-one (21) days of course to each applicator completing the course. This document must include at least the following information:

(l) The sponsor must maintain course completion records for two (2) years and a list of participants must be forwarded to the department within twenty-one (21) days of completion of the training course. The list must contain name of sponsor, course title and course number(s), number of units awarded, speaker name and number(s), name of attendee and license number, if applicable.

(m) A non-refundable annual fee is due for each course taken into consideration for approval. Courses may be considered on a two-year basis if the course presenter submits a fee of $40.00 for each year at the time of submission. Course will be approved for a maximum of two (2) consecutive years. Governmental agencies are exempt from this fee if the course is presented as a part of the legally mandated function of the agency or the main purpose is education.

(n) For purposes of this section, a course is defined as specific instruction in a category presented by any one sponsor, company or organization.

(o) "Sponsor" means the person, company or organization that compiles, organizes, writes and/or produces category specific training courses to be given at a training seminar submitted to the department for approval as continuing education program for recertification units. The sponsor is responsible for establishing procedures for verification of completion and comprehension of its courses, and for awarding course completion certificates. The sponsor is responsible for the qualifications, competence and performance of the authors, speakers, presenters, or instructors who produce or present its courses, and for performance of self-study course examination.

(p) Videotapes, slides or other media presentations shall not be approved by the department unless accompanied by a qualified speaker and course outline, as required by subsection (a) and (c) of this section or unless approved as a self-study course under subsection (h) of this section.

(q) Personnel of the department are exempt from any fee charged for a continuing education program if they are monitoring the program as a part of the duties of their employment.

(r) A course may be approved as a self-study or electronic course if it meets the following additional criteria:

(1) attendees must take an examination designed to verify their knowledge of the material provided in the course. The course sponsors must grade the examination and keep records for a minimum of two (2) years.

(2) the attendee's grade on the examination must be at least 70% correct to obtain credit for the course.

(3) the examination for a self-study course must be proctored by the course provider or person responsible to the course provider. The examination location must be made available and accessible to department staff.

(4) a self-study course examination proctor must be a certified applicator licensed by the department. Anyone serving as an examination proctor may not take a verification exam for credit while serving as a monitor. The department must be notified to time, physical address, and city two weeks prior to each self-study course examination. The department may waive this requirement upon written request by the applicant taking the self-study course.

(s) A course may be approved as an electronic course if verified by the responsible certified applicator of the pest control company and/or noncommercial entity.

(t) A self-study course or electronic course is limited to one continuing education unit in the general training or a specific category.

(u) The department may re-evaluate or cancel a currently approved continuing education course during the calendar year for failure to comply with the elements of the course as outlined in this section.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806147
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

4 TAC §§7.130, 7.132, 7.136

The repeal of §§7.130, 7.132 and 7.136 is adopted under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators, and certified noncommercial applicators conducting structural pest control activities; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal 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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DIVISION 3. COMPLIANCE AND ENFORCEMENT

The Texas Department of Agriculture (the department) adopts amendments to Chapter 7, Subchapter H, Division 3, §§7.141 - 7.149 and 7.154 - 7.156 and the repeal of §§7.151, 7.157 and 7.158, all concerning regulation of structural pest control. Sections 7.141, 7.144 - 7.149 and 7.155 are adopted with changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5152) and will be republished. The amendments to §§7.142, 7.143, 7.154 and 7.156 and the repeals of §§7.151, 7.157 and 7.158 are adopted without change and will not be republished. The department is withdrawing the proposed repeal of §7.150, proposed new §7.150 and proposed amendments to §7.153.

The amendments, repeals and new section are adopted to eliminate unnecessary sections and to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill 2458, 80th Legislative Session, 2007, which transferred the responsibilities of the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Changes are made throughout the sections for purposes of clarification and to make the sections consistent with the transfer of the regulation of structural pest control to the department. Section 7.141 is amended to require that a structural pest control license must only be presented for visual inspection to a customer or to the department or Department of State Health Services staff upon request and to allow a license to be laminated as long as the required content is not obscured or modified. Section 7.141(b) is adopted with changes. The term "branch suffix letter" is deleted to be consistent with other changes made to these rules. Section 7.142 is amended to clarify that a business must inform the department of all licensees and apprentices employed or terminated and where employee training records will be maintained. Section 7.143 is amended to clarify the employee supervision requirements for the responsible certified applicator and to clarify the conditions under which a technician and apprentice may perform pest control services without physical supervision. Section 7.144 is amended to require that the responsible certified applicator is responsible for maintaining pest control records and adds that the license number of the person applying the pesticide be maintained in the use records. Section 7.144(a) is adopted with changes based on comment to require that pest control use records be maintained for the current 2 years instead of the proposed 5 years. Section 7.144(a)(3) is adopted with changes. The word "pre-formulated" is deleted, also based on comment, as unnecessary.

Section 7.145 is amended to incorporate the reference of the contact information for the department. Section 7.146 is amended to provide requirements for the content of and posting of a pest control sign. Section 7.145(a) and (c) are adopted with changes, based on comment, to require that information to be included in certain documents be in at least eight point type, as the existing rule requires, instead of the proposed 12-point type. Section 7.146(c) is adopted with changes, based on comment, to take out the proposed exemption for restaurants, retail food and food service establishments in regard to posting of pest control signs. Proposed new §7.146(j) and (k) have been deleted, based on comment. Section 7.147 is amended to add that the posting sign for residential rental property in excess of 5 rental units be posted in areas of common access for residents, to add that indoor treatment information at an institutional facility extends to residents and that parents, guardians or managing conservators of schools or day care centers may receive prior notice of indoor and outdoor application information upon request. Section 7.147(d) is adopted with changes to correct a grammatical error. The word "or" is added to subsection (e) and to paragraph (2). Section 7.147(f) is adopted with changes

adding language providing that notification may be given by telephone, in writing or electronically. Section 7.148 is amended to clarify the term "adjacent" and to add that the Consumer Information Sheet at an institutional facility extends to residents, and that parents, guardians or managing conservators of schools or day care centers may receive prior notice of indoor and outdoor application information upon request. Section 7.148(a)(2) is adopted with changes. The proposed language including "any area sharing a common ventilation system" in the definition of adjacent is deleted based on comment. Section 7.148(c) is adopted with changes adding language that provides that notification may be given by telephone, in writing or electronically. Section 7.149 is amended to specify the frequency of inspection change from 2 to 4 years for business licensees, except that new business licensees shall be inspected within the first year of operation. The section is also amended to add new language that allows the department to conduct more frequent inspections using a risk-based set of criteria as provided by HB 2458. Section 7.149(a) is adopted with a change to correct a grammatical error. The word "or" is deleted in the third sentence. As noted previously, the proposed repeal of §7.150, proposed new §7.150 and proposed amendments to §7.153 are being withdrawn. Section 7.154 is amended to correct the name and address of the regulating agency. Section 7.155 is amended to correct the name and address of the regulating agency and to coordinate requirements for school districts to those in §7.150. Section 7.155(a) and (e) are adopted with changes taking out the proposed term "Category" instead of the proposed term "List" and reinstating other language proposed for deletion. Also in §7.155(a), the term "ant" is added in the first sentence, and "Texas" is added to the last sentence. Subsection (d) is adopted with changes, based on comment, to require that pest control use records be maintained for the current 2 years instead of the proposed 5 years. Section 7.156 is amended to add new language that provides for disciplinary action for licensees that interfere with the entry or access to property, equipment or records by department personnel in conducting its responsibilities under this chapter. Section 7.151, relating to Misapplications, §7.157, relating to Investigation of Complaints, and §7.158, relating to Investigation Reports, are no longer needed because the subjects are covered by other department rule or policy.

Many written comments were received on the proposal from individuals, employed or operating business locations for ABC Pest and Lawn Services, Termimesh, and Chemfree, from other individual pest control operators and from the Texas Pest Control Association. Comment was received on §7.141(a), objecting to the elimination of the requirement for the business license to be displayed in a conspicuous place at the business of the license holder. The commenter felt that this was an important mechanism for the public to know that the company was currently licensed. The department believes in the importance of the protection of the general public, but believes that the industry has changed in that consumers now seek pest control services through telephone or on-line inquiries and seldom goes to the pest control company place of business. The department believes further, that this requirement no longer serves a useful purpose to a consumer in that the consumer can still request to see the license, the business is not prohibited from displaying the license. Moreover, the existing rule subjects the pest control company to potential enforcement action if the license is not displayed. Therefore, this section is adopted as proposed. Comment was received on §7.142(b), in support of the proposed change to add the location where the employee training records will be maintained in the notice of employment of employees by businesses. This subsection was changed, as previously noted, to delete references to the "branch suffix letter". This change is made to make the subsection consistent with other changes made to the rules, because these rules, as adopted, no longer require licensure for each branch location. Comment was received on §7.143(a), suggesting that the proposed language does not assure the public that a competent person will be handling, storing or applying pesticides. The department disagrees with the comment and believes that the proposed language more clearly defines that the responsible certified applicator is responsible for supervising pesticide use by all employees of a pest control businesses. This section is adopted as proposed. Numerous comments were received on §7.144(a), objecting to the proposed five year requirement that pest control use records are maintained as being burdensome, unnecessary and having a significant economic impact. The department generally agrees with the objection to the extension of record keeping time frames proposed throughout this subchapter, and, as previously noted, readopts the current language of a two year time frame. Comment was received on §7.144(a)(3), suggesting that the proposed word "pre-formulated" is unnecessary and may be confusing. The department agrees with the comment and has deleted the word "pre-formulated" in the rule adoption. Comment was received on §7.144(a)(9), objecting to the addition of the license number as a required item in the pest control use record for the person applying a pesticide or using a device. Comment stated that the printed name should be sufficient. The department disagrees with the comment and believes that the license number will further clarify and identify a licensee as the person that made the application or supervised the application. The section is adopted as proposed.

Comments were received on §7.145(a), objecting to the requirement that certain information contained in contracts be in 12-point type or larger. Comments stated that changing font sizes will result in increasing printing costs to a business and does not appear to serve any useful purpose. The department agrees with this comment and has withdrawn all font size proposals throughout these regulations and has readopted the current language. Comments were received on §7.146(c), objecting to the addition of a restaurant, retail food or food service establishment as being excepted from the pest control sign requirement being provided prior to a planned treatment and the addition of the IPM Coordinator of a school being added to the list of persons to whom a sign must be provided. The commenters generally felt that the language was vague and unnecessary since the exception was contained in the statute. The commenters also felt that the IPM Coordinator is already aware of the planned treatment. The department agrees with the comment on the proposed language clarifying the excepted entities and withdraws that language. However, the department does not agree with removing the IPM Coordinator as a person that should receive the pest control sign. The department believes that adding the IPM Coordinator as one person who may receive the pest control sign will ensure that a responsible manager is aware of the application. Comments were received on §7.146(j), generally in support of the subsection. Comment was also submitted in opposition to clarifying the conditions under which application ranges can appear on the pest control sign, stating that to not allow the intended date of application to exceed three days is not workable in all situations, and does not allow the applicator any flexibility to address individual needs. Comment was also received on §7.146(k), in opposition to the proposed requirement that an application made outside of the posted date be re-posted at least 48

hours prior to the intended treatment. The commenters felt that this requirement will create an untenable situation. The department agrees with the comments in opposition and has deleted proposed new §7.146(j) and (k).

Comments were received on §7.147(e)(1), recommending removing the IPM Coordinator from the list of persons required to receive the consumer information sheet and the pest control sign for indoor treatments. The commenters felt that the IPM Coordinator is already aware of the indoor treatment in the school and that this would be an unnecessary and burdensome requirement. The department believes that it is imperative that the IPM Coordinator receives the consumer information sheet and the pest control sign, especially when the building manager or chief administrator are not available to ensure that all applications to schools are made in accordance with regulations pertaining to pesticide use in schools. The proposed language is adopted with no change. Comments were received on §7.147(f), in opposition to the proposed change that adds that outdoor applications be included and subject to notification to parents, guardians, or managing conservators of children attending a school or day care center at the time the child is registered. The commenters generally felt that this is addressed in the IPM in Schools regulation and was unnecessary and that the notice should come from the IPM Coordinator. The department disagrees with the comments and believes that it is prudent that notice of applications made both indoors and outdoors at schools or educational institutions or a day care center be made available at the time a child is registered or upon request. The proposed language is adopted with no change. Comment was received on §7.147(g), recommending that this section that defines that a perimeter treatment is an extension of an indoor treatment be deleted as unnecessary. The department disagrees with the comment and believes that it is vital to the enforcement of structural pest control to define that a perimeter treatment done to exclude the entry or reentry of pests into the interior of the premises be considered as an indoor treatment. The proposed language is adopted with no change.

Comment was received on §7.148(a)(1), objecting to the proposed addition of the word "residents" to the requirement that a pest control sign be posted before a planned treatment in an area of common access at residential properties with five or more units. The commenter felt that the addition is overbroad, unnecessary and subject to interpretation. The department disagrees with the comment and believes that the addition actually clarifies that the sign be posted in areas commonly accessed by residents of the property. The proposed language is adopted with no change. Comment was received on §7.148(a)(2), objecting to the proposed language expanding the definition of the term "adjacent" to include areas sharing a common ventilation system. The commenter felt that it would be difficult for a person other than an expert in the design and construction of heating and ventilations systems to determine what units in a residential property might share a common ventilation system. The department agrees with this comment and the proposed language is withdrawn, and the current language readopted, as noted previously. Comment was received on §7.148(b) recommending that the IPM Coordinator be removed from the list of persons responsible for posting a pest control sign and provide a consumer information sheet to individuals working or residing in the building to which a pesticide treatment is planned. The department believes that it is essential for the IPM Coordinators of schools to be included in the posting and notification process whenever pesticides are used in schools, and that there is explicit language in the Structural Pest Control Act that mandates that responsibility. The proposed language is adopted with no change. Comment was received to §7.148(c), recommending removing the IPM Coordinator as an alternative to notify parents or guardians of children attending the facility that pesticides are periodically applied indoors and outdoors and that certain information is available upon request. The department believes that it is essential that IPM Coordinators be involved in all aspects of pesticide use in schools in order to protect children, teachers and staff and the general public from potential exposure to the use of a pesticide. The proposed language is adopted with no change. Comment was received on §7.148(f), objecting to the deletion of language that a person in violation of this section is subject to an administrative penalty. The commenter believes that the proposed deletion will affect the ability of the department to enforce this section. The department disagrees with the comment in that it has broad authority under the Structural Pest Control Act to assess administrative penalties or to pursue other sanctions for violations of the Act or its enabling regulations. The proposed deletion is adopted with no change.

Comment was received on §7.149, recommending that the department spend its resources on IPM and education rather than inspecting businesses every four years and to require that noncommercial licensees be inspected on a four year basis. The proposed changes to this section were made to accommodate specific statutory changes imposed by the passage of HB 2458 for the department to inspect businesses every four years and to develop a risk-based schedule in which inspections may be made more frequently. No specific statutory language addressed extending the inspection frequency for noncommercial license holders. The proposed language is adopted with no change. Numerous comments were received on proposed new §7.150. Comments were submitted by a number of school districts, pest control operators, associations, state agencies and the public overwhelmingly opposed to many of the changes in the proposed new section regarding IPM in schools. The commenters believe that the proposed regulations would create significant costs to the school districts in complying with the new regulations by requiring additional time for existing school personnel and the potential to add new staff to carry out the provisions of the proposed regulations. It is also felt by many that the new proposed regulation drastically changes the way that schools have been carrying out IPM programs and that many of the proposed changes will weaken existing programs instead of making improvements. Commenters also believe that the proposed regulations, although well intentioned, needed further evaluation, particularly regarding the guidelines for determining what pesticides may be used in schools, as well as the times and conditions of their use to address pest issues without compromising the safety of children, school staff and the general public. A number of recommendations were submitted in the comments proposing new language to improve and strengthen IPM programs. After evaluation of the comments submitted, the department agrees that further evaluation is warranted to this vital regulation. Therefore, the department is withdrawing proposed new §7.150. The existing §7.150 will remain in effect as is until amendments are made through the formal rulemaking process. The department intends to reevaluate the regulations to incorporate the required changes necessary to address the change to school IPM brought about by HB 2458, as well as further work with the various stakeholder groups and the Structural Pest Control Advisory Committee, to craft workable solutions that will continue the successful efforts invested by schools.

Comment was received from the Texas Center for Policy Studies on §7.151, objecting to the repeal of the section addressing misapplication of pesticides. The commenter believes that the revised rules do not give any provision for an enforcement response in the event of misapplication as required by the Structural Pest Control Act. The repeal of this section will not preclude the department from taking appropriate enforcement action, but rather, will allow the department to carry out its enforcement authority with strict and case-appropriate enforcement in the event of a misapplication. The structural pest control statute provides authorization and guidance as to when the agency will take enforcement action and leaves the details to the discretion of the agency, with no requirement to impose further restrictions by rule. The current rule is, therefore, repealed as unnecessary. Numerous comments were received on §7.153, in opposition to the elimination of the current regulation that provides for reduced impact pest control services. The commenters generally felt that the ability to provide to consumers pest control services that promoted the use of alternative means to traditional pest was an important tool designed to stay abreast with advancements and changes in technology made in the industry in combating pest problems. Many businesses had expended great effort in moving to a reduced impact concept and consumers have readily embraced the service. The department agrees with the comments and withdraws the proposed change to delete this section. The existing regulation language will remain in effect. Comments were received on §7.155, in opposition to the proposed changes for incidental use of pesticides in schools. Commenters felt that the proposed changes restricted tools that can be used in schools to protect children from medically important pests by trained and licensed professionals. The proposed changes in this section were predicated on proposed new §7.150 addressing IPM programs in schools. Since the department is withdrawing the proposed new §7.150 and the existing language will remain in effect, with the exception of subsection (a), where "ant" is added to list of Yellow List products for which fact sheets must be distributed. Except for this change, §7.155 is adopted with changes to withdraw language referring to pesticide categories and readopt existing language for Green and Yellow List products. The department is adopting proposed changes to replace references to the Texas Structural Pest Control Board and updating contact information for the department required in the Incidental Use Situation For Schools Fact Sheet.

Comment was received from the Texas Center for Policy Studies (TCPS) on §7.157 opposed to the repeal of this section addressing the investigation of complaints. The TCPS feels that the Structural Pest Control Act requires the department to adopt by rule a policy that provides for investigating complaints concerning the misuse of pesticides and to adopt by rule circumstances in which a complaint will be referred to another agency. The TCPS also feels that the repeal of this section would not be consistent with the intent and requirements of the Act. All complaints are treated seriously and appropriate action is taken to resolve all complaints. While the department is committed to continuing the current complaint receipt and investigation process and working to improve it, the department believes that a self-imposed mandatory requirement to investigate all complaints received, as is required by this rule proposed for repeal, is unnecessarily restrictive and will divert limited resources from more important tasks. Such a requirement also contradicts the risk-based paradigm that the department, the legislature, and the Sunset Commission have determined will ensure the most effective use of agency resources in carrying out its mission. The structural pest control law does not require that the department adopt a rule mandating an investigation upon receipt of a complaint. Therefore, the current rule will be repealed as unnecessarily restrictive.

The following comments were also received on language that was not proposed for change. The department will review and consider these changes for future rule revisions. Comment was received to §7.143(b), requesting that the department consider allowing other currently available technology be used in allowing a technician or apprentice to report to a certified applicator three days a week to receive instruction instead of the current requirement that they report in person. Comment was received on §7.144(b)(1), objecting to having to draw a diagram describing the installation of physical devices to be maintained as part of a pest control use record. Comment was received on §7.148(b), recommending that department reconsider public notice requirements of schools to parents. Comment was received on §7.148(d) recommending the removal of the ability to waive the 48 hour pre-notification requirements of this section if an emergency exists and the customer and certified applicator sign a statement attesting that an emergency exists that requires immediate treatment. In addition, the Texas Pest Control Association (TPCA) submitted a comment in objection to all of the proposed changes and a request that the department shelve its proposal and rework the process utilizing the Structural Pest Control Advisory Committee and the TPCA. The process used to develop the proposal was inclusive of input from the Advisory Committee and the TPCA was also given an opportunity to provide input at the Advisory Committee meeting that took place to discuss the proposal prior to the publication of the proposal in the *Texas Register*, as well as several direct meetings with department management. TPCA followed up with more detailed comments with respect to the specific rule changes which were considered as the final rule was formulated.

4 TAC §§7.141 - 7.149, 7.154 - 7.156

The amendments to §§7.141 - 7.149 and 7.154 - 7.156 are adopted under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; §1951.207, which authorizes the department to adopt a policy by rule that requires a business holding a structural pest control business license to be inspected by a field inspector at least once in the business's first year of operation and every four years after the first year of operation and provides for additional inspections based on a schedule of risk-based inspections; §1951.212, which authorizes the department to establish standards for an integrated pest management program for the use of pesticides, herbicides, and other chemical agents to control pests, rodents, insects, and weeds at the school buildings and other facilities of school districts and by rule shall establish categories of pesticides that a school district is allowed to apply; §1951.452, which provides that department may require each license holder to make records, as prescribed by the department, of the license holder's use of pesticides; §§1951.153 - 1951.155, which provide for posting of notice of treatments and distribution of consumer information related to structural pest control treatments; §1951.156, which provides that the department shall develop a policy to implement and enforce §§1951.453 - 951.455; and the Texas Government Code, §2001.004, which provides that a state agency shall

adopt rules of practice stating the nature and requirements of all available formal procedures.

§7.141. License Display.

(a) All structural pest control licenses must be presented for visual inspection to a customer or to the department or Department of State Health Services staff upon request. A licensee must also carry a license card while engaged in structural pest control work. The license card may be laminated as long as the content is readable and is not modified in the process of lamination.

(b) The business license number must be prominently displayed on all vehicles used in the company business. The business license number shall not be required on unmarked management vehicles. A management vehicle is defined as a vehicle not used to perform sales, or provide service to customers. Company vehicles may have more than one license number if a written request is made to the Director and the Director approves the request. The numbers and letters must be permanently affixed to the vehicle in a prominent place on each front fender and/or front door panel in no less than two-inch letters in a color which would contrast to the background color of the truck or vehicle and shall be designated as: Texas Pest Control License (number). This may be abbreviated to TPCL (number). Any numbers, letters or symbols that adhere to vehicle by way of a magnetic device are not considered to be permanently affixed.

§7.144. Pest Control Use Records.

(a) The responsible certified applicator or, in the case of the certified noncommercial applicator, the certified applicator shall ensure that correct and accurate records of all uses of pesticides and pest control devices registered with the United States Environmental Protection Agency and the department are maintained for a period of two (2) years. Said records must be kept on the premise of the business licensee or, in the case of a certified noncommercial applicator, the employer's premises. The records must include, but are not limited to:

(1) routine operational data, name and address of the customer;

(2) name of pesticides or devices used or EPA registration number;

(3) total amounts of each pesticide applied where the percentage of active ingredient was not changed;

(4) device used and total number of each device;

(5) for manufacturer's formulations that are mixed with water or other material, the mixing rate and total amount of material applied or the percent of active ingredient(s) and total amount of material applied;

(6) purpose for which the pesticides or devices were used or target pest;

(7) date the pesticides or devices were used;

(8) service address where the pesticides and devices were used, except that for utility pole re-treatments, records shall be kept for the location of each pole treated; and

(9) the name, and license number of the person(s) applying pesticides or using devices or name of the technician or apprentice and license number of the supervising certified applicator if the technician or apprentice have not been assigned a license or registration number.

(b) If a physical device is used, the appropriate unit of measurement (square foot, cubic foot, or linear foot) of the physical device must be recorded and a diagram describing the installation will be provided.

(c) These records shall be made available to the department or its authorized agents upon written or verbal request.

§7.145. Contracts.

(a) Each written contract, warranty, service agreement, termite disclosure document or guarantee of a business regulated by the department must contain on the face of the document the business name, business license number and letter, location address or mailing address, telephone number and the statement "Licensed and regulated by: Texas Department of Agriculture, P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481, (FAX) 888-232-2567".

(b) The business name, business license number and letter, telephone number and location address or mailing address must be on the face of any invoice.

(c) The requirement in subsection (a) and (b) of this section must be legible and printing shall be in at least 8-pt type.

§7.146. Pest Control Sign.

(a) A pest control sign must be provided by the licensee to the owner or manager at least 48 hours prior to a planned indoor treatment at a residential rental property with five or more rental units.

(b) A pest control sign must be provided by the licensee to the employer or building manager at least 48 hours prior to a planned indoor treatment at a workplace. A workplace is defined as any nonresidence structure with three or more full-time paid employees which is treated by a licensed business or a certified noncommercial applicator.

(c) A pest control sign must be provided by the licensee to the chief administrator, IPM Coordinator or building manager at least 48 hours prior to a planned indoor treatment at a hospital, nursing home, hotel, motel, lodge, warehouse, food-processing establishment, school or educational institution, or day-care center. This requirement does not apply for new construction on school campuses where students have not yet been introduced.

(d) An indoor treatment includes a perimeter treatment if the primary purpose of the treatment is to treat the interior of the structure.

(e) A person may not be considered in violation of this section if the space to be treated is vacant, unused and unoccupied at the time of treatment, or if extenuating circumstances require an emergency treatment.

(f) Each pest control sign must be at least 8 1/2 inches by 11 inches in size and contain the required information with the first line in a minimum of 24-point type (one-fourth inch) and all remaining lines in a minimum of 12-point type (one-eighth inch). The addition of advertising and logos to the sign is permissible to the extent that such advertising does not interfere with the purpose of public notification of a pest control treatment. A standard sign in Spanish is available from the department upon request. The sign shall appear in a format approved by the department. The text and format of the sign is available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs/, or by contacting the Texas Department of Agriculture at P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481.

(g) In the space marked "For more information call or contact," the telephone number where information on the pesticide(s) used may be obtained must be listed, such as the apartment manager, building manager, IPM Coordinator or pest control operator.

(h) In the space marked "phone number of hotline for pesticide information," the following wording must be used: National Pesticide Information Center 1-800-858-7378.

(i) If a workplace has its own pesticide information center, the workplace center telephone number may be listed rather than the information in subsection (h) of this section.

§7.147. Consumer Information Sheet.

(a) For an indoor treatment at a private residence that is not a rental property the certified applicator or technician must give the consumer information sheet to the owner of the residence before each treatment begins, or, if the owner is not available at the time treatment begins, leave the sheet in a conspicuous place in the residence.

(b) For indoor treatment at a residential rental property with less than five (5) rental units, the certified applicator or technician must leave the consumer information sheet in the residence at the time of each treatment.

(c) For an indoor treatment at a residential rental property with five (5) or more rental units, the certified applicator or technician must supply the consumer information sheet to the owner or manager of the complex. The certified applicator or technician must also supply the owner or manager with a pest control sign. The owner or manager or an employee or agent of the owner or manager, other than the certified applicator or technician, must notify residents who live in direct or adjacent areas of the treatment by:

(1) posting the sign in an area of common access of residents at least 48 hours before each planned treatment; or

(2) distributing the information sheet at least 48 hours before each planned treatment by leaving the sheet on the front door of each unit or in a conspicuous place inside each unit.

(d) For an indoor treatment at a workplace, the certified applicator or technician must supply the consumer information sheet and a pest control sign to the employer or the building manager. The employer or the building manager or an employee or agent of the owner or manager, other than the certified applicator or technician, must notify individuals at the workplace of the date of the planned treatment by:

(1) posting the sign in an area of common access that the employees are most likely to see at least 48 hours before each planned treatment; and

(2) providing the consumer information sheet to any individual working in the building on request of the individual if the request is made during normal business hours.

(e) For an indoor treatment at a building that is a hospital, nursing home, hotel, motel, lodge, warehouse, food-processing establishment, school or educational institution, or a day-care center, the certified applicator or technician must supply the consumer information sheet and a pest control sign to the chief administrator, IPM Coordinator or building manager. The chief administrator, IPM Coordinator or building manager must notify the individuals who work or reside in the building of the treatment by:

(1) posting the sign in an area of common access that the individuals are likely to check at least 48 hours before each planned treatment; and

(2) providing the information sheet to any individual working or residing in the building on request of the individual.

(f) Personnel at a school or educational institution or a day-care center are required to inform the parents, guardians, or managing conservators of the children attending the school or day-care center, at the time the child is registered, that:

(1) the school, institution, or center periodically applies pesticides indoors and outdoors; and

(2) prior notice and information on the application of the pesticides is available from the school, institution, or center at the written request of the parents, guardians, or managing conservators. Telephonic, written or electronic notification will meet this requirement.

(g) For the purpose of this section, if the primary purpose of a perimeter treatment of a premises is to augment or supplement an indoor treatment, or is performed in lieu of an indoor treatment for a particular pest or pests by preventing the entry or re-entry of pests into the interior of the premises, then the perimeter treatment shall be considered an indoor treatment.

(h) The department's Consumer Information Sheet must be used. Copies of the Consumer Information Sheet are available from the department in English and Spanish and are available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs/, or by contacting the Texas Department of Agriculture at P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481. The department's Consumer Information Sheet may be copied and used in accordance with this section.

(i) The pre-notification requirements of subsections (c), (d) and (e) of this section are waived if the customer and certified applicator sign a statement attesting to the fact that an emergency exists which requires immediate treatment. If such an emergency exists, the Consumer Information Sheet must be provided by the licensee at the time of treatment. The statement must be kept on file with the pest control use records. If the customer is not available to sign a statement at the time of treatment, that shall be recorded in the use records along with the customer's name and telephone number. An emergency is defined as an imminent hazard to health or property or an imminent infestation. An emergency treatment is limited to the localized area of the emergency.

(j) Licensees holding the lawn and ornamental or weed categories may use text provided by the department in place of that required in subsection (h) of this section. This text is available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs, or by contacting the Texas Department of Agriculture at P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481.

(k) Any consumer may waive receipt of the Consumer Information Sheet for multiple treatments by signing or initialing below the following statement: "I have received one copy of the Consumer Information Sheet for all treatments to be provided as a part of this pest control service agreement. I may receive additional copies at any time upon request to the service provider, and will receive any updates to the Consumer Information Sheet which may occur." A licensee must keep a copy of this statement in the pest control use records for each customer covered by the agreement.

§7.148. Responsibilities of Unlicensed Persons for Posting and Notification.

(a) Owners or managers of residential rental properties with five (5) or more units must either:

(1) post a pest control sign at least 48 hours before the planned treatment in an area of common access to residents; or

(2) distribute the consumer information sheet to each unit planned to be treated and each unit adjacent to those planned to be treated at least 48 hours before the planned time of treatment. Adjacent means having a common wall, ceiling, or floor. Area of common access means a common area that an individual is likely to check on a regular basis, such as building entranceway, mailboxes, laundry rooms, beverage machines, building bulletin boards, etc.

(b) Employers, building managers, IPM Coordinators and chief administrators of workplaces, hospitals, nursing homes, hotels,

motels, lodges, warehouses, food-processing establishments, school or educational institutions, and day-care centers must post a pest control sign in an area of common access at least 48 hours prior to each planned treatment and provide a Consumer Information Sheet to any individual working or residing in the building at the request of that individual. Area of common access means a common area that an individual is likely to observe on a regular basis, such as building entranceway, mailboxes, laundry rooms, beverage machines, building bulletin boards, etc. This requirement does not apply to new construction on school campuses where students have not yet been introduced.

(c) Chief administrators or the IPM Coordinator of schools or educational institutions and day-care centers must notify the parents or guardians of children attending the facility in writing that pesticides are periodically applied indoors and outdoors, and that information on the times and types of applications and prior notification is available upon request. Such notification must be made at the time of the child's registration. Telephonic, written or electronic notification of planned applications will meet the notification requirements.

(d) The 48 hour pre-notification requirements of subsections (a) and (b) of this section may be waived if an emergency exists and the customer and certified applicator sign a statement attesting to the fact that an emergency exists that requires immediate treatment. The statement must be kept on file with the pest control use records at the business license location. Certified noncommercial applicators may attest to an emergency by signing a statement attesting to the emergency and must keep the statement on file with the pest control use records. An emergency is defined as an imminent hazard to health or property or an imminent infestation and emergency treatment is limited to the localized area of the emergency.

(e) A person may not be considered in violation of this section if a pest control sign is removed by an unauthorized person or if the space to be treated is vacant, unused and unoccupied at the time of treatment.

§7.149. Inspections.

(a) Each licensed pest control business shall be inspected at least once in the business's first year of receiving a license and at least every four years thereafter. School districts will be inspected at least once every five (5) years. The department may waive these requirements due to staff availability, budgetary constraints, inspection trends or operational efficiencies. Businesses and school districts demonstrating a lack of compliance with department rules may be inspected more frequently than every four years for businesses and every five years for districts based on risk using the following elements of consideration:

(1) prior violations;

(2) prior inspection results;

(3) type and nature of business;

(4) size and location of a school district;

(5) prior complaints.

(b) Risk-based inspections will be scheduled based on the following criteria:

(1) High Risk. Inspection schedule: not later than 180 days. This includes businesses or districts with a history of engaging in pest control operations or practices that could be injurious to public health, safety or the environment.

(2) Moderate Risk. Inspection schedule: not later than one (1) year. This includes businesses or districts with a substantiated complaint history and a history of significant lapses in licensing, record keeping and insurance.

(3) Concerned Risk. Inspection schedule: not later than three (3) years. This includes businesses or districts with a history of complaints whether substantiated or not and repeat non-compliance of an administrative nature.

§7.155. Incidental Use For Schools.

(a) The Incidental Use Situation For Schools Fact Sheet must contain the following text: "This fact sheet must be distributed to all employees of school districts who apply general use Green List products (or Yellow List products specific to ant, bee and wasp applications) and are not licensed by the Texas Department of Agriculture. The fact sheet, instruction and training must be provided upon initial employment by the school district's IPM Coordinator, and thereafter must be available as needed. These general use Green List pesticides include insecticides only and involve applications made both inside and outside of structures. Incidental Use is not intended for long term or extensive pest control measures, rather emergency situations where safety of students or workers is at risk and there is insufficient time to contact a licensed applicator. Where long term pest control is required, a trained, licensed person is to make the applications. Examples of Incidental Use situations are treating fire ants in a transformer box or treatments for bees or wasps as a non-routine application to protect children or personnel. Incidental Use is defined as site-specific and incidental to the employee's primary duties. If it is part of the employee's primary duty to make applications of pesticides, that employee is required, by law to obtain a Texas Department of Agriculture license, depending on the location and type of application. In all cases of Incidental Use, the employee should use the least hazardous, effective method of controlling pests. All applications to schools or school grounds must be in compliance with school district IPM policies. If chemicals are utilized, they must be applied in strict accordance with manufacturer labels of "General Use" products on the Green or Yellow List products being used. Applications made inconsistent with the department Law and Regulations, or applications made inconsistent with the label requirements of the product may result in an enforcement action being taken against the individual and/or the certified applicator or technician responsible. "Incidental Use Situation" applications of pesticides are regulated by the Texas Department of Agriculture. If you have any questions or comments, contact the Texas Department of Agriculture, phone number 1-866-918-4481 or P.O. Box 12847, Austin, Texas 78711-2847.

(b) The Incidental Use For Schools Fact Sheet must be provided during pesticide instruction and training by the IPM Coordinator to each employee of the school district whose primary duty is not pest control, and whose work may include tasks subject to the exception. The IPM Coordinator must keep records of all the training conducted annually.

(c) Primary duty is defined as a job duty that is part of a written job description or is a regularly assigned task of the employee.

(d) Pest control use records must be kept by IPM Coordinator(s) for all Incidental Use applications including reason for application and justification for emergency for two (2) years.

(e) Incidental Use in school districts is limited to insecticides and rodenticides that are Green and Yellow list products.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806148
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

4 TAC §§7.151, 7.157, 7.158

The repeal of §§7.151, 7.157, and 7.158 is adopted under Occupations Code, §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal 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.

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806149
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

DIVISION 4. UNLAWFUL ACTS AND GROUNDS FOR REVOCATION

4 TAC §§7.161 - 7.163

The Texas Department of Agriculture (the department) adopts amendments to Chapter 7, Subchapter H, Division 4, §§7.161 - 7.163, relating to structural pest control, without changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5160). The amendments are adopted to make revisions to the structural pest control service regulations to conform to new requirements established under House Bill 2458, 80th Legislative Session, 2007, which transferred the responsibilities of the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Sections 7.161 - 7.163 are amended to change the name and address of the oversight agency from the Board to the department, to correct citations to rules and laws and to clarify procedures for granting and setting of hearings on appeals of a revoked or suspended license is the Commissioner of Agriculture.

No comments were received specifically on the proposal, however, the Texas Pest Control Association (TPCA) submitted a comment in objection to all of the proposed changes and a request that the department shelve its proposal and rework the process utilizing the Structural Pest Control Advisory Committee and the TPCA. The process used to develop the proposal was inclusive of input from the Advisory Committee and the TPCA was also given an opportunity to provide input at the Advisory Committee meeting that took place to discuss the proposal prior to the publication of the proposal in the *Texas Register*, as well as several direct meetings with department management. TPCA followed up with more detailed comments with respect to the specific rule changes which were considered as the final rule was formulated.

The amendments to §§7.161 - 7.163 are adopted under Occupations Code, §1951.501. which establishes disciplinary powers of commissioner relating to structural pest control; §1951.502, which provides that the department shall establish procedures under which a person may appeal the agency's notice of suspension and request a hearing; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal 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.

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806152
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

DIVISION 5. TREATMENT STANDARDS

The Texas Department of Agriculture (the department) adopts amendments to Chapter 7, Subchapter H, Division 5, §§7.172 - 7.178, and the repeal of §7.171, all concerning regulation of structural pest control. Sections 7.172 - 7.174 and 7.176 - 7.178 are adopted with changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5162) and will be republished. The amendment to §7.175 and the repeal of §7.171 are adopted without changes and will not be republished.

The amendments and repeal are proposed to eliminate an unnecessary section and to make revisions to the structural pest control service regulations to conform to new requirements established under HB 2458, 80th Legislative Session, 2007, which transferred the responsibilities of the licensing and regulation of structural pest control to the department and established the Structural Pest Control Service within the department, abolished the Structural Pest Control Board, and made other changes to Occupations Code, Chapter 1951. Section 7.172 is amended to clarify the information required to appear on a durable sticker upon completion of a termite treatment or installation of a baiting system to include the size of the sticker, the telephone number of the business licensee, name and license number of the applicator and the date of the treatment or installation of the baiting system. Subsection 7.172(e) is adopted with changes, based on

comment, to require that Termite Treatment Disclosure records be maintained for the current 2 years instead of the proposed 5 years. Section 7.173 is amended to delete references to a U.S. Environmental Protection Agency (EPA) registered wood treatment termiticide and to delete language specifying product specific research for registered wood treatment termiticide products. This amendment is made to make this section consistent with existing federal requirements pertaining to the registration requirements for termiticides. Subsection 7.173(g) is adopted with changes, based on comment, to require that pre-construction treatment records be maintained for the current 2 years instead of the proposed 5 years. The language specifying the administrative penalty amount and process used for violations of this section are deleted to allow the department to incorporate the enforcement process used for its other regulatory programs to also include structural pest control. Section 7.174 is amended to clarify the requirements for the information to be included in termite treatment disclosure documents. Subsection 7.174(b)(6), (7) and (9) are adopted with changes, based on comment, to require that certain statements be printed in the current 8-point type instead of the proposed 12-point type. Section 7.175 is amended to delete the requirement that a certified applicator approve a Wood Destroying Insect Report conducted by a technician licensed in the termite category. Subsection 7.176(e) is adopted with changes, based on comment, to require that Wood Destroying Insect reports be maintained for the current 2 years instead of the proposed 5 years. Section 7.177(a) is adopted with changes to the proposal. References to apprentice are deleted because an apprentice may not conduct an inspection for termites or other wood destroying insects. Section 7.178 is adopted with changes. Subsection (n) is revised to take out the words "Monday through Friday". This language is deleted because the proposed language would have required licensees to provide notice of a fumigation treatment to the department only on Monday through Friday. This requirement, when combined with the 24 hour prior notification requirement, may have resulted in the unintended consequence of restricting the practice of structural fumigation on Sunday. Section 7.178 is amended to clarify the requirements for structural fumigation and add language to require when the certified applicator must be present at the site during fumigation; clarifies that local authorities may be notified by telephone if a record is made containing the name of the person informed and the date and time of the notification; add language that the certified applicator shall post a person or persons to guard the location from the time the fumigant is introduced until the ventilation level is reached and that all entrances are secured until the structure is released for occupancy; modify the information that must be contained in the fumigation report to include the business license number, delete the type of roof, delete the type of sealing method, add the license number of the certified applicator, and add the date released for occupancy; and clarify calibration information requirements. Subsection 7.178(j)(8), (l)(3), (p) are adopted with changes, based on comment, to require that certain records be maintained for the current 2 years instead of the proposed 5 years. Section 7.171 is repealed because other current laws, procedures, processes, and policies allow the department to fully and adequately address any issues arising in this regulatory area.

Written comments were received on the proposal from individuals, employed or operating business locations for ABC Pest and Lawn Services, Termimesh, and Chemfree, from other individual pest control operators, and from the Texas Pest Control Association. Comment was received on §7.172(e), in support of the proposed change to increasing the period that an applicator must maintain a copy of the Termite Treatment Disclosure document from two years to five years. The department, as noted previously, is withdrawing the five year requirement and readopting the existing two year requirement to be consistent with record retention time periods throughout the regulations, in response to comments received opposed to extending such time periods in the various sections. Comments were received on §7.173(e), generally in support of the proposed changes. Comment was received on §7.174, requesting that the department allow a grace period for the proposed change increasing the font size used in certain information required on Termite Treatment Disclosure Documents, to allow pest control companies to exhaust existing supplies. The department proposed changes to font sizes in other sections of the regulations, but has withdrawn those changes because of the comments received indicating the unnecessary burden and additional cost associated with those changes. Therefore, the department is withdrawing the proposed language in §7.174(b)(6)(7) and (9), and readopting existing language in those paragraphs pertaining to font sizes, to be consistent with other sections throughout the rules. Comment was received on §7.178(a), objecting to the deletion of the words "the entire" and replacing with the word "any" when requiring that the certified applicator be physically present for structural fumigations. The department does not fully understand the substance of the comment, however, we believe that it is important for the supervising certified applicator be present at key times during the fumigation process from introduction of the fumigant to the time that the structure is released for occupancy. This section is adopted with no change.

The following comments were also received on language that was not proposed for change. The department will review and consider these proposed changes for future rule revisions. Comments were received on §7.173, recommending new language to not allow the use of a wood treatment termiticide, remove the product specific research requirement, and modify the section to allow that a wood treatment termiticide be allowed as a primary protection treatment when used according to the pesticide product label. Comment was received on §7.175, recommending that a definition for conducive conditions be added for wood destroying insect report inspection procedures. Comment was received to §7.176, recommending that a definition for "conducive conditions" be added for real estate transaction inspection reports and to support the continued use of the Texas Wood Destroying Insect Report. The department did not propose discontinuing the use of the existing Texas Wood Destroying Insect Report and the use of that report is continued. In addition, the Texas Pest Control Association (TPCA) submitted a comment in objection to all of the proposed changes and a request that the department shelve its proposal and rework the process utilizing the Structural Pest Control Advisory Committee and the TPCA. The process used to develop the proposal was inclusive of input from the Advisory Committee and the TPCA was also given an opportunity to provide input at the Advisory Committee meeting that took place to discuss the proposal prior to the publication of the proposal in the *Texas Register*, as well as several direct meetings with department management. TPCA followed up with more detailed comments with respect to the specific rule changes which were considered as the final rule was formulated.

4 TAC §7.171

The repeal of §7.171 is adopted under Occupations Code §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides

that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; §1951.205, which provides that the department, shall adopt rules governing the methods and practices of structural pest control that the department determines are necessary to protect the public's health and welfare and prevent adverse effects on human life and the environment; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal 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.

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806154
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

4 TAC §§7.172 - 7.178

The amendments to §§7.172 - 7.178 are adopted under Occupations Code §1951.201, which provides that the department is the sole authority in this state for licensing persons engaged in the business of structural pest control; the Code §1951.203, which provides that the department shall develop standards and criteria for issuing licenses to individual technicians, businesses, certified commercial applicators and certified noncommercial applicator's conducting structural pest control activities; §1951.205, which provides that the department shall adopt rules governing the methods and practices of structural pest control that the department determines are necessary to protect the public's health and welfare and prevent adverse effects on human life and the environment; and the Texas Government Code, §2001.004, which provides that a state agency shall adopt rules of practice stating the nature and requirements of all available formal procedures.

§7.172. Subterranean Termite Post Construction Treatments.

(a) All pesticide applications must be made in accordance with the directions and precautions specified on the labeling of the pesticide used.

(b) A treatment of less than the entire structure will be permitted to accommodate the customer's desires and to allow the treating company to perform the job in a manner prescribed by their professional evaluation and label requirements.

(c) All treatments must strictly adhere to the procedures outlined in the disclosure statement required in §7.174 of this title (relating to Termite Treatment Disclosure Documents). A deviation will be permitted when unexpected circumstances occur necessitating a change in the treatment and the certified applicator responsible for the treatment provides the customer with a written addendum to the contract or disclosure documents at the completion of the treatment.

(d) Upon completion of a termite treatment, or installation of a baiting system, the company responsible for providing the treatment must leave a durable sticker of not less than one (1) inch by two (2) inches in size on the wall adjacent to the water heater, electric breaker box, beneath the kitchen sink or in the interior bath trap access giving the name, address and telephone number of the business licensee, name and license number of the applicator, product used, method or device used, the date of the treatment or installation of the baiting system, and a statement that the notice should not be removed.

(e) The business license holder or, in the case of the certified noncommercial applicator, the applicator must keep and maintain a correct and accurate copy of the Termite Treatment Disclosure Documents for a period of two (2) years.

§7.173. Subterranean Termite Pre-Construction Treatments.

(a) Subsections (b) - (f) do not apply to baits or baiting systems and subsections (c) - (d) do not apply to wood applied termiticide products.

(b) All pesticide liquid applications must be made by using the application rates and methods and by following the precautionary statements on the labeling of the pesticide being used.

(c) For a full treatment, the entire structure must be treated to provide a continuous horizontal and vertical barrier. The final treatment shall be performed within thirty (30) days of notification of completion of landscaping or one year from the date of completion of construction, whichever comes first. However, when construction has proceeded to the point that all areas cannot be treated before the company providing the treatment is called to perform the application, a partial treatment is permitted if the owner of the structure or the person in charge of the construction and the licensee for the pest control company sign a statement attesting to the construction conditions, and attach it to the contract with an amended diagram or blueprint or building plat showing the exact areas to be treated and send copies to the owner of the property within seven (7) days of the application. A copy of the contract with an amended diagram or blueprint or building plat showing the exact areas to be treated must be made available to the department upon request. A partial treatment will also be permitted if allowed by label directions and if the licensee proposing the treatment issues a Termite Treatment Disclosure Document prior to the treatment.

(d) In order to comply with subsection (c) of this section, it will be necessary to return to the pretreatment site after the slab has been poured and/or piers and support beams have been placed to complete the treatment for the vertical barrier.

(e) A primary treatment of the wood framing following full label application instructions for barrier treatment protection must be performed with a termiticide that has specific label instructions to be used as a primary treatment to offer protection for prevention of subterranean termites in new construction. This treatment may be used in lieu of a full, partial, or bait treatment and must include providing a barrier application to exposed surfaces of wood framing with exterior sheathing in place but before any walls are enclosed to a height of not less than two (2) feet above a contact with a slab foundation or a (2) foot horizontal and vertical treatment of wood above contact with a concrete crawlspace or basement foundation. Label instructions must provide a barrier application for the prevention of subterranean termite intrusion and tubing onto non-cellulose areas around bath-traps, plumbing penetrations and concrete foundation areas.

(f) Notice of all pre-construction treatments with contracts requiring treatment of a structure other than a single family dwelling must be called, e-mailed or faxed in to the department between the hours of 6:00 a.m. and 9:00 p.m. using the specified e-mail address, telephone number or fax number at least four (4), and no more than twenty four

(24) hours prior to a termiticide application. The licensee must provide address and site location, type of treatment (partial or full), date and time of treatment, approximate and appropriate unit of measurement used under contract and the name and the license number and physical address of the pest control company. If the treatment is cancelled, notice of cancellation must be sent using the specified telephone number, e-mail address or fax number within one hour of the time the pest control company learns of the cancellation.

(g) For all commercial pre-construction treatments, the licensee must maintain records of the appropriate unit of measurement treated per application site, amount of termiticide used per application site, rate at which termiticide is mixed for each application site, number of application tanks which were in use for the treatment, the capacity, in gallons, of each application tank, and the start and stop time for the treatment. The business license holder or, in the case of the certified noncommercial applicator, the applicator must keep and maintain a correct and accurate copy of the pre-construction treatment records for a period of two (2) years. A baiting system may be used in lieu of a pre-construction treatment if installed within thirty (30) days of notification of completion of landscaping. If a physical device is used, the appropriate unit of measurement of the physical device must be recorded and a diagram describing the installation must be provided.

§7.174. Termite Treatment Disclosure Documents.

(a) As part of each written estimate submitted and before conducting an initial termite treatment for a customer, the pest control company proposing the treatment must present the prospective customer or designee with the disclosure documents. Verbal estimates may be provided to customers to advise of a general range of treatment costs, but a written estimate must be provided before offering a contract and beginning a treatment.

(b) Each termite treatment disclosure document must include, but is not limited to:

(1) a diagram or blueprint or building plat and description of the structure or structures to be treated to include the following:

(A) the address or physical location;

(B) perimeter measurements of the structure as accurately as practical;

(C) areas of active or previous termite activity;

(D) areas to be treated;

(2) a label for any pesticide recommended or used. If a physical device is used, the appropriate unit of measurement of the physical device must be recorded and a diagram describing the installation must be provided.

(3) the complete details of the warranty provided if any; including:

(A) if the warranty does not include the entire structure treated, the areas included must be listed;

(B) the time period of the warranty;

(C) the renewal options and cost;

(D) the obligations of the pest control operator to retreat for termite infestations or repair damage caused by termite infestations within the warranty period; and

(E) conditions that could develop as a result of the owners action or inaction that would void the warranty; and

(F) name of the pest control company responsible for the warranty.

(4) the signature of approval on the diagram by a certified applicator or licensed technician in the termite category employed by the company making the proposal.

(5) the concentration of termiticide used or minimum number of bait stations to be installed.

(6) for subterranean termite post construction treatments the following statements and definitions in at least 8-point type: A termite treatment may be a partial treatment or spot treatment using termiticide, approved physical barriers or a baiting system. These types of treatments are defined as follows:

(A) Partial. This technique allows a wide variety of treatment strategies but is more involved than a spot treatment (see definition below). Ex.: treatment of some or all of the perimeter, bath traps, expansion joints, stress cracks, portions of framing, walls and bait locations.

(B) Pier and Beam. Generally defined as the treatment of the outer perimeter including porches, patios and treatment of the attached garage. In the crawl space, treatment would include any soil to structure contacts as well as removal of any wood debris on the ground.

(C) Slab Construction. Generally defined as treatment of the perimeter and all known slab penetrations as well as any known expansion joints or stress cracks.

(D) Spot Treatments. Any treatment which concerns a limited, defined area less than ten (10) linear or square feet that is intended to protect a specific location or "spot". Often there are adjacent areas that are susceptible to termite infestation which are not treated.

(E) Baiting Systems. This type of treatment may include interior and/or perimeter placement of monitoring or baiting systems along with routine inspection intervals. The baiting technique may include one or more locations as prescribed by the product label and instructions.

(F) Barriers. If a physical device is used, the square footage of the physical device must be recorded and a diagram describing the installation will be provided.

(7) For all termite treatments the following statement in at least 8-point type: For all treatments there will be a diagram showing exactly what will be treated. Treatment specifications and warranties for those treatments may vary widely. Review the pesticide label provided to you for minimum treatment specification. If you have any questions, contact the pest control company or the Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711-2847. Telephone number (866) 918-4481.

(8) For any pre-construction treatment, the Proper Pre-construction Subterranean Termite Treatments - A Guide for Builders and Consumers, must be provided to, and signed by, the contractor or purchaser of the pretreatment service prior to the beginning of the treatment. A signed copy must be kept in the pest control use records of the licensee. The text and format of the termite pre-treatment disclosure document is available on the Structural Pest Control Service website at: http://www.tda.state.tx.us/spcs/, or by contacting the Texas Department of Agriculture at the address provided in subsection (b)(7) of this section.

(9) For drywood termite and related insect treatments the following statements and definitions in at least eight (8) point type: A drywood termite or related insect treatment may be a full treatment or spot treatment. These types of treatments are defined as follows:

(A) Full Treatment: Generally defined as a treatment to control 100% of the insect infestation by tarpaulin fumigation or appropriate sealing method. A full treatment by fumigation is designed to eliminate every insect colony. It should include the infested structure and all attached structures.

(B) Spot Treatment: Any treatment less than a full treatment by tarpaulin fumigation. This treatment should be considered only when a drywood termite or related insect infestation has a limited and defined area of infestation. Adjacent areas susceptible to dry wood termite or related insect infestations are not treated. Because of the nature of wood destroying insects, these untreated areas may continue to harbor dry wood termites and unrelated insects throughout the structure without detection.

(10) A consumer information sheet as required by §7.147 of this title (relating to Consumer Information Sheet).

(c) Before conducting an initial termite treatment, the pest control company proposing the treatment must present the customer or designees with a diagram or blueprint or building plat and description of the structure(s) to be treated including the following:

(1) construction details needed for clarity of the report;

(2) known wood destroying insect activity;

(3) areas of conditions conducive to infestation by wood destroying insects; and

(4) other information about construction relevant to the treatment proposal.

(d) For a retreatment of a property for an existing customer, the pest control company must provide the following before conducting the retreatment:

(1) the label;

(2) a diagram or updated diagram of the structure showing areas to be treated;

(3) any changes to the warranty information;

(4) a consumer information sheet as required by §7.147 of this title.

§7.176. Real Estate Transaction Inspection Reports.

(a) All inspection reports issued regarding the visible presence or absence of termites, other wood destroying insects and conditions conducive to infestation of wood destroying insects in connection with a real estate transaction must be made on a form prescribed by the department. Inspection results may be recorded additionally on a form required by a real estate lending provider such as the Veterans Administration as long as the form required by this section is maintained in the inspection files.

(b) The report form will include a space to report conditions consistent with §7.175 of this title (relating to Inspection Procedures).

(c) The Texas Official Wood Destroying Insect Report is available from the Texas Department of Agriculture, may be obtained from the department at P.O. Box 12847 Austin, Texas 78711-2847, and may be downloaded from the department's web page at: http://www.tda.state.tx.us/spcs/.

(d) For each inspection, copies of the completed form must be prepared for the:

(1) person who ordered the inspection; and

(2) business files of business license holder issuing the report.

(e) The licensee issuing the report must retain records of inspection reports for a minimum of two (2) years.

§7.177. Posting Notice of Inspection.

(a) Upon completion of an inspection for the purposes of completing the Texas Official Wood Destroying Insect Inspection Report, the inspector must post a durable sticker on the wall adjacent to the water heater, interior of bath trap access, electric breaker box or beneath the kitchen sink giving the name and license number of the licensee or license number of the supervising certified applicator if the technician has not been assigned a license number other than the social security number, the date of the inspection, a statement that the sticker should not be removed and statement of the product used.

(b) It will be a violation of this section for any licensee to remove or deface a posted inspection sticker.

§7.178. Structural Fumigation Requirements.

(a) Fumigation of structures to control wood destroying insects shall be performed only under the direct on-site supervision of a certified applicator licensed in the category of structural fumigation. Direct on-site supervision means that the certified applicator exercising such supervision must be present at the site of the fumigation during any time the fumigants are being released and at the time property is inspected, ventilated and released for occupancy.

(b) Fumigation shall be performed in compliance with all label requirements applicable to state and federal laws and regulations.

(c) Prior to the release of the fumigant, warning signs shall be posted in plainly visible locations on or in the immediate vicinity of all entrances to the space under fumigation and shall not be removed until the premises is determined safe for reoccupancy. Ventilation shall be conducted with due regard for public safety.

(d) When directed by the label, local fire authorities or, when not available, local police authorities, shall be notified in writing, by telephone if a record is made of the name of the person that was informed and the date and time, or by e-mail prior to introduction of the fumigant. The same agency shall be informed that the structure is released for occupancy.

(e) The space to be fumigated shall be vacated by all occupants prior to the commencement of fumigation. The space to be fumigated shall be sealed in such manner to ensure that the concentration of the fumigant released is retained in compliance with the manufacturer's recommendations.

(f) Warning signs shall be printed in red on white backgrounds and shall contain the following statement in letters not less than two inches in height: "Danger-Fumigation." Signs must also depict a skull and crossbones, not less than one inch in height, the name of the fumigant, the date and time fumigant was introduced, and the name, license number, and telephone number where the certified applicator performing the fumigation may be reached twenty four (24) hours a day.

(g) On any structure that has been fumigated, the certified applicator responsible for the fumigation shall, immediately upon completion, post a durable sticker on the wall adjacent to the electric breaker box, water heater, beneath the kitchen sink or in the interior bath trap access. This must be a durable sticker not less than one inch by two inches in size. It must have the name and license number of the certified applicator, date of fumigation, fumigant used, and the purpose for which it was fumigated (target pest).

(h) A certified applicator performing fumigation shall use adequate warning agents with all fumigants that lack such properties. When conditions involving abnormal hazards exist, the person exercising direct on-site supervision shall take such safety precautions in

addition to those prescribed to protect the public health and safety. The certified applicator responsible for the fumigation shall visibly inspect the structures to assure vacancy prior to introduction of fumigant.

(i) The certified applicator responsible for the fumigation shall also post a person or persons to guard the location whenever a licensed applicator is not present from the time the fumigant is introduced until the label concentration for aeration is reached. The person posted at the location shall deter entry into the structure by routinely inspecting the structure under fumigation at least once each hour. The person posted at the location shall remain alert and on duty as directed by the certified applicator. The certified applicator responsible for the fumigation shall secure all entrances to the structure in such a manner as to prevent entry by anyone other than the certified applicator responsible for the fumigation. The structure must remain secured until the structure is released for occupancy.

(j) For the purpose of maintaining proper safety and establishing responsibility in handling the fumigants, the business license holder shall compile and retain for a period of at least two (2) years a report for each fumigation job and/or treatment. The report for each fumigation job or treatment must contain the following information:

(1) name, address and business license number of the pest control company;

(2) name and address of property and owner;

(3) cubic feet fumigated;

(4) target pest or pest controlled;

(5) fumigant or fumigants used and amount;

(6) name of warning agent and amount used;

(7) temperature and wind conditions;

(8) time gas introduced and aerated (date and hour);

(9) name and license number of certified applicator;

(10) list of any extraordinary safety precautions taken;

(11) date and time released for occupancy (signed by certified applicator);

(12) the dates and time fire or police authorities were notified; and

(13) identification of clearing devices used.

(k) Fumigations for the purpose of controlling wood destroying insects are subject to the provisions of §7.174 of this title (relating to Termite Treatment Disclosure Documents).

(l) Every licensee engaged in application of a fumigant is required to use an approved and calibrated clearance device as prescribed on the fumigant label.

(1) This approved and calibrated clearance device must be used as required by the label.

(2) An independent and qualified facility or person must perform calibration of the clearance device not less than annually and anytime it is suspected to be inaccurate. Calibration must be in compliance with the manufacturer's requirements.

(3) Proof of calibration must be kept on file for a period of two (2) years and available for review by department personnel and by placing an annual validation on the clearance device.

(m) The certified applicator responsible for the fumigation shall be responsible for following label requirements for aeration and clearing of the structure that is being fumigated.

(n) Notice of all fumigations of a structure must be called, emailed, or faxed to the department between the hours of 6:00 a.m. and 9:00 p.m., Monday through Friday, using the specified telephone number, email address or fax number at least four (4), and no more than twenty four (24) hours prior to the structural fumigation application. The licensee must provide address and site location, chemical to be used, date and time of treatment, approximate square footage under contract and the name and license number of the business licensee. If the structural fumigation is cancelled, notice of the cancellation must be sent using the department specified telephone number, email address or fax number within three hours of the time the pest control company learns of the cancellation.

(o) Before an individual may apply for an initial certified applicator's license in the structural fumigation category the following experience requirements must be met:

(1) Attend a forty (40) hour structural fumigation school that has at least sixteen (16) hours of hands on training, and has been approved by the department; or

(2) Obtain forty (40) hours of on-the-job training with at least sixteen (16) hours of hands on training that is approved by the department.

(p) Current certified applicators must conduct/perform four (4) hours of training per year to maintain their certification.

(1) A verifiable performance/training records form will be made available to the department upon request. These performance/training records forms shall be kept on a format prescribed by the department in the business file for at least two (2) years. The verifiable performance/training records form will be made available to the certified applicator or technician upon written request.

(2) A minimum of one CEU per year in structural fumigation is required to maintain the certification following initial testing.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806153
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

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DIVISION 6. STRUCTURAL PEST CONTROL ADVISORY COMMITTEE

4 TAC §7.190

The Texas Department of Agriculture (the department) adopts the repeal of Chapter 7, Subchapter H, Division 6, §7.190, concerning definitions, without changes to the proposal published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5167).

The repeal is adopted to move definitions in this section to Subchapter H, Division 1, concerning General Provisions, where all other defined terms are located.

No comments were received on the proposal.

The repeal of §7.190 is adopted under Occupations Code, §1951.105, which provides the department with the authority to adopt rules for the operation of the Structural Pest Control Advisory Committee.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806155
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: December 11, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 463-4075

PART 5. STATE SEED AND PLANT BOARD

CHAPTER 81. CERTIFICATION PROCEDURES

4 TAC §81.1

The Texas Department of Agriculture (the department) adopts the repeal of Title 4, Part 5, §81.1, concerning Certification of Seed in Texas, without changes to the proposal published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4438). The repeal is adopted to eliminate an unnecessary section. The section is outdated, subsection (a) is now in law, and seed inspectors are no longer required to be approved for employment by the State Seed and Plant Board.

No comments were received on the proposal.

The repeal of §81.1 is adopted under the Texas Agriculture Code, §62.008, which provides that the department is the certifying agency in Texas for the certification of seed and plants; and the Texas Agriculture Code §12.016, which provides the department with the authority to adopt rules for administration of its duties under the code.

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

Filed with the Office of the Secretary of State on November 18, 2008.

TRD-200806027
Dolores Alvarado Hibbs
General Counsel, Texas Department of Agriculture
State Seed and Plant Board
Effective date: December 8, 2008
Proposal publication date: June 6, 2008
For further information, please call: (512) 463-4075

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 7. TEXAS FIRST-TIME HOMEBUYER PROGRAM

10 TAC §7.3

The Texas Department of Housing and Community Affairs (the Department) adopts the amendment to 10 TAC Chapter 7, §7.3 to include the completion of a pre-purchase homebuyer education course. The amendment is adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7853).

The adpoted amendment requires pre-purchase homebuyer education counseling for eligible First Time Homebuyers and for those First Time Homebuyers qualifying for Mortgage Credit Certificates.

No comments were received regarding adoption of this amendment.

The Board approved the final order adopting this amendment on November 13, 2008.

The amended section is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§7.3. Administration of the Program.

(a) First-time homebuyer program eligibility requirements. To be eligible for any assistance under the program a first-time homebuyer must:

(1) qualify as a first-time homebuyer;

(2) be able to sign at loan closing an affidavit of eligible borrower;

(3) apply with respect to a home whose purchase price does not exceed the maximum purchase price limit for the relevant area, and is either a new or existing single family residence, new or existing condominium or town home, or manufactured housing that has been converted to real property in accordance with the Texas Occupations Code Chapter 1201; and

(4) completion of a pre-purchase homebuyer education course as determined by Department staff.

(b) Types of assistance available. Depending on the applicants' income, a first-time home buyer that applies for a loan under the program may also be eligible for down payment and closing cost assistance or mortgage credit certificates. Down payment and closing cost assistance or mortgage credit certificates may be awarded only in conjunction with an application for a mortgage loan.

(c) Income limits for loans. First-time homebuyers applying for a mortgage loan or a mortgage credit certificate must have an income of not more than 115 percent of area median family income or 140 percent of area median family income in targeted areas.

(d) Income limits for down payment and closing cost assistance. First-time homebuyers applying for down payment and closing cost assistance in conjunction with a mortgage loan must have an income of not more than 80 percent of area median family income.

(e) Application Procedure.

(1) Only applications filed on or after January 1, 2008 are subject to this Chapter.

(2) Applicants seeking assistance under the program must first contact a participating mortgage lender. A list of participating mortgage lenders may be obtained on the department's website or by contacting the department.

(3) All applicants shall complete an application with a participating mortgage lender and shall provide the following information at the time of application:

(A) written permission to obtain credit reports of the applicants on a form to be provided by the mortgage lender;

(B) an affidavit of Texas residency on a form to be provided by the mortgage lender;

(C) the most recent statements for all credit and bank accounts;

(D) pay stubs for the 3-month period prior to the month in which the application was filed;

(E) W-2 forms for the two most recent calendar years for which they are available;

(F) any information concerning debts that will not be paid off within twelve months of the date the application is filed, including, but not limited to the names of the associated creditors, account numbers and regular payment amounts;

(G) documentation of any other income or other form of support not evidenced above; and

(H) a copy of the executed sales contract for the subject property.

(f) Application Fees. Fees that may be collected by the mortgage lender from the first-time homebuyer relating to a mortgage loan include:

(1) an appropriate origination fee and buyer/seller points;

(2) all usual and reasonable settlement or financing costs that are permitted to be so collected by Federal Housing Administration ("FHA"), Veteran's Administration ("VA"), Rural Housing Services ("RHS"), Freddie Mac or Fannie Mae, as applicable, and other applicable laws, but only to the extent such charges do not exceed the usual and reasonable amounts charged in the area in which the home is located in cases where owner financing is not provided through a tax-exempt mortgage revenue bond financing. Such usual and reasonable settlement or financing costs shall include an application fee not to exceed $325 (which includes the funding fee and the tax compliance fee), the total estimated costs of a credit report on the applicants and an appraisal of the property to be financed with the mortgage loan, payable to the mortgage lender at or within ten (10) days of the application for a mortgage loan, title insurance survey fees, credit reference fees, legal fees, appraisal fees and expenses, credit report fees, FHA insurance premiums, private mortgage guaranty insurance premiums, VA guaranty fees, VA funding fees, RHS guaranty fees, hazard or flood insurance premiums, abstract fees, tax service fees, recording or registration fees, escrow fees, file preparation fees; and

(3) with respect to the issuance of mortgage credit certificates:

(A) an issuance fee;

(B) a non-refundable commitment fee; and

(C) a document handling fee.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806196
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

CHAPTER 51. HOUSING TRUST FUND RULE

10 TAC §§51.1 - 51.17

The Texas Department of Housing and Community Affairs adopts the repeal of 10 TAC Chapter 51, §§51.1 - 51.17 concerning the Housing Trust Fund Rule, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7919) and will not be republished.

The repeal is adopted in order to allow adoption of new rules governing the Housing Trust Fund Program, to coordinate the adoption of new Housing Trust Fund rules with new rules being adopted as part of the 2009 rule cycle.

No comments were received regarding the adoption of this repeal.

The Board approved the final order adopting this repeal on November 13, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806194
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

10 TAC §§51.1 - 51.22

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 51, §§51.1 - 51.22, concerning the Housing Trust Fund Rule. Sections 51.2, 51.3, 51.6, and 51.18 are adopted with changes to the proposed in the September 19, 2008, issue of the *Texas Register* (33 TexReg

7920). Sections 51.1, 51.4, 51.5, 51.7 - 51.17, and 51.19 - 51.22 are adopted without changes and will not be republished.

The adopted new sections make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines contained in the Housing Trust Fund program manuals and include revisions of necessary policy and administrative changes to further enhance operations.

SUMMARY OF COMMENTS, STAFF RESPONSE AND BOARD ACTION

Public comments and the Department's responses are presented in the order in which the sections appear in the new chapter. Following the section number is the title of the section as it appears in the rule. Following the comment is a parenthetical containing a number or series of numbers. Each number corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new section.

Comments on the Proposed Housing Trust Fund Rule, 10 TAC, Chapter 51.

General Public Comment.

Comment:

Commenter requests the establishment of a Housing Trust Fund demonstration program for housing development, preservation, and organizational capacity-building to serve farmworker housing. (15)

Staff Response:

The Housing Trust Fund (HTF) has established several successful demonstration housing programs over the last several years. While there has not been a farmworker specific demonstration program, non-profit organizations and units of general local government are eligible to apply for any of the Housing Trust Fund programs and serve farmworkers as a part of their program design. It is important to note the Department is currently proposing a capacity building grant through the Office of Colonia Initiatives and the Department has made funds available to multifamily housing development and preservation throughout the year. As no specific rule change is currently requested, there is no recommendation for a rule change to address this issue at this time.

Comment:

Commenter requests the Department make available at least $3 million in funding with the stated purpose of producing and preserving housing for Texas farmworkers, improving the conditions in which Texas farmworkers live, and increasing the availability and affordability of housing for Texas farmworkers. (15)

Staff Response:

The Department is committed to providing quality, affordable housing. Last year 95 percent of HOME funds and approximately 20 percent of Housing Tax Credits were programmed for the purpose of improving housing conditions in rural Texas. Unfortunately, the need is greater than current resources are able to address. While the Department has not set-aside funding for Farmworker housing, eligible organizations may apply for many of the Department's available funds and serve the Farmworker community. The Department will take this request under advisement as it requests an increase in Housing Trust Fund money.

Comment:

Provide financial and technical assistance that would be available through a variety of programs to be established by TDHCA or programs proposed by potential grantees in response to grant solicitations. The commenter provided a detailed list for how the funds could be programmed and new projects. (15)

Staff Response:

The Department appreciates the detailed suggestions prioritizing the different ways the Department could approach technical assistance in the Farmworker community. Unfortunately, there is a shortage of funds to provide technical assistance at the level requested. However, the Department will take the comments under advisement as it pursues increasing the capacity of the Housing Trust Fund and as it programs the Trust Fund dollars in the 2010 Housing Trust Fund Plan.

Comment:

Commenter requests the development of ongoing sources of funding to continue farmworker housing activities in the future using philanthropy grants, program related investments, and other potential resources and ideas. (15)

Staff Response:

The Department will research these recommendations as it develops housing policy in the future. As no specific rule change is currently requested, there is no recommendation for a rule change to address this issue at this time.

Comment:

Commenter requests the Department explore other state's programs for applicability in Texas. (15)

Staff Response:

The Department will research these recommendations as it develops housing policy in the future. As no specific rule change is currently requested, there is no recommendation for a rule change to address this issue at this time.

§51.2. Definitions. Administrative Change.

Staff Recommendation:

Staff makes an administrative change to add the word 'repaid' to complete the definition.

(37) Loan--Financial assistance that is awarded in the form of money and in an executed agreement between the Department and Person for a specific purpose and that is required to be repaid.

§51.3. Notice of Receipt of Application or Proposed Application.

Comment:

Commenter recommends clarification to this section to ensure that this section applies only to multifamily applications and that notice will only be given if required by federal or state law. (18)

Staff Response:

Staff concurs with the comment and makes the following clarification to the proposed rule:

(a) Not later than the 14th day after the date an Application or a proposed Application for housing funds described by §2306.111

has been filed for multifamily or single family development, the Department shall provide written notice of the filing of the Application or proposed Application to the following Persons:

§51.6. Basic Eligible Activities. Administrative Change.

Comment:

Commenter contends that §2306.754 does not seem to apply to other TDHCA programs and therefore, recommends the elimination of this subsection. (18)

Staff Response:

The statute, at §2306.754, indicates that the source for loans in excess of the $30,000 committed by the Bootstrap Program, must come from "local governmental entities, nonprofit organizations, or private lenders." This list does not include any other Department programs or state or federal funds. To ensure compliance with the statute, staff recommends no change.

§51.10. Multifamily Development Application Requirements.

Comment:

Commenter recommends reverting to the previous language on multifamily size limitations as it provides clarity on the intent of leveraging Housing Trust Fund funds for multifamily development and prevents the Department from overcommiting funds to multifamily rental at the expense of single family homeownership. (18)

Staff Response:

Staff proposed the elimination of this subsection in order to maintain flexibility in the use of the Housing Trust Funds. The programming of the annual appropriation of Housing Trust Funds is outlined in the Annual Plan and delineates the set-asides and funding available for multifamily and single family activities, as well as any other eligible activities. No change to the proposed rule is recommended.

§51.13(a)(2). Criteria for Funding.

Comment:

Commenter suggests adding language that would include the cost of energy as one of the evaluation factors. (16)

Staff Response:

While staff agrees with the importance of energy saving costs in affordable housing, it does not recommend a revision to this section. This section of the rule specifically relates to a statutory citation, of which energy costs is not referenced. To the extent the Department incentivizes energy costs as an evaluation factor it will be included in the Trust Fund Annual Plan and/or the Notices of Funding Availability.

§51.18. General Contract Administration. Administrative Change.

Staff Recommendation:

Administrative changes are made to clarify the contract administration requirements to ensure compliance with the Texas Residential Construction Commission requirements.

All Administrators and Development Owners must use the forms provided on the Department's website and comply with the Department's procedural and documentation requirements as outlined in the Program Manual and in this section including:

(16) Ensure and verify that each building construction contractor performing activities in the amount of $10,000 or more under the Contract is registered and maintains good standing with the Texas Residential Construction Commission in accordance with Chapters 401 and 416 of the Texas Property Code;

(17) Ensure and verify that each housing unit being rehabilitated in the amount of $10,000 or more under the Contract is registered with the Texas Residential Construction Commission in accordance with §426.003 of the Texas Property Code;

(21) Conduct appropriate property inspections and documentation in accordance with applicable program requirements. Ensure compliance with the Texas Residential Construction Commission inspection requirements under Title 16 of the Texas Property Code;

List of Commenters: (15) Motivation Education & Training, Inc; (16) Lone Star Chapter of Sierra Club; (18) Habitat Texas.

BOARD RESPONSE: The Board approved the final order adopting these new sections on November 13, 2008.

The new sections are adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306.

§51.2. Definitions.

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

(1) Administrative Deficiencies--The absence of information or a document from the application as required in this rule or applicable NOFA.

(2) Administrator--The Person responsible for performing under a Contract with the Department.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest.

(4) Affiliated Party--A Person in a relationship with the Administrator on a Contract with the Department.

(5) Applicant--A person who has submitted an Application for Department funds or other assistance.

(6) Application--A request for funds submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material.

(7) Application Acceptance Period--The period of time that Applications may be submitted to the Department as more fully described in the applicable NOFA.

(8) Application Submission Procedures Manual ("ASPM")--The manual which sets forth the procedures, forms and instructions for the completion and submission of an Application to the Department.

(9) Area Median Family Income ("AMFI")--The income estimated and determined by HUD as the median family income with adjustments for family size and geographic locations.

(10) Articles of Incorporation--The document that sets forth the basic terms for a corporation's existence and is the official recognition of the corporation's existence.

(11) Board--The governing board of the Texas Department of Housing and Community Affairs.

(12) Bylaws--A rule or administrative provision adopted by a corporation for its internal governance. Bylaws are enacted apart from the Articles of Incorporation. Bylaws and amendments to Bylaws must be formally adopted in the manner prescribed by current Bylaws by either the organization's board of directors or the organization's members, whoever has the authority to adopt and amend Bylaws.

(13) Capacity Building--Educational and organizational support assistance to promote the ability of community housing development organizations and nonprofit organizations to maintain, rehabilitate and construct housing for low, very low, and extremely low-income persons and families. This activity may include:

(A) organizational support to cover expenses for housing development or management related training, technical and other assistance to the board of directors, staff, and members of the nonprofit organizations or community housing development organizations;

(B) technical assistance and training related to housing development, housing management, or other subjects related to the provision of housing or housing services; or

(C) studies and analyses of housing needs.

(14) Chapter 2306--The enabling statute for the Department found in Texas Government Code, Chapter 2306.

(15) Colonia--A geographic area that is located in a county some part of which is within 150 miles of the international border of this state that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that:

(A) has a majority population composed of individuals and families of low income and very low income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed area under §17.921, Texas Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Department.

(16) Competitive Application Cycle--A defined period of time that Applications may be submitted according to a published Notice of Funding Availability (NOFA). Applications will be reviewed in accordance with the rules for application review published in the NOFA, and the ASPM.

(17) Contract--The executed written agreement between the Department and an Administrator performing an activity related to a program that outlines performance requirements and responsibilities assigned by the document.

(18) Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including specifically ownership of more than 50 percent of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(19) Council of Governments (COG)--A regional body which serves an area of several counties to address regional planning including but not limited to transportation planning, economic and community development, information gathering and processing, hazard mitigation and emergency preparedness, and water and environmental planning.

(20) Deobligated Funds--The funds released by an Administrator or Contractor or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department and an Administrator or Development Owner.

(21) Department--The Texas Department of Housing and Community Affairs.

(22) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(23) Development--A Project that has a construction component, either in the form of New Construction or the Rehabilitation of multi-unit or single family residential housing that meet the affordability requirements.

(24) Development Funding--

(A) a loan or grant; or

(B) an in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) provides an economic benefit; and

(ii) results in a quantifiable cost reduction for the applicable development.

(25) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract approved by the Department.

(26) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and is to be under the Development Owner's Control.

(27) Executive Award and Review Advisory Committee ("The Committee")--The Department committee that will develop funding priorities and make funding and allocation recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306, Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities.

(28) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors.

(29) General Partner--The partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(30) Grant--Financial assistance that is awarded in the form of money to a housing sponsor for a specific purpose and that is not required to be repaid. For purposes of this chapter, a Grant includes a forgivable loan.

(31) Household--One or more persons occupying a housing unit.

(32) Housing Development Costs--The total of all costs incurred, or to be incurred, by the Development Owner in acquiring, constructing, rehabilitating and financing a Development as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas.

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

(34) Income Eligible Households--

(A) Low-Income Households--Households whose annual incomes do not exceed 80 percent of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(B) Very Low-Income Households--Households whose annual incomes do not exceed 60 percent of the median family income for the area, as determined by HUD and published by the Department, with adjustments for family size.

(C) Extremely Low Income Households--Households whose annual incomes do not exceed 30 percent of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(35) Intergenerational Housing--Housing that includes specific units that are restricted to the age requirements of a Qualified Elderly Development and specific units that are not age restricted in the same Development that:

(A) have separate and specific buildings exclusively for the age restricted units;

(B) have separate and specific leasing offices and leasing personnel exclusively for the age restricted units;

(C) have separate and specific entrances, and other appropriate security measures for the age restricted units;

(D) provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group;

(E) share the same Development site;

(F) are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) meet the requirements of the federal Fair Housing Act.

(36) Land Use Restriction Agreement ("LURA")--An agreement between the Department and a Person related to a specific property, or properties, which is filed with the responsible recording authority.

(37) Loan--Financial assistance that is awarded in the form of money and in an executed agreement between the Department and Person for a specific purpose and that is required to be repaid.

(38) Material Noncompliance--As is defined in Chapter 60, Subchapter A of this title.

(39) Manufactured Housing Unit (MHU)--As defined by HUD is a structure transportable in one or more sections which, in traveling mode, is 8 body-feet or more in width or 40 body-feet or more in length, or when erected on site, is 320 square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required facilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein.

(40) Memorandum of Understanding (MOU)--A written agreement detailing the understanding between the parties.

(41) Modular Housing--As defined by HUD is a home built in sections in a factory to meet state, local, or regional building codes. Once assembled, the modular unit becomes permanently fixed to one site.

(42) Mortgagor ("Borrower")--The Person who borrows money and uses his or her real property as collateral and security for the payment of the debt.

(43) New Construction--Any Development not meeting the definition of Rehabilitation or Reconstruction.

(44) NOFA--Notice of Funding Availability, published in the *Texas Register.*

(45) Nonprofit Organization--A public or private organization that:

(A) is organized under state or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

(C) has a current tax exemption ruling from the Internal Revenue Service (IRS) under §501(c)(3), a charitable, nonprofit corporation, or §501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as evidenced by a certificate from the IRS that is dated 1986 or later. The exemption ruling must be effective on the date of the application and must continue to be effective throughout the length of any contract agreements; or classification as a subordinate of a central organization non-profit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS that includes the Applicant. The group exemption letter must specifically list the Applicant; and

(D) A private nonprofit organization's pending application for §501(c)(3) or (c)(4) status cannot be used to comply with the tax status requirement.

(46) Open Application Cycle--A defined period during which applications may be submitted according to a published NOFA and which will be reviewed on a first come-first served basis until all funds available are committed, or until the NOFA is closed, whichever is earlier.

(47) Person--Any individual, partnership, corporation, association, unit of government, community action agency, or public or private organization of any character.

(48) Persons with Disabilities--A Household composed of one or more persons, at least one of whom is a Person, who has a disability that is a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002).

(49) Person with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs:

(A) consistent with 42 USC §§12701 et seq. and as provided in the Consolidated Plan and may include any households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, elderly, victims of domes-

tic violence, persons with HIV/AIDS, homeless populations and migrant farm workers, and public housing residents.

(B) Housing Trust Funds may also be awarded through Persons legally responsible for caring for a Person with Special Needs, pursuant to §2306.511, Texas Government Code.

(50) Predevelopment Costs--Reimbursable costs related to a specific eligible housing project including:

(A) Predevelopment housing project costs that the Department determines to be customary and reasonable, including but not limited to consulting fees, architectural fees, engineering fees, engagement of a development team, site control, and title clearance;

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) Predevelopment costs do not include general operational or administrative costs.

(51) Principal--Any Person that does or will exercise Control over a partnership, corporation, limited liability company, trust or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a ten percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(52) Principal Residence--The primary housing unit a Person or Household inhabits.

(53) Project--A site or an entire building (including a manufactured housing unit), or two or more buildings, together with the site or sites on which the building or buildings are located, that are under common ownership, management, and financing.

(54) Property--The real estate and all improvements thereon which are the subject of the Application whether currently existing or proposed to be built thereon in connection with the Application.

(55) Public Housing Authority--A housing authority established under the Texas Local Government Code, Chapter 392.

(56) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) is intended for, and solely occupied by, individuals sixty-two (62) years of age or older; or

(B) is intended and operated for occupancy by at least one individual fifty-five (55) years of age or older per unit, where at least 80 percent of the total housing units are occupied by at least one individual who is fifty-five (55) years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals fifty-five (55) years of age or older.

(57) Received Date--The date and time at which an Application is actually received by the Department.

(58) Rehabilitation--The improvement or modification of an existing residential development through an alteration, addition, or enhancement. The term includes the demolition of an existing residential development and the reconstruction of any development units, but does not include the improvement or modification of an existing residential development for the purpose of an adaptive reuse of the development. Rehabilitation also includes replacing and existing substandard MHU with a new MHU.

(59) Resolution--Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment. Resolutions must be in writing and state the specific action that was approved and adopted, the date the action was approved and adopted, and the signature of Person or Persons authorized to sign resolutions. Resolutions must be approved and adopted in accordance with the corporate Bylaws.

(60) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for funding by the Texas Rural Development Office of the United States Department of Agriculture, other than an area that is located in a municipality with a population of more than 50,000.

(61) Rural Development--A development or proposed development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(62) Service Area--The city(ies), county(ies) and/or place(s) identified in the Contract that the Administrator will serve.

(63) TAC--Texas Administrative Code.

(64) Third Party--A Person who is not:

(A) an Applicant, General Partner, Developer, or General Contractor; or

(B) an Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor; or

(C) a Person(s) receiving any portion of the contractor fee or developer fee.

(65) Unit of General Local Government--A city, town, county, or other general purpose political subdivision of the State.

(66) Urban Area--The area that is located within the boundaries of a primary metropolitan statistical area other than an area described by §2306.004(28-a)(B), Texas Government Code, or eligible for funding as described by §2306.004(28-a)(C).

§51.3. Notice of Receipt of Application or Proposed Application.

(a) Not later than the 14th day after the date an Application or a proposed Application for housing funds described by §2306.111 has been filed for multifamily or single family development, the Department shall provide written notice of the filing of the Application or proposed Application to the following Persons:

(1) the United States representative who represents the community containing the Development described in the Application;

(2) members of the legislature who represent the community containing the Development described in the Application;

(3) the presiding officer of the governing body of the political subdivision containing the Development described in the Application;

(4) any member of the governing body of a political subdivision who represents the area containing the Development described in the Application;

(5) the superintendent and the presiding officer of the board of trustees of the school district containing the Development described in the Application; and

(6) any neighborhood organizations on record with the state or county in which the Development described in the Application is to be located and whose boundaries contain the proposed development site.

(b) The notice provided under subsection (a) of this section must include the following information:

(1) the relevant dates affecting the Application, including:

(A) the date on which the Application was filed;

(B) the date or dates on which any hearings on the Application will be held; and

(C) the date by which a decision on the Application will be made;

(2) a summary of relevant facts associated with the development;

(3) a summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(4) the name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

§51.6. Basic Eligible Activities.

(a) Pursuant to §2306.202, Texas Government Code, the Department, through the housing finance division, shall use the housing trust fund to provide Loans, Grants, or other comparable forms of assistance to Units of General Local Government, Public Housing Authorities, for-profit entities, Nonprofit organizations, and Income-Eligible individuals, families, and Households to finance, acquire, Rehabilitate, and Develop decent, safe, and sanitary housing. In each biennium the first $2.6 million available through the housing trust fund for Loans, Grants, or other comparable forms of assistance shall be set aside and made available exclusively for Units of General Local Government, Public Housing Authorities, and Nonprofit organizations. Any additional funds may also be made available to for-profit organizations so long as at least 45 percent of available funds in excess of the first $2.6 million shall be made available to Nonprofit organizations for the purpose of acquiring, Rehabilitating, and Developing decent, safe, and sanitary housing. The remaining portion shall be competed for by nonprofit organizations, for-profit organizations, and other eligible entities. Notwithstanding any other section of this chapter, but subject to the limitations in §2306.251(c), the Department may also use the fund to acquire property to endow the fund.

(b) Use of the fund is limited to providing:

(1) assistance for individuals and families of low and very low income;

(2) technical assistance and capacity building to nonprofit organizations engaged in developing housing for individuals and families of low and very low income; and

(3) security for repayment of revenue bonds issued to finance housing for individuals and families of low and very low income.

(c) Pursuant to §2306.754, Applicants combining other Housing Trust Fund funding with the Texas Bootstrap Loan Program funds must limit total Department loans to $30,000.

§51.18. General Contract Administration.

All Administrators and Development Owners must use the forms provided on the Department's website and comply with the Department's procedural and documentation requirements as outlined in the Program Manual and in this section including:

(1) Contract must be signed and executed by all appropriate authorized parties.

(2) Attend training as required by the Department.

(3) Develop and comply with written procurement selection criteria and committees.

(4) Procure consultants, if applicable. Consultants may not participate in or direct any part of the process for procuring consultants.

(5) Complete all applicable Department Contract System access request forms and requirements.

(6) Perform Loan closing, if required, prior to performing any construction activities, including demolition.

(7) Develop and comply with written accounting, reporting, filing, and documentation procedures.

(8) Develop and comply with written applicant intake and selection criteria and ensure program eligibility which must include, but is not limited to:

(A) Homeownership, if applicable;

(B) Income eligibility;

(C) Assisted Households must be located within the Administrator's Service Area, as defined by the Contract;

(D) Property taxes are current, if applicable; and

(E) Assist Special Needs Households, if applicable.

(9) Develop and comply with affirmative marketing procedures.

(10) Complete applicant intake and applicant selection. Notify each applicant Household in writing of either acceptance or denial of assistance within sixty (60) days following receipt of the intake application.

(11) To ensure compliance with the Texas Comptroller of Public Accounts requirements, Contract Administrators are required to ensure the applicant Household does not owe a debt to the State of Texas including tax liens, child support liens, or student loan delinquencies.

(12) Ensure that no Conflict of Interest exists between Households to be assisted and Persons designated to receive or assist with the application intake process.

(13) Document and verify all income and asset eligibility requirements for the Household to be assisted.

(14) Ensure compliance with applicable audit certification requirements.

(15) Ensure that the demolition and removal of all dilapidated units on the lot occurs prior to the Household's occupancy of the Newly Constructed or Rehabilitated housing unit.

(16) Ensure and verify that each building construction contractor performing activities in the amount of $10,000 or more under the Contract is registered and maintains good standing with the Texas Residential Construction Commission in accordance with Chapters 401 and 416 of the Texas Property Code.

(17) Ensure and verify that each housing unit being rehabilitated in the amount of $10,000 or more under the Contract is registered with the Texas Residential Construction Commission in accordance with §426.003 of the Texas Property Code.

(18) Provide building construction contractor oversight and ensure builder's risk coverage is provided.

(19) Ensure that the demolition of any housing unit does not occur less than six (6) months prior to the Contract end date.

(20) Ensure compliance with applicable construction or property standards and lead-based paint requirements.

(21) Conduct appropriate property inspections and documentation in accordance with applicable program requirements. Ensure compliance with the Texas Residential Construction Commission inspection requirements under Title 16 of the Texas Property Code.

(22) Submit required documentation and electronic requests for Project setups and disbursement requests to the Department.

(23) Submit support documentation for Project setups and disbursement requests within thirty (30) days of electronic submission to the Department.

(24) Submit all Project setups and support documentation for Households to be assisted no later than ninety (90) days prior to the Contract end date. In the event that a loan closing is required for single family Rehabilitation or Reconstruction, non-development activities, all Project setups and support documentation must be submitted no later than one hundred eighty (180) days prior to the Contract end date.

(25) Submit required documentation for Project completion reports and certificate of Contract Completion no later than sixty (60) days from the Contract end date.

(26) Complete the terms of the Contract.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806195
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

The Texas Racing Commission adopts amendments to the following rules without changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4957): §§309.1, 309.7, 309.9, 309.113, 309.114, 309.115, 309.117, 309.120, 309.123, 309.250, 309.253, 309.254, 309.296, and 309.305.

The Commission adopts amendments to the following rules with changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4957): §§309.103, 309.116, 309.118, 309.294, 309.309, 309.311, 309.312, and 309.314.

The Commission adopts new rule §309.168 with changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4957).

The Commission adopts the repeal of §309.251 and §309.252 and adopts new §309.255 and §309.317 without changes to the proposed text as published in the June 27, 2008, issue of the *Texas Register* (33 TexReg 4957). The rules are adopted in conjunction with the Commission's rule review of Chapter 309 pursuant to Texas Government Code §2001.039. Notice of this rule review was published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 289).

The sections relate to: (1) racetrack licenses, including their duration, the application fees, and the grounds for denying, suspending, or revoking a racetrack license; (2) racetrack operations, including construction plans, design and maintenance, accessibility and restroom standards, mandatory refreshments, complaints, first aid, regulatory office space and equipment, parking, internal communications system, and hazardous weather procedures; (3) horse racetrack requirements, including the test barn, postmortem area, equine ambulance, starting crew, and the official program; and (4) greyhound racetrack requirements, including the starting boxes, lockout kennel, kennel compound, and the turnout pens. The repealed sections relate to the isolation and treatment areas at a horse racetrack. The new sections relate to the chase vehicle at a horse racetrack and to maintenance personnel at a greyhound racetrack.

The amendment to §309.1 clarifies that the Commission may suspend or revoke a license, and that an association may surrender a license by agreement with the Commission.

The amendment to §309.7 more directly correlates the application fee for a racetrack license to the actual costs of processing the application. While the change increases the initial processing charge for a racetrack license, it also provides that the Commission will only charge for the actual costs of processing the application. Any portion of the processing charge that exceeds the actual administrative costs will be reimbursed to the applicant, and any deficit will be billed to the applicant. The change also establishes the application fees for a greyhound racetrack license.

The amendment to §309.9 clarifies the grounds for denying, suspending or revoking a racetrack license by incorporating several grounds that exist in the Texas Racing Act but are not currently listed in the rule. These include: habitual alcohol abuse or the use of controlled substances; the improper use of a license, credential or identification card; a determination by the Commission that an applicant or licensee is unqualified to perform the duties of a licensee; or a determination by the Commission that an applicant or licensee is not of good moral character or that the person's reputation as a peaceable, law-abiding citizen is bad. The change also clarifies that it is a ground for denying, suspending

or revoking a racetrack license that the person owns or would own more than a five percent interest in more than three Texas racetrack licenses, and that the prohibition under §6.06(h) of the Texas Racing Act attaches to each license regardless of whether the physical racetrack facilities for a particular license have been constructed.

The amendment to §309.103 increases the Commission's ability to oversee the construction of three new racetracks in the next 18 months and the ability of the executive secretary to oversee construction and remodeling at existing racetracks.

The amendment to §309.113 corrects an out-of-date reference in the rules. The state's accessibility standards for disabled persons have been codified in Chapter 469 of the Texas Government Code.

The amendment to §309.114 clarifies that the requirement to provide adequate restrooms on association grounds includes those areas that are within the restricted area of the enclosure.

The amendment to §309.115 clarifies that an association must provide adequate free drinking water to both patrons and licensees.

The amendment to §309.116 increases accountability and responsiveness to complaints by expanding the circumstances under which an association must notify the executive secretary of a complaint. The change requires an association to report complaints regarding: violations of ordinances or statutes; accidents or injuries; and unsafe or unsanitary conditions. The change also clarifies that an association's responsibility to respond to complaints is independent of the association's responsibility to notify the executive secretary of the complaint.

The amendment to §309.117 improves safety by defining the minimum qualifications for personnel staffing the first aid room, and by requiring a Class 1 or 2 racetrack to provide a properly certified MICU ambulance anytime it is conducting racing.

The amendment to §309.118 updates the physical, electrical and communications requirements for regulatory office space and equipment.

The amendment to §309.120 improves safety by requiring that the association's parking lot for licensees be lighted.

The amendment to §309.123 updates the requirements for an association's internal communications system.

New §309.168 improves safety by requiring associations to establish and implement approved procedures for protecting race participants, licensees, employees, and patrons during hazardous weather.

The amendment to §309.250 updates the physical and security requirements for the test barn.

The repeal of §309.251 removes the unnecessary requirement for an isolation area; current practice is that any horse with a communicable disease is relocated to a farm or facility off the track.

The repeal of §309.252 removes the unnecessary requirement for a treatment area; current practice is that any horse requiring emergency care is relocated to a properly equipped veterinary clinic.

The amendment to §309.253 removes the unnecessary requirement that the postmortem area have a locked storage area.

The amendment to §309.254 updates the equine ambulance requirements.

New §309.255 improves safety by defining the minimum standards for the chase vehicle.

The amendment to §309.294 improves safety by distinguishing among the breeds when specifying the number of assistant starters that an association shall provide for each horse to start in a race.

The amendment to §309.296 improves wagering integrity by requiring horse racing associations to list in the official program the names of the lessee and lessor of a leased race animal and the city and state of each horse's owner or designated representative.

The amendment to §309.305 deletes a requirement for maintenance personnel at a greyhound racetrack; the requirement for maintenance personnel is being separately addressed in proposed new §309.317.

The amendment to §309.309 provides additional flexibility to greyhound associations in enabling trainers to view the greyhounds in a lockout kennel.

The amendment to §309.311 clarifies the circumstances under which a greyhound association must provide a separate kennel building to accommodate greyhounds and trainers participating in stakes races.

The amendment to §309.312 addresses the need for the sand in the turnout pen to be sanitary and sufficiently deep, while providing flexibility to the Commission and the associations in addressing each racetrack's differing schedules and specific needs.

The amendment to §309.314 improves safety for the greyhounds in the sprint paths by requiring the association to place a highly visible material at both ends of each path.

New §309.317 improves safety for the greyhounds by requiring an association to have a person present during racing and schooling who is qualified to maintain the starting boxes, racing surface, and track equipment.

The Commission received the following comments regarding the rules.

Section 309.1: The Commission received no comments regarding the adoption of this rule.

Section 309.7: Retama Park agreed in principle with the changes, but suggested lowering the application fee to $25,000 for uncontested cases. Trinity Meadows stated that the fee increase was excessive. The Commission disagrees that the fee increase was excessive because the amended rule provides for the reimbursement of the processing fee to the extent that it exceeds the agency's actual cost.

Section 309.9: The Commission received no comments regarding the adoption of this amendment.

Section 309.103: Retama Park and Sam Houston Race Park observed that increasing the notice period from 30 days to 60 days would adversely affect the operations of the racetrack associations, particularly for smaller construction projects. Consequently, the Commission considered a variety of options, including creating different requirements for new and existing tracks to submit construction plans and defining the term "construction project." Ultimately, the Commission decided to keep the current rule's 30 day requirement, but also to amend the rule to authorize

the executive secretary to take an additional 30 days to review a construction plan before notifying the association of his or her determination on whether the construction project complies with agency rules.

Section 309.113: The Commission received no comments regarding the adoption of this rule.

Section 309.114: Retama Park disagreed with language requiring conformance with the state's regulations under 25 TAC Chapter 265. The Commission disagreed and adopted the amendment due to the importance of providing functional and sanitary restrooms for the use of licensees.

Section 309.115: Retama Park and Sam Houston Race Park objected to the rule change if it required the provision of water fountains in the secured backside area of a racetrack. The Commission disagreed and adopted the amendment due to the importance of providing an adequate supply of drinking water for both patrons and licensees.

Section 309.116: The racing associations objected that the proposal was too burdensome due to the requirement that the associations report all complaints regardless of whether they were verbal or written. The associations objected that in order to report verbal complaints the Commission would have to further define what constituted a complaint. In addition, the associations would have to create additional databases to track the complaints. In response, the Commission revised the amendment to limit additional reporting requirements to written complaints in three new categories: alleged violations of ordinances or statutes; accidents or injuries; and unsafe or unsanitary conditions.

Section 309.117: The Commission received comments from the Jockey's Guild and Retama Park in support of the rule amendment.

Section 309.118: Retama Park and Sam Houston Race Park disagreed with the amendments to the rule and felt the changes were overly broad or unclear. In response, the Commission revised the amendment to delete the requirement that associations provide "private" phone lines. The amendment retains the changes regarding the physical, electrical and other communications requirements for regulatory office space and equipment.

Section 309.120: Retama Park and Sam Houston Race Park believed the rule was unclear. Staff clarified that most of the racetrack associations are already in compliance with the proposed requirement. Those tracks that are not currently in compliance stated that it would not be a burden to comply, therefore the Commission made no changes to the amendment.

Section 309.123: The Commission received a comment from Retama Park in support of the amendment.

Section 309.168: Retama Park and Sam Houston Race Park commented that the proposed amendment does not adequately address the need for stewards and judges to consult with association management before making the decision to suspend live racing. The associations also commented that the rule is overly strict in that it does not leave flexibility for an association to continue live racing when the weather is not as bad as the National Weather Service indicates or when only a few additional minutes will allow a race to begin and finish. The associations also observed that any suspension of live racing lasting an hour will result in almost all patrons leaving the track. The Jockey's Guild commented in support of the rule proposal. The Commission responded by revising the amendment to provide an opportunity for racetrack management to consult with the stewards or judges about hazardous weather. The revised amendment specifies two hazardous weather scenarios under which live racing must be suspended. It also requires associations to develop and implement a plan to promptly notify individuals on association grounds of hazardous weather and to assist those individuals in seeking protection.

Section 309.250: The associations' comments requested clarification as to whether each active association's facility complies with the amendment. Staff confirmed that the existing tracks are currently in compliance. The Commission made no changes to the amendment.

Section 309.251: The Commission received a comment from Retama Park supporting the repeal of this rule.

Section 309.252: The Commission received a comment from Retama Park supporting the repeal of this rule.

Section 309.253: The Commission received a comment from Retama Park in support of the amendment.

Section 309.254: The Commission received a comment from Retama Park in support of the amendment.

Section 309.255: The Commission received a comment from Retama Park in support of the new rule.

Section 309.294: Retama Park and Sam Houston Race Park disagreed with requiring one starter for every horse due to cost. The Jockey's Guild agreed with the rule proposal. One horseman commented in favor of the proposed rule, stating he would rather have a consistent rule requiring an assistant starter for every starter in a race, regardless of breed. In response, the Commission modified the amendment to require an association to provide one assistant starter for each Quarter Horse, Paint Horse, or Appaloosa to start in a race, and maintains the current "sufficient number of assistant starters" standard for Thoroughbred or Arabian races.

Section 309.296: Retama Park agreed with the requirement to list the names of the lessor and lessee but disagreed with listing the owners' or designated representatives' city and state of residence in the official program. Some associations observed that the changes would require minimal costs related to software and programming changes. In response, staff observed that the specific scenario that prompted the requested change--the fact that at one racetrack there were two owners with the same name and the wrong owner received purse money from a race--could recur without the amendment. The Commission adopted the proposal without changes.

Section 309.305: The Commission received a comment from the Texas Greyhound Association in support of the amendment.

Section 309.309: The Texas Greyhound Association (TGA) asked that the associations also provide the trainers with a view of the greyhounds as they are loaded into the starting boxes. The racing associations did not object to TGA's request. The Commission revised the amendment to require that, in addition to a method for monitoring the interior of the greyhound lockout kennel, there also be a way to monitor the back of the starting box.

Section 309.311: The Texas Greyhound Association disagreed with eliminating a separate kennel for stakes races. TGA commented that without a stakes kennel, a shipped-in greyhound would be housed with an existing contracted kennel that may have competing entries of its own. In response the Commission

revised the amendment to require an association to provide a separate kennel building for stakes races only if all of the existing kennel buildings have been contracted out. If a regular kennel building is not under contract, the association may use that building to house shipped-in stakes greyhounds and their trainers.

Section 309.312: The Texas Greyhound Association asked that the rule address its concerns about sanitary maintenance in the turnout pens as well as the fact that each racetrack has different drainage systems. The greyhound racetracks observed that the current rule, which requires that pens have a minimum of 12 inches of sand that is replaced every three months, creates significant expense for the racetracks and inconvenience to the kennels. In response, the Commission changed the amendment to clarify that an association must ensure that each kennel building has an adequate drainage system as well as adequate sand or comparable material to keep a pen in a sanitary state. The change adds the requirement that the sand and drainage system are subject to periodic inspection by the commission veterinarian.

Section 309.314: The Texas Greyhound Association commented that the proposal to require a sprint path for every five kennels instead of every three kennels would not provide an adequate number of paths if all the kennel buildings at a track reached full occupancy. In response, the Commission revised the amendment to require a greyhound racetrack to provide a sprint path for every three occupied kennel buildings.

Section 309.317: The Commission received a comment from the Texas Greyhound Association in support of the new rule.

SUBCHAPTER A. RACETRACK LICENSES

16 TAC §§309.1, 309.7, 309.9

The amendments are adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Civil Statutes, Article 179e.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805991
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

SUBCHAPTER B. OPERATIONS OF RACETRACKS
DIVISION 1. GENERAL PROVISIONS

16 TAC §309.103

The amendment is adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Civil Statutes, Article 179e.

§309.103. Construction and Renovation of Racetrack Facilities.

(a) Definitions. In this section:

(1) "Racetrack construction project" means:

(A) the construction of a new racetrack facility by an association; or

(B) the renovation of an existing racetrack facility by an association that affects a specific requirement in the Rules.

(2) "Construction plan" means architectural drawings, engineering plans, or other documents that describe a proposed racetrack construction project.

(b) Review of construction plan.

(1) At least 30 days before the date an association proposes to start a racetrack construction project, the association shall submit a construction plan to the executive secretary. The construction plan must be in sufficient detail for the executive secretary to determine whether the proposed project complies with all applicable Commission rules.

(2) After reviewing the construction plan, if the executive secretary determines the racetrack construction project will comply with the Rules, the executive secretary shall approve the project. If the executive secretary determines the project will not comply with the Rules, the executive secretary shall notify the association in writing and specifically describe the aspect of the project that does not comply. The executive secretary may require an additional 30 days to review the construction plan before notifying the association under this paragraph of his/her determination.

(3) If the project is not approved, the association may not start construction until the necessary corrections are made to the construction plan for the project to comply with the Rules and the executive secretary has approved the corrections.

(c) Monitoring construction.

(1) At least monthly during a racetrack construction project, an association shall file a written report with the executive secretary on the progress of the project.

(2) The executive secretary or his/her designee may periodically inspect the project to ensure ongoing compliance with the Rules.

(3) An association shall maintain records of the racetrack construction project, including a copy of all change orders made during the project. Records shall be maintained under this paragraph for at least twelve months after the end of the project and are subject to review by the executive secretary at any time.

(d) Changes to construction plan.

(1) If after construction starts an association changes the construction plan in a manner that affects a requirement in the Rules, the association shall notify the executive secretary in writing. The association shall state the reason for the change.

(2) After reviewing the change if the executive secretary determines the change complies with the Rules, the executive secretary shall approve the change. If the executive secretary determines the change does not comply with the Rules, the executive secretary shall notify the association in writing and specifically state why the change does not comply.

(3) If the change is not approved, the association may not continue on any aspect of the project that is affected by the change until the necessary corrections are made and the executive secretary has approved the corrections.

(e) Final approval.

(1) After a racetrack construction project is complete, the executive secretary or his/her designee shall inspect the newly constructed or renovated portion of the racetrack facility to determine whether the facility complies with the Rules.

(2) If the executive secretary determines the facility complies with the Rules, the executive secretary shall approve the facility for use. If the executive secretary determines the facility does not comply with the Rules, the executive secretary shall issue a notice of violation to the association. The notice of violation must specify the specific rule violated. The notice of violation must include an order to remedy the violation and state a deadline for the remediation.

(3) The association may not use the newly constructed or renovated portion of the racetrack facility for racing, training, or wagering purposes until the executive secretary has determined that the facility complies with the Rules.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805992
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

DIVISION 2. FACILITIES AND EQUIPMENT

16 TAC §§309.113 - 309.118, 309.120, 309.123

The amendments are adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Civil Statutes, Article 179e.

§309.116. Complaints.

(a) An association shall provide an office to handle complaints.

(b) An association shall respond promptly to all complaints by patrons and licensees.

(c) An association shall promptly notify the executive secretary of:

(1) a complaint regarding an alleged violation of the Act or a rule of the Commission; or

(2) any written complaint regarding:

(A) an alleged violation of ordinances or statutes;

(B) accidents or injuries; or

(C) unsafe or unsanitary conditions for patrons, licensees or race animals.

(d) An association's responsibility to respond to complaints under subsection (b) of this section is independent of the association's responsibility to notify the executive secretary under subsection (c) of this section.

(e) An association shall maintain a record of each complaint received regarding the association facilities, each complaint received under subsection (c) of this section, and the action taken by the association regarding the complaint. The association shall maintain each record for two years after the complaint is received.

§309.118. Regulatory Office Space and Equipment.

(a) An association shall provide adequate office space for the use of the stewards or racing judges, occupational licensing personnel, the Commission's investigative unit, the pari-mutuel auditing staff and the staff employed by the comptroller, the Commission veterinary and drug testing staff, and the Department of Public Safety. The location and size of the office space, furnishings, electrical outlets, telephone lines, television monitors, and equipment required under this section must be approved by the executive secretary.

(b) An association shall provide a place for posting notices from the Commission that is easily viewed by patrons and licensees. An association shall promptly post all notices received from the Commission.

(c) The office for the stewards or racing judges must be furnished and be equipped with at least one telephone line.

(d) The office for the Commission's investigative unit must be located adjacent to the occupational licensing office and the Department of Public Safety office. The office must be furnished and be equipped with:

(1) a telephone line; and

(2) a television monitor to monitor the events on the racetrack.

(e) The office space for occupational licensing personnel must consist of two rooms, one of which must be private. The room that is not private must be equipped with:

(1) a double counter;

(2) a fingerprint work area;

(3) a television monitor;

(4) a telephone line;

(5) a dedicated telephone line to be used by a fax machine;

(6) a dedicated telephone line to be used by a credit card machine and that does not require a code to access an outside line;

(7) the appropriate number of desks, file cabinets and chairs;

(8) locking file cabinets or other locking storage facilities adequate in size and number to store the licensing files and checks; and

(9) power outlets adequate in number and capacity to operate all of the Commission's electrical equipment located within the occupational licensing office.

(f) The office space for the pari-mutuel auditing staff and the staff employed by the comptroller must:

(1) provide an unrestricted view of the pari-mutuel computers;

(2) permit unrestricted entry to the totalisator facilities;

(3) be furnished with the appropriate number of desks and chairs;

(4) include locking file cabinets in the work area or other locking storage facilities, in which the auditors may store computer printouts or magnetic tape and that are large enough to store all state-controlled wagering records for the association that are needed for audits by the Commission or the comptroller;

(5) include a video and audio device that enables the auditors to receive, simultaneously with the patrons, the same information that the patrons receive;

(6) have at least six power outlets to operate electrical equipment;

(7) include a telephone line;

(8) if requested by the Commission or the comptroller, have an additional voice line to support dial-up capabilities for a personal computer; and

(9) a dedicated telephone line to be used by a fax machine.

(g) Commission Veterinarian's Office.

(1) An association shall provide a secured office area for the Commission veterinarians.

(2) The office must be adjacent to the drug testing area and the pre-race holding area.

(3) The office must consist of at least two rooms, one of which must be private.

(4) At horse racetracks, the office must be constructed to allow a view of each of the adjacent areas.

(5) The office must be equipped with:

(A) a sink with hot and cold water built into a counter of a size required by the executive secretary;

(B) desks and filing cabinets, in numbers as required by the executive secretary, equipped with locks;

(C) at horse racetracks, refrigerators and freezers, in sizes and numbers as required by the executive secretary, equipped with locks;

(D) at greyhound racetracks, a freezer in a size as required by the executive secretary;

(E) a storage area, of a size required by the executive secretary, with a door approved by the executive secretary.

(F) telephone lines with telephones as required by the executive secretary;

(G) television monitors as required by the executive secretary; and

(H) at horse racetracks, a freestanding counter of a size required by the executive secretary.

(6) All locks must be of a type approved by the executive secretary.

(h) An association shall provide a private telephone line for the exclusive use of the Department of Public Safety in the department's office. An association shall provide, inside the enclosure in close proximity to the department's office, adequate reserved parking for the Department of Public Safety personnel.

(i) All telephone lines provided under this section must:

(1) be assigned a unique telephone number that is directly accessible by outside callers;

(2) if requested by the executive secretary, be listed in the governmental section of the local telephone directory; and

(3) if requested by the executive secretary, be listed on the association's website.

(j) An association shall provide at its expense computer lines, phone equipment, and any necessary voice and data network cabling in the offices of the state regulatory and law enforcement personnel as prescribed by the executive secretary. In addition, the association shall reimburse the Commission for the costs of any network or data circuits installed or caused to be installed by the Commission at the association's location.

(k) All costs of telecommunications for regulatory and law enforcement personnel provided under this section shall be paid by the association and the telecommunications service may not be interrupted at any time. To ensure minimal disruption to the Commission's regulatory functions, the association shall ensure the Commission staff has twenty-four hour access and keys to any telecommunications rooms serving regulatory and law enforcement personnel as prescribed by the executive secretary.

(l) An association shall provide to the Commission a number of keys to the Commission offices as approved by the executive secretary.

(m) An association shall provide, inside the enclosure and in close proximity to the Commission's regulatory offices, adequate reserved parking for Commission staff.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805994
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

DIVISION 3. OPERATIONS

16 TAC §309.168

The new rule is adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and

§11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The new rule implements Texas Civil Statutes, Article 179e.

§309.168. Hazardous Weather.

(a) An association shall establish procedures for ensuring that appropriate management personnel are available to consult with the stewards or judges about hazardous weather.

(b) After consultation with association management, the stewards or judges shall suspend live racing when hazardous weather occurs. The suspension of live racing shall take place:

(1) before lightning-producing thunderstorms have moved to within 6 miles of the facility; or

(2) whenever the facility is within the affected area of a severe thunderstorm or tornado warning as announced by the National Weather Service.

(c) The association shall develop and implement a plan to promptly notify individuals on association grounds of hazardous weather and assist them in seeking protection.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805995
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

SUBCHAPTER C. HORSE RACETRACKS
DIVISION 2. FACILITIES FOR HORSES

16 TAC §§309.250, 309.253 - 309.255

The amendments and new rule are adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Civil Statutes, Article 179e.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805997
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

16 TAC §309.251, §309.252

The repeals are adopted under Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The repeal of these rules implement Texas Civil Statutes, Article 179e.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200805999
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

DIVISION 4. OPERATIONS

16 TAC §309.294, §309.296

The amendments are adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Civil Statutes, Article 179e.

§309.294. Starting Crew.

An association shall provide a starting crew for each race to assist in handling the horses in the starting gates. The association shall provide:

(1) one assistant starter for each Quarter Horse, Paint Horse, or Appaloosa to start in a race; and

(2) a sufficient number of assistant starters for the number of Thoroughbred or Arabian horses to start in a race.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806000

Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

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SUBCHAPTER D. GREYHOUND RACETRACKS

DIVISION 1. FACILITIES AND EQUIPMENT

16 TAC §§309.305, 309.309, 309.311, 309.312, 309.314, 309.317

The amendments and new rule are adopted under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse or greyhound racing involving wagering and other rules to administer the Texas Racing Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

The amendments implement Texas Civil Statutes, Article 179e.

§309.309. Lockout Kennel.

(a) An association shall provide a lockout kennel that:

(1) is soundproof, to prevent noise from disturbing the greyhounds that are waiting to race;

(2) is air-conditioned sufficiently to maintain a temperature between 68 and 75 degrees Fahrenheit; and

(3) has sealed or ceramic floors and walls to permit proper cleaning and disinfection.

(b) Each crate located in the lockout kennel must:

(1) be constructed of a smooth, hard material, such as stainless steel or tile;

(2) be at least three feet wide, four feet deep, and four feet high;

(3) be constructed so that the crate floor is not in direct contact with the concrete surface;

(4) be located on the floor level to prevent greyhounds from sustaining jumping injuries; and

(5) have a drop latch on the door.

(c) An association shall provide a comfortable room near the lockout kennel in which a kennel owner or trainer may view the race. The association shall also provide kennel owners and trainers a method, as approved by the executive secretary, for monitoring the interior of the lockout kennel and the back of the starting box and view the interior of the lockout kennel.

(d) An association shall provide an area adjacent to the lockout kennel in which a greyhound can wait to weigh-in and cool down following a race or wait for schooling races. The area must:

(1) be large enough to comfortably accommodate 100 greyhounds and the leadouts and trainers;

(2) be adequately shaded and fenced to shield the greyhounds' view of the racetrack;

(3) have eight water faucets with hoses;

(4) have a disinfected dipping vat, approved by the Commission veterinarian, through which a greyhound may be walked to assist in cooling down following a race; and

(5) have adequate drainage.

§309.311. Kennel Compound.

(a) An association shall provide in the kennel compound area:

(1) not more than 18 separate kennel buildings for the kennel owners under contract with the association; and

(2) if the association has contracted with kennel owners to fill all of the kennel buildings, a separate kennel building for greyhounds that will be participating in stake races, designed to accommodate several trainers and their greyhounds.

(b) Each kennel building must be located at least 100 yards from the public area of the enclosure and at least 150 yards from the nearest racetrack surface.

(c) The kennel buildings must be spaced at least 100 feet apart to ensure proper air circulation and to minimize fire hazards.

(d) The association shall provide at its expense a continuous security system for the kennel compound area approved by the executive secretary. The security system must include floodlights to adequately illuminate the kennel compound at night.

§309.312. Turnout Pens.

(a) Each kennel building must have at least three turnout pens. Each pen must:

(1) be free of any obstructions;

(2) measure at least 20 feet by 40 feet;

(3) have gates that connect to the other pens;

(4) have at least a 15 foot overhang from the building;

(5) have at least two halogen lights of 300 watts each located at each end;

(6) be surrounded by a fence at least six feet high, of which the lower 32 inches is constructed of cinder block or a comparable material and the remaining portion is constructed of chain link;

(7) have a gate adequate to accommodate a vehicle to remove the sand and deposit new sand;

(8) have adequate water faucets;

(9) have an adequate drainage system; and

(10) have sand or a comparable material of a depth adequate to be maintained in a sanitary state.

(b) The sand and drainage system are subject to periodic inspection by the commission veterinarian.

§309.314. Sprint Path.

An association shall provide, for every three occupied kennel buildings, a sprint path located adjacent to the kennel compound area. The sprint path must:

(1) be at least 30 feet wide and 400 feet long;

(2) be divided down the middle by a chain link fence;

(3) have at least one gate on each end for entering or exiting with greyhounds;

(4) have a driveway along the side;

(5) have a base and surface comparable to the racetrack surface;

(6) have a highly visible material at both ends; and

(7) be maintained by the association at all times.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806001
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: December 7, 2008
Proposal publication date: June 27, 2008
For further information, please call: (512) 833-6699

TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 227. PROVISIONS FOR EDUCATOR PREPARATION CANDIDATES

The State Board for Educator Certification (SBEC) adopts amendments to §§227.1, 227.10, and 227.20, new §227.5 and §227.15, and the repeal of §§227.30, 227.32, 227.34, 227.36, 227.38, 227.40, 227.42, 227.44, 227.46, 227.48, 227.50, 227.52, 227.54, 227.56, and 227.58, concerning provisions for educator preparation candidates. The amendment to §227.1, new §227.5 and §227.15, and the repeal of §§227.30, 227.32, 227.34, 227.36, 227.38, 227.40, 227.42, 227.44, 227.46, 227.48, 227.50, 227.52, 227.54, 227.56, and 227.58, are adopted without changes to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6692) and will not be republished. The amendments to §227.10 and §227.20 are adopted with changes to the proposed text published in the August 22, 2008, issue. The adopted amendments, new sections, and repeals update the rules to reflect current law, add minimum standards for all educator preparation programs, while still allowing flexibility, and ensure consistency among educator preparation programs in the state. The adopted amendments, new sections, and repeals result from the SBEC's rule review conducted in accordance with Texas Government Code, §2001.039.

The SBEC rules in 19 TAC Chapter 227 are currently organized as follows: Subchapter A, Admission to an Educator Preparation Program, and Subchapter B, Teach for Texas Pilot Program. These subchapters establish requirements for admission to an educator preparation program and the Teach for Texas Pilot Program. The Texas Education Code (TEC), §21.049, authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs. The TEC, §21.031, states that the SBEC is established to oversee all aspects of the certification and continuing education of public school educators, and to ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state.

The Texas Education Agency (TEA) staff presented to the SBEC draft proposed changes to 19 TAC Chapter 227 at the March 2008 meeting and at the May 2008 meeting. The SBEC took action at the July 2008 meeting to approve proposed revisions to 19 TAC Chapter 227 for filing as proposed with the *Texas Register.*

Following the public comment period, the SBEC took action in October 2008 to approve for adoption, subject to State Board of Education (SBOE) review, the proposed revisions to 19 TAC Chapter 227 with additional changes to 19 TAC §227.10, Admission Criteria, and §227.20, Implementation Date.

The adopted revisions to 19 TAC Chapter 227 update the rules to reflect current law and provide minimum standards with flexibility for all educator program candidates. These adopted revisions reflect discussions held during the January 9, 2008, Educator Preparation Advisory Committee meeting and the January 24, 2008, and June 12, 2008, stakeholder meetings. Additional changes also reflect public input received at the March 2008, May 2008, and July 2008 SBEC meetings and comments received on the rule review of Chapter 227.

General Provisions

Language in §227.1 has been amended in subsection (a) to clarify "candidates for certification" as "educator preparation candidates." Also, in subsection (b) language has been updated to reflect TEC, §22.083.

Definitions

Adopted new §227.5 adds definitions for words and terms used in Chapter 227.

Language has been added in adopted new §227.5(3), (6), and (9) to specify that clinical teaching, internship, or student teaching will occur at a public school accredited by the TEA or a TEA-recognized private school.

Admission Criteria

The adopted amendment to §227.10 includes amending language in subsection (a) that will ensure that all candidates accepted into an educator preparation program meet the same minimum requirements for admission. Language has been added to specify the minimum requirements for admission to an educator preparation program. Specifically, the adopted amendments, new sections, and repeals will allow an exception from minimum admission criteria for career and technology education certification candidates in subsection (a); add minimum standards for undergraduates in a university educator preparation program in adopted new subsection (a)(1); and add minimum standards for an alternative certification program or post-baccalaureate program in adopted new subsection (a)(2). Subsection (b) has been amended to clarify preparation programs as educator preparation programs. Adopted new subsection (c) specifies that an educator preparation program may not admit a candidate who has either completed another educator preparation program in the same certification field or who has been employed for three years in a public school under a specified certificate. Adopted new subsection (d) provides that the admission criteria for career and technology education candidates are specified in 19 TAC Chapter 230 and Chapter 233. Also, adopted new subsection (e) specifies requirements for educator preparation program candidates who have transcripts from outside the United States.

As a result of public input received at the May 2008 and July 2008 SBEC meetings and a June 12, 2008, stakeholder meeting, language in §227.10 was modified to specify in adopted new subsection (a)(3) a minimum grade point average (GPA) requirement, a provision for an exception to the GPA requirement, and a provision for demonstrating content area competency by having (1) a minimum of 12 semester credit hours in the subject-specific content area, (2) a passing score on an SBEC content area certification examination, or (3) a passing score on a content examination administered by a vendor on the TEA-approved vendor list published by the commissioner of education for the calendar year during which the candidate seeks admission. Language has also been modified in adopted new subsection (a)(3) to allow a candidate to take a content certification examination before graduation or full acceptance into an educator preparation program. In adopted new subsection (a)(5), the requirement of an oral communication skills test has been added because oral communication will not be covered in the basic skills assessment referenced in adopted new subsection (a)(4). In adopted new subsection (a)(6), a screening requirement to determine the educator preparation candidate's appropriateness for the certification sought has been added. In adopted new subsection (c), language has been modified to clarify that an educator preparation program may not admit a candidate who has completed another educator preparation program in the same certification field or a candidate who has been employed for three years in a public school under a permit or probationary certificate as specified in Chapter 232, Subchapter A.

Since published as proposed, language in §227.10 has been amended further to remove the list of regional accrediting agencies recognized by the Texas Higher Education Coordinating Board (THECB) in adopted new subsection (a)(1). The THECB recently recognized additional regional accrediting agencies that were not included in the proposal. By listing the regional accrediting agencies in rule each time the THECB recognizes additional regional accrediting agencies, the rule would need to be amended each time through the rulemaking process to keep the list current.

In addition, language in adopted new subsection (a)(4) has been modified further to specify the use of the Texas Academic Skills Program® (TASP®) or the Texas Higher Education Assessment® (THEA®) or the Texas Success Initiative to demonstrate basic skills in reading, written communication, and mathematics. The TASP® test has been added, in response to testimony given at the July 2008 SBEC meeting, since it was the former name of the THEA®. The SBEC requested at the July 2008 meeting that TEA staff research the validation of the examinations included in the proposal. As a result of the research, TEA staff determined that the THEA® (formerly known as the TASP®) has been validated as a measure of the basic skills needed to be a teacher. In order to provide more flexibility and to further prevent any disparate effect from this requirement, the additional alternative of demonstrating basic skills by any of the alternative methods allowed by the Texas Success Initiative, adopted by the THECB, in the TAC, Title 19, Part 1, Chapter 4, Subchapter C, was added.

Contingency Admission

Adopted new §227.15 provides flexibility to alternative certification program or post-baccalaureate program candidates who are in the final semester of their degree plan and who have met all other program requirements. These program candidates could be admitted into a program to begin training pending degree conferred or having met all degree requirements. The contingency will be valid only for the semester for which the application was submitted.

As a result of public input received at the June 12, 2008, stakeholder meeting, language in adopted new §227.15(b) has been modified to allow a candidate admitted on a contingency basis to be approved to take a certification examination but not be recommended for a probationary certificate until the candidate has been awarded a baccalaureate degree.

Implementation Date

Since published as proposed, language in §227.20 has been modified further to specify an implementation date of January 1, 2009.

Teach for Texas Pilot Program

The rules for the Teach for Texas Pilot Program found in Chapter 227, Subchapter B, are repealed since the program no longer exists.

Technical Changes

Cross references to the SBEC rules have been updated to comply with *Texas Register* formatting requirements.

Regarding procedural and reporting implications for the adopted rule actions, educator preparation programs will be responsible for tracking the admission requirements of educator preparation candidates. The adopted rule actions will not include any additional locally maintained paperwork requirements.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Following the July 2008 SBEC meeting, the proposed revisions to 19 TAC Chapter 227 were filed with the *Texas Register,* initiating the official public comment period. The following comments were received regarding the proposed revisions.

Comment: Legal counsel for A+ Texas Teachers (also known as Texas Teachers for Tomorrow) commented that minimum standardized test scores specified in §227.10 are de facto occupational requirements that will likely disparately impact minorities. In the absence of the required validation study, these requirements cannot be legally adopted, and are subject to legal challenge. The commenter also stated that one solution would be eliminating the required college entrance exam and looking to the degree, the new GPA requirement, and passing of the state's content test for this admission requirement.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to clarify the procedure for demonstrating basic skills. The best measure of the basic skills needed to be a successful educator is a test specifically designed for that purpose. Section 227.10(a)(4) specifies the use of the Texas Academic Skills Program® (TASP®) or the Texas Higher Education Assessment® (THEA®) as a measure of a candidate's basic skills. The THEA® (formerly known as the TASP®) has been validated for the purpose of admission to educator preparation programs. Section 227.10 also provides that in the alternative, a candidate may demonstrate basic skills in reading, written communication, and mathematics by meeting the requirements of the Texas Success Initiative, adopted by the Texas Higher Education Coordi-

nating Board, in the TAC, Title 19, Part 1, Chapter 4, Subchapter C.

Comment: The Texas Classroom Teachers Association (TCTA) commented that the TCTA has both legal and philosophical concerns about the exception to the GPA requirement in §227.10(a)(3). The TCTA commented in support of the proposed minimum standards contained in 19 TAC Chapters 227 and 228 for educator preparation programs overall, however, the TCTA stated that some of the proposed amendments have been "watered down" in the rule development process.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rule as published as proposed. The exception to the GPA requirement is included in §227.10(a)(3)(B) to allow for flexibility and will place the responsibility on the educator preparation program director to ensure that the candidates' work experience is appropriate for the exception.

Comment: Representatives from Texas A&M University-Corpus Christi, The University of Texas at Brownsville, Lamar State College-Orange, Sul Ross State University, Victoria College, Tarleton State University, and ACT, Inc., commented that §227.10(a)(4) should be amended to add the ASSET® and COMPASS® tests to the list of basic skills examinations. A representative of Texas A&M University-Commerce commented that §227.10(a)(4) should be amended to add the COMPASS® test to the list of basic skills examinations.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed in §227.10(a)(4) to allow a candidate to demonstrate basic skills by passing the TASP® test or the THEA® or, in the alternative, by meeting the requirements of the Texas Success Initiative, which includes the ASSET® and COMPASS® tests.

Comment: A representative from Houston Community College commented that §227.10(a)(4) should be amended to add the ASSET® and COMPASS® tests to the list of basic skills examinations.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed in §227.10(a)(4) to allow a candidate to demonstrate basic skills by passing the TASP® test or the THEA® or, in the alternative, by meeting the requirements of the Texas Success Initiative, which includes the ASSET® and COMPASS® tests.

Comment: Legal counsel for A+ Texas Teachers commented that the "contingency admission" in §227.15(a)(1) only allows college seniors in their "last semester" to begin steps to teaching. The commenter stated that this should be expanded to the "last year."

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rule as published as proposed in §227.15(a)(1). The contingency admission provisions are designed only for a candidate who is about to graduate or whose degree is pending.

Comment: Legal counsel for A+ Texas Teachers commented that interns who have already begun teaching in the classroom on a probationary certificate prior to the 2009-2010 school year should explicitly be exempted from having to meet the new requirements before teaching in the classroom. The commenter stated that once an intern has already been teaching in front of a classroom, it would be erroneous to require them to meet additional requirements before being allowed to continue their student teaching for another year.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to specify in §227.20 that the rule revisions to 19 TAC Chapter 227 apply to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009.

Comment: Legal counsel for A+ Texas Teachers commented that candidates who are fully accepted into a program before the rules become effective should be explicitly exempted from having to meet the new admission requirements. The commenter stated that explicit transition language should be adopted.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to specify in §227.20 that the rule revisions to 19 TAC Chapter 227 apply to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009.

Comment: A representative from iteachTexas commented that the implementation date in both Chapters 227 and 228 should be changed and set for "two months from the date of adoption of the rules" to allow programs time to implement the new requirements and not place a significant burden on candidates.

Board Response: The SBEC substantially agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to specify in §227.20 that the rule revisions to 19 TAC Chapter 227 apply to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009. The implementation date is shortly after the rule revisions take effect.

General Comments

Comment: Legal counsel for A+ Texas Teachers commented that "...the proposed rules will instead exacerbate the current teacher shortage, especially in high need areas." The commenter also indicated that the rules implemented as currently written would increase the State's non-compliance with the No Child Left Behind (NCLB) "highly qualified teacher" standards.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. The rule revisions will not exacerbate the teacher shortage since most individuals who are committed to teaching will meet the minimum standards. In addition, the rules give programs the flexibility to deal with exceptional situations. The provisions for the Texas Success Initiative and the GPA exception in 19 TAC §227.10 should ensure that qualified candidates are accepted into educator preparation programs. Also, the use of the certification content examination as an educator preparation program entry requirement should increase the State's compliance with the NCLB "highly qualified teacher" status, since more candidates will have already met the requirement prior to entering the classroom and will, therefore, reflect on the campus report early in the school year.

Comment: Legal counsel for A+ Texas Teachers commented that the imposition of new state-wide program admission standards will have a significant disparate impact on the ability of minority certification program applicants to enter certification programs and commented that the standards have not been validated in violation of the Title VI of the Civil Rights Act of 1964.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. TEA staff researched the proposed basic skills examinations to ensure that the TASP® or THEA® have been validated for the purpose of entering an educator preparation program in Texas. Data from the test vendor show that the primary basic skills examinations adopted by the SBEC, the THEA® (formerly known as the TASP®), has been validated for this purpose. At the same time, use of the Texas Success Initiative, in the alternative, provides more flexibility and protects against disparate impact by allowing other alternative tests and remediation that have been determined to be the equivalent of the TASP® or THEA®.

Comment: Legal counsel for A+ Texas Teachers commented that the imposition of "hard admission requirements," especially those imposed upon alternative certification programs, violates the guidance published in the 2007 State Teacher Policy Yearbook-Progress on Teacher Quality by the National Council on Teacher Quality (NCTQ), which calls for more flexibility, not less.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. The admission criteria were not considered hard requirements because the majority of the programs in Texas had already been implementing the proposed standards and the criteria recommended by staff are those recommended by the NCTQ. In addition, the rules give programs the flexibility to deal with exceptional situations. The rules in 19 TAC Chapter 227 set minimum requirements as recommended by the NCTQ, while still providing substantial flexibility. Texas received a "D" on the last NCTQ report due to the lack of a basic skills requirement.

Comment: Legal counsel for A+ Texas Teachers commented that SBEC has not followed its own direction or that of the executive and legislative branches and that "most" of the proposed rules go well beyond the "minimum" standards and restrict flexibility and creativity in the alternative route. The commenter further stated that the rules add unjustified barriers to entry for newly qualified candidates.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. Flexibility and creativity are desirable in the design of programs; however, the TEA staff has identified the need through the State Auditor's report issued June 2008 and program site visits to add minimum standards and ensure consistency for all educator preparation programs in the state. The rules in 19 TAC Chapter 227 set minimum requirements while still providing substantial flexibility.

The SBOE took no action on the review of the amendments to 19 TAC §§227.1, 227.10, and 227.20, new §227.5 and §227.15, and the repeal of §§227.30, 227.32, 227.34, 227.36, 227.38, 227.40, 227.42, 227.44, 227.46, 227.48, 227.50, 227.52, 227.54, 227.56, and 227.58 at the November 21, 2008, SBOE meeting.

19 TAC §§227.1, 227.5, 227.10, 227.15, 227.20

The amendments and new sections are adopted under the TEC, §21.031, which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; §21.044, which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on information that is disaggregated with respect to sex and ethnicity and that includes results of the certification examinations prescribed under TEC, §21.048(a), and performance based on the appraisal system for beginning teachers adopted by the SBEC; §21.049, which authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs; §21.050(a), which specifies that a person who applies for a teaching certificate for which SBEC rules require a bachelor's degree must possess a bachelor's degree received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to the curriculum as prescribed under TEC, Chapter 28, Subchapter A; and §21.051, which authorizes the SBEC to propose rules providing flexible options for persons for any field experience or internship required for certification.

The adopted amendments and new sections implement the TEC, §§21.031; 21.044; 21.045(a); 21.049; 21.050(a); and 21.051.

§227.10. Admission Criteria.

(a) The educator preparation program delivering educator preparation shall require the following minimum criteria of all candidates prior to admission to the program, except candidates for career and technology education certification:

(1) for an undergraduate university program, a candidate shall be enrolled in an educator preparation program from an institution of higher education that is accredited by a regional accrediting agency, as recognized by the Texas Higher Education Coordinating Board (THECB);

(2) for an alternative certification program or post-baccalaureate program, a candidate shall have a baccalaureate degree earned from and conferred by an institution of higher education that is recognized by one of the regional accrediting agencies by the THECB, specified in paragraph (1) of this subsection;

(3) for an undergraduate university program, alternative certification program, or post-baccalaureate program, a candidate shall meet the following criteria in order to be eligible to enter an educator preparation program:

(A) an overall grade point average (GPA) of at least 2.5 or at least 2.5 in the last 60 semester credit hours; or

(B) documentation and certification from the program director that a candidate's work, business, or career experience demonstrates achievement equivalent to the academic achievement represented by the GPA requirement. This exception to the minimum GPA requirement will be granted by the program director only in extraordinary circumstances and may not be used by a program to admit more than 10% of any cohort of candidates; and

(C) for a program candidate who will be seeking an initial certificate, a minimum of 12 semester credit hours in the subject-specific content area for the certification sought, a passing score on a content certification examination, or a passing score on a content examination administered by a vendor on the Texas Education Agency

(TEA)-approved vendor list published by the commissioner of education for the calendar year during which the candidate seeks admission;

(4) for a program candidate who will be seeking an initial certificate, the candidate shall demonstrate basic skills in reading, written communication, and mathematics or by passing the Texas Academic Skills Program® (TASP®) test or the Texas Higher Education Assessment® (THEA®) with a minimum score of 230 in reading, 230 in mathematics, and 220 in writing. In the alternative, a candidate may demonstrate basic skills by meeting the requirements of the Texas Success Initiative (Texas Education Code, §51.3062) under the rules established by the Texas Higher Education Coordinating Board in Part 1, Chapter 4, Subchapter C of this title (relating to Texas Success Initiative);

(5) for a program candidate who will be seeking an initial certificate, the candidate shall demonstrate oral communication skills as specified in §230.413 of this title (relating to General Requirements);

(6) an application and either an interview or other screening instrument to determine the educator preparation candidate's appropriateness for the certification sought; and

(7) any other academic criteria for admission that are published and applied consistently to all educator preparation candidates.

(b) An educator preparation program may adopt requirements in addition to those explicitly required in this section.

(c) An educator preparation program may not admit a candidate who has completed another educator preparation program in the same certification field or who has been employed for three years in a public school under a permit or probationary certificate as specified in Chapter 232, Subchapter A, of this title (relating to Types and Classes of Certificates Issued).

(d) An educator preparation program may admit a candidate for career and technology education certification who has met the experience and preparation requirements specified in Chapter 230 of this title (relating to Professional Educator Preparation and Certification) and Chapter 233 of this title (relating to Categories of Classroom Teaching Certificates).

(e) An educator preparation program may admit a candidate who has met the minimum academic criteria through credentials from outside the United States that are determined to be equivalent to those required by this section using the procedures and standards specified in Chapter 245 of this title (relating to Certification of Educators from Other Countries).

§227.20. Implementation Date.

This chapter applies to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806206

Jerel Booker

Associate Commissioner, Educator Quality and Standards, Texas Education Agency

State Board for Educator Certification

Effective date: December 14, 2008

Proposal publication date: August 22, 2008

For further information, please call: (512) 475-1497

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CHAPTER 227. PROVISIONS FOR EDUCATOR PREPARATION STUDENTS

SUBCHAPTER B. TEACH FOR TEXAS PILOT PROGRAM

19 TAC §§227.30, 227.32, 227.34, 227.36, 227.38, 227.40, 227.42, 227.44, 227.46, 227.48, 227.50, 227.52, 227.54, 227.56, 227.58

The repeals are adopted under the Texas Education Code (TEC), §21.031, which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; §21.044, which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on information that is disaggregated with respect to sex and ethnicity and that includes results of the certification examinations prescribed under TEC, §21.048(a), and performance based on the appraisal system for beginning teachers adopted by the SBEC; §21.049, which authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs; §21.050(a), which specifies that a person who applies for a teaching certificate for which SBEC rules require a bachelor's degree must possess a bachelor's degree received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to the curriculum as prescribed under TEC, Chapter 28, Subchapter A; and §21.051, which authorizes the SBEC to propose rules providing flexible options for persons for any field experience or internship required for certification.

The adopted repeals implement the TEC, §§21.031; 21.044; 21.045(a); 21.049; 21.050(a); and 21.051.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806207

Jerel Booker
Associate Commissioner, Educator Quality and Standards, Texas Education Agency
State Board for Educator Certification
Effective date: December 14, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 475-1497

CHAPTER 228. REQUIREMENTS FOR EDUCATOR PREPARATION PROGRAMS

19 TAC §§228.1, 228.2, 228.10, 228.20, 228.30, 228.35, 228.40, 228.50, 228.60

The State Board for Educator Certification (SBEC) adopts amendments to §§228.1, 228.2, 228.10, 228.20, 228.30, 228.40, 228.50, and 228.60, and new §228.35, concerning requirements for educator preparation programs. The amendments to §§228.1, 228.30, and 228.50 are adopted without changes to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6696) and will not be republished. The amendments to §§228.2, 228.10, 228.20, 228.40, 228.60, and new §228.35 are adopted with changes to the proposed text published in the August 22, 2008, issue. The adopted amendments and new section update the rules to reflect current law, add minimum standards for all educator preparation programs, while still allowing flexibility, and ensure consistency among the educator preparation programs in the state. The adopted amendments and new section result from the SBEC's rule review conducted in accordance with Texas Government Code, §2001.039.

The SBEC rules in 19 TAC Chapter 228 establish requirements for educator preparation programs. The Texas Education Code (TEC), §21.049, authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional educator preparation programs. The TEC, §21.031, states that the SBEC is established to oversee all aspects of the certification and continuing education of public school educators and to ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state.

The Texas Education Agency (TEA) staff presented to the SBEC draft proposed changes to 19 TAC Chapter 228 at the March 2008 meeting and at the May 2008 meeting. The SBEC took action at the July 2008 meeting to approve proposed revisions to 19 TAC Chapter 228 and repeal of 19 TAC §230.191 for filing as proposed with the *Texas Register*.

Following the public comment period, the SBEC took action in October 2008 to approve for adoption, subject to State Board of Education (SBOE) review, the proposed revisions to 19 TAC Chapter 228 with additional changes to 19 TAC §228.2, Definitions; §228.10, Approval Process; §228.20, Governance, Design, and Delivery of Educator Preparation Programs; §228.40, Assessment and Evaluation of Candidates for Certification and Program Improvement; and §228.60, Implementation Date; and new §228.35, Preparation Program Coursework and/or Training.

The adopted revisions to 19 TAC Chapter 228 update the rules to reflect current law and provide minimum standards with flexibility for all educator program candidates. These adopted revisions reflect discussions held during the November 9, 2007, Educator Preparation Advisory Committee meeting and the January 24-25, 2008, and June 12, 2008, stakeholder meetings. Additional changes also reflect public input received at the March 2008, May 2008, and July 2008 SBEC meetings.

General Provisions

Language in §228.1 has been amended to update the term "prekindergarten" to "early childhood" and delete the references to the "Centers for the Professional Development of Teachers," as they no longer exist. The reference to "alternative routes to certification" has also been deleted, as the rules apply to all educator preparation programs in the state.

Definitions

The adopted amendment to §228.2 updates terms to be used by all programs in the state to ensure effective communication among and with all educators and stakeholders in the state. Specifically, the adopted amendment specifies in new paragraphs (4), (12), and (17) that clinical teaching, internship, or student teaching will occur at a public school accredited by the TEA or a TEA-recognized private school; specifies in adopted new paragraph (9) the guidelines for field-based experiences; modifies paragraph (18) to specify that instruction will occur for the majority of the instructional day instead of at least one class period; and clarifies in adopted new paragraph (20) that the state curriculum is for Kindergarten-Grade 12.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.2 was modified to specify in adopted new paragraph (13) that "a late hire" will refer to an individual accepted into an educator preparation program and hired for a teaching assignment by a school to allow the individual time to complete the field-based experience requirement while school is in session.

Since published as proposed, language in adopted new paragraph (9) has been modified further to clarify that not all field-based experiences must be conducted face-to-face. In adopted new paragraph (13), language has been modified further to clarify that "a late hire" will be an individual who has not been accepted into an educator preparation program before June 15 and who is hired for a teaching assignment by a school after June 15 or after the school's academic year has begun.

Approval Process

The adopted changes to §228.10 clarify in new subsection (a) that public university programs must have an approved degree plan from the Texas Higher Education Coordinating Board prior to applying to be an approved educator preparation program. Language has been added in subsection (b) to specify the program components to be incorporated into a proposal. Subsection (c) has been modified to delete the reference to the Texas State Partnership since it is a voluntary national accreditation process with standards that are not the same as the state. In addition, language has been added to specify that an entity approved by the SBEC before September 1, 2008, will be required to submit a status report and be reviewed at least once every five years, and that an entity approved after August 31, 2008, will be approved only for a term of 10 years and must reapply every 10 years thereafter. Adopted new subsection (d) incorporates into rule the process for alternative certification programs to add a clinical teaching component. Language in subsection (e) has been amended to specify the requirements for adding additional certification fields and new classes of certificates. Adopted new subsection (f) has been added to require SBEC approval for new program locations. Also, current subsection (e) has been re-

pealed since this provision is incorporated in adopted changes to §228.10.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.10 was modified to allow in subsection (e)(1) that an "accredited" educator preparation program may submit a modified curriculum matrix for adding a certification field when the SBEC changes the grade level of a certificate if the educator preparation program was previously approved by the SBEC for the certification field of a similar grade level.

Since published as proposed, language in adopted new subsection (f) has been modified further to clarify the process for educator preparation programs to add additional locations.

Governance of Educator Preparation Programs

Language in §228.20 has been amended in subsection (a) to allow an educator preparation program to be delivered by identified providers. Language in subsection (b) has been amended to specify a minimum requirement of at least two advisory meetings during the academic year to promote collaboration with the school districts that the educator preparation programs serve. In adopted new subsections (d) and (e), language has been added to ensure communication, clarity, and intent of programs.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.20 was modified to add the word "or" in subsection (b) for clarification, and also provide in subsection (b) that the advisory committee must include members representing as many as possible of the groups identified as collaborators in that subsection.

Since published as proposed, language in adopted new subsection (e) has been modified further to clarify the process for educator preparation programs to amend the program.

Educator Preparation Curriculum

The adopted amendment to §228.30 includes reorganizing provisions in current subsections (a), (b), and (c) to other sections for clarification. Also, adopted new subsection (b) has been added to specify that the curriculum listed refers to programs for candidates seeking initial certification, and adds language to provide specificity to the rule to ensure more consistency among the programs in the state.

Preparation Program Coursework and/or Training

Adopted new §228.35 establishes minimum preparation program coursework and/or training requirements. Language in adopted new subsection (a) clarifies coursework and/or training requirements for initial teacher certification and specifies that all educator preparation programs in the state require a minimum of 300 clock-hours of training. Language in adopted new subsection (b) has been added to set out the coursework and/or training requirements for professional certification. In adopted new subsection (c), language has been added to allow for greater flexibility by permitting the required training to be done within a reasonable time in order to allow the district to hire a candidate on short notice, and language has been added to clarify that "late hire" refers to a candidate for a teaching position. Adopted new subsection (d) sets out the different types of field experiences that may be available through a program and establishes the expectations for each type of experience. Adopted new subsection (e) adds the requirement that each new educator preparation program candidate be assigned a campus mentor and the requirement that a program provide training for the mentor. In adopted new subsection (f), language has been added to provide specificity for program supervision with minimum formal observations each semester to ensure support and instructional feedback.

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in adopted new §228.35 was modified to specify in adopted new subsection (a)(5) that 50 clock-hours of training may be provided by a school district; add in adopted new subsection (c) the phrase, "within 90 school days," for clarification; clarify in adopted new subsection (d)(2)(C)(i)(III) that authorized internships or teaching experiences completed through Head Start programs must be affiliated with a public school; and specify in adopted new subsection (f) that two formal observations must be completed during the first semester and one formal observation must be completed during the second semester since a campus administrator also conducts at least one observation.

Since published as proposed, language in adopted new subsections (a)(3)(A), (c), and (d)(1) has been modified further to allow for up to 15 clock-hours of field-based experience to be provided by use of electronic transmission or other video or technology-based method. In adopted new subsection (a)(5), language has been modified further to change Texas Education Agency to TEA since the acronym has been established in subsection (a)(3)(A)(i).

Assessment and Evaluation of Candidates for Certification and Program Improvement

The adopted amendment to §228.40 updates terminology and specifies when programs shall grant test approval. Also, current subsections (c) and (e) have been removed since these provisions are included in other SBEC rules. In addition, language has been added in adopted new subsection (d) to specify a five-year record retention requirement for documents that evidence a candidate's completion of all program requirements.

As a result of the adopted amendment to 19 TAC §227.10(a)(3)(C), the language in §228.40(b) has been modified to clarify that educator preparation programs shall not grant test approval for the pedagogy and professional responsibilities assessment until a candidate is eligible for admission and fully accepted into an educator preparation program.

Implementation Date

As a result of public input received at the May 2008 SBEC meeting and a June 12, 2008, stakeholder meeting, language in §228.60 was modified to specify in adopted new subsection (b) that 380 clock-hours of training will be required as included in 19 TAC §232.5, Temporary Teacher Certificates.

Since published as proposed, language in §228.60(a) has been modified further to specify that all educator preparation programs must implement the changes for all candidates admitted on or after January 1, 2009.

In response to public comment received on the amendment to 19 TAC §232.5, Temporary Teacher Certificates, language has been added to §228.60, in adopted new subsection (b), that specifies that provisions in 19 TAC Chapter 228, Requirements for Educator Preparation Programs, shall apply to §232.5, upon the effective date of the rule actions adopted in Chapter 228.

Technical Changes

Throughout Chapter 228, numerous grammatical and technical changes are adopted, such as replacement of the term "Board" by the term "State Board for Educator Certification." Also, statutory citation references have been updated and standardized to reflect current law and *Texas Register* formatting requirements. Sections have also been restructured for consistency and readability.

Minimizing the economic impact on small businesses and/or microbusinesses is not a viable option since doing so will not protect the health, safety, and environmental and economic welfare of the state; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Following the July 2008 SBEC meeting, the proposed revisions to 19 TAC Chapter 228 were filed with the *Texas Register*, initiating the official public comment period. The following comments were received regarding the proposed revisions.

Comment: A representative from iteachTexas commented that although they support the concept of field-based experiences, the definition should be revised to delineate the "performance of professional educator activities" and recommended "alternative methods" for meeting the 30-hour requirement.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed to clarify field-based experiences. Section 228.2(9) clarifies that field-based experiences do not have to be face-to-face, and new §228.35(a)(3)(A), (c), and (d)(1) provide that, subject to certain conditions, up to 15 clock-hours of the required 30 clock-hours of field-based experiences may be provided by technological simulations of an actual classroom.

Comment: Legal counsel for A+ Texas Teachers (also known as Texas Teachers for Tomorrow) commented that the definition of late hires and the 30-hour field-based experience requirement are both unworkable and proposed that the 30 hours be changed to 15 hours and be allowed to be completed via video recordings, complete with pedagogical interpretation and instruction from program instructors.

Board Response: The SBEC disagreed with changing the 30-hour field-based experience requirement to 15 hours only and took action to adopt, subject to SBOE review, the rules with changes since published as proposed to clarify field-based experiences. The field-based experience requirement is a vital element of an educator preparation program that demonstrates the complexities of teaching. However, flexibility in the method of its delivery can be allowed without affecting the value of the experience. Section 228.2(9) clarifies that field-based experiences do not have to be face-to-face, and new §228.35(a)(3)(A), (c), and (d)(1) provide that, subject to certain conditions, up to 15 clock-hours of the required 30 clock-hours of field-based experiences may be provided by technological simulations of an actual classroom.

Comment: The Austin Community College (ACC) commented that §228.2(9) should be amended to remove the requirement that professional activities include more than observation within a classroom and that interaction must be ongoing and relevant because the requirements are restrictive for all program participants. The ACC expressed concern that the proposed requirement of ongoing interactions will be difficult for all alternative certification candidates to achieve and for school districts to provide placement.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to clarify the definition of field-based experiences. The field-based experience requirement is a vital element of an educator preparation program that demonstrates the complexities of teaching. Section 228.2(9) clarifies that field-based experiences do not have to be face-to-face, and new §228.35(a)(3)(A), (c), and (d)(1) provide that, subject to certain conditions, up to 15 clock-hours of the required 30 clock-hours of field-based experiences may be provided by technological simulations of an actual classroom.

Comment: Legal counsel for A+ Texas Teachers commented that the requirement in §228.10(c) that programs must seek approval to deviate from their original proposals stifles business innovation and runs contrary to the performance based review that Alternative Certification Programs (ACPs) are subject to. The commenter further stated that fully accredited programs must be grandfathered, otherwise the rule is an impermissible retroactive regulation of past conduct.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to clarify the process for educator preparation programs to add additional locations. Effective oversight by TEA staff is dependent on accurate and up-to-date information regarding program operations. If the program deviates significantly from the original proposal that was approved by the SBEC, then the SBEC has the right to know and reapprove programmatic changes. The SBEC disagreed that the rule will stifle innovation.

Comment: Legal counsel for A+ Texas Teachers commented that the requirement in §228.10(f) and §228.20(d) that new geographic locations must be approved must allow for existing locations to be grandfathered. The commenter further stated that any attempt to require SBEC approval for geographical expansion already undertaken before the rule becomes effective would be an impermissible retroactive regulation of past conduct.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to clarify the process for educator preparation programs to add additional locations. Section 228.10(f) clarifies that geographical expansions from the original proposal existing before January 1, 2009, do not require SBEC approval but must be reported to TEA staff. This applies to §228.20(d) as well.

Comment: The ACT Houston educator preparation program commented that §228.35(a)(3)(A) should be amended and expressed concern that all candidates would be able to fulfill the requirement of 30 clock-hours of field-based experience due to work and family obligations or locating a district willing to allow classroom visitations.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to clarify that field-based experiences do not have to be face-to-face. New §228.35(a)(3)(A), (c), and (d)(1) provide that, subject to certain conditions, up to 15 clock-hours of the required 30 clock-hours of field-based experiences may be provided by technological simulations of an actual classroom.

Comment: The Texas Association of School Personnel Administrators and Lone Star College-Tomball commented that §228.35(a)(3)(A) should be approved along with the other revisions to 19 TAC Chapter 228 as published as proposed.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. While the field-based experience requirement is a vital element of an educator preparation program, some flexibility in the method of its delivery can be allowed without affecting the value of the experience. Section 228.35(a)(3)(A) provides that, subject to certain conditions, up to 15 clock-hours of the required 30 clock-hours of field-based experiences may be provided by technological simulations of an actual classroom.

Comment: Legal counsel for A+ Texas Teachers commented that in §228.35(a)(5) the use of professional development should be allowed by any TEA school approved to offer the probationary certificate and not only those that are listed on the "approved TEA continuing professional education provider" list.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rule as published as proposed, with a minor, technical edit to use the acronym TEA. The Continuing Professional Education (CPE) providers on the TEA list have gone through an approval process and have been approved based on their alignment to the Texas Essential Knowledge and Skills (TEKS) and, therefore, are approved providers. School districts and others have the option to apply to become approved CPE providers.

Comment: Legal counsel for A+ Texas Teachers commented that §228.35(f) should require that field supervisors make their first visit within the first nine weeks of school instead of six weeks.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rule as published as proposed. New interns, student teachers, and clinical teachers need the support early in the school year to identify concerns and offer support to assist the candidates in being successful during this critical period.

Comment: Legal counsel for A+ Texas Teachers commented that language in §228.40 should conform with language proposed in §227.10(a)(3)(C) since the requirement that a candidate must be fully accepted into an ACP before being approved to take the content test contradicts with language proposed in §227.10(a)(3)(C), which would allow ACPs to use the content test as an admission requirement.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to align 19 TAC §228.40 with §227.10(a)(3)(C) as was approved for adoption, subject to SBOE review, at the October SBEC Board meeting.

Comment: Legal counsel for A+ Texas Teachers commented that interns who have already begun teaching in the classroom on a probationary certificate prior to the 2009-2010 school year should explicitly be exempted from having to meet the new requirements before teaching in the classroom. The commenter stated that once an intern has already been teaching in front of a classroom, it would be erroneous to require them to meet additional requirements before being allowed to continue their student teaching for another year.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to specify in §228.60 that the rule revisions to 19 TAC Chapter 228 apply to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009.

Comment: Legal counsel for A+ Texas Teachers commented that candidates who are fully accepted into a program before the rules become effective should be explicitly exempted from having to meet the new admission requirements. The commenter stated that explicit transition language should be adopted.

Board Response: The SBEC agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to specify in §228.60 that the rule revisions to 19 TAC Chapter 228 apply to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009.

Comment: A representative from iteachTexas commented that the implementation date in both Chapters 227 and 228 should be changed and set for "two months from the date of adoption of the rules" to allow programs time to implement the new requirements and not place a significant burden on candidates.

Board Response: The SBEC substantially agreed and took action to adopt, subject to SBOE review, the rule with changes since published as proposed to specify in §228.60 that the rule revisions to 19 TAC Chapter 228 apply to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009. The implementation date is shortly after the rule revisions are anticipated to take effect if the SBOE takes no action on the review of the proposed revisions to 19 TAC Chapter 228 at the November 2008 SBOE meeting.

General Comments

Comment: Legal counsel for A+ Texas Teachers commented that "...the proposed rules will instead exacerbate the current teacher shortage, especially in high need areas." The commenter also indicated that the rules implemented as currently written would increase the State's non-compliance with the No Child Left Behind (NCLB) "highly qualified teacher" standards.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. The rule revisions will not exacerbate the teacher shortage since most individuals who are committed to teaching will meet the minimum standards. With the inclusion of the use of the certification content examination as a program entry requirement, it should help increase the State's compliance with the NCLB "highly qualified teacher" status as candidates will have already met the requirement prior to entering the classroom and will, therefore, reflect on the campus report early in the school year.

Comment: Legal counsel for A+ Texas Teachers commented that the imposition of new state-wide program admission standards will have a significant disparate impact on the ability of minority certification program applicants to enter certification programs and commented that the standards have not been validated in violation of the Title VI of the Civil Rights Act of 1964.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. TEA staff researched the proposed basic skills examinations to ensure that the TASP® or THEA® have been validated for the purpose of entering an educator preparation program in Texas. Data from the test vendor show that the primary basic skills examinations adopted by the SBEC, the THEA® (formerly known as the TASP®), has been validated for this purpose. At the same time, use of the Texas Success Initiative, in the alternative, provides more flexibility and protects against dis-

parate impact by allowing other alternative tests and remediation that have been determined to be the equivalent of the TASP® or THEA®.

Comment: Legal counsel for A+ Texas Teachers commented that the imposition of "hard admission requirements," especially those imposed upon alternative certification programs, violates the guidance published in the 2007 State Teacher Policy Yearbook-Progress on Teacher Quality by the National Council on Teacher Quality (NCTQ), which calls for more flexibility, not less.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. The admission criteria were not considered hard requirements because the majority of the programs in Texas had already been implementing the standards and the criteria recommended by staff are those recommended by the NCTQ report. Texas received a "D" on the last NCTQ report due to the lack of a basic skills requirement.

Comment: Legal counsel for A+ Texas Teachers commented that SBEC has not followed its own direction or that of the executive and legislative branches and that "most" of the proposed rules go well beyond the "minimum" standards and restrict flexibility and creativity in the alternative route. The commenter further stated that the rules add unjustified barriers to entry for newly qualified candidates.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed. Flexibility and creativity are desirable in the design of programs; however, the TEA staff has identified the need through the State Auditor's report issued June 2008 and program site visits to add minimum standards and ensure consistency for all educator preparation programs in the state. The rules in 19 TAC Chapter 228 set minimum requirements while still providing substantial flexibility.

Comment: The Texas Classroom Teachers Association (TCTA) commented that nothing replaces actually being present in a classroom, so that the rules should not allow the field-based experience requirement to be satisfied through technological simulations of an actual classroom.

Board Response: The SBEC disagreed and took action to adopt, subject to SBOE review, the rules with changes since published as proposed to clarify field-based experiences. While the field-based experience requirement is a vital element of an educator preparation program, some flexibility in the method of its delivery can be allowed without affecting the value of the experience. Section 228.2(9) clarifies that field-based experiences do not have to be face-to-face, and new §228.35(a)(3)(A), (c), and (d)(1) provide that, subject to certain conditions, up to 15 clock-hours of the required 30 clock-hours of field-based experiences may be provided by technological simulations of an actual classroom.

The SBOE took no action on the review of the amendments to 19 TAC §§228.1, 228.2, 228.10, 228.20, 228.30, 228.40, 228.50, and 228.60, and new §228.35 at the November 21, 2008, SBOE meeting.

The amendments and new section are adopted under the TEC, §21.031(a), which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.044, which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.045(a), which authorizes the SBEC to propose rules establishing standards to govern the approval and continuing accountability of all educator preparation programs based on information that is disaggregated with respect to sex and ethnicity and that includes results of the certification examinations prescribed under TEC, §21.048(a), and performance based on the appraisal system for beginning teachers adopted by the SBEC; §21.050(a), which specifies that a person who applies for a teaching certificate for which SBEC rules require a bachelor's degree must possess a bachelor's degree received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to the curriculum as prescribed under TEC, Chapter 28, Subchapter A; and §21.051, which authorizes the SBEC to propose rules providing flexible options for persons for any field experience or internship required for certification.

The adopted amendments and new section implement the TEC, §§21.031(a); 21.044; 21.045(a); 21.050(a); and 21.051.

§228.2. Definitions.

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

(1) Academic year--If not referring to the academic year of a particular public, private, or charter school or institution of higher education, September 1 through August 31.

(2) Alternative certification program--An approved educator preparation program, delivered by entities described in §228.20(a) of this title (relating to Governance of Educator Preparation Programs), specifically designed as an alternative to a traditional undergraduate certification program, for individuals already holding at least a baccalaureate degree.

(3) Candidate--A participant in an educator preparation program seeking certification.

(4) Clinical teaching--A 12-week full-day teaching practicum in an alternative certification program at a public school accredited by the Texas Education Agency (TEA) or a TEA-recognized private school that may lead to completion of a standard certificate.

(5) Clock-hours--Fifteen clock-hours at an accredited university is equal to one semester credit hour.

(6) Cooperating teacher--The campus-based mentor teacher for the student teacher or clinical teacher.

(7) Educator preparation program--An entity approved by the State Board for Educator Certification (SBEC) to recommend candidates in one or more educator certification fields.

(8) Entity--The legal entity that is approved to deliver an educator preparation program.

(9) Field-based experiences--Experiences in which the primary activity of a candidate for certification is the performance of professional educator activities while interacting with Early Childhood-Grade 12 students, teachers, and faculty/staff members in a school setting that is part of regular classroom instruction. The professional activities include more than observation within a classroom. The interaction with students, teachers, and entity faculty/staff must be ongoing and relevant.

(10) Field supervisor--A certified educator, hired by the educator preparation program, who preferably has advanced credentials,

to observe candidates, monitor his or her performance, and provide constructive feedback to improve his or her professional performance.

(11) Head Start Program--The federal program established under the Head Start Act (42 United States Code, §9801 et seq.) and its subsequent amendments.

(12) Internship--A one-year supervised professional assignment at a public school accredited by the TEA or a TEA-recognized private school that may lead to completion of a standard certificate.

(13) Late hire--An individual who has not been accepted into an educator preparation program before June 15 and who is hired for a teaching assignment by a school after June 15 or after the school's academic year has begun.

(14) Mentor--For a classroom teacher, a certified educator assigned by the campus administrator who has completed mentor training; who guides, assists, and supports the beginning teacher in areas such as planning, classroom management, instruction, assessment, working with parents, obtaining materials, district policies; and who reports the beginning teacher's progress to that teacher's educator preparation program.

(15) Pedagogy--The art and science of teaching, incorporating instructional methods that are developed from scientifically-based research.

(16) Practicum--Practical work in a particular field; refers to student teaching, clinical teaching, internship, or practicum for a professional certificate that is in the school setting.

(17) Student teaching--A 12-week full-day teaching practicum in a program provided by an accredited university at a public school accredited by the TEA or a TEA-recognized private school that may lead to completion of a standard certificate.

(18) Teacher of record--An educator employed by a school district who teaches the majority of the instructional day in an academic instructional setting and is responsible for evaluating student achievement and assigning grades.

(19) Texas Education Agency staff--Staff of the TEA assigned by the commissioner of education to perform the SBEC's administrative functions and services.

(20) Texas Essential Knowledge and Skills (TEKS)--The Kindergarten-Grade 12 state curriculum in Texas adopted by the State Board of Education and used as the foundation of all state certification examinations.

§228.10. Approval Process.

(a) Approval to Operate. A public institution of higher education must provide documentation to the Texas Education Agency (TEA) from the Texas Higher Education Coordinating Board (THECB) of approval to operate in Texas prior to submitting a proposal to offer an educator preparation and/or alternative certification program.

(b) New Entity Approval. An entity seeking initial approval to deliver an educator preparation program shall submit an application and proposal with evidence indicating the ability to comply with the provisions of this chapter and Chapter 227 of this title (relating to Provisions for Educator Preparation Candidates). The proposal shall include the following program approval components: entity commitment to adequate preparation of certification candidates, program standards, and community collaboration; criteria for admission to an educator preparation program; curriculum; program delivery and evaluation; and a plan for ongoing support of the candidates. The proposal must also identify the certificates proposed to be offered by the entity and meet applicable federal statutes or regulations. The proposal will be reviewed by the TEA staff and a pre-approval site visit will be conducted. The TEA staff shall recommend to the State Board for Educator Certification (SBEC) whether the entity should be approved.

(c) Continuing Entity Approval. An entity approved by the SBEC under this chapter prior to September 1, 2008, shall be reviewed at least once every five years under procedures approved by the TEA staff; however, a review may be conducted at any time at the discretion of the TEA staff. At the time of the review, the entity shall submit to the SBEC a status report regarding its compliance with existing standards for educator preparation programs and the entity's original proposal. An entity approved by the SBEC under this chapter after August 31, 2008, shall be approved for a term of ten years and must reapply every ten years thereafter for approval by the SBEC in the same manner as a new educator preparation program seeking approval.

(d) Approval of Clinical Teaching for an Alternative Certification Program. An alternative certification program seeking approval to implement a clinical teaching component shall submit a description of the following elements of the program for approval by the TEA staff:

(1) general clinical teaching program description, including conditions under which clinical teaching may be implemented;

(2) selection criteria for clinical teachers;

(3) selection criteria for mentor teachers;

(4) description of support and communication between candidates, mentors, and the alternative certification program;

(5) description of program supervision; and

(6) description of how candidates are evaluated.

(e) Addition of Certificate Fields.

(1) An educator preparation program that is rated "accredited," as provided in §229.3 of this title (relating to The Accreditation Process), may request additional certificate fields be approved by TEA staff, by submitting the curriculum matrix; a description of how the standards for Texas educators are incorporated into the educator preparation program; and documentation showing that the program has the staff knowledge and expertise to support individuals participating in each certification field being requested. The curriculum matrix must include the standards, framework competencies, applicable Texas Essential Knowledge and Skills, course and/or module names, and the benchmarks or assessments used to measure successful program progress. An educator preparation program rated "accredited," as provided in §229.3 of this title, and currently approved to offer a content area certificate for which the SBEC is changing the grade level of the certificate may request to offer the preapproved content field at different grade levels by submitting a modified curriculum matrix that includes the standards, course and/or module names, and the benchmarks or assessments used to measure successful program progress. The requested additional certificate fields must be within the classes of certificates for which the educator preparation program has been previously approved by the SBEC. An educator preparation program that is not rated "accredited" may not apply to offer additional certificate fields or classes of certificates.

(2) An educator preparation program that is rated "accredited" may request the addition of certificate fields in a class of certificates that has not been previously approved by the SBEC, but must present a full proposal for consideration and approval by the SBEC.

(f) Addition of Program Locations. An educator preparation program that proposes to provide educator preparation in a different geographic location from that contained in its approved proposal shall

present a new proposal for consideration and approval by the SBEC that includes provisions for meeting all program requirements at the new location. The educator preparation program will be notified in writing of its proposal approval or denial within 60 days following a determination by the SBEC. If an educator preparation program has already added additional locations or is already providing educator preparation in locations different from that contained in its original approved proposal as of January 1, 2009, the additional locations are not required to be presented to or approved by the SBEC. However, the educator preparation program shall inform the SBEC of the existence of the additional locations at which the program is providing educator preparation within 60 days of the adoption of this subsection.

(g) Contingency of Approval. Approval of all educator preparation programs by the SBEC or by the TEA staff, including each specific certificate field, is contingent upon approval by other lawfully established governing bodies, such as the THECB, boards of regents, or school district boards of trustees. Continuing educator preparation program approval is contingent upon compliance with superseding state and federal law.

§228.20. Governance of Educator Preparation Programs.

(a) Preparation for the certification of educators may be delivered by an institution of higher education, regional education service center, public school district, or other entity approved by the State Board for Educator Certification (SBEC) under §228.10 of this title (relating to Approval Process).

(b) The preparation of educators shall be a collaborative effort among public schools accredited by the Texas Education Agency (TEA) and/or TEA-recognized private schools; regional education service centers; institutions of higher education; and/or business and community interests; and shall be delivered in cooperation with public schools accredited by the TEA and/or TEA-recognized private schools. An advisory committee with members representing as many as possible of the groups identified as collaborators in this subsection shall assist in the design, delivery, evaluation, and major policy decisions of the educator preparation program. The approved educator preparation program shall approve the roles and responsibilities of each member of the advisory committee and shall meet a minimum of twice during each academic year.

(c) The governing body and chief operating officer of an entity approved to deliver educator preparation shall provide sufficient support to enable the educator preparation program to meet all standards set by the SBEC, and shall be accountable for the quality of the educator preparation program and the candidates whom the program recommends for certification.

(d) All educator preparation programs must be implemented as approved by the SBEC as specified in §228.10 of this title. An approved educator preparation program may not expand to other geographic locations without prior approval of the SBEC.

(e) Proposed amendments to an educator preparation program shall be submitted to the TEA staff and approved prior to implementation. Significant amendments, related to the five program approval components specified in §228.10(b) of this title, must be approved by the SBEC. The educator preparation program will be notified in writing of its proposal approval or denial within 60 days following a determination by the SBEC. If an educator preparation program has already implemented significant amendments to its original approved proposal as of January 1, 2009, those amendments are not required to be presented to or approved by the SBEC. However, the educator preparation program shall inform the SBEC of the existence of the significant amendments within 60 days of the adoption of this subsection.

§228.35. Preparation Program Coursework and/or Training.

(a) Coursework and/or Training for Candidates Seeking Initial Certification.

(1) An educator preparation program shall provide coursework and/or training to ensure the educator is effective in the classroom.

(2) Professional development should be sustained, intensive, and classroom focused.

(3) An educator preparation program shall provide each candidate with a minimum of 300 clock-hours of coursework and/or training that includes the following:

(A) 30 clock-hours of field-based experience to be completed prior to student teaching, clinical teaching, or internship. Up to 15 clock-hours of field-based experience may be provided by use of electronic transmission, or other video or technology-based method. Use of technology must integrate the following:

(i) authentic classrooms in a public school accredited by the Texas Education Agency (TEA) or TEA-recognized private school;

(ii) instruction by content certified teachers;

(iii) actual students in classrooms with identity proof provisions;

(iv) content or grade level specific classrooms;

(v) variable time length of observation; and

(vi) reflection of the observation;

(B) 80 clock-hours of training prior to student teaching, clinical teaching, or internship; and

(C) six clock-hours of test preparation.

(4) All coursework and training shall be completed prior to educator preparation program completion and standard certification.

(5) With appropriate documentation, 50 clock-hours of training may be provided by a school district and/or campus that is an approved TEA continuing professional education provider.

(6) Each educator preparation program must develop and implement specific criteria and procedures that allow candidates to substitute experience and/or professional training directly related to the certificate being sought for part of the educator preparation requirements.

(b) Coursework and/or Training for Professional Certification (i.e. superintendent, principal, school counselor, school librarian, educational diagnostician, reading specialist, and/or master teacher). An educator preparation program shall provide coursework and/or training to ensure that the educator is effective in the professional assignment. An educator preparation program shall provide a candidate with a minimum of 200 clock-hours of coursework and/or training that is directly aligned to the state standards for the applicable certification field.

(c) Late Hires. A late hire for a teaching position shall complete 30 clock-hours of field-based experience as well as 80 clock-hours of initial training within 90 school days of assignment. Up to 15 clock-hours of field-based experience may be provided by use of electronic transmission, or other video or technology-based method. Use of technology must integrate the following:

(1) authentic classrooms in a public school accredited by the TEA or TEA-recognized private school;

(2) instruction by content certified teachers;

(3) actual students in classrooms with identity proof provisions;

(4) content or grade level specific classrooms;

(5) variable time length of observation; and

(6) reflection of the observation.

(d) Educator Preparation Program Delivery. An educator preparation entity shall provide evidence of on-going and relevant field-based experiences throughout the educator preparation program, as determined by the advisory committee as specified in §228.20 of this title (relating to Governance of Educator Preparation Programs), in a variety of educational settings with diverse student populations, including observation, modeling, and demonstration of effective practices to improve student learning.

(1) For initial certification, each educator preparation program shall provide field-based experience, as defined in §228.2 of this title (relating to Definitions), for a minimum of 30 clock-hours. The field-based experience must be completed prior to assignment in an internship, student teaching, clinical teaching, or practicum. Up to 15 clock-hours of field-based experience may be provided by use of electronic transmission, or other video or technology-based method. Use of technology must integrate the following:

(A) authentic classrooms in a public school accredited by the TEA or TEA-recognized private school;

(B) instruction by content certified teachers;

(C) actual students in classrooms with identity proof provisions;

(D) content or grade level specific classrooms;

(E) variable time length of observation; and

(F) reflection of the observation.

(2) For initial certification, each educator preparation program shall also provide one of the following:

(A) student teaching, as defined in §228.2 of this title, for a minimum of 12 weeks;

(B) clinical teaching, as defined in §228.2 of this title, for a minimum of 12 weeks; or

(C) internship, as defined in §228.2 of this title, for a minimum of one academic year (or 180 school days) for the assignment that matches the certification field for which the individual is accepted into the educator preparation program. The individual would hold a probationary certificate and be classified as a "teacher" as reported on the campus Public Education Information Management System (PEIMS) data. An educator preparation program may permit an internship of up to 30 school days less than the minimum if due to maternity leave, military leave, illness, or late hire date.

(i) An internship, student teaching, or clinical teaching for an Early Childhood-Grade 4 and Early Childhood-Grade 6 candidate may be completed at a Head Start Program with the following stipulations:

(I) the Head Start program is participating in either the School Readiness Integration (SRI) or the Texas Early Education Model (TEEM);

(II) a certified teacher is available as a trained mentor;

(III) the Head Start program is affiliated with a public school accredited by the TEA;

(IV) the Head Start program teaches three and four-year-old students; and

(V) the state's pre-kindergarten curriculum guidelines are being implemented.

(ii) An internship, student teaching, or clinical teaching experience may not be held in a distance learning lab setting.

(3) For candidates seeking professional certification as a superintendent, principal, school counselor, school librarian, or an educational diagnostician, each educator preparation program shall provide a practicum, as defined in §228.2 of this title, for a minimum of 160 clock-hours.

(e) Campus Mentors and Cooperating Teachers. In order to support a new educator and to increase teacher retention, an educator preparation program shall collaborate with the campus administrator to assign each candidate a campus mentor during his or her internship or assign a cooperating teacher during the candidate's student teaching or clinical teaching experience. The educator preparation program is responsible for providing mentor and/or cooperating teacher training that relies on scientifically-based research, but the program may allow the training to be provided by a school district, if properly documented.

(f) On-Going Educator Preparation Program Support. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. The initial contact with the assigned candidate must occur within the first three weeks of assignment. The program must provide a minimum of two formal observations during the first semester and one formal observation during the second semester. Each observation must be at least 45 minutes in duration and must be conducted by the field supervisor. The first observation must occur within the first six weeks of assignment. The field supervisor shall document instructional practices observed, provide written feedback through an interactive conference with the candidate, and provide a copy of the written feedback to the candidate's campus administrator. Informal observations and coaching shall be provided by the field supervisor as appropriate.

§228.40. Assessment and Evaluation of Candidates for Certification and Program Improvement.

(a) To ensure that a candidate for educator certification is prepared to receive the standard certificate, the entity delivering educator preparation shall establish benchmarks and structured assessments of the candidate's progress throughout the educator preparation program.

(b) An educator preparation program shall determine the readiness of each candidate to take the appropriate certification assessment of pedagogy and professional responsibilities, including professional ethics and standards of conduct. An educator preparation program shall not grant test approval for the pedagogy and professional responsibilities assessment until a candidate has met all of the requirements for admission to the program and has been fully accepted into the educator preparation program.

(c) For the purposes of educator preparation program improvement, an entity shall continuously evaluate the design and delivery of the educator preparation curriculum based on performance data, scientifically-based research practices, and the results of internal and external assessments.

(d) An educator preparation program shall retain documents that evidence a candidate's eligibility for admission to the program and evidence of completion of all program requirements for a period of five years after program completion.

§228.60. Implementation Date.

(a) This chapter applies to an educator preparation program candidate who is admitted to an educator preparation program on or after January 1, 2009.

(b) All provisions in this chapter shall apply to §232.5 of this title (relating to Temporary Teacher Certificates) upon the effective date of the rule actions adopted in this chapter, except that a certificate issued under §232.5 of this title shall require 380 total clock-hours of training.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806208
Jerel Booker
Associate Commissioner, Educator Quality and Standards, Texas Education Agency
State Board for Educator Certification
Effective date: December 14, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 475-1497

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION SUBCHAPTER G. CERTIFICATION REQUIREMENT FOR CLASSROOM TEACHERS

19 TAC §230.191

The State Board for Educator Certification (SBEC) adopts the repeal of §230.191, concerning certification requirement for classroom teachers. The repeal of §230.191 is adopted without changes to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6702) and will not be republished. The section establishes a provision for preparation required in all programs. The adopted repeal removes this provision for preparation required in all programs from rule.

The Texas Education Code (TEC), §21.031, states that the SBEC is established to oversee all aspects of the certification and continuing education of public school educators and to ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state.

At the October 2008 meeting, the SBEC approved for adoption, subject to State Board of Education review, the proposed repeal of 19 TAC Chapter 230, Professional Educator Preparation and Certification, Subchapter G, Certification Requirement for Classroom Teachers, §230.191, Preparation Required in All Programs.

The adopted repeal of 19 TAC Chapter 230, Professional Educator Preparation and Certification, Subchapter G, Certification Requirement for Classroom Teachers, §230.191, Preparation Required in All Programs, is necessary since the program preparation requirements in this rule have been incorporated into the adopted revisions to 19 TAC Chapter 228, Requirements for Educator Preparation Programs, or have an expiration date in rule of September 1, 2007. The adopted revisions to 19 TAC Chapter 228 can be found in the Adopted Rules section of this issue

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Following the July 2008 SBEC meeting, the proposed repeal of 19 TAC §230.191 was filed with the *Texas Register* initiating the official public comment period. No comments were received regarding adoption of the repeal.

The repeal is adopted under the TEC, §21.031(a), which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.041(b)(3), which requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid.

The adopted repeal implements the TEC, §21.031(a) and §21.041(b)(1), (2), and (3).

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806209
Jerel Booker
Associate Commissioner, Educator Quality and Standards, Texas Education Agency
State Board for Educator Certification
Effective date: December 14, 2008
Proposal publication date: August 22, 2008
For further information, please call: (512) 475-1497

TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 133. LICENSING SUBCHAPTER E. EXPERIENCE

22 TAC §133.43

The Texas Board of Professional Engineers adopts an amendment to §133.43, relating to Experience Evaluation, without changes to the proposed text as published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8124) and will not be republished.

As part of the rule review required by Chapter 2001, Texas Government Code, the Board must review and update the existing rules. During this review, several minor or non-substantive changes were identified. These include minor grammar and language changes. The adopted minor changes to the rule include a clarification of the use of the NCEES Council Record regarding

experience, and giving the Board latitude in criteria for considering engineering experience.

In addition to the minor language changes, the Board adopts an additional change in response to a petition for rulemaking. The change clarifies the requirements for counting experience credit gained prior to receiving a qualifying degree and limits the claimed experience gained in this manner to a total of two years. This provision goes into effect on January 1, 2009. Applications received between the date of adoption of this amendment and the effective date of this provision are eligible to have all experience submitted evaluated, regardless if earned pre- or post-graduation. However, all other provisions of the rules regarding engineering experience evaluation remain in effect and the Board has discretion regarding the quality and relevance of experience claimed.

Twelve comments were received from individuals during the public comment period. Ten comments were in favor of the proposal as written and two were in favor of allowing experience gained prior to graduation to be allowed to be reviewed but suggested additional rule changes. The first suggestion was to modify the effective date to 2010; the Board reviewed this suggestion and determined that the 2009 effective date was appropriate. No change was made in response to this comment. The second suggestion was to require that all experience claimed prior to graduation be under the direct supervision of a Professional Engineer. The Board discussed this concern and noted that this requirement was covered in §133.51 of the Board rules. No change was made in response to this comment.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; §1001.302, which requires that an applicant meet educational and experience requirements as determined by the Board; and Chapter 2001, Texas Government Code, requiring a four year rule review of all agency rules.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806089
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: December 11, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 440-7723

PART 7. STATE COMMITTEE OF EXAMINERS IN THE FITTING AND DISPENSING OF HEARING INSTRUMENTS

CHAPTER 141. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §141.10

The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (committee) adopts an amendment to §141.10, concerning the licensing and regulation of fitters and dispensers of hearing instruments, without changes to the proposed text as published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7125) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

Amendments to §141.10 relate to licensure by reciprocity. The amendments are adopted to clarify requirements and procedures for persons who are licensed as a fitter and dispenser of hearing instruments in another state or territory, and who wish to become licensed as a fitter and dispenser of hearing instruments in Texas.

SECTION SUMMARY

Amendments to §141.10 establish specific procedures and requirements for applicants for licensure by reciprocity. The new provisions address requirements concerning the application form, verification of licensure in another state or territory, examination requirements and procedures, disciplinary actions and criminal convictions in another state or territory, and procedures for reciprocity applicants who are licensed audiologists.

COMMENTS

The committee received comments during the comment period. The commenter was the Texas Hearing Aid Association. The commenter provided comments in favor of the rule; however, the commenter also suggested a recommendation for change as discussed in the summary of comments.

Comment: The commenter recommended that the committee adopt language that would require an applicant for licensure by reciprocity to provide an affidavit with the application stating the applicant is currently a resident of Texas.

Response: The committee disagrees with the recommendation, due to lack of statutory authority and other legal considerations relating to such a restriction. No change was made as a result of the comment.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is authorized by the Texas Occupations Code, §402.102, which authorizes the committee to adopt rules necessary for the performance of the committee's duties.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806106

Ron Ensweiler
Chair
State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments
Effective date: December 11, 2008
Proposal publication date: August 29, 2008
For further information, please call: (512) 458-7111 x6972

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §281.66

The Texas State Board of Pharmacy adopts amendments to §281.66, concerning Application for Reissuance or Removal of Restrictions of a License. The amendments are adopted without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7966).

The amendments clarify that the rules regarding reissuance of a license or registration or the removal of restrictions on a license or registration includes pharmacy technicians and rename the section Application for Reissuance or Removal of Restrictions of a License or Registration.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806197
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 305-8028

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CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.7, §283.8

The Texas State Board of Pharmacy adopts amendments to §283.7, concerning Examination Requirements and §283.8, concerning Reciprocity Requirements. Section 283.7 is adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7967). Section 283.8 is adopted without changes and will not be republished.

The amendments clarify that the Board may require individuals to submit the required information to perform a criminal background check including fingerprinting.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and §411.084 of the Texas Government Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §411.084 of the Texas Government Code which gives the agency the authority to obtain criminal history information from the Federal Bureau of Investigations.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§283.7. Examination Requirements.

Each applicant for licensure by examination shall pass the Texas Pharmacy Jurisprudence Examination and the NAPLEX. The examination requirements shall be as follows:

(1) Prior to taking the required examination, the applicant:

(A) shall meet the educational and age requirements as set forth in §283.3 of this title (relating to Educational and Age Requirements); and

(B) may be required to meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs.

(2) All applicants shall pass NAPLEX, which includes, at a minimum, the following subject areas:

(A) chemistry;

(B) mathematics;

(C) pharmacy;

(D) pharmacology; and

(E) practice of pharmacy.

(3) Effective October 1, 1979, the following requirements apply.

(A) To pass NAPLEX, an applicant shall make the following grades:

(i) a minimum grade of 60 on chemistry, mathematics, pharmacy, and pharmacology test;

(ii) a minimum grade of 75 on the practice of pharmacy test; and

(iii) a minimum average grade of 75 on the NAPLEX.

(B) Should the applicant fail to achieve a minimum grade of 60 in any of the tests set out in paragraph (2)(A) - (E) of this section or fail to achieve a minimum grade of 75 in the practice of pharmacy test or fail to achieve a minimum average grade of 75 in the NAPLEX, such applicant, in order to be licensed, is required to retake all tests until such time as the minimum average grades are achieved.

(4) Effective June 1, 1986, the following requirements apply.

(A) To pass the NAPLEX, an applicant shall make a minimum average grade of 75.

(B) Should the applicant fail to achieve a minimum average grade of 75 in the NAPLEX, such applicant, in order to be licensed, shall retake the NAPLEX, as specified in §283.11 of this title (relating to Examination Retake Requirements) until such time as a minimum average grade of 75 is achieved.

(5) To pass the Texas Pharmacy Jurisprudence Examination, an applicant shall make a minimum grade of 75. Should the applicant fail to achieve a minimum grade of 75 on the Texas Pharmacy Jurisprudence Examination, such applicant, in order to be licensed, shall retake the Texas Pharmacy Jurisprudence Examination as specified in §283.11 of this title until such time as a minimum average grade of 75 is achieved.

(6) If the applicant should fail one of the examinations, the grade of the examination which the applicant initially passed may be used for the purpose of licensure by examination for a period of two years from the date of passing the initial examination.

(7) Examination applications and fees as specified in §283.9(a) of this title (relating to Fee Requirements for Licensure by Examination and Reciprocity) shall be received in the board office no later than six weeks prior to the examination date.

(8) Each applicant for licensure by examination utilizing NAPLEX scores transferred from another state shall meet the following requirements for licensure in addition to the requirements set out in paragraphs (1) - (7) of this section.

(A) The applicant shall request NABP to transfer NAPLEX scores to the board. Such request shall be in accordance with NABP policy.

(B) The applicant shall pay the fee set out in §283.9 of this title.

(9) The NAPLEX and Texas Pharmacy Jurisprudence Examination shall be administered in compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.) and in accordance with NABP policy.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806198
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 305-8028

CHAPTER 291. PHARMACIES
SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33

The Texas State Board of Pharmacy adopts amendments to §291.33, concerning Operational Standards. The amendments are adopted without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7968).

The amendments remove the storage of drugs requirements from this section and locate the requirements in new §291.15 previously adopted by the Board.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806199
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 305-8028

CHAPTER 295. PHARMACISTS

22 TAC §295.8

The Texas State Board of Pharmacy adopts amendments to §295.8, concerning Continuing Education Requirements. The amendments are adopted without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7968).

The amendments clarify the procedures for pharmacists who have been licensed for 50 years wanting to return to the practice of pharmacy.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806200
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 305-8028

CHAPTER 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

22 TAC §297.3

The Texas State Board of Pharmacy adopts amendments to §297.3, concerning Registration Requirements. The amendments are adopted without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7970).

The amendments clarify the requirements for registration as a pharmacy technician trainee and pharmacy technician and that the Board may require individuals to submit the required information to perform a criminal background check including fingerprinting.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and §411.084 of the Texas Government Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §411.084 of the Government Code as authorizing the agency to obtain criminal history information from the Federal Bureau of Investigations.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806201
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 305-8028

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 461. GENERAL RULINGS

22 TAC §461.6

The Texas State Board of Examiners of Psychologists adopts amendments to §461.6, File Updates, without changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8154) and will not be republished.

The amendments are being adopted to clarify the rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806004
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: December 7, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 305-7706

22 TAC §461.11

The Texas State Board of Examiners of Psychologists adopts amendments to §461.11, Continuing Education, without changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8155) and will not be republished.

The amendments are being adopted to set requirements for online renewal of licenses that are audited.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806005
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: December 7, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 305-7706

22 TAC §461.18

The Texas State Board of Examiners of Psychologists adopts new §461.18, Minimum Data Set Requirement for Online Renewals, without changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8156) and will not republished.

The new rule is being adopted to implement Senate Bill 29, 80th Texas Legislature, that requires the Board to collect a set of standardized information about the training and practices of licensees through the Texas Online System.

The new rule will adhere to state law.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806006
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: December 7, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 305-7706

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.1

The Texas State Board of Examiners of Psychologists adopts amendments to §465.1, Definitions, without changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8156) and will not be republished.

The amendments are being adopted to clarify that the subject of a forensic evaluation is not considered a patient.

The adopted amendments will help to ensure protection of the public.

The public comment period on the proposal began September 26, 2008 and ended October 26, 2008. Following is a summary of public comments received and corresponding agency responses regarding the proposed amendment to 22 TAC §465.1, Definitions.

Comment. The Director of the Texas Psychological Association Forensic Practice Division stated that they concurred with the definition change in paragraph (3).

Agency Response: The agency agrees.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806007
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: December 7, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 305-7706

22 TAC §465.17

The Texas State Board of Examiners of Psychologists adopts amendments to §465.17, Therapy and Counseling, without changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8156) and will not be republished.

The amendments are being adopted to correct a rule reference in the rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this

State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806008
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: December 7, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 305-7706

22 TAC §465.18

The Texas State Board of Examiners of Psychologists adopts amendments to §465.18, Forensic Services, with changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8157). The rule will be republished.

The amendments are being adopted to clarify requirements for forensic services especially forensic evaluations.

The adopted amendments will help to ensure protection of the public.

The public comment period on the proposal began September 26, 2008 and ended October 26, 2008. Following is a summary of public comments and corresponding agency responses regarding the proposed amendment to 22 TAC §465.18, Forensic Services.

Comment. The Director of the Texas Psychological Association Forensic Practice Division commented that the wording "or designation as an expert" be added to the subsection (b)(5).

Agency Response. The agency agrees. Subsection (b)(5) has been modified to indicate "or designation as an expert."

Comment. The Director of the Texas Psychological Association Forensic Practice Division commented that opposition to the word "access" in the proposed rule amendment to subsection (c)(6). The commenter stated that the identity of persons having "access" to results of a forensic evaluation may not be known by the psychologists. The commenter suggested the term "distribution." The psychologist would therefore describe the anticipated distribution of the report, e.g. to the court, to his or her attorney, etc.

Agency Response. The agency disagrees and maintains language as published as proposed. The agency maintains that the language of the rule is parallel to language in 22 TAC §465.22, Psychological Records, Test Data and Test Protocols subsection (c) pertaining to "access to records and test data." In addition, subjects of forensic psychological services are entitled to know who will have "access" to the psychological records and reports.

Comment. The Director of the Texas Psychological Association Forensic Practice Division stated the opposition to the proposed amendment in subsection (c)(7). The commenter stated that the language is ambiguous and that the time frame for completion of a report is often established by a court.

Agency Response. The agency disagrees. Subjects of forensic psychological services are entitled to know how much time the psychologist expects he or she will require to complete a report, and if the time frame has been established by court order, the subjects should be made aware of that time frame.

Comment. The Director of the Texas Psychological Association Forensic Practice Division noted that in subsection (e) and (e)(1) that the heading and paragraph could be more clear if transposed.

Agency Response. The agency generally agrees with the comments and the language has been changed. In addition, the agency adds the phrase "unless required to do so by court order" to acknowledge the possibility of a superceding order, and to maintain a parallel provision with subsection (d)(3).

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

§465.18. Forensic Services.

(a) In General.

(1) A licensee who provides services concerning a matter which the licensee knows or should know will be utilized in a legal proceeding, such as a child custody determination or a divorce, must comply with all applicable Board rules concerning forensic services regardless of whether the licensee is acting as a factual witness or an expert.

(2) Licensees who engage in forensic services must have demonstrated appropriate knowledge of and competence in all underlying areas of psychology about which they provide such services.

(3) All forensic opinions, reports, assessments, and recommendations rendered by a licensee must be based on information and techniques sufficient to provide appropriate substantiation for each finding.

(4) A licensee who provides forensic services must comply with all other applicable Board rules and state and federal law relating to the underlying areas of psychology relating to those services.

(b) Limitation on Services.

(1) A licensee who is asked to provide an opinion concerning an area or matter about which the licensee does not have the appropriate knowledge and competency to render a professional opinion shall decline to render that opinion.

(2) A licensee who is asked to provide an opinion concerning a specific matter for which the licensee lacks sufficient information to render a professional opinion shall decline to render that opinion unless the required information is provided.

(3) A licensee shall not render a written or oral opinion about the psychological characteristics of an individual without conducting an examination of the individual unless the opinion contains a statement that the licensee did not conduct an examination of the individual.

(4) A written or oral opinion about the psychological characteristics of an individual rendered by a licensee who did not conduct an examination of that individual must contain clarification of the extent to which this limits the reliability and validity of the opinion and the conclusions and recommendations of the licensee.

(5) When seeking or receiving court appointment or designation as an expert for a forensic evaluation a licensee specifically avoids accepting appointment or engagement for both evaluation and therapeutic intervention for the same case. A licensee provides services in one but not both capacities in the same case.

(c) Describing the Nature of Services. A licensee must document in writing that subject(s) of forensic evaluations or their parents or legal representative have been informed of the following:

(1) The nature of the anticipated services (procedures);

(2) The specific purpose and scope of the evaluation;

(3) The identity of the party who requested the psychologist's services;

(4) The identity of the party who will pay the psychologist's fees and if any portion of the fees is to be paid by the subject, the estimated amount of the fees;

(5) The type of information sought and the uses for information gathered;

(6) The people or entities to whom psychological records will be distributed;

(7) The approximate length of time required to produce any reports or written results;

(8) Applicable limits on confidentiality and access to psychological records; and

(9) Whether the psychologist has been or may be engaged to provide testimony based on the report or written results of forensic psychological services in a legal proceeding.

(d) Child Custody Evaluations.

(1) The primary consideration in a child custody evaluation is to assess the individual and family factors that affect the best psychological interests of the child. Other factors or specific factors may also be addressed given a specific forensic services engagement.

(2) Child custody evaluations generally involve an assessment of the adults' capacity for parenting, an assessment of the psychological functioning, developmental needs, and wishes of the child, and the functional ability of each parent to meet such needs. Other socioeconomic factors, family, collateral and community resources may also be taken into secondary consideration.

(3) The role of the psychologist in a child custody forensic engagement is one of a professional expert. The psychologist cannot function as an advocate and must retain impartiality and objectivity, regardless of whether retained by the court or a party to the divorce. The psychologist must not perform an evaluation where there has been a prior therapeutic relationship with the child or the child's immediate family members, unless required to do so by court order.

(4) The scope of the evaluation is determined by the psychologist based on the referral question(s). Licensees must comprehensively perform the evaluation based on the scope of the referral, but not exceed the scope of the referral.

(e) Child Visitation. Forensic opinions as to child visitation and parenting arrangements must be supported by forensic evaluations.

(1) Licensees may provide treatment or evaluation, but not both in the same case.

(2) A treating psychologist may express an opinion as to the progress of treatment, but shall refrain from rendering an opinion about child visitation or parenting arrangements, unless required to do so by court order.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806009
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: December 7, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 305-7706

22 TAC §465.37

The Texas State Board of Examiners of Psychologists adopts amendments to §465.37, Compliance with All Applicable Laws, without changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8158).

The amendments are being adopted to indicate that licensees who serve as experts must adhere to state law.

The adopted amendments will help to ensure protection of the public.

The public comment period on the proposal began September 26, 2008 and ended October 26, 2008. Following is a summary of public comments and corresponding agency responses regarding the proposed amendment to 22 TAC §465.37, Compliance with All Applicable Laws.

Comment. The Director of the Texas Psychological Association Forensic Practice Division stated that they concurred with the indication that licensees who serve as experts must adhere to state law.

Agency Response. The agency agrees.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806010
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: December 7, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 305-7706

CHAPTER 471. RENEWALS

22 TAC §471.6

The Texas State Board of Examiners of Psychologists adopts an amendment to §471.6, Renewal Penalty Waiver for Licensees on Military Deployment, without changes to the proposed text published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8158) and will not be republished.

The amendment is being adopted to clarify the rule.

The adopted amendment will help to ensure protection of the public.

No public comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806011
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Effective date: December 7, 2008
Proposal publication date: September 26, 2008
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PART 32. STATE BOARD OF EXAMINERS FOR SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY

CHAPTER 741. SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

The State Board of Examiners for Speech-Language Pathology and Audiology (board) adopts amendments to §§741.44, 741.64, 741.82, and 741.102 concerning the regulation and licensure of speech-language pathologists and audiologists. Section 741.64 is adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7970). Sections 741.44, 741.82, and 741.102 are adopted without changes, and the sections will not be republished.

BACKGROUND AND PURPOSE

The adopted amendments update the rules so that they reflect the board's current operational procedures in processing and approving licensure applications and provide clarification of the rules, so that the intent is not ambiguous for license holders and the public. The adopted amendments are necessary to update and clarify existing licensure requirements for doctor of audiology students by reflecting current national standards.

SECTION-BY-SECTION SUMMARY

The amendment to §741.44(a) is adopted to clarify the experience requirements for supervisors.

The amendment to §741.64(g)(4) is adopted to delete obsolete language. The amendment to subsection (k)(17) clarifies documentation that is required.

The amendments to §741.82 are adopted to clarify the educational documentation required from the fourth-year audiology extern student.

The amendment to §741.102 is adopted to clarify what should be included on the written contract.

COMMENTS

The board has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period. The commenters were five individuals and one association including the following: Licensees of the board and representatives of the Texas Speech-Language-Hearing Association. The commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments. Commenters were generally in favor of the rules.

Comment: Concerning §741.64(g)(4), five of the commenters indicated that deletion for the current language of "at the location where the assistant is employed" would create more confusion.

Response: The board agrees with the commenters and amended the language in §741.64(g)(4) to read "where the speech-language pathology assistant is providing the therapy."

Comment: Concerning §741.81(b)(1)(C), one commenter indicated that the wording of the rule was not clearly written and thinks that some words may have been omitted.

Response: The board agrees with the commenter. Since this section was not proposed for revision at this time, the board will review this language when it considers subsequent revisions. No change was made to the rule as a result of this comment.

Comment: Concerning §741.82(f)(1), three commenters indicated that the wording of the rule was not clearly written and thinks that some words may have been omitted.

Response: The board agrees with the commenters. The board will review this language when it considers subsequent revisions. No change was made to the rule as a result of these comments.

SUBCHAPTER D. CODE OF ETHICS; DUTIES AND RESPONSIBILITIES OF LICENSE HOLDERS

22 TAC §741.44

STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806202
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State Board of Examiners for Speech-Language Pathology and Audiology
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
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SUBCHAPTER E. REQUIREMENTS FOR LICENSURE OF SPEECH-LANGUAGE PATHOLOGISTS

22 TAC §741.64

STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

§741.64. Requirements for an Assistant in Speech-Language Pathology License.

(a) An applicant for an assistant in speech-language pathology license shall meet the requirements set out in the Act, and this section. The applicant for the assistant license must:

(1) possess a baccalaureate degree with an emphasis in communicative sciences and disorders;

(2) have acquired the following:

(A) at least 24 semester hours in speech-language pathology and/or audiology;

(B) and at least 18 semester hours of the 24 hours must be in speech-language pathology;

(C) at least three semester hours in language disorders;

(D) at least three semester hours in speech disorders; and

(E) excludes clinical experience and course work such as special education, deaf education, or sign language; and

(3) have earned no fewer than 25 hours of clinical observation in the area of speech-language pathology and 25 hours of clinical assisting experience in the area of speech-language pathology obtained within an educational institution or in one of its cooperating programs or under the direct supervision at their place of employment.

(b) The baccalaureate degree shall be completed at a college or university which has a program accredited by the American Speech-Language-Hearing Association Council on Academic Accreditation or holds accreditation or candidacy status from a recognized regional accrediting agency.

(1) Original or certified copy of the transcripts showing the conferred degree shall be submitted and reviewed as follows:

(A) only course work earned within the past 10 years with a grade of "C" or above is acceptable;

(B) a quarter hour of academic credit shall be considered as two-thirds of a semester credit hour; and

(C) academic courses, the titles of which are not self-explanatory, shall be substantiated through course descriptions in official school catalogs or bulletins or by other official means.

(2) In the event the course work and clinical experience set out in subsection (a) of this section were earned more than 10 years before the date of application for the assistant license, the applicant shall submit proof of current knowledge of the practice of speech-language pathology to be evaluated by the board's designee. Within 15 working days of receipt, the board's designee shall evaluate the documentation and shall either approve the application, request additional documentation, or require that additional coursework or continuing professional education be earned. If necessary, the applicant may reapply for the license when the requirements of this section are met.

(c) An applicant who possesses a baccalaureate degree with a major that is not in communicative sciences and disorders may qualify for the assistant license. The board's designee shall evaluate transcripts on a case-by-case basis to ensure equivalent academic preparation and shall determine if the applicant satisfactorily completed 24 semester credit hours in communicative sciences or disorders which may include some leveling hours. Within 15 working days of receipt, the board's designee shall approve the application, request additional documentation, or require that additional coursework or continuing professional education be earned. If necessary, the applicant may reapply for the license when the requirements of this section are met.

(d) Degrees and/or course work received at foreign universities shall be acceptable only if such course work and clinical practicum hours may be verified as meeting the requirements of subsection (a) of this section. The applicant must bear all expenses incurred during the procedure. The board's designee shall evaluate the documentation within 15 working days of receipt of all documentation, which shall include an original transcript and an original report from a credential evaluation services agency acceptable to the board.

(e) An applicant who has not acquired the hours referenced in subsection (a)(3) of this section shall not meet the minimum qualifications for the assistant license. Other than acquiring the 25 hours of clinical observation and the 25 hours of clinical assisting experience through an accredited college or university, there are no other exemptions in the Act, for an applicant to acquire the hours. The applicant shall first obtain the assistant license by submitting the forms, fees, and documentation referenced in §741.112(e) of this title (relating to Required Application Materials) and include a clinical deficiency plan to acquire the clinical observation and clinical assisting experience hours lacking.

(1) The licensed speech-language pathologist who will provide the assistant with the training to acquire these hours shall submit:

(A) the supervisory responsibility statement form; and

(B) a clinical deficiency plan that shall include the following:

(i) name and signature of the assistant;

(ii) name, qualifications, and signature of the licensed speech-language pathologist who will provide the training;

(iii) number of hours of observation and/or assisting experience lacking;

(iv) statement that the training shall be conducted under 100% direct, face-to-face supervision of the assistant; and

(v) list of training, consistent with subsection (h) of this section, that shall be completed.

(2) The board office shall evaluate the documentation and fees submitted to determine if the assistant license shall be issued. Additional information or revisions may be required before approval is granted.

(3) The clinical deficiency plan shall be completed within 60 days of the issue date of the license or the assistant shall be considered to have voluntarily surrendered the license.

(4) Immediately upon completion of the clinical deficiency plan, the trainer identified in the plan shall submit:

(A) a supervision log that verifies the specific times and dates in which the hours were acquired with a brief description of the training conducted during each session;

(B) a rating scale of the assistant's performance; and

(C) a signed statement that the assistant successfully completed the clinical observation and clinical assisting experience under his or her 100% direct, face-to-face supervision of the assistant. This statement shall specify the number of hours completed and verify completion of the training identified in the clinical deficiency plan.

(5) Board staff shall evaluate the documentation required in paragraph (4) of this subsection and inform the licensed assistant and licensed speech-language pathologist who will provide the licensed assistant with the training if acceptable.

(6) A licensed assistant may continue to practice under supervision of the licensed speech-language pathologist who will provide the licensed assistant with the training while the board office evaluates the documentation identified in paragraph (4) of this subsection.

(7) In the event, another licensed speech-language pathologist shall supervise the assistant after completion of the clinical deficiency plan, a supervisory responsibility statement form shall be submitted to the board office seeking approval for the change in supervision. If the documentation required by paragraph (4) of this subsection has not been received and approved by the board office, approval for the change in supervision shall not be granted.

(f) A supervisory responsibility statement form shall be completed and signed by both the applicant and the licensed speech-language pathologist who agrees to assume responsibility for all services provided by the assistant. The supervisor shall have practiced for at least three years and shall submit a signed statement verifying he or she has met this requirement. If the supervisor does not have the required experience, the supervisor shall submit a written request outlining the supervisor's qualifications and a justification for the request for an exception. The board's designee shall evaluate the request and approve or disapprove it within 15 working days of receipt by the board.

(1) Approval from the board office shall be required prior to practice by the assistant. The supervisor responsibility statement shall be submitted upon:

(A) application for a license;

(B) license renewal when there is a change in supervisor;

(C) other changes in supervision; and

(D) the addition of other supervisors.

(2) In the event more than one licensed speech-language pathologist agrees to supervise the assistant, each supervisor shall be identified on the supervisor responsibility statement.

(3) An assistant may renew the license if there is a change in supervision, but may not practice until a new supervisory responsibility statement form is approved.

(4) In the event the supervisor ceases supervision of the assistant, the supervisor shall notify the board, in writing, and shall inform the assistant to stop practicing immediately. The board shall hold the supervisor responsible for the practice of the assistant until written notification has been received in the board office.

(5) Should the assistant practice without approval from the board office, disciplinary action may be initiated against the assistant. If the supervisor had knowledge of this violation, disciplinary action against the supervisor may also be initiated.

(g) A licensed speech-language pathologist shall assign duties and provide appropriate supervision to the assistant.

(1) Initial diagnostic contacts shall be conducted by the supervising speech-language pathologist.

(2) Following the initial diagnostic contact, the supervising speech-language pathologist shall determine whether the assistant has the competence to perform specific duties before delegating tasks.

(3) Indirect methods of supervision may include audio and/or video tape recording, report review, telephone or electronic communication, or other means of reporting.

(4) The supervising speech-language pathologist shall provide a minimum of two hours per week of supervision, at least one hour of which is face-to-face supervision where the speech-language pathology assistant is providing the therapy. This applies whether the assistant's practice is full or part-time.

(5) An exception to paragraph (3) of this subsection may be requested. The supervising speech-language pathologist shall submit a proposed plan of supervision for review by the board's designee. Within 15 working days of receipt of the request, the board's designee shall approve or disapprove the plan. The plan shall be for not more than one year's duration and shall include:

(A) the name of the licensed speech-language pathology assistant;

(B) the name and signature of the supervising speech-language pathologist;

(C) the proposed plan of supervision;

(D) the exact time frame for the proposed plan;

(E) the length of time the assistant has been practicing under the requestor's supervision; and

(F) the reason the request is necessary.

(6) If the exception referenced in paragraph (5) of this subsection is approved and the reason continues to exist, the licensed supervising speech-language pathologist shall annually resubmit a request to be evaluated by the board's designee. Within 15 working days of receipt of the request, the board's designee shall approve or disapprove the plan.

(7) Supervisory records shall be maintained for a period of three years by the licensed speech-language pathologist that verify regularly scheduled monitoring, assessment, and evaluation of the assistant's and client's performance. Such documentation may be requested by the board.

(A) An assistant may conduct assessments which includes data collection, clinical observation and routine test administration if the assistant has been appropriately trained and the assessments

are conducted under the direction of the supervisor. An assistant may not conduct a test if the test developer has specified that a graduate degreed examiner should conduct the test.

(B) An assistant may not conduct an evaluation which includes diagnostic testing and observation, test interpretation, diagnosis, decision making, statement of severity or implication, case selection or case load decisions.

(h) Although the licensed supervising speech-language pathologist may delegate specific clinical tasks to an assistant, the responsibility to the client for all services provided cannot be delegated. The licensed speech-language pathologist shall ensure that all services provided are in compliance with this chapter.

(1) The licensed supervising speech-language pathologist need not be present when the assistant is completing the assigned tasks; however, the licensed speech-language pathologist shall document all services provided and the supervision of the assistant.

(2) The licensed supervising speech-language pathologist shall keep job descriptions and performance records. Records shall be current and made available to the board within 30 days of the date of the board's request for such records.

(3) The assistant may execute specific components of the clinical speech, language, and/or hearing program if the licensed speech-language pathologist determines that the assistant has received the training and has the skill to accomplish that task, and the licensed speech-language pathologist provides sufficient supervision to ensure appropriate completion of the task assigned to the assistant.

(4) Examples of duties which an assistant may be assigned by the speech-language pathologist who agreed to accept responsibility for the services provided by the assistant, provided appropriate training has been received, are to:

(A) conduct or participate in speech, language, and/or hearing screening;

(B) implement the treatment program or the individual education plan (IEP) designed by the licensed speech-language pathologist;

(C) provide carry-over activities which are the therapeutically designed transfer of a newly acquired communication ability to other contexts and situations;

(D) collect data;

(E) administer routine tests as defined by the board if the test developer does not specify a graduate degreed examiner and the supervisor has determined the assistant is competent to perform the test;

(F) maintain clinical records;

(G) prepare clinical materials; and

(H) participate with the licensed speech-language pathologist in research projects, staff development, public relations programs, or similar activities as designated and supervised by the licensed speech-language pathologist.

(i) A licensed speech-language pathology assistant may represent special education and speech pathology at Admission, Review and Dismissal (ARD) meetings with the following stipulations.

(1) The speech-language pathology assistant shall have written documentation of approval from the licensed, board approved speech-language pathologist supervisor.

(2) The speech-language pathology assistant shall have three years experience as a speech pathology assistant in the school setting.

(3) The speech-language pathology assistant may attend, with written approval of the supervising speech-language pathologist, a student's annual review ARD meeting if the meeting involves a student for whom the licensed speech-language pathology assistant provides services. If an assistant attends a meeting as provided by this rule, the supervising speech-language pathologist is not required to attend the meeting. A supervising speech-language pathologist must attend an ARD meeting if the purpose of the meeting is to develop a student's initial individual educational plan or if the meeting is to consider the student's dismissal, unless the supervising speech-language pathologist has submitted their recommendation in writing on or before the date of the meeting.

(4) The speech-language pathology assistant shall present Individual Educational Plan (IEP) goals and objectives that have been developed by the supervising speech-language pathologist and reviewed with the parent by the speech-language pathologist.

(5) The speech-language pathology assistant shall discontinue participation in the ARD meeting, and contact the supervising speech-language pathologist, when questions or changes arise regarding the IEP Document.

(j) The licensed, board approved supervisor of the assistant, prior to the ARD, shall:

(1) notify the parents of students with speech impairments that services will be provided by an SLP assistant and that the SLP assistant will represent Speech Pathology at the ARD;

(2) develop the student's new IEP goals and objective and review them with the SLP assistant; and

(3) maintain undiminished responsibility for the services provided and the actions of the assistant.

(k) The licensed speech-language pathology assistant shall not:

(1) conduct evaluations, even under supervision, since this is a diagnostic and decision making activity;

(2) interpret results of routine tests;

(3) interpret observations or data into diagnostic statements, clinical management strategies, or procedures;

(4) represent speech-language pathology at staff meetings or at an admission, review and dismissal (ARD), except as specified in this section;

(5) attend staffing meeting or ARD without the licensed assistant's supervising speech-language pathologist being present except as specified in this section;

(6) design or alter a treatment program or individual education plan (IEP);

(7) determine case selection;

(8) present written or oral reports of client information, except as provided by this section;

(9) refer a client to other professionals or other agencies;

(10) use any title which connotes the competency of a licensed speech-language pathologist;

(11) practice as an assistant in speech-language pathology without a valid supervisory responsibility statement on file in the board office;

(12) perform invasive procedures;

(13) screen or diagnose clients for feeding and swallowing disorders;

(14) use a checklist or tabulated results of feeding or swallowing evaluations;

(15) demonstrate swallowing strategies or precautions to clients, family, or staff;

(16) provide client or family counseling; or

(17) write or sign any formal document relating to the reimbursement for or the provision of speech-language pathology services.

(l) In any professional context the licensee must indicate the licensee status as a speech-language pathology assistant.

(m) The board may audit a random sampling of licensed speech-language pathology assistants for compliance with this section and §741.44 of this title (relating to Requirements, Duties, and Responsibilities of Supervisors).

(1) The board shall notify an assistant and supervisor by mail that he or she has been selected for an audit.

(2) Upon receipt of an audit notification, the licensed speech-language pathology assistant and the licensed speech-language pathologist who agreed to accept responsibility for the services provided by the assistant shall mail the requested proof of compliance to the board.

(3) The licensed speech-language pathology assistant and the supervising speech-language pathologist shall comply with the board's request for documentation and information concerning compliance with the audit.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806203
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Effective date: December 14, 2008
Proposal publication date: September 19, 2008
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SUBCHAPTER F. REQUIREMENTS FOR LICENSURE OF AUDIOLOGISTS

22 TAC §741.82

STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806204
Kerry Ormson, Ed.D., Au.D.
Presiding Officer
State Board of Examiners for Speech-Language Pathology and Audiology
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER H. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §741.102

STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §401.202, which provides the State Board of Examiners for Speech-Language Pathology and Audiology with the authority to adopt rules necessary to administer and enforce Texas Occupations Code, Chapter 401.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806205
Kerry Ormson, Ed.D., Au.D.
Presiding Officer
State Board of Examiners for Speech-Language Pathology and Audiology
Effective date: December 14, 2008
Proposal publication date: September 19, 2008
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER F. HEMOPHILIA ASSISTANCE PROGRAM

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§37.111

- 37.119, and new §§37.111 - 37.119, concerning the Hemophilia Assistance Program (HAP). The new §37.112, §37.113, and §37.115 are adopted with changes to the proposed text as published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7127). New §§37.111, 37.114, and 37.116 - 37.119 and the repeal of §§37.111 - 37.119 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeals and new sections will reorganize and update information, delete and revise language, and make grammatical corrections to improve flow, accuracy, and clarity.

The repeals and new sections are necessary to comply with Government Code, §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.111 - 37.119 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The following changes to names and addresses have been made throughout §§37.111 - 37.119. References to legacy agencies, now part of the Health and Human Services Commission, have been amended to reflect the department's name change from "Texas Department of Health" to "Department of State Health Services," and references to the "Board of Health" have been deleted.

New §37.111 groups the terms "purpose," "confidentiality of information," and "forms" together.

New §37.112 includes new definitions for terms used with the rules.

New §37.113 clarifies the eligibility requirements, the application and eligibility dates, financial eligibility criteria, and residency requirements.

New §37.114 clarifies and updates existing language, and sets out conditions for benefits and limitations of the HAP.

New §37.115 clarifies provider enrollment criteria for the HAP, change of provider ownership requirements, the consequences for not continuing to meet the requirements, and provider limitations.

New §37.116 includes language for authorizations and claims processing, including filing deadlines.

New §37.117 includes language concerning rights and responsibilities for applicants, clients, providers, and participating providers.

New §37.118 includes language concerning modifications, suspensions, denials, and terminations for applicants, clients, providers, and participating providers.

New §37.119 clarifies the appeal process, describes the procedures for informal disposition of a complaint, and describes the procedures for an administrative review and fair hearing request.

COMMENTS

The department, on behalf of the commission, did not receive any public comments regarding the proposed rules during the comment period.

However, department staff provided comments and made minor editorial changes in §37.112(1), §37.113(a)(6), and §37.115(a)(3) to enhance the clarity of the sections.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

25 TAC §§37.111 - 37.119

STATUTORY AUTHORITY

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

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806164
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 14, 2008
Proposal publication date: August 29, 2008
For further information, please call: (512) 458-7111 x6972

25 TAC §§37.111 - 37.119

STATUTORY AUTHORITY

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

§37.112. Definitions.

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

(1) Administrative review--A process that allows applicants or clients the opportunity to request an informal review of any intended HAP action that would suspend, modify, deny, or terminate their eligibility for benefits or participation in the HAP or reimbursement for allowable products.

(2) Allowable products--Blood derivatives, blood concentrates, and manufactured pharmaceutical products indicated for the treatment of hemophilia and approved for payment by the HAP.

(3) Applicant--An individual whose application has been submitted, but HAP has not made a final determination of eligibility.

This includes an individual whose application is submitted by a representative or person with legal authority to act for the individual.

(4) Client--A person who has applied for program services and who meets all HAP eligibility requirements and is determined to be eligible for program services.

(5) Commission--The Health and Human Services Commission (HHSC).

(6) Date of service (DOS)--The date the allowable products are dispensed.

(7) Department--Department of State Health Services.

(8) Effective date--The initial date of eligibility for a HAP client.

(9) Fair hearing--The informal hearing process the department follows under 25 Texas Administrative Code (TAC), §§1.51 - 1.55 (relating to Fair Hearing Procedures).

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

(11) Filing deadline--The last date that a claim may be received by the HAP and still be considered for benefits eligibility.

(12) Hemophilia Assistance Program (HAP)--A program funded by the State of Texas that provides limited financial assistance to persons age 21 and older who have been diagnosed with hemophilia and meet other program eligibility requirements for blood derivates, blood concentrates, and manufactured pharmaceutical products that are administered or dispensed by program-approved providers.

(13) Hemophilia--A human physical condition characterized by bleeding, resulting from a genetically determined deficiency of a blood coagulation factor or an abnormal or deficient plasma procoagulant that prevents the blood from clotting properly. The diagnoses covered by the HAP include:

(A) congenital factor VIII disorder (Hemophilia A);

(B) congenital factor IX disorder (Hemophilia B); and

(C) congenital factor XI disorder (Hemophilia C).

(14) Inhibitor--A type of antibody that requires the use of higher doses of blood factor to contain a bleeding episode.

(15) Provider--Any individual or entity approved by the HAP to provide allowable products to HAP clients.

(16) Physician--An individual licensed by the Texas Medical Board to practice medicine in the State of Texas.

(17) Reimbursement--Payment of a claim for allowable products administered or dispensed to a HAP client submitted by a provider.

(18) Reimbursement rate--The HAP payment rate for allowable products, determined annually for the following fiscal year based on the current year's Texas Medicaid Program reimbursement rate.

§37.113. Eligibility.

(a) Client Requirements. A person shall meet all of the following requirements to be eligible for benefits from the HAP:

(1) have a diagnosis of hemophilia certified by a physician;

(2) be 21 years of age or older;

(3) be a resident of Texas as specified in subsection (d) of this section and not be:

(A) incarcerated in a city, county, state, or federal jail, or prison; or

(B) a ward of the state.

(4) submit a complete application for benefits to the HAP;

(5) satisfy the financial criteria as specified in subsection (c) of this section, including any person or persons who have a legal obligation to support the client; and

(6) the applicant must not be eligible for the Children with Special Health Care Needs Services Program, the Texas Medicaid Program, or Medicare.

(b) Applications and Eligibility Dates.

(1) Persons meeting the eligibility requirements set forth in subsection (a) of this section must submit a complete application in order to receive benefits through the HAP.

(2) An eligibility determination will be made upon receipt of a complete application, which shall consist of all of the following:

(A) a complete Application for Assistance Form, with the applicant's, or the applicant's representative's, and physician's original signatures or "mark";

(B) documentation of Texas residency as specified in subsection (d) of this section; and

(C) documentation of income as specified in subsection (c) of this section.

(3) Any application which does not meet all of the requirements of paragraph (2) of this subsection is incomplete and shall be returned to the submitting person for correction or completion if the missing information is not otherwise provided.

(4) The HAP eligibility date for HAP benefits will be either:

(A) the date the HAP receives a completed application; or

(B) the date of conditional authorization for allowable products, if all written information to establish eligibility is received within 30 calendar days following the date of conditional authorization.

(5) If HAP benefits are terminated, the eligibility date for any subsequent benefit period will be the date on which the HAP receives a subsequent completed application for HAP benefits or the date of conditional authorization for allowable products, if all written information to establish eligibility is received within 30 calendar days following the date of conditional authorization.

(6) All HAP clients are required to submit valid residency and income verification information as outlined in subsections (c) and (d) of this section upon request and at least annually, in order for the HAP to determine continuing program eligibility.

(7) The denial of any application submitted to the HAP shall be in writing and shall include the reason(s) for such denial. The applicant has the right of appeal as outlined in §37.119 of this title (relating to Right of Appeal).

(c) Financial Criteria.

(1) Income must be at or below 200% of the FPL.

(2) Acceptable income verification documentation as described in paragraph (3)(C) of this subsection shall be submitted with the application. Changes in income or financial qualifications that would affect the applicant's eligibility shall be reported to the HAP.

(3) Financial need is established on the basis of income available to the applicant and the person(s) who have a legal obligation to support the applicant. If the applicant and person(s) who have a legal obligation to support the applicant are unemployed, a statement(s) of termination from the employer(s), or other documentation acceptable to the HAP, is required.

(A) The income used to determine eligibility is the combined gross income of the applicant and of all persons who have a legal obligation to support the applicant.

(B) Income includes, but is not limited to:

(i) earned wages;

(ii) pensions;

(iii) allotments;

(iv) alimony; and

(v) any other monies received on a regular basis for support purposes.

(C) Income verification documentation includes:

(i) employer's written verification of gross monthly income;

(ii) the most recent pay check stub/monthly employee earnings statement;

(iii) Internal Revenue Service Income Tax Return forms for the most recently completed year;

(iv) pension/allotment award letters; or

(v) any other documents considered valid by the HAP.

(d) Residency Requirements.

(1) The following conditions shall be met by an applicant and maintained by a client to satisfy the residency requirements in this section:

(A) physically reside within the state; and

(B) maintain a home or abode within the state.

(2) If the applicant is a legal dependent of, and residing with, a person establishing residency on behalf of the applicant (such as a parent, a sibling, an adult child, or spouse), or if the applicant is a person under legal guardianship, then the person providing support or the legal guardian of the applicant must meet the requirements of paragraph (1) of this subsection.

(3) If the applicant is a parent residing with an adult child who meets the requirements of paragraph (1) of this subsection, residency may be established through the adult child.

(4) If the applicant is a parent being supported by an adult child, whether or not the child meets the requirements of paragraph (1) of this subsection, the parent applicant's residency may be established by the adult child's providing the required documents that establish the Texas residency of the parent applicant.

(5) The provisions of paragraphs (3) and (4) of this subsection apply, even if no legal guardianship has been established.

(6) An applicant who is currently a Texas resident and currently approved to receive benefits from Temporary Assistance for Needy Families (TANF) or Food Stamps is not required to provide additional residency verification.

(7) A person establishing residency on behalf of the applicant, who is currently a Texas resident and currently approved to receive benefits from Temporary Assistance for Needy Families (TANF) or Food Stamps, is not required to provide additional residency verification.

(8) An applicant or person establishing residency on behalf of the applicant, may submit a copy of any one of the following documents as evidence of residency. All documents shall be in the applicant's name or in the name of the person establishing residency for the applicant, and provide verification of a Texas address or domicile:

(A) a valid Texas driver license, or an identification card issued by the Texas Department of Public Safety;

(B) a valid Texas voter's registration card, or a copy of a validated (by a Texas county clerk's office) application for a voter's registration card;

(C) a current Texas motor vehicle registration or automobile license plate registration renewal form;

(D) a statement reflecting that the applicant is currently receiving rent-free housing. The statement must be signed by an individual responsible for providing the rent-free housing and must include the address and phone number of the individual or the organization providing the rent-free housing;

(E) a Texas property tax receipt for the most recently completed tax year; or

(F) any of the following documents, which must not be older than three months immediately preceding the applicant's signature date on the HAP application not including the application month:

(i) a mortgage payment receipt;

(ii) a rent payment receipt;

(iii) a utility payment receipt;

(iv) a dated payroll or retirement check;

(v) prepared employment/unemployment records;

(vi) an account statement from a financial institution;

(vii) Social Security supplemental income or disability income records, or Social Security retirement benefit records; or

(viii) any other documents deemed appropriate by the HAP.

(e) Legal Relationship. If the applicant's residency is established through the residency of another person, the following conditions must be met.

(1) The applicant must include documentation of the legal relationship between the applicant and the resident or person providing financial support, such as:

(A) a marriage license or declaration of non-ceremonial marriage to document the marriage of the applicant and spouse;

(B) a birth certificate establishing the parent-child relationship between the applicant and the resident; or

(C) an income tax return showing the name and relationship of the applicant to the resident.

(2) Any difference between the name of the applicant and the name on any document must be explained by additional documentation (example: marriage license, divorce decree, or adoption decree).

§37.115. Providers.

(a) Applicable provider types for the HAP include, but are not limited to:

(1) pharmacies;

(2) hospitals; or

(3) blood banks.

(b) In order for a provider to qualify for participation and to enroll in the HAP, the provider shall meet the following criteria:

(1) enter into an agreement to participate in the HAP;

(2) submit a completed HAP provider enrollment form to the HAP;

(3) submit a completed department Child Support Certification form to the HAP;

(4) be a current Texas Medicaid Program provider;

(5) reimburse the HAP for any overpayments made to the provider by the HAP upon request;

(6) not currently be on suspension as a HAP provider or as a Texas Medicaid Program provider;

(7) accept the payment amount authorized by the HAP as payment in full; and

(8) comply with provisions of the most current HAP Provider Manual.

(c) Changes in provider ownership require termination of the agreement to participate. A new agreement must be executed under the new ownership.

(d) The HAP may establish provider enrollment limitations in order to conserve funds, assure quality, and effectively administer the program.

(e) The HAP may modify, suspend, deny, or terminate a provider's approval to participate for the following reasons:

(1) submission of false or fraudulent claims;

(2) failure to provide and maintain quality services;

(3) failure to adhere to medically acceptable standards;

(4) breach of the provider agreement;

(5) disenrollment as a Texas Medicaid Program provider; or

(6) violation of the requirements of this chapter.

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

Filed with the Office of the Secretary of State on November 24, 2008.

TRD-200806165

Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 14, 2008
Proposal publication date: August 29, 2008
For further information, please call: (512) 458-7111 x6972

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.22

The General Land Office (GLO) adopts amendments to §15.22 relating to Certification Status of Brazoria County Dune Protection and Beach Access Plan (Plan) with changes to the text published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5239). The changes to the adopted text are minor and reflect syntax corrections. The GLO adopts an amendment to §15.22 concerning the certification status of the Plan, adopted on August 9, 1993, and amended by Brazoria County (County), on September 27, 1993. The amendment to §15.22 certifies as consistent with state law the amendments to the Plan that were adopted by Brazoria County on April 8, 2008 by Order No. 39. The amendment includes a variance requested by the County relating to the use of unreinforced fibercrete in four foot by four foot sections in the area 25 feet landward of the north toe of the dune to 200 feet landward of the line of vegetation. Copies of the local government dune protection and beach access plan and any amendments to those plans are available from the Floodplain/911 Administrator Penny Goode, who may be contacted at 451 North Velasco Street, Suite 210, Angleton, Texas 77515, Phone: (979) 864-1295, Fax: (979) 864-1003, Email: pennyg@brazoria-county.com.

BACKGROUND

Pursuant to the Open Beaches Act (Texas Natural Resources Code, Chapter 61), the Dune Protection Act (Texas Natural Resources Code, Chapter 63), and the Beach/Dune Rules (31 TAC §§15.1 - 15.12, 15.21 - 15.36), a local government with jurisdiction over Gulf Coast beaches must submit its dune protection and beach access plan and any amendments to such a plan to the GLO for certification pursuant to 31 TAC §15.3(o). The GLO reviews a local beach access and dune protection plan and, if appropriate, certifies that the plan is consistent with state law by adoption or amendment of a rule as authorized in Texas Natural Resources Code §61.011(d)(5) and §61.015(b). The certification by rule reflects the state's approval of the plan, but the text of the plan is not adopted by the GLO as provided in 31 TAC §15.3(o)(4).

A local government requesting certification of a plan or plan amendment that includes a variance of any requirement or prohibition in the GLO's Beach/Dune Rules must submit to the GLO a reasoned justification demonstrating how the variance provides equal or better protection of dunes, dune vegetation,

and public access to and use of the public beach than is provided by the Beach/Dune Rules, as required by 31 TAC §15.3(o)(6).

Brazoria County is a coastal county consisting of areas bordering West Bay, Chocolate Bay, and Christmas Bay. The County also borders the Gulf of Mexico to the southeast, extending from the southernmost boundaries of Galveston County at the San Luis Pass south to the northernmost boundary of Matagorda County at Cedar Lake Creek. The Gulf beaches and adjacent areas governed by the Plan are those areas within Brazoria County.

VARIANCE

On April 8, 2008, the Brazoria County Commissioner's Court adopted amendments to its Plan and submitted those amendments to the GLO with a request for certification received by the GLO on April 16, 2008. The County requested that the GLO certify a Plan amendment that includes a variance from the prohibitions and requirements of §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of the Beach/Dune Rules. Section 15.4(c)(8) prohibits the construction of concrete slabs or other impervious surfaces within 200 feet landward of the natural line of vegetation. Section 15.5(b)(3) prohibits a local government from issuing a beachfront construction certificate if the construction includes a proposal to build a concrete slab or other impervious surface within 200 feet landward of the line of vegetation or within the eroding area boundary, whichever distance is greater. Section 15.6(f)(3) applies to construction in eroding areas and provides that a local government may allow a permittee to alter or pave only the ground within the footprint of the habitable structure only if the alteration or paving will be entirely undertaken, constructed, and located landward of 200 feet landward from the line of vegetation or landward of an eroding area boundary established in the local dune protection and beach access plan, whichever distance is greater.

The requested variance establishes special standards providing that: (1) paving or altering the grade below the lowest habitable floor is prohibited in the area between the line of vegetation and 25 feet landward of the north toe of the dune; (2) paving used under the habitable structure and for a driveway connecting the habitable structure and the street is limited to the use of unreinforced fibercrete in 4 foot by 4 foot sections, which shall be a maximum of four inches thick with sections separated by expansion joints or pervious materials approved by the Floodplain Administrator, in that area 25 feet from the north toe of the dune to 200 feet landward of the line of vegetation, with driveway width limited to no more width than necessary to service two vehicles; (3) the County shall assess a "Fibercrete Maintenance fee" of $200.00 to be used to pay for the clean-up of fibercrete from the public beaches should the need arise; and (4) reinforced concrete may be used under the habitable structure and for a driveway connecting the habitable structure and the street in that area landward of 200 feet from the line of vegetation.

RESPONSE TO PUBLIC COMMENT

The GLO received no comments regarding the proposed amendment.

REASONED JUSTIFICATION

The reasoned justification submitted by the County in support of its request for the variance authorizing the use of fibercrete in eroding areas within 200 feet seaward of the line of vegetation suggests that it advances the public interest and provides an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach in that: (1) the ordinance provides financial assurance for debris removal and beach clean-up through imposition of the $200 fibercrete maintenance fee; (2) debris removal and beach clean-up are facilitated by the use of unreinforced fibercrete in large 4 feet by 4 feet sections rather than small pavers, with less sand removed from the beach during clean-up; and (3) prohibiting the use of fibercrete in the area between the line of vegetation and 25 feet from the north toe of the dune ensures that dune hydrology are not adversely affected. Accordingly, the General Land Office finds that the variance requested by the County and the County's reasoned justification for the variance meet the requirements for a variance under §15.3(o)(6) of the Beach/Dune Rules and proposes to certify as consistent with state law the requested variances from §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of the Beach/Dune Rules (relating to Dune Protection Standards, Beachfront Construction Standards, and Concurrent Dune Protection and Beachfront Construction Standards).

CONSISTENCY WITH CMP

The adopted amendment to §15.22 concerning Certification Status of Brazoria County Dune Protection and Beach Access Plan is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(J), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed the adopted amendment for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.26, relating to Policies for Construction in the Beach/Dune System, and §501.27, relating to Policies for Development in Coastal Hazard Areas. The amendment will not allow the material weakening of dunes and does not affect the requirement that unavoidable damage to dunes and dune vegetation be compensated. Additionally, the amendment will preserve public beach access by assisting with debris removal in the event of a storm. The GLO has determined that the adopted amendment provides equal or better protection for dunes, dune vegetation, and public access to and use of the beach as the GLO's Beach/Dune Rules that the Council has determined to be consistent with the CMP. Consequently, the GLO has determined that the adopted amendment is consistent with applicable CMP goals and policies. No comment on the consistency of the adopted amendment was received during the comment period.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the adopted amendment in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendment is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§61.011, 61.015(b), and 61.022(c), which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and Texas Natural Resources Code §63.121

which provides the Texas General Land Office with authority to adopt rules for protection of critical dune areas.

STATUTORY AUTHORITY.

The amendment is adopted under the Texas Natural Resources Code §§61.011, 61.015(b), 61.022(c), and 61.070, which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law. In addition, Texas Natural Resources Code §63.121 provides the GLO with authority to adopt rules for protection of critical dune areas.

Texas Natural Resources Code §§61.011, 61.015, 61.022, 61.070, and 63.121 are affected by the proposed amendments.

§15.22. Certification Status of Brazoria County Dune Protection and Beach Access Plan.

(a) Brazoria County has submitted to the General Land Office a dune protection and beach access plan which is certified as consistent with state law. The County's plan was adopted on August 9, 1993, and amended on September 27, 1993 and April 8, 2008.

(b) The General Land Office certifies as consistent with state law the following variances from §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of this title (relating to Dune Protection Standards, Beachfront Construction Standards, and Concurrent Dune Protection and Beachfront Construction Standards) in the County's plan. The plan establishes special standards providing that:

(1) Paving or altering the grade below the lowest habitable floor is prohibited in the area between the line of vegetation and 25 feet landward of the north toe of the dune.

(2) Paving used under the habitable structure and for a driveway connecting the habitable structure and the street is limited to the use of unreinforced fibercrete in four- (4) foot by four- (4) foot sections, which shall be a maximum of four inches thick with sections separated by expansion joints, or pervious materials approved by the Floodplain Administrator and the driveway width shall be limited to no more than the width necessary to service two vehicles, in that area 25 feet landward of the north toe of the dune to 200 feet landward of the line of vegetation.

(3) The County shall assess a "Fibercrete Maintenance Fee" of $200.00 to be used to pay for the cleanup of fibercrete from the public beaches should the need arise.

(4) Reinforced concrete may be used under the habitable structure and for a driveway connecting the habitable structure and the street in that area landward of 200 feet from the line of vegetation.

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

Filed with the Office of the Secretary of State on November 19, 2008.

TRD-200806074
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: December 9, 2008
Proposal publication date: July 4, 2008
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER G. SPECIAL APPRAISAL

34 TAC §§9.2001 - 9.2005

The Comptroller of Public Accounts adopts new §§9.2001 - 9.2005, regarding standards for determining when land that is currently qualified for agricultural appraisal (also called open-space or productivity appraisal) under Tax Code, Chapter 23, Subchapter D, is entitled to be qualified as agricultural land used for wildlife management for property tax appraisal purposes. Sections 9.2001, 9.2004, and 9.2005 are adopted with changes to the proposed text as published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8159). Section 9.2002 and §9.2003 are adopted without changes to the proposed text as published. The new sections will be under new Subchapter G, Special Appraisal. The new sections are adopted to replace the current §9.4003, which the comptroller adopts to repeal. The new sections implement Tax Code, §23.251 by setting out rules and standards governing the qualification of agricultural land used for wildlife management and clarifying certain issues that have arisen under current §9.4003.

New §§9.2001 - 9.2005 clarify existing definitions and add new definitions, reorganize the existing wildlife use appraisal regions, modify the standards for a qualifying wildlife management plan and the requirements for qualifying land for wildlife management appraisal, and set out the formula for determining the amount of space in certain tracts that must be devoted to wildlife management to qualify the land for wildlife management appraisal.

New §9.2001, concerning Purpose and Definitions, defines certain words and terms that are used throughout the rules to establish a common terminology and avoid ambiguity. Subsection (a) sets out the purposes of the subchapter. Subsection (b) identifies comptroller and Texas Parks and Wildlife Department (TPWD) publications and provide information on how they can be obtained. These publications provide landowners and appraisal districts with information concerning the qualification of land for wildlife management appraisal.

New §9.2002, concerning Wildlife Use Appraisal Regions, identifies the counties within each appraisal region.

New §9.2003, concerning Wildlife Management Plan, sets forth the required contents of a wildlife management plan, which is required to qualify land for wildlife management appraisal. Subsections (a) and (b) require a landowner who seeks to qualify land for wildlife management appraisal to submit a wildlife management plan, on a form prescribed by TPWD, to the appraisal district in which the tract of land is located. The chief appraiser may accept, but may not require, a plan submitted on a form other than the TPWD form, if the plan contains all of the information required. Subsection (c) specifies the required contents of the wildlife management plan. Subsection (d) requires a landowner to intend the wildlife management practices and activities to benefit specific indigenous species and requires these activities to be consistent with the practices and activities con-

tained in the publications referenced in §9.2001. Subsection (e) clarifies standards for qualifying land that provides habitat for resident species that are federally listed as endangered or threatened, or designated as candidate species for listing. Subsection (f) allows a wildlife management property association to prepare a single wildlife management plan if the plan addresses the requirements of this subchapter for each tract of land in the wildlife management property association and is signed by each member of the wildlife management property association. Subsection (g) allows appraisal districts to require a signed annual report, submitted on a form prescribed by TPWD, that shows how the wildlife management plan was implemented during the previous tax year. The new section permits a wildlife management property association to file a single annual report if it is signed by each member of the wildlife management property association and contains each property owner's affirmative statement that the wildlife management activities and practices specified in a wildlife management plan have taken place.

New §9.2004, concerning Qualification for Agricultural Appraisal Based on Wildlife Management Use, incorporates and clarifies the statutory requirements for qualifying land for wildlife management appraisal. Subsection (a) requires the chief appraiser to determine if land qualifies for wildlife management appraisal by applying the wildlife management appraisal qualification criteria set forth in the subchapter. Subsection (b) sets out wildlife management use standards that must be met to qualify land for wildlife management appraisal. Subsection (c) was added to the rules as proposed and concerns the year in which a property owner files an application to qualify agricultural land (1-d-1 or open-space land) for wildlife management for the first time and recognizes that the owner's wildlife management plan may not call for the required wildlife management activities to be performed until later in the tax year, after applications have been considered for approval. The subsection notes that the Tax Code requires the chief appraiser to "back-assess" land on which the required activities were not performed by appraising it at market value for the year that it was erroneously qualified. Subsection (d) sets forth standards the chief appraiser is required to consider to determine if land is used primarily for wildlife management as required by law, which are: (1) the tract is being actively managed under a wildlife management plan; (2) the landowner gives wildlife management practices and activities priority over other uses and activities on the tract of land; and (3) secondary uses of the property do not significantly and demonstrably interfere with the wildlife management practices, and activities being conducted on the land or are not detrimental to the species targeted for management. Subsection (e) clarifies that the terms "primary use" and "principle use," as used in this subchapter, are synonymous.

New §9.2005, concerning Wildlife Use Requirement, sets out a mathematical formula used to determine the number of acres that must be devoted to wildlife management use to qualify certain tracts of land for wildlife management appraisal. The wildlife use requirements apply to land that was qualified for wildlife management appraisal, if the tract was reduced in size after January 1 of the preceding year. This formula determined the "wildlife use percentages" that are set out by the existing rule, but the formula is not in the current rule. The comptroller and TPWD proposed to adopt the formula to make the standards landowners must meet to qualify land for wildlife management appraisal more transparent to taxpayers, appraisal districts, and interested members of the public. By setting the formula out, neither the comptroller nor TPWD intends to change the manner in which the wildlife use percentage required by the existing rule has been interpreted and administered. The formula described in subsection (a) is: the tract size in acres, minus 1, divided by the tract size in acres. The "one" in the formula is not a unit of measure; it functions only to create a dividend that is slightly smaller than the divisor in order to yield a figure that is an indicator of the spatial scale of effort that must exist for the tract to be presumed to be in bona fide wildlife management. Subsection (b) exempt land from the section's requirements if the qualified tract of land is the same size or larger than it was on January 1 of the preceding tax year. Subsections (c) - (e) establish three sets of wildlife use requirements for each wildlife use appraisal region. Subsections (f) and (g) are transitional provisions. Current §9.4003, which is adopted for repeal, provides that tracts of land that qualified for wildlife management appraisal before January 1, 2002 are not required to meet the wildlife use percentage. Subsection (f) mirrors that provision for the new wildlife use requirement. Subsection (g) applies to tracts of land in three counties for which the proposed wildlife management use requirement increases the current wildlife management percentage. Land in these counties that qualified for wildlife management appraisal on January 1, 2008 continues to qualify by meeting the wildlife management percentage that is currently in place.

During the proposed period, several comments were received and considered by the comptroller.

The Texas Wildlife Association and former State Representative Bob Turner commented by expressing support for the new rules and suggesting that a provision clarifying the standards for qualification of land for wildlife management use in the first year in which the owner seeks to qualify. The commenters suggested a clarification that applies only when a property owner is first applying to qualify the land for wildlife management. The commenters noted that an owner's wildlife management plan may not require performance of wildlife management activities until later in the year, so at the time of application, a chief appraiser may not be able to find evidence that the owner is engaged in wildlife management. The commenters suggested clarifying that the chief appraiser should approve the application if the application, wildlife management plan, and any other evidence submitted to the appraisal district, shows that the owner will engage in wildlife management activities later in the year. Clarifying language has been added to the rule.

Comal Appraisal District commented that language providing that the land must be qualified for 1-d-1 agricultural appraisal to qualify for wildlife management use appraisal appeared to have been deleted from the rules. The agency disagreed and did not make changes because the proposed and adopted rules and current law require the land to be qualified 1-d-1 agricultural land before the chief appraiser may approve an application to qualify the land for wildlife management use appraisal.

Williamson Central Appraisal District commented that the rules should not allow the chief appraiser to accept a wildlife management plan that is not on a Texas Parks and Wildlife Department form because use of other forms could create inconsistency and the alternate plan could contain confusing information. The agency disagreed and did not make the suggested change because the chief appraiser is not required to accept a plan on an alternate form. If a plan is on a form that provides confusing or insufficient information, the chief appraiser may reject it and require a plan that adheres to the Texas Parks and Wildlife Department's form. The commenter also asked a question per-

taining to the qualification of other land, but did not suggest a change, therefore no change was made.

J. Scott Morris, P.C. commented that §9.2003(g), which permits a chief appraiser to request an annual plan from a property owner could be helpful to chief appraisers or it could create an unnecessary burden on property owners. The commenter noted that appraisal districts have the "power to do annual inspections," are very busy, and that the annual report requirement could accomplish nothing beyond creating extra paper. The commenter did not suggest a change and no change was made because appraisal districts do not have legal authority to physically inspect property over the property owner's objections, an annual report can provide critical information concerning the owner's land use, and a chief appraiser who does not need an annual report is not required to request one. The commenter also commented that the rules have a "fatal flaw" because they "attempt to insert new wording and new meaning into the statute that defines wildlife management." The commenter noted that §9.2004(b)(2) (the comment cites §9.2004(a)(2), but there was no subsection (a)(2) in the proposed rules) requires that land qualified for wildlife management be used primarily for wildlife management and new §9.2004(d) (proposed as §9.2004(c)) sets out factors to be considered in determining if wildlife management is the primary use, which would validate that wildlife management uses must be "primary uses." The commenter did not suggest a change, but presumably the commenter suggests deleting §9.2004(b)(2) and (e). The agency disagreed and did not delete the primary use language because the rules do not add language or meaning to the law, which unquestionably requires qualified land to be used primarily for wildlife management. Tax Code, §23.51(1) requires land to be devoted "principally" to agricultural use; primarily is defined by §9.2004(e) as synonymous with principally, and Tax Code, §23.51(2) specifies that the term "agricultural use" includes land used for wildlife management. The commenter also stated that "while wildlife management practices obviously will vary with terrain, yearly rainfall ... making allowance for differing management practices for these reasons, as is presently done... is very different from allowing one county's appraisal district to set for itself a definition of 'primary use' that is inconsistent with said definition as used in other counties. Such inconsistent practices will lead to virtually identical tracts of land, with virtually identical mixes of agricultural uses ... being taxed differently... I am well aware that some appraisal districts consider [the constitutional requirement for equal and uniform taxation] to be satisfied so long as there is uniformity within a given county, but such conclusions are based on very old cases that far predate our current system of property taxation." The commenter did not suggest a change. The agency could not determine what language the commenter would delete or amend and does not agree that the law requires appraisal districts to follow uniform standards.

Bexar Appraisal District, noting that land used as an ecological laboratory qualifies for agricultural appraisal without first establishing that the land has been used for agriculture for five of the preceding seven years, suggested that the rules be amended to prohibit agricultural land that is used as an ecological laboratory land from qualifying for wildlife management appraisal without first proving that the land has met the historical use requirement that other agricultural land must meet. The district suggests that the legislature intended to require ecological laboratories to meet the historical use requirement in order to qualify for wildlife management appraisal. The agency declined to amend the rule to add the suggested qualification requirement. The law does not require qualified ecological laboratory land to have a history. The agency does not have authority to add wildlife management qualification requirements that are not required by law and is not aware of any evidence of legislative intent regarding the matter.

Johnson County Appraisal District sent a copy of the proposed rules with the following provisions deleted from §9.2005: subsection (b), the first sentence of subsection (c), and subsections (f) and (g). These subsections exempt certain land from the wildlife use requirements set out in §9.2005, which would expand the wildlife use requirement to all land that is qualified for wildlife management appraisal. The agency declined to make the suggested changes because the use requirement is intended to encourage the preservation of open space land by applying wildlife management use requirements only when a large tract is divided into smaller tracts of land. In addition, land that was qualified before the original rules were adopted is not subject to the use requirement because applying the use requirement to already-qualified land could be considered by the courts as the application of an retroactive law, which is unconstitutional in this state. The same rationale applies to the exemption of currently-qualified land from the changes made by the new rules. The commenter also made changes to §9.2002(g) that would require all property owners to submit an annual report to the appraisal district. The proposed rule requires the owner to submit an annual report on the chief appraiser's request. The agency declined to make the suggested change because chief appraisers should be given the flexibility to require an annual report when one is needed, and requiring an annual report that is not needed would waste property owner and appraisal district resources.

Titus County Appraisal District commented that it supported the rules. The appraisal district commented, however, that the terms "propagate" and "sustaining" should not have been removed from the rule because appraisal districts need to determine if the wildlife populations are increasing or decreasing. The term "propagate" was not used in the current rule. The term "breeding" is used in both rules, and TPWD considers the terms "breeding" and "propagate" to be synonymous when used in the wildlife management context. The term "sustain" was used in the replaced rule and is also used in the new rules. The term was removed from one of the definitions of "breeding population," but is part of the standards for qualifying land for agricultural appraisal based on wildlife management. The agency did not make a change because no change was needed to address the concern expressed by the commenter.

Kenedy County Appraisal District commented in support of the rules.

The new sections are adopted under Tax Code, §23.521, which requires that the Comptroller adopt rules that set standards developed by TPWD with the comptroller's assistance.

The new sections implement Tax Code, Chapter 23, §23.51 and §23.251.

§9.2001. Purpose and Definitions.

(a) The purpose of this section is to implement the intent of Tax Code, §23.51(1) and (7) and §23.251 as follows:

(1) to encourage the preservation of open space for wildlife management and conservation of the state's natural heritage in all areas of the state;

(2) to create definitive standards for tax appraisers to follow in determining the qualification of property for appraisal on the basis of wildlife management use;

(3) to create a mechanism in addition to traditional agricultural use to allow ranchers, farmers, and land managers to conserve open space;

(4) to affirm local control of property taxation;

(5) to preserve revenue neutrality for all concerned parties; and

(6) to allow each property currently qualified in wildlife management use to continue being appraised as open space land.

(b) The following words and terms, when used in this subchapter, shall have the following meanings:

(1) *Manual for the Appraisal of Agricultural Land*--a publication of the Comptroller of Public Accounts. A copy of this publication may be obtained by contacting Texas Comptroller of Public Accounts, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528, or online through www.window.state.tx.us.

(2) *Guidelines for Qualification of Agricultural Land in Wildlife Management Use*--a publication of the Comptroller of Public Accounts. A copy of this publication may be obtained by contacting Texas Comptroller of Public Accounts, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528, or online through www.window.state.tx.us.

(3) *Comprehensive Wildlife Management Planning Guidelines*--a series of publications of the Texas Parks and Wildlife Department. Copies of these publications may be obtained by contacting Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744-3291 or online through www.tpwd.state.tx.us. There is a separate publication for the following ecoregions or groups of ecoregions:

(A) Edwards Plateau and Cross Timbers and Prairies;

(B) Gulf Prairies and Marshes;

(C) High Plains and Rolling Plains;

(D) Pineywoods;

(E) Post Oak Savannah and Blackland Prairie;

(F) South Texas Plains; and

(G) Trans-Pecos.

(4) Wildlife management practices--the management categories listed in Tax Code, §23.51(7)(A)(i) - (vii), habitat control, erosion control, predator control, providing supplemental supplies of water, providing supplemental supplies of food, providing shelters, and making of census counts to determine population.

(5) Wildlife management activities--the method of implementation of wildlife management practices through the specific activities described in *Guidelines for Qualification of Agricultural Land in Wildlife Management Use* and the *Comprehensive Wildlife Management Planning Guidelines* for the ecoregion in which the tract of land is located.

(6) Tract of land--the entire area of a parcel or contiguous parcels of land as reflected in appraisal district records, under common ownership. The presence of public roads and bodies of water does not affect the contiguity of the parcels of land.

(7) Wildlife management property association--a group of landowners whose tracts of land:

(A) are contiguous (the presence of public roads and bodies of water does not affect the contiguity of the tracts of land);

(B) are subject to the wildlife use requirements set forth in §9.2005 of this title (relating to Wildlife Use Requirement);

(C) are appraised as qualified open space land under Tax Code, Chapter 23, Subchapter D; and

(D) are subject to a written agreement that legally obligates the owner of each tract of land to perform the management practices and activities necessary for each tract of land to qualify under this subchapter for appraisal based on wildlife management use.

(8) Indigenous wildlife--all native animals that originated in or naturally migrate into or through an area, and that are capable of living naturally in that area, but does not include exotic livestock as defined by Agriculture Code, §142.001(4).

(9) Breeding population--a group or population of indigenous wildlife that is capable of perpetuating itself through natural breeding.

(10) Migrating population--indigenous wildlife that moves between seasonal ranges.

(11) Wintering population--indigenous wildlife that occupies an area during the winter as a consequence of natural migratory behavior.

(12) Human use--the use of indigenous wildlife or habitat for food, medicine, or recreation by humans.

(13) Recreation--an active or passive activity for pleasure or sport.

(14) Wildlife use requirement--the number calculated in the manner required by §9.2005(a), as specified by §9.2005(c)(1) - (12) of this title (relating to Wildlife Use Requirement), for each wildlife use appraisal region.

§9.2004. Qualification for Agricultural Appraisal Based on Wildlife Management Use.

(a) The chief appraiser shall determine if land qualifies for agricultural appraisal based on wildlife management use in compliance with, and in a manner consistent with, §9.2005 of this title (relating to Wildlife Use Requirement), the *Manual for the Appraisal of Agricultural Land, the Guidelines for Qualification of Land in Wildlife Management Use,* and the *Comprehensive Wildlife Planning Guidelines* for the ecoregion in which the tract of land is located.

(b) A tract of land qualifies for agricultural appraisal based on wildlife management use if:

(1) the tract of land is appraised as qualified open space land under Tax Code, Chapter 23, Subchapter D;

(2) the landowner's primary use of the tract of land is wildlife management;

(3) the tract of land is actively being managed to sustain a breeding, migrating, or wintering population of indigenous wildlife through implementation of a wildlife management plan that meets the requirements of §9.2003 of this title (relating to Wildlife Management Plan);

(4) in each tax year for which the owner seeks to qualify the tract of land for agricultural appraisal based on wildlife management use, the landowner has selected at least three wildlife management practices and, using wildlife management activities, has implemented each of the selected practices to the degree of intensity that is consistent with the *Guidelines for Qualification of Agricultural Land*

in Wildlife Management Use and the *Comprehensive Wildlife Management Planning Guidelines* for the ecoregion in which the tract of land is located and for the specific indigenous wildlife species targeted for management;

(5) the landowner manages indigenous wildlife for human use; and

(6) the tract of land meets the specified wildlife use requirements set forth in §9.2005 of this title, if applicable.

(c) In the first year in which the owner seeks to qualify the tract of land for agricultural appraisal based on wildlife management use, the chief appraiser is required to approve the application if the facts stated on the application, the management plan, and any additional evidence presented by the owner indicate that the land will meet the requirements of subsection (b)(1) of this section and that the owner will devote the land primarily to wildlife management in the manner required by subsection (b)(2) - (3), (5) - (6) of this section, to a degree of intensity that complies with subsection (b)(4) of this section. If in the first year the owner's actual use of the land did not meet these requirements and was otherwise ineligible for appraisal as open-space land, Tax Code, §23.54(j) requires the chief appraiser to appraise the property at market value for the year that it was erroneously appraised.

(d) The following factors indicate that the primary use of the land is wildlife management, and the chief appraiser shall take each factor into consideration when determining if the land is primarily used for wildlife management as required by subsection (b) of this section:

(1) the tract of land is actively being managed under a wildlife management plan as required by this section;

(2) the landowner gives the wildlife management practices and activities priority over other uses and activities that take place on the tract of land; and

(3) secondary uses of the property do not significantly and demonstrably interfere with the wildlife management practices and activities being conducted on the tract of land or are not detrimental to the indigenous wildlife targeted for management.

(e) For purposes of this subchapter, the *Manual for the Appraisal of Agricultural Land,* and the *Guidelines for Qualification of Agricultural Land in Wildlife Management Use,* "primary use" has the same meaning as "principal use."

§9.2005. Wildlife Use Requirement.

(a) A tract of land's wildlife use requirement is a number expressed as a percentage and calculated by subtracting one from the total number of acres in the tract of land and dividing the result by the total number of acres in the tract of land. The following formula expresses the calculation, with "x" representing the tract of land's total acreage: $(x-1) \div x$ = wildlife use requirement.

(b) If the number of acres in the tract of land is equal to or greater than the number of acres in the tract of land on January 1 of the preceding tax year, the tract of land is not subject to the wildlife use requirement.

(c) If the number of acres in the tract of land is fewer than the number of acres in the tract of land on January 1 of the preceding tax year, the wildlife use requirement the tract of land must meet to qualify for agricultural appraisal based on wildlife management use shall be selected by the chief appraiser, with the advice and consent of the Appraisal District Board of Directors, from the wildlife use requirement ranges specified for the wildlife use appraisal region in which the tract of land is located as follows:

(1) Trans Pecos Region--at least 97% but not more than 99%.

(2) High Plains Region--at least 96% but not more than 98%.

(3) Rolling Plains Region--at least 96% but not more than 98%.

(4) Edwards Plateau (Western) Region--at least 96% but not more than 98%.

(5) Edwards Plateau (Eastern) Region--at least 93% but not more than 95%.

(6) Cross Timbers and Prairies Region--at least 93% but not more than 95%.

(7) Gulf Prairies and Marshes (Upper Coast) Region--at least 92% but not more than 94%.

(8) Gulf Prairies and Marshes (Lower Coast) Region--at least 96% but not more than 98%.

(9) Post Oak Savannah Region--at least 92% but not more than 94%.

(10) Blackland Prairie Region--at least 92% but not more than 94%.

(11) Pineywoods Region--at least 92% but not more than 94%.

(12) South Texas Plains Region--at least 96% but not more than 98%.

(d) The wildlife management use requirement that applies to a tract of land located in a wildlife management property association shall be selected by the chief appraiser, with the advice and consent of the Appraisal District Board of Directors, for the wildlife use appraisal region in which the tract of land is located as follows:

(1) Trans Pecos Region--at least 95% but not more than 96%.

(2) High Plains Region--at least 94% but not more than 96%.

(3) Rolling Plains Region--at least 94% but not more than 95%.

(4) Edwards Plateau (Western) Region--at least 94% but not more than 95%.

(5) Edwards Plateau (Eastern) Region--at least 91% but not more than 92%.

(6) Cross Timbers and Prairies Region--at least 91% but not more than 92%.

(7) Gulf Prairies and Marshes (Upper Coast) Region--at least 90% but not more than 91%.

(8) Gulf Prairies and Marshes (Lower Coast) Region--at least 94% but not more than 95%.

(9) Post Oak Savannah Region--at least 90% but not more than 91%.

(10) Blackland Prairie--at least 90% but not more than 91%.

(11) Pineywoods Region--at least 90% but not more than 91%.

(12) South Texas Plains Region--at least 94% but not more than 95%.

(e) If the tract of land is located in an area designated by Texas Parks and Wildlife Department as habitat for endangered species, a threatened species, or a candidate species for listing as threatened or endangered, the wildlife use requirement for a tract of land to qualify for agricultural appraisal based on wildlife management use shall be selected by the chief appraiser, with the advice and consent of the Appraisal District Board of Directors, from the wildlife use requirement ranges specified for the wildlife use appraisal region in which the tract of land is located as follows:

(1) Trans Pecos Region--at least 95% but not more than 96%.

(2) High Plains Region--at least 94% but not more than 96%.

(3) Rolling Plains Region--at least 94% but not more than 95%.

(4) Edwards Plateau (Western) Region--at least 94% but not more than 95%.

(5) Edwards Plateau (Eastern) Region--at least 91% but not more than 92%.

(6) Cross Timbers and Prairies Region--at least 91% but not more than 92%.

(7) Gulf Prairies and Marshes (Upper Coast) Region--at least 90% but not more than 91%.

(8) Gulf Prairies and Marshes (Lower Coast) Region--at least 94% but not more than 95%.

(9) Post Oak Savannah Region--at least 90% but not more than 91%.

(10) Blackland Prairie Region--at least 90% but not more than 91%.

(11) Pineywoods Region--at least 90% but not more than 91%.

(12) South Texas Plains Region--at least 94% but not more than 95%.

(f) The wildlife management use requirements made by this section do not apply to a tract of land if:

(1) beginning with the tax year that began on January 1, 2002, the tract of land has continuously and without interruption qualified for agricultural appraisal based on wildlife management use; and

(2) the size of the tract of land, when measured in acres, is equal to or greater than, the size of the tract on January 1, 2002.

(g) The wildlife management use requirements set by this section do not apply to a tract of land located in Clay, McCulloch, or Terrell County that was qualified for agricultural appraisal based on wildlife management use in the tax year that began on January 1, 2008, if the size of the tract, when measured in acres, is equal to or greater than the size of the tract on January 1, 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 November 21, 2008.

TRD-200806104
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: December 11, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 475-0387

SUBCHAPTER I. VALIDATION PROCEDURES

34 TAC §9.4003

The Comptroller of Public Accounts adopts the repeal of §9.4003, regarding wildlife management use, without changes to the proposal as published in the September 26, 2008, issue of the *Texas Register* (33 TexReg 8164).

The section will be replaced by a proposed new subchapter that establishes clearer standards for determining when land that is currently qualified for agricultural or productivity appraisal under Tax Code, Chapter 23, Subchapter D, is entitled to be qualified as agricultural land used for wildlife management for property tax purposes.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Tax Code, §23.521, which requires that the comptroller adopt rules that set standards developed by Texas Parks and Wildlife Department with the comptroller's assistance.

The repeal affects Tax Code, Chapter 23, §23.51 and §23.251.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806105
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: December 11, 2008
Proposal publication date: September 26, 2008
For further information, please call: (512) 475-0387

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 63. BOARD OF TRUSTEES

34 TAC §63.4

The Employees Retirement System of Texas ("ERS") adopts amendments to 34 Texas Administrative Code Chapter 63, §63.4, concerning the Election of Trustees (Ballot), without changes to the proposed text as published in the October 3, 2008, issue of the *Texas Register* (33 TexReg 8305) and will not be republished.

The amendments will allow ERS to obtain needed information earlier in the process from candidates seeking election to serve

on the ERS Board of Trustees and to simplify the election/balloting process.

Section 63.4, subsection (b), is amended to change the first word in the subsection from "Qualified" to "All." In order to timely prepare ballots, newsletters, and other election materials, information is needed from the candidates earlier in the process. A candidate is typically not considered "qualified" until after the close of the petition process and the system has verified the validity of the petitions. This change allows ERS to request this needed information from the candidates earlier in the process.

Subsection (e) of this section is amended to insert the phrase, "Upon request of the qualified candidate" and remove the term "simultaneously." These changes were needed to ensure that "blank ballots" are sent only to those candidates appearing on the ballot who request them, thereby reducing the cost of the election.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Government Code, §815.003, which provides authorization for the board of trustees (board) to adopt rules governing the election of trustees and §815.102, which provides authorization for the board to adopt rules in carrying out its responsibilities for the administration and operation of the retirement 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.

Filed with the Office of the Secretary of State on November 17, 2008.

TRD-200806002
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: December 7, 2008
Proposal publication date: October 3, 2008
For further information, please call: (512) 867-7288

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety adopts amendments to Chapter 4, Subchapter A, §4.1, concerning Transportation of Hazardous Materials, without changes to the proposed text as published in the October 3, 2008, issue of the *Texas Register* (33 TexReg 8306).

Adoption of amendments to §4.1 is necessary in order to ensure that the Federal Hazardous Material Regulations, incorporated by reference in this section, reflect all amendments and interpretations issued through October 1, 2008.

On October 20, 2008, the department held a public hearing to receive comments from all interested persons regarding adoption of the amendments. No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

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

Filed with the Office of the Secretary of State on November 20, 2008.

TRD-200806075
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 10, 2008
Proposal publication date: October 3, 2008
For further information, please call: (512) 424-2135

SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §4.11

The Texas Department of Public Safety adopts amendments to Chapter 4, Subchapter B, §4.11, concerning General Applicability and Definitions, without changes to the proposed text as published in the October 3, 2008, issue of the *Texas Register* (33 TexReg 8307).

Adoptions of the amendments to §4.11 are necessary in order to ensure that the Federal Motor Carrier Safety Regulations, incorporated by reference in this section, reflect all amendments and interpretations issued through October 1, 2008; and to implement the requirements of the Unified Carrier Registration Act. The Unified Carrier Registration Act was established by federal law in the highway reauthorization bill known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, which was enacted on August 10, 2005. Interstate motor carriers exempt from economic regulation are now required to comply with the Unified Carrier Registration Act, so all references to these carriers have been removed from subsection (c)(2) of the section.

On October 20, 2008, the department held a public hearing to receive comments from all interested persons regarding adoption of the amendments. No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the

safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

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

Filed with the Office of the Secretary of State on November 20, 2008.

TRD-200806076
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 10, 2008
Proposal publication date: October 3, 2008
For further information, please call: (512) 424-2135

CHAPTER 35. PRIVATE SECURITY

SUBCHAPTER A. DEFINITIONS

37 TAC §35.1

The Texas Department of Public Safety adopts amendments to §35.1, concerning Definitions, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7976).

Adoption of the amendments to §35.1 is necessary due to the addition of new definitions to define and clarify that the term "application" includes renewal applications for purposes of statutory eligibility and for denial actions under §1702.364 or §1702.3615; and to define the phrase "due diligence" as employed in 37 TAC §35.204, in order to provide guidance to the Board's investigators, staff, and the security industry regarding employers' specific obligations in performing background checks.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806117
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

SUBCHAPTER B. PROHIBITIONS

37 TAC §35.14

The Texas Department of Public Safety adopts new §35.14, concerning Unlicensed General Contractors or Other Intermediaries, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7977).

Adoption of new §35.14 is necessary in order to clarify existing policy and to provide guidance to the public and the industry regarding the regulation of service providers in the context of complex projects involving multiple parties.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806118
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

SUBCHAPTER C. STANDARDS

37 TAC §35.34

The Texas Department of Public Safety adopts amendments to §35.34, concerning Standards of Conduct, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7977).

Adoption of the amendments to §35.34(j) is necessary in order to clarify the obligations of employers who are made aware of arrests or offenses of their regulated employees.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806119
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

SUBCHAPTER E. GENERAL ADMINISTRATION AND EXAMINATIONS

37 TAC §35.60

The Texas Department of Public Safety adopts new §35.60, concerning Guard Company Manager Requirements, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7978).

Adoption of new §35.60 is necessary in order to establish the experience and eligibility requirements for guard company managers.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806120
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

37 TAC §35.61

The Texas Department of Public Safety adopts amendments to §35.61, concerning Written Examination, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7979).

Adoption of the amendments to §35.61 is necessary in order to clarify the scope of the manager's examination and to provide for discretion on the part of the Private Security Bureau manager in establishing the examination's passing score.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Occupations Code, §1702.061(b) which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806121
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

37 TAC §35.78

The Texas Department of Public Safety adopts new §35.78, concerning Evidence of Insurance, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7979).

Adoption of new §35.78 is necessary in order to clarify the statutory requirements for proof of insurance for licensees and to facilitate enforcement of those requirements.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806122
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §35.97

The Texas Department of Public Safety adopts new §35.97, concerning Entry of Appearance Required, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7980).

Adoption of new §35.97 is necessary in order to provide for more efficient handling of contested cases and allow for the administrative disposition of cases in which the respondent fails to make an appearance.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806123
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

SUBCHAPTER N. RECIPROCITY

37 TAC §35.221

The Texas Department of Public Safety adopts the repeal of §35.221, concerning General Reciprocity, without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7981).

Adoption of the repeal of §35.221 is necessary in order to eliminate a source of confusion on the part of the public and the regulated community, and conflict with the Private Security Act (Chapter 1702, Occupations Code).

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806124
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

37 TAC §35.222

The Texas Department of Public Safety adopts the repeal of §35.222, concerning Limited Reciprocity, without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7982).

Adoption of the repeal of §35.222 is necessary in order to eliminate a source of confusion on the part of the public and the regulated community, and conflict with the Private Security Act (Chapter 1702, Occupations Code).

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806125
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

SUBCHAPTER Q. TRAINING

37 TAC §35.257

The Texas Department of Public Safety adopts amendments to §35.257, concerning Training Courses, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7982).

Adoption of the amendments to §35.257 is necessary in order to allow applicants who are recently retired full-time peace officers to be exempted from training under the same conditions currently provided to active peace officers, on the grounds that such individuals have received training identical to that of active full-time peace officers.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the De-

partment's work; and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806126
Stanley E. Clark
Director
Texas Department of Public Safety
Effective date: December 11, 2008
Proposal publication date: September 19, 2008
For further information, please call: (512) 424-2135

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER I. ELECTRONIC SIGNATURES

43 TAC §1.700

The Texas Department of Transportation (department) adopts new Subchapter I, Electronic Signatures, §1.700, concerning Digital Certificates. New §1.700 is adopted without changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7702) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

To facilitate the digital signing of electronic documents, the department has elected to use public key/private key infrastructure technology as outlined in Appendix 1(2), entitled "Public/Private Key (Asymmetric) Cryptography - Digital Signatures" of the "Guidelines for the Management of Electronic Transactions and Signed Records," prepared by the Uniform Electronic Transactions Act Task Force of the Department of Information Resources and the Texas State Library and Archives Commission. As a result, the department, acting as a registration authority, will approve the issuance of digital certificates to individuals by a contracted certification authority that has been approved by the Department of Information Resources under 1 TAC Part 10, Chapter 203, Subchapter B, §203.25, concerning Acceptable PKI (Public Key Infrastructure) Service Providers.

New §1.700, Digital Certificates, has been added to govern the issuance of digital certificates. Subsection (a), Purpose, prescribes the purpose of the section to govern the issuance, use, and revocation of digital certificates issued by the department, and provides that 1 TAC Part 10, Chapter 203, Subchapter B, governs over any conflict with the section.

New §1.700(b), Definitions, provides definitions.

New §1.700(c), Program authorization, explains that digital certifications will be phased into the department based on whether the industries and organizations involved in particular programs are already using that technology and the frequency of document submission. Since the department's programs are so varied in subject matter and each program works with a different set of interested stakeholders, each division director will decide whether digital signatures is appropriate for that division's programs.

New §1.700(d), Application and issuance of digital certificate, prescribes the procedures for application, including identification, and issuance of a digital certificate to an individual.

New §1.700(e), Refusal to issue a digital certificate, provides that the department will not issue a digital certificate if the identity of the individual to whom the certificate is to be issued or the identity of the individual requesting the certificate cannot be established or if the business entity on whose behalf the request is allegedly being made does not authorize its issuance.

New §1.700(f), Responsibilities of certificate holder, requires the certificate holder to maintain the security of the digital certificate, use the certificate solely for the purpose for which it was issued, and renew the certificate in a timely manner.

New §1.700(g), Responsibilities of business entity, provides that a business entity is responsible for determining the individual who may request and be issued a certificate and requesting revocation of a certificate when necessary.

New §1.700(h), Revocation of certificate, authorizes the department to revoke a digital certificate when requested by an individual authorized to act on behalf of the business entity, for suspension or debarment, or if the department has reason to believe the digital certificate would present a security risk.

New §1.700(i), Use of digital certificate, provides that a digital signature must be used for digitally signing electronic documents, the digital signature is binding on the certificate holder and the represented business entity, and the digital certificate may be used to identify the certificate holder when granting or verifying access to secure computer systems.

New §1.700(j), Forms, authorizes the department to prescribe forms to request, modify, or revoke a digital certificate.

COMMENTS

No comments on the proposed new section were received.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Government Code, §2054.060 and Business and Commerce Code, §43.017.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806090

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Effective date: December 11, 2008
Proposal publication date: September 12, 2008
For further information, please call: (512) 463-8683

CHAPTER 4. EMPLOYMENT PRACTICES SUBCHAPTER D. SUBSTANCE ABUSE PROGRAM

43 TAC §§4.31, 4.34, 4.37, 4.39, 4.42 - 4.44

The Texas Department of Transportation (department) adopts amendments to §4.31, Definitions, §4.34, Illegal Drugs, §4.37, Test Results, §4.39, Refusal to Test, §4.42, Recurrence of Substance Abuse, §4.43, Employees Who Drive for the Department, and §4.44, Commercial Drivers, Safety-Sensitive Employees, and Vessel Crewmembers, all concerning the department's substance abuse program. The amendments to §§4.31, 4.34, 4.37, 4.39, and 4.42 - 4.44 are adopted without changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7704) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The adopted amendments are necessary to implement recent amendments to the United States Coast Guard regulations at 46 Code of Federal Regulations (C.F.R.) Parts 4 and 16 for employees who are vessel crewmembers; to reflect changes in the federal Fair Labor Standards Act; to reflect recent amendments to the United States Department of Transportation regulations at 49 C.F.R. Part 40, which added additional activities that may be considered a refusal to test; to better reflect current practice; to clarify existing language; and to update standards to prevent the evasion of the intent of the rules. The federal Fair Labor Standards Act has been amended to allow for the flexibility to suspend an employee for less than a full work week, so references to the requirement of five-day suspension without pay are decreased to a three-day suspension without pay for all disciplinary issues. References to C.F.R. and United States Code (U.S.C.) are updated throughout to reflect proper legal formatting.

Amendments to §4.31 change the term serious marine "accident" to serious marine "incident" and change "ferry" to "self-propelled vessel" to correspond to the changes in the federal regulations 46 C.F.R. Part 4.

Amendments to §4.34 add conspiracy to the list of drug-related criminal offenses that will result in termination, to clarify that any type of involvement in the sale, distribution, transportation, or manufacture of illegal drugs is prohibited.

Changes to §4.34(c) decrease the five day suspension without pay to a three day suspension without pay for all disciplinary issues associated with policy violations that require disciplinary action. The federal Fair Labor Standards Act has been amended to allow for the flexibility to suspend an employee for less than a full work week.

Amendments to §4.37 add that project and temporary employees will be terminated from the department for a refusal to test or a positive drug test result or an alcohol test result of 0.04 or greater. This will deter temporary employees from violating the substance abuse policy and eliminate the undue hardship imposed upon supervisors and co-workers because of an employee's absence after being referred for treatment. To bring the rules in line with current department policy, the reference to the typical length of initial probation was omitted in order to include those employees who have their initial probationary period extended for 90 days.

Amendments to §4.39 reflect changes to the United States Department of Transportation regulations at 49 C.F.R. Part 40, which added additional activities that may be considered a refusal to test.

Amendments to §4.42(a) clarify the circumstances under which the department will terminate an employee for recurrence of substance abuse.

Amendments to §4.43(b) delete the requirement to maintain a list of employees who drive for the department because under current policy and practice, all employees are considered to be employees who drive for the department.

Amendments to §4.43(c) add the phrase "other than operating a commercial motor vehicle" to clarify that an occupational license will be accepted if it allows the employee to perform driving duties for the department as long as the driving does not require a commercial license. Transportation Code, §521.242 prohibits the issuance of an occupational license to replace a commercial driver's license.

Changes to §4.43(d) and (e) decrease the five day suspension without pay to a three day suspension without pay for all disciplinary issues associated with policy violations that require disciplinary action. The federal Fair Labor Standards Act has been amended to allow for the flexibility to suspend an employee for less than a full work week.

Amendments to §4.44 change serious marine "accident" to serious marine "incident" and permit the department to delay conducting a drug or alcohol test if necessary to address safety concerns following a serious marine incident. These amendments reflect changes in the federal regulations, 46 C.F.R. Part 4. To comply with amendments to 46 C.F.R. Part 16, §4.44 is also amended to require that the provisions of 46 C.F.R. Part 5 be satisfied prior to allowing an employee to perform vessel crewmember duties.

COMMENTS

Twenty-nine comments on the proposed amendments were received from 21 individuals. Some comments were of a general nature and did not particularly concern the amendments. No changes to the proposed rules are made as a result of these comments.

Comment: Four commenters suggested that the suspension without pay in §4.34 and §4.43 should remain at five days instead of being reduced to three days.

Response: The rules originally provided for a three-day suspension but were amended to extend the required suspension to five days in response to a new Fair Labor Standards Act requirement that suspensions last a full work week. Now that the Fair Labor Standards Act regulations permit suspensions of less than a full work week, the department has elected to return to a three-day suspension since employees affected by the required suspension are typically in the lower salary groups.

Comment: One commenter suggested amending §4.34 to require immediate termination of employees who are found using or possessing illegal drugs in the workplace.

Response: The department chooses to give its employees a chance to be rehabilitated in order to be fair to all employees and to enhance and maintain productivity of department employees.

Comment: Four commenters asked for clarification on the amendment to §4.37 to terminate project or temporary employees and asked if it replaced the requirement to terminate employees during their initial probationary period.

Response: This amendment includes employees who are classified as project and temporary employees and does not negate this same requirement for employees in their initial probation period.

Comment: Four commenters did not agree with the new requirements in §4.39 for a direct observation collection or the expanded list of behaviors that are considered a refusal to test.

Response: The amendments to §4.39 are mandated by recent changes to the U.S. Department of Transportation's regulations.

Comment: One commenter objected to the requirement in §4.42 that an employee be terminated upon the need for a second mandatory referral to the Employees Assistance Program.

Response: The department is committed to providing one chance to rehabilitate employees whose performance may be impaired by alcohol or drugs. Even though the department does not have a zero tolerance policy, any time frame for repeat offenses of these rules increases the potential risk of liability and is unacceptable. Because employees may go through many life issues throughout their career that may require counseling and treatment, the department encourages all employees to use the services of the department's Employee Assistance Program on a voluntary basis for various personal issues including drug or alcohol abuse.

Comment: One commenter objected to the deletion of the records requirement in §4.43 and asked how the General Services Division (GSD) and the Maintenance Division (MNT) will be able to check to see if an employee can check out a vehicle without referring to a list of employees who drive.

Response: Employees requesting to check out vehicles from GSD or MNT must submit Form 4.85 signed by their supervisor. Employees are required to report the loss of legal authority to drive to their supervisor. The supervisor should be aware of the employee's status to drive when reviewing Form 4.85.

Comment: One commenter asked why §4.43 does not allow an occupational license to be accepted for someone who holds a commercial driver's license.

Response: State law governs the use of an occupational driver's license and does not permit its use for operating commercial motor vehicles.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §521.242.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806091
Bob Jackson
General Counsel
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Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §§9.11 - 9.19

The Texas Department of Transportation (department) adopts amendments to §9.11, Definitions, §9.12, Qualification of Bidders, §9.13, Notice of Letting and Issuance of Bid Forms, §9.14, Submittal of Bid, §9.15, Acceptance, Rejection, and Reading of Bids, §9.16, Tabulation of Bids, §9.17, Award of Contract, §9.18, After Contract Award, and §9.19, Emergency Contract Procedures. The amendments to §§9.11 and 9.16 - 9.19 are adopted without changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 4692) and will not be republished. The amendments to §§9.12 - 9.15 are adopted with changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 4692).

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, Chapter 223, Subchapter A, prescribes the method by which the department receives competitive bids for the improvement of highways that are a part of the state highway system. Pursuant to this authority, the Texas Transportation Commission (commission) previously adopted §§9.10 - 9.21 to specify the process by which the department will award state highway improvement contracts.

In accordance with Transportation Code, §223.013, the amendments accommodate the submission of bids for highway improvement contracts electronically, and prescribe department policy and procedure in determining bidder eligibility when bidder affiliations exist. The following is a synopsis of the amendments for each affected section. Except as noted, the revisions are nonsubstantive in nature.

Amendments to §9.11, Definitions, include additional definitions for the terms "Electronic Bidding System (EBS)" and "Electronic vault," which are necessary to accommodate the submission of electronic bids associated with EBS that will be deposited into the electronic vault. Definitions for unnecessary terms have been removed, while references to the term "proposal" have been replaced with the term "bid." Previously, these terms were used interchangeably; this revision provides clarity and uniformity within the subchapter. Consequently, the term "proposal" is replaced with the term "bid" throughout the remainder of the subchapter. In addition, the term "Executive director" has been

revised to include the director's designee not below the level of district engineer or division director. Previously, this designation was referenced separately in each affected section. With the exception of §9.19, Emergency Contract Procedures, these separate executive director designations have been removed to provide uniformity within the rule. The separate executive director designation retained in §9.19 is necessary as the designation for emergency contracts differs from the executive director definition as revised. This revision provides uniformity and clarity throughout the affected rule.

Amendments to §9.12, Qualification of Bidders, involve designating the terms currently and routinely used in referring to the application documents that must be submitted by a contractor to be considered as eligible to bid on department highway improvement contracts. The "Confidential Questionnaire" is the application form that must be submitted by a contractor for bidding eligibility on department contracts requiring financial prequalification, while the "Bidder's Questionnaire" is the application form that may be submitted by a contractor for eligibility to bid on department highway improvement contracts where the financial requirements have been waived. Amendments to subsection (c) require that a bidder submit a bidder's questionnaire to the department's headquarters office in Austin ten days prior to the date bids are opened to be eligible to bid on projects for which the audited financial data has been waived. This revision coincides with similar existing submission requirements for the confidential questionnaire and provides uniformity within the rule. Subsection (d) is added to prescribe policy and procedure in determining bidder eligibility on department highway improvement contracts when bidder affiliations are determined to exist. This new section is necessary to ensure the integrity of the department's competitive bid process, and prevent the actual or perceived existence of bidder collusion, by addressing those instances where affiliated bidders submit separate bids for the same project. Criteria used by the department to determine bidder affiliations are included in this new subsection to identify those firms that are so closely affiliated that the operations of one firm are dependent on the other. An appeal process is limited to those bidders who are determined to be affiliated based solely on a family connection. This appeal process is necessary as the department realizes that, in certain instances, a bidder determined to be affiliated based solely on a family connection may operate independently from the affiliated entity. This section has also been reorganized to provide clarity regarding department requirements associated with the submittal of bids for highway improvement contracts.

Amendments to §9.14, Submittal of Bid, involve revisions necessary to implement EBS and clarify the requirements that apply to manually and electronically submitted bids. The use of EBS in submitting a bid to the department is at the bidder's discretion. The department will continue to accept manually submitted bids, however, once EBS is fully implemented, the department will begin charging a fee for manually submitted bids. The amount of the fee will be determined based on the department's administrative cost in processing manual bids. New subsection (b), Manually submitted bids, is added to define the manual bid forms acceptable for bid submission and the bidder's option to print a bid form from EBS for manual submission. New subsection (c), Electronically submitted bids, establishes the requirements for the submission of an electronic bid. Section 9.14(d), Bid guaranty, is amended to clarify the submission requirements for bid bonds by joint venture participants. In addition, new §9.14(d)(5) specifies that the bid bond for an electronically submitted bid must be a electronic bid bond as the acceptance of digital checks is not currently supported by the EBS software. Due to the administrative burden and increased possibility of errors in properly matching manually submitted checks with electronically submitted bids, the department will not accept manual checks for bids submitted electronically. These revisions are necessary for the department to effectively implement EBS.

Amendments to §9.15 include revisions to existing subsection (b)(2) clarifying that all bids will be rejected if bids are submitted on the same project separately by a joint venture and one or more members of that joint venture. In addition, new subsection (b)(3) adds the condition that the department will not accept or read bids submitted by affiliated bidders on the same project. This revision is needed to ensure the integrity of the competitive bidding process and prevent the actual or perceived existence of bidder collusion. New subsections (c)(3) and (d)(2) are added to clarify the bid revision and bid withdrawal requirements for electronically submitted bids, which are necessary to effectively implement EBS.

Amendments to §9.16(b), Department interpretations, include revisions to subsection (b)(3) and (4) to describe how the department will determine the low bid amount when multiple bids are received from a bidder for the same project and one of the bids received is electronic. During the initial implementation phase of EBS when both an electronic and a manual bid are received from a bidder and both bids are determined to be responsive, the department will use the manually submitted bid to determine the total bid amount for the bid. Once EBS is fully implemented, the department will revise this rule to specify that in those instances when both a responsive electronic bid and a responsive manual bid are received from a bidder, the electronic bid will be used by the department to determine the total bid amount for the bid. These revisions are necessary to effectively implement EBS while ensuring the successful submittal of bids for highway improvement contracts during the initial implementation phase of EBS.

COMMENTS

No comments on the proposed amendments were received. However, the department made minor technical corrections to §§9.12(c), 9.13(e)(1)(A)(ii), 9.13(e)(2)(A), 9.14(a), 9.15(b)(1)(F), and 9.15(b)(3). These changes correct citations to subsections that were incorrect in the proposed rules and do not substantively change the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.004, which provides the commission with the authority to prescribe conditions for the rejection of a bid, Transportation Code, §223.0041, which provides the commission with the authority to adopt rules concerning the award of contracts, Transportation Code, §223.005, which provides the commission with the authority to adopt rules for contracts involving less than $300,000, Transportation Code, §223.007, which provides the commission with the authority to prescribe the form of contracts, Transportation Code, §223.013, which provides the department with the authority to create an electronic bidding system to receive bids for highway improvement contracts electronically, and Transportation Code, §223.014, which provides the commission with authority related to bid guaranties.

CROSS REFERENCE TO STATUTE

Transportation Code, §§223.001 - 223.016.

§9.12. Qualification of Bidders.

(a) Eligibility. To be eligible to bid on department contracts, potential bidders must satisfy the requirements listed in this section.

(b) Confidential Questionnaire. Unless waived under subsection (c) of this section, a potential bidder must be prequalified in accordance with this section to be eligible to bid on a construction or maintenance contract.

(1) A potential bidder must:

(A) submit a Confidential Questionnaire to the department's Construction Division in Austin 10 days prior to the last day of bid opening, in a form prescribed by the department, which shall include certain information concerning the bidder's equipment and experience as well as financial condition;

(B) have its certified public accountant submit the audited and other financial information required by the current edition of the department's Bulletin Number 2, titled "Accounting Procedures in Determination of Contractor's Financial Resources";

(C) satisfactorily comply with any technical qualification requirements determined by the department to be necessary for a specific project; and

(D) for the purpose of bidding on federal-aid projects, properly complete the Certification of Eligibility Status form contained in the Confidential Questionnaire.

(2) The department will make its examination and determination under this subsection based on the information submitted, and will advise the potential bidder of its approved bidding capacity. Information adverse to the potential bidder contained in the Certification of Eligibility Status form will be reviewed by the department and the Federal Highway Administration, and may result in the bidder being declared ineligible to submit bids on federal-aid projects.

(3) Satisfactory audited financial information will grant a 12-month period of qualification from the date of the financial statement.

(4) A three month grace period of qualification, for the purpose of preparing and submitting current audited information, will be granted prior to the expiration date of the financial statement.

(5) The department may require current audited information at any time if circumstances develop which are factors that could alter the firm's financial condition, ownership structure, affiliation status, or ability to operate as an on-going concern.

(c) Bidders Questionnaire. The department may waive audited financial qualification requirements as provided by this subsection.

(1) The department will waive the qualification requirements of subsection (b) of this section if:

(A) the engineer's estimate is $300,000 or less;

(B) the project is a maintenance project; or

(C) the project pertains to specialty items not normal to the department's roadway projects program.

(2) A waiver will not be given under paragraph (1) of this subsection if the executive director determines that audited financial qualification should be required due to:

(A) safety considerations;

(B) the complexity of the work; or

(C) the potential impact of the work on adjacent property owners.

(3) To be eligible to bid on a contract for which the audited financial qualification requirements have been waived under this subsection, or on a contract to be awarded under §9.19 of this subchapter, a bidder must:

(A) submit a bidder's questionnaire to the department's headquarters office in Austin 10 days prior to the date the bid opens, in a form prescribed by the department, which includes certain information concerning a bidder's equipment and experience;

(B) submit unaudited and other data as required in the instructions to the bidder's questionnaire;

(C) satisfactorily comply with any technical qualification requirements determined by the department to be necessary on a specific project; and

(D) for a federal-aid project, properly complete the Certification of Eligibility Status form contained in the bidder's questionnaire. Information adverse to the potential bidder contained in the certification will be reviewed by the department and by the Federal Highway Administration, and may result in the bidder being declared ineligible to submit bids on a federal-aid project.

(4) The department will make its examination and determination under this subsection based on the information submitted, and advise the bidder of its approved bidding capacity.

(A) A bidder with no prior experience in construction or maintenance, or a negative working capital position (i.e., financial statements indicate that current liabilities exceed current assets), will receive a bidding capacity of $300,000.

(B) An experienced bidder with sufficient working capital and financial capability, as determined by the department, will receive a bidding capacity of:

(i) $500,000 for a bidder submitting compiled financial information if the principals of the bidder have at least one year experience in construction or maintenance and have satisfactorily completed at least two projects in these fields;

(ii) $1,000,000 for a bidder submitting compiled financial information if the principals of the bidder have at least two years experience in construction or maintenance and have satisfactorily completed at least four projects in these fields. Those contractors possessing more than two years experience will be granted an additional $250,000 in bidding capacity for each additional year of experience in construction or maintenance, with a maximum bidding capacity of $3,000,000; and

(iii) over $1,000,000 for a bidder submitting reviewed financial information if the principals of the bidder have at least three years of experience in construction or maintenance and have satisfactorily completed at least six projects in these fields. The amount of the bidding capacity will be determined by multiplying the net working capital by a factor determined by the department based upon the expected dollar volume of projects to be awarded and the number of bidders prequalified by the department. In the event that this calculation does not result in an amount greater than $1,000,000, the bidder will receive a bidding capacity of $1,000,000.

(d) Affiliated entities. In making examinations and determinations under this section, the department will make a determination of bidder affiliations. Bidders the department determines are affiliated are not eligible to submit bids for the same project. A bidder that is determined to be affiliated solely because of a family relationship may

request, in accordance with this subsection, an exception to its ineligibility.

(1) For purposes of this subchapter:

(A) two or more firms are affiliated if:

(i) the firms share common officers, directors, or stockholders;

(ii) a family member of an officer, director, or stockholder of one firm serves in a similar capacity in another of the firms;

(iii) an individual who has an interest in, or controls a part of, one firm either directly or indirectly also has an interest in, or controls a part of, another of the firms;

(iv) the firms are so closely connected or associated that one of the firms, either directly or indirectly, controls or has the power to control another firm;

(v) one firm controls or has the power to control another of the firms; or

(vi) the firms are closely allied through an established course of dealings, including but not limited to the lending of financial assistance; and

(B) a family member of an individual is the individual's parent, parent's spouse, step-parent, step-parent's spouse, sibling, sibling's spouse, spouse, child, child's spouse, spouse's child, spouse's child's spouse, grandchild, grandparent, uncle, uncle's spouse, aunt, aunt's spouse, first cousin, or first cousin's spouse.

(2) To request the exception, a bidder must submit to the executive director a written request explaining the basis for the exception accompanied by supporting evidence. The written request must be received not later than the 30th day before the date of the bid opening for which the exception is requested.

(3) The department will review the request and supporting evidence provided to determine the affiliation or independence of the potential bidders. The department will consider, in addition to other affiliation criteria:

(A) transactions between the potential bidders; and

(B) the extent to which the potential bidders share:

(i) equipment;

(ii) personnel;

(iii) office space; and

(iv) finances.

(4) The department will not grant an exception if the bidders affiliated by a family relationship are not independent.

(5) The executive director will review the department's finding and will send to the bidder the final written determination. An exception granted to the bidder remains in effect for future bid openings unless the exception is revoked under paragraph (6) of this subsection.

(6) The granting of an exception under this subsection does not remove the classification of the bidders as affiliated. The department reserves the right to conduct follow-up reviews and revoke the exception if the follow-up reviews indicate that the bidders are no longer independent.

(7) Affiliated bidders that are granted an exception under this subsection and that have been sanctioned in accordance with Subchapter G of this chapter must meet the exception criteria in Subchapter G to be eligible to bid.

(e) Building contracts. To be eligible to bid on a building contract, a potential bidder must satisfactorily comply with any financial, experience, technical, or other requirement contained in the governing specifications applicable to the project.

(f) Financial statements. For purposes of this section, an audited financial statement involves an examination of the accounting system, records, and financial statements by an independent certified public accountant in accordance with generally accepted auditing standards. Based on the examination, the auditor expresses an opinion concerning the fairness of the financial statements in conformity with generally accepted accounting principles. A reviewed financial statement is substantially less in scope than an audited financial statement, and consists primarily of inquiries of company personnel and analytical procedures applied to financial data by an independent certified public accountant. Only negative assurance is expressed by the auditor, meaning the auditor is not aware of any material modifications that should be made in order for the financial statements to conform to generally accepted accounting principles. A compiled financial statement is limited to presenting in the form of financial statements information that is the representation of management. No opinion or any other form of assurance is expressed on the statements by the auditor.

§9.13. Notice of Letting and Issuance of Bid Forms.

(a) Notice to bidders. A person may apply to have his or her name placed on a mailing list to receive the Notice to Contractors for a fee of $65 per year to cover costs of mailing the notices.

(b) Fee exemption. The following entities are not required to pay the notice subscription fee:

(1) qualified bidders approved under §9.12 of this subchapter;

(2) other state agencies;

(3) other state departments of transportation;

(4) disadvantaged business enterprises and historically underutilized businesses;

(5) offices of the federal government; and

(6) organizations performing work under supportive service contracts awarded by the commission.

(c) Advertising. Contracts will be advertised in accordance with Transportation Code, §223.002, Government Code, §2155.083(h)(1), and Title 23, Code of Federal Regulations, §635.112(b).

(d) Bid form.

(1) Bid form content. A bid form may include:

(A) the location and description of the proposed work;

(B) an approximate estimate of the various quantities and kinds of work to be performed or materials to be furnished;

(C) a schedule of items for which unit prices are requested;

(D) the time within which the work is to be completed; and

(E) the special provisions and special specifications.

(2) Form of request. A request for a bid form on a highway improvement contract may be made orally or in writing.

(e) Issuance of bid form.

(1) Construction and maintenance contracts.

(A) Issuance. Except where prohibited under subparagraph (B) of this paragraph, the department will, upon receipt of a request, issue a bid form for a construction or maintenance contract as follows:

(i) for a project on which audited financial prequalification is not waived, only to a prequalified bidder, and only if the estimated cost of the project is within that bidder's available bidding capacity; and

(ii) for a project on which audited financial qualification is waived under §9.12(c) of this subchapter, only if the estimated cost of the project is within that bidder's available bidding capacity.

(B) Non-issuance. Except as provided in subparagraph (C) of this paragraph, the department will not issue a bid form requested by a bidder for a construction or maintenance contract if at the time of the request the bidder:

(i) is disqualified by an agency of the federal government as a participant in programs and activities involving federal assistance and benefits, and the contract is for a federal-aid project;

(ii) is suspended or debarred by order of the commission;

(iii) is prohibited from rebidding a specific project because of default of the first awarded contract;

(iv) has not fulfilled the requirements for qualification under §9.12 of this subchapter;

(v) is prohibited from rebidding that project as a result of having previously submitted a mathematically and materially unbalanced bid resulting in the rejection of the bid by the commission; or

(vi) is prohibited from rebidding that project as a result of having submitted a bid containing an error resulting in the rejection of bids by the commission.

(C) Exception. The department may issue a bid form under a temporary approval to a bidder who would be ineligible under subparagraph (B)(iv) of this paragraph if the bidder has substantially complied with the requirements of §9.12 of this subchapter.

(2) Building contracts.

(A) Issuance. Except as provided in subparagraph (B) of this paragraph, the department will issue, upon request, a bid form to a bidder having complied with §9.12(e) of this subchapter.

(B) Non-issuance. The department will not issue a bid form requested by a bidder for a building contract if, at the time of the request, the bidder:

(i) is disqualified by an agency of the federal government as a participant in programs and activities involving federal assistance and benefits and the contract is a federal-aid project;

(ii) is suspended or debarred by order of the commission; or

(iii) is prohibited from bidding that project because of default of the first awarded contract.

(3) All contracts. The department will not issue a bid form for a highway improvement contract to a bidder if the bidder or a subsidiary or affiliate of the bidder has received compensation from the department to participate in the preparation of the plans or specifications on which the bid or contract is based.

§9.14. Submittal of Bid.

(a) Acceptable methods. Bids for department highway improvement contracts may be submitted either manually or electronically.

(b) Manually submitted bids. For the purpose of manually submitting a bid, an acceptable bid form is the form that is printed and given to the bidder by the department, a computer printout that meets the requirements of paragraph (3) of this subsection, or a form printed by the bidder from EBS.

(1) Delivery of Bid. The bidder shall place each completed bid form in a sealed envelope marked to show its contents. When submitted by mail, this envelope shall be placed in another envelope which shall be sealed and addressed as indicated in the notice. Bids must be received on or before the hour and date set for the receipt and opening of bids and must be in the hands of the department letting official by that time.

(2) Bid content. The bidder shall submit the bid in compliance with the following requirements.

(A) Except as provided in subparagraph (B) of this paragraph and paragraph (3) of this subsection, the blank spaces for each item as required in the bid form shall be filled in by writing in words in ink.

(B) The bidder shall submit a unit price for each item for which a bid is requested (including a zero if appropriate), except in the case of a regular bid item that has an alternate bid item. In such case, prices must be submitted for the base bid or with the set of items of one or more of the alternates.

(C) The bid shall be executed with ink in the complete and correct name of the bidder making the bid and be signed by the person or persons authorized to bind the bidder.

(D) Except in the case of a regular bid item that has an alternate bid item, unit prices shall be stated in dollars and/or cents for each bid item listed in the bid form.

(3) Computer printouts.

(A) For manually submitted bids, a bidder may, in lieu of writing in words in ink, submit an original computer printout sheet bearing the authorized signature for the bidder. The unit prices shown on acceptable printouts will be the official unit prices used to tabulate the official total bid amount and used in the contract if awarded by the commission.

(B) Computer printouts are not acceptable on building contracts.

(c) Electronically submitted bids. In lieu of submitting a printed bid form, the bidder may submit the bid electronically using EBS in accordance with this subsection.

(1) Bids must be received by the electronic vault on or before the time and date set for the receipt and opening of bids.

(2) For the submission or withdrawal of electronic bids, the bidder is responsible for obtaining its use of a computer system and access to the Internet.

(3) The department is not responsible for a bidder being unable to submit or withdraw a bid due to the unavailability of the Internet.

(4) The bid shall be in the correct name of the bidder making the bid and executed by digitally signing the bid by the person or persons authorized to bind the bidder or bidders, in the case of a joint venture, using the digital signature assigned in the digital certificate issued to the person by the department.

(5) For purposes of this subsection, digital certificate means an electronic identifier assigned in a digital certificate and intended by the person using it to have the same force and effect as the use of a manual signature for signing an electronic document.

(d) Bid guaranty. Except as provided in paragraph (5) of this subsection, a bidder must submit a bid guaranty with the bid.

(1) Except as provided in paragraph (2) or (5) of this subsection, the bid guaranty must be in the amount specified by the bid form, made payable to the order of the commission, and in the form of a cashier's check, money order, or teller's check drawn by or on a state or national bank, savings and loan association, or a state or federally chartered credit union (collectively referred to as a "bank"). The check must be payable at or through the institution issuing the instrument, or must be drawn by a bank on a bank, or by a bank and payable at or through a bank. The form of the instrument must be identified on the instrument's face.

(2) A bidder may submit a bid bond, in lieu of providing the guaranty required in paragraph (1) of this subsection. The bid bond shall be on the form and in the amount specified by the department. A bid bond will only be accepted from a surety company authorized to execute a bond under and in accordance with state law. The bond must be dated on or before the date of the bid opening, bear the impressed seal of the surety company and the name of the bidder, and be signed by the bidder or bidders, in the case of a joint venture, and an authorized representative of the surety company. As an alternative for joint venture bidders, each of the bidders may submit a separate bid bond, completed as outlined in this paragraph. Powers of attorney must be attached to the bid bond. The bid bond amount required by the department must be within the surety company's authorized bonding limit.

(3) The department will not accept as a bid guaranty:

(A) personal checks or certified checks;

(B) other types of money orders; or

(C) checks or money orders more than 90 days old.

(4) The commission will establish by order bid guaranty and bid bond amounts. The commission may require a greater amount for a bid bond in order to compensate for increased administrative costs associated with bid bonds.

(5) For bids submitted electronically under subsection (c) of this section, the bid guaranty must be an electronic bid bond, the form of which must be the most current version issued by the department. For joint venture bidders, the bond must be made in the name of all joint venture bidder participants. The bond authorization code must be entered into the authorization code field contained in EBS. Only bond authorization codes from the companies listed in the most recent version of EBS are acceptable. Printed checks or bid bond forms are not acceptable as guaranties for electronic bids.

§9.15. Acceptance, Rejection, and Reading of Bids.

(a) Public reading. Bids will be opened and read in accordance with Transportation Code, §223.004 and §223.005. Bids for contracts with an engineer's estimate of less than $300,000 may be filed with the district engineer at the headquarters for the district, and opened and read at a public meeting conducted by the district engineer, or his or her designee on behalf of the commission.

(b) Bids not read.

(1) The department will not accept and will not read a bid if:

(A) the bid is submitted by an unqualified bidder;

(B) the bid is in a form other than the official bid form issued to the bidder;

(C) the certification and affirmation are not signed;

(D) the bid was not in the hands of the letting official at the time and location specified in the advertisement;

(E) the bidder modifies the bid in a manner that alters the conditions or requirements for work as stated in the bid;

(F) the bid guaranty, when required, does not comply with §9.14(d) of this subchapter;

(G) the bidder did not attend a specified mandatory prebid conference;

(H) the bid does not include a fully completed historically underutilized business subcontracting plan in accordance with §9.54(c)(1) of this chapter when required;

(I) a computer printout bid, when used, does not have the unit bid prices entered in designated spaces, is not signed in the name of the firm or firms to whom the bid was issued, or omits required bid items or includes items not shown in the bid;

(J) the bidder was not authorized to be issued a bid form under §9.13(e) of this subchapter;

(K) the bid did not otherwise conform with the requirements of §9.14 of this subchapter;

(L) the bidder fails to properly acknowledge receipt of all addenda;

(M) the bid submitted has the incorrect number of bid items; or

(N) the bidder bids more than the maximum or less than the minimum number of allowable working days shown on the plans when working days is a bid item.

(2) If bids are submitted on the same project separately by a joint venture and one or more members of that joint venture, the department will not accept and will not read any of the bids submitted by the joint venture and those members for that project.

(3) If bids are submitted on the same project by affiliated bidders as determined under §9.12(d) of this subchapter, the department will not accept and will not read any of the bids submitted by the affiliated bidders for that project.

(c) Revision of bid.

(1) For a manually submitted bid, a bidder may change a bid price before it is submitted to the department by changing the price in the printed bid form and initialing the revision in ink;

(2) For a manually submitted bid, a bidder may change a bid price after it is submitted to the department by requesting return of the bid in writing prior to the expiration of the time for receipt of bids, as stated in the advertisement. The request must be made by a person authorized to bind the bidder. The department will not accept a request by telephone or telegraph, but will accept a properly signed facsimile

request. The revised bid must be resubmitted prior to the time specified for the close of the receipt of bids.

(3) For an electronically submitted bid, a bidder may change a unit bid price in EBS and resubmit electronically to the electronic vault until the time specified for the close of the receipt of bids. Each bid submitted will be retained in the electronic vault. The electronic bid with the latest date and time stamp by the vault will be used for bid tabulation purposes.

(d) Withdrawal of bid.

(1) A bidder may withdraw a manually submitted bid by submitting a request in writing before the time and date of the bid opening. The request must be made by a person authorized to bind the bidder. The department will not accept telephone or telegraph requests, but will accept a properly signed facsimile request. Except as provided in §9.16(c) of this subchapter and §9.17(d) of this subchapter, a bidder may not withdraw a bid subsequent to the time for the receipt of bids.

(2) A bidder may withdraw an electronically submitted bid by submitting an electronic or written request to withdraw the bid. An electronic withdrawal request must be submitted using EBS. The request, whether electronic or written, must be submitted by a person who is authorized by the bidder to submit the request and received by the department before the time and date of the bid opening.

(e) Unbalanced bids. The department will examine the unit bid prices of the apparent low bid for reasonable conformance with the department's estimated prices. The department will evaluate a bid with extreme variations from the department's estimate, or where obvious unbalancing of unit prices has occurred. For the purposes of the evaluation, the department will presume the same retainage percentage for all bidders. In the event that the evaluation of the unit bid prices reveals that the apparent low bid is mathematically and materially unbalanced, the bidder will not be considered in future bids for the same project.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806092
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General Counsel
Texas Department of Transportation
Effective date: December 11, 2008
Proposal publication date: September 12, 2008
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SUBCHAPTER G. CONTRACTOR SANCTIONS

The Texas Department of Transportation (department) adopts the repeal of §§9.100 - 9.106 in its entirety and simultaneously adopts new §§9.100 - 9.117 all concerning contractor sanctions. The repeal of §§9.100 - 9.106 and new §§9.100, 9.103 - 9.107, and 9.109 - 9.117 are adopted without changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7721) and will not be republished. New §§9.101, 9.102, and 9.108 are adopted with changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7721).

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

The department's contractor sanction rules set forth the circumstances under which contractors may be sanctioned and the procedures that must be followed. The commission previously adopted §§9.100 - 9.106 to specify the process by which the department will administer and manage contractor sanctions associated with highway improvement contracts.

The repeals and new sections are necessary to incorporate the consideration of an internal compliance program applicable to a contractor's organization in considering the application and level of a sanction; provide an opportunity for an informal hearing concerning a sanction decision prior to filing a formal appeal or request that an indirect sanction imposed as a result of an affiliation based solely on a family connection with a sanctioned firm be lifted; and reorganize the rules to provide clarity and better organization. In addition, the existing rule was reorganized and rewritten to provide better understanding and a chronological order of events in the consideration and application of sanctions. For reference purposes, detailed explanations of the location of existing rule are provided for each of the new sections below.

New §9.100, Purpose, reorganizes and replaces existing §9.100 and sets forth the purpose of this subchapter to protect the health, welfare, and safety of the traveling public and the state's investment in its state highway system. No substantial revisions from the existing rule were made.

New §9.101, Definitions, reorganizes and replaces existing §9.101. This new section includes a new definition for a contractor compliance program that outlines the program components necessary for the department to consider its existence in the determination and application of sanctions. Public trust and confidence is of the utmost importance to the department and the department desires that its partners in transportation exhibit a high commitment to ethical behavior. The rule changes provide a possible mitigating circumstance for imposing sanctions if the contractor has an ethics and compliance program in place at the time of the offense. Detailed information concerning the components necessary for department recognition of the existence of a contractor compliance program serves to provide clarification and understanding to affected parties, and ensure that a compliance program is potentially effective and not pro forma in nature. Definitions for unnecessary terms contained in the existing rule were removed. No other substantial revisions from the existing rule were made.

New §9.102, Grounds for Sanctions, the language of which is found in existing §9.106(a), specifies the grounds or conditions for which a contractor may be sanctioned. New §9.102(a)(1)(A) - (C) references fraud, violation of federal or state antitrust laws, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, and obstruction of justice as grounds for sanctions. The existing rule simply referenced bidding crimes. The new section provides detailed information regarding the department's interpretation of a bidding crime as it relates to sanctions. This expanded definition of a bidding crime provides clarification and necessary information to affected parties concerning the department's interpretation of a bidding crime, and serves to protect the integrity of the department's competitive bidding process by ensuring that those contractors that have demonstrated fiscal irresponsibility are not eligible to bid on department highway improvement contracts. No other substantial revisions from the existing rule were made.

New §9.103, Notification of Rules, reorganizes and replaces existing §9.102(a) and states that failure to receive a copy of the sanction rules is not a contractor defense to an alleged violation of the rules. No substantial revisions from the existing rule were made.

New §9.104, Referral to Executive Director, combines, reorganizes, and replaces existing §9.102(b) and §9.104(c). This new section outlines the criteria the department will consider in determining whether to refer a contractor to the executive director for possible sanctions. Section 9.104(a)(6) - (18) were added to provide additional information and clarification regarding department considerations in determining whether to refer a contractor to the executive director for possible sanctions. This new section provides additional clarification, protects the integrity of the competitive bid process, and ensures that only responsible bidders are eligible to bid on department highway improvement contracts. A contractor's failure to act, if an action is required, will also be considered in making a determination to refer a contractor to the executive director for possible sanctions.

New §9.105, Determinations Related to Sanction, reorganizes and replaces existing §9.104(a), (b), (f), and (g). This new section outlines the review and determination process regarding possible sanctions for a contractor referred to the executive director under new §9.104. Included as a consideration for imposing possible sanctions is the existence of, and adherence to, a compliance program as defined in new §9.101. The additional consideration of the existence of a contractor's internal compliance program in the determination of a sanction will serve to encourage industry use of such a program to prevent and detect noncompliance with applicable laws and procedures, and promote an industry culture that encourages ethical conduct and a commitment to compliance with the law. No other substantive revisions were made from the existing rule.

New §9.106, Responsibility for Acts of Others, reorganizes and replaces existing §9.102(f) and states that the contractor is responsible for the conduct of others acting on its behalf. No substantial revisions from the existing rule were made.

New §9.107, Sanction Levels, reorganizes and replaces existing §9.105(b) and prescribes the various sanction levels that may be imposed on a contractor in those instances when the executive director has determined that a sanction will be imposed under §9.105. In determining the appropriate sanction level, the executive director will consider the existence of, and the contractor's adherence to, a compliance program as defined under new §9.100. Consideration of the existence of a contractor's internal compliance program in the application of a sanction will serve a dual purpose to encourage industry use of such a program to promote ethical behavior, and protect the integrity of the department's competitive bidding process. Under this new section, the maximum sanction level is limited to a debarment period of 60 months. This ensures that sanctions imposed by the department are applied consistently and uniformly. No other substantial revisions from the existing rule were made.

New §9.108, Application of Sanctions, reorganizes and replaces existing §9.104(e) and (f) and addresses the imposition of consecutive sanctions on a contractor determined to have committed multiple violations, and the executive director's discretion in imposing a sanction that is less than the maximum prescribed under new §9.107. No substantial revisions from the existing rule were made.

New §9.109, Notice of Sanctions, reorganizes and replaces existing §9.102(c) and provides for the content and requirements associated with the notice to a contractor of sanctions imposed by the department. No substantial revisions from the existing rule were made.

New §9.110, Suspension, reorganizes and replaces existing §9.105 and provides that the executive director may immediately suspend a contractor if it is determined that grounds for sanctions exist. This new section also outlines the requirements associated with the department's notice to a contractor of a suspension, which may be included in a sanctions notice. These notification requirements parallel those for sanctions and are necessary to ensure uniformity and consistency within the rule. While §9.105 addressed notification requirements associated with the application of sanctions, no notification requirements were listed for the application of a suspension. Suspensions will terminate once a final order is entered after a hearing or as ordered by the executive director. No other substantial revisions from the existing rule were made.

New §9.111, Contractual Obligations Unaffected, reorganizes and replaces existing §9.102(d) and states that the imposition of a sanction or suspension does not relieve a contractor's contractual obligations under an existing contract. No substantial revisions from the existing rule were made.

New §9.112, Opportunity for Informal Hearing, provides those contractors sanctioned at a Level 2 or greater the opportunity to appeal directly to the department. This new section prescribes the procedures associated with filing an appeal and scheduling an informal hearing with the department. The existing rule allowed only for the opportunity to appeal and schedule a formal administrative hearing in accordance with 43 TAC §1.21 et. seq. (relating to Procedures in Contested Cases). The department adopts this additional step in the appeals process as it recognizes the seriousness of the application of sanctions and desires to afford due process to affected contractors while also ensuring the maximum number of qualified bidders are eligible to bid on department highway improvement contracts. This additional department hearing process will also provide a more expeditious means of considering appeals associated with department sanctions and suspensions. If the executive director determines to continue a sanction, the contractor may request a formal hearing in accordance with new §9.114.

New §9.113, Informal Hearing on Indirect Sanction, provides an opportunity for an informal hearing for those contractors indirectly sanctioned due to an immediate family relationship to an affiliated entity upon which a sanction was directly imposed. This new section is similar to new §9.112 with the exception that the referenced hearing will involve only the consideration of the family connection associated with the affiliated entity. This additional hearing is necessary as the department recognizes that bidders who are indirectly sanctioned as affiliated entities only because of a family connection may be independent of the directly sanctioned firm. In such an instance, allowing the indirectly sanctioned contractor to be exempted from the sanction would better serve the department and public interests by providing increased competition on highway improvement contracts. As with the informal hearing provided in new §9.112, if the executive director determines to continue a sanction, the contractor may request a formal hearing in accordance with new §9.114.

New §9.114, Opportunity for Formal Hearing, replaces existing §9.103(a) and provides a contractor dissatisfied with an informal hearing associated with new §9.112 or §9.113 the opportunity to

request a formal hearing in accordance with 43 TAC §1.21 et. seq. This new section requires that contractors wishing to appeal a department sanction or suspension first exhaust the appeals processes provided in new §9.112 and new §9.113 prior to filing an appeal with the State Office of Administrative Hearings. This is necessary to afford appealing contractors due process within the department and effectuate an appeals process that ensures the maximum number of qualified bidders are eligible to bid on highway improvement contracts, thereby increasing competition. The possibility of resolving an appeal within the department prior to a contractor filing an appeal with the State Office of Administrative Hearings will also provide a more effective use of available state resources.

New §9.115, Stay of Sanctions, reorganizes and replaces existing §9.103(b) and provides that an imposed sanction is stayed pending the outcome of an informal or formal hearing. This new section also addresses the conditions for the continuance and duration of an imposed sanction in those instances when a sanction is continued following an informal hearing and a formal hearing is not requested, or when a sanction is continued following a formal hearing. Other than providing necessary information concerning the application of a stay with regard to the informal hearings provided in new §9.112 and new §9.113, no substantial revisions were made from the existing rule.

New §9.116, List of Debarred or Suspended Contractors, outlines the procedures taken by the department in posting on the Internet a list of the names and known affiliates and principals of those contractors upon which a Level 2, 3, or 4 sanction has been imposed. The department is adding this provision for a list of debarred and suspended contractors to provide information to our customers regarding those contractors that are no longer eligible to bid on department highway improvement contracts due to an imposed sanction or suspension. This posting also provides a more expeditious method to communicate the necessary information concerning department sanctioned and suspended contractors to affected local, state, and federal agencies.

New §9.117, Request for Review, outlines the procedures a sanctioned contractor may use to request that the executive director review the imposed sanction for modification. A contractor may submit no more than one review request during any 12-month period. This limitation helps ensure that reviews are conducted in an efficient manner without placing an undue and unnecessary burden on available department resources. The executive director may reduce, eliminate, or modify the imposed sanction. This serves a dual purpose of providing sanctioned contractors with a process to show their rehabilitation, while also serving the best interest of the public by ensuring the maximum number of contractors are eligible to bid on highway improvement contracts thereby increasing competition.

COMMENTS

No comments on the proposed repeals and new sections were received. However, the department made minor technical corrections to §9.101(4) and §9.102(4) to correct references to section numbers. These changes correct citations to subsections that were incorrect in the proposed rules and do not substantively change the proposed sections.

43 TAC §§9.100 - 9.106

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806093
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 11, 2008
Proposal publication date: September 12, 2008
For further information, please call: (512) 463-8683

43 TAC §§9.100 - 9.117

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.101. Definitions.

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

(1) Bidding capacity--An amount calculated in accordance with §9.12 of this chapter (relating to Qualification of Bidders).

(2) Commission--The Texas Transportation Commission.

(3) Compliance Program--A written internal compliance and ethics program applicable to the contractor's organization. The program must be recognized as a qualifying compliance program by the department. At a minimum the program must provide compliance standards and procedures that employees and agents are expected to follow and must provide that:

(A) high-level personnel are responsible for oversight of compliance with the standards and procedures;

(B) appropriate care is being taken to avoid the delegation of substantial discretionary authority to individuals whom the organization knows, or should know, have a propensity to engage in illegal activities;

(C) compliance standards and procedures are effectively communicated to all of the organization's employees by requiring them to participate in training and disseminating to them information that explains, in understandable language, the requirements of the program;

(D) the governing body or individuals of the organization have periodic training in ethics and in the compliance program;

(E) compliance standards and procedures are effectively communicated to all of the organization's agents;

(F) reasonable steps are being taken to achieve compliance with the compliance standards and procedures by:

(i) using monitoring and auditing systems that are designed to reasonably detect noncompliance; and

(ii) providing and publicizing a system for the organization's employees and agents to report suspected noncompliance without fear of retaliation;

(G) consistent enforcement of compliance standards and procedures is administered through appropriate disciplinary mechanisms;

(H) reasonable steps are being taken to respond appropriately to detected offenses and to prevent future similar offenses; and

(I) the organization has a written employee code of conduct that, at a minimum, addresses:

(i) record retention;

(ii) fraud;

(iii) equal opportunity employment;

(iv) sexual harassment and sexual misconduct;

(v) conflicts of interest;

(vi) personal use of the organization's property; and

(vii) gifts and honoraria.

(4) Contractor--An entity that is eligible to bid on a highway improvement contract or that functions or seeks to function as a subcontractor under a highway improvement contract or as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system. The term includes an affiliated entity of a contractor, as described by §9.12(d) of this chapter (relating to Affiliated entities).

(5) Debarment--Disqualification of a contractor from bidding on or entering into a highway improvement contract, from participating as a subcontractor under a highway improvement contract, and from participating as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system.

(6) Executive director--The executive director of the Texas Department of Transportation or the director's designee not below the level of division director.

(7) Highway improvement contract--A contract entered under Transportation Code, Chapter 223, Subchapter A for the construction, reconstruction, or maintenance of a segment of the state highway system, or for the construction or maintenance of a building or other facility appurtenant to a building.

(8) Sanction--Debarment or reduction in bidding capacity.

(9) Suspension--Immediate, temporary disqualification of a contractor from bidding on or entering into a highway improvement contract, from participating as a subcontractor under a highway improvement contract, and from participating as a supplier of materials or equipment to be used in the construction or maintenance of a part of the state highway system. Suspension differs from a sanction involving debarment as it may take effect prior to and during a hearing.

§9.102. Grounds for Sanctions.

The executive director may sanction a contractor for:

(1) a conviction of, a plea of guilty or nolo contendere to a charge of, or a civil judgment or a public admission by the contractor or an individual or entity that acted on behalf of the contractor related to:

(A) fraud or other criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;

(B) the violation of a federal or state antitrust statute, including a statute that proscribes price fixing between competitors, allocation of customers between competitors, or bid rigging; or

(C) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice;

(2) any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the contractor's responsibility, if the executive director has probable cause to believe that the offense has been committed;

(3) the contractor's disqualification by the comptroller, another state, or an agency of the federal government for any of the reasons listed in this section;

(4) failure to execute a highway improvement contract after a bid is awarded, unless the contractor honors a bid guaranty submitted under §9.14(d) of this chapter (relating to Bid guaranty);

(5) the rejection by the commission of two or more bids by the contractor during the 36-month period preceding the month in which the determination is being made because of contractor error;

(6) failure of the contractor to notify the department promptly of a conviction of a crime related to bidding or debarment for any reason by the comptroller, another state, or an agency of the federal government; or

(7) the contractor's declaration of default on a highway improvement contract.

§9.108. Application of Sanctions.

(a) Consecutive sanctions. In the case of multiple actions or failures by a contractor arising out of separate occurrences, the executive director may impose multiple sanctions consecutively and in any order.

(b) Imposition of lesser sanctions. When applying a level of sanctions provided by §9.107 of this subchapter (relating to Sanction Levels), the executive director may impose a sanction that is less than the maximum sanction for that level. For example, the bidding capacity may be reduced by a lesser percentage than the percentage provided for Level 1, or a reduction in bidding capacity of any amount may be ordered for any length of time for Level 2, 3, or 4.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806094
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 11, 2008
Proposal publication date: September 12, 2008
For further information, please call: (512) 463-8683

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CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) adopts amendments to §21.31, Definitions, §21.35, Exceptions, §21.37, Design, §21.38, Construction and Maintenance, §21.39, Ownership/Abandonment/Idling, §21.40, Underground Utilities, §21.52, Forms--General, §21.53, Use and Occupancy Agreement Forms, §21.54, Notice Forms, §21.55, Abandoned Interests, §21.902, Definitions, and §21.905, Requests, all concerning utility accommodation on the state highway system and state railroads. The amendments to §§21.31, 21.35, 21.37, 21.38, 21.40, 21.53, 21.54, 21.902, and 21.905 are adopted without changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7729) and will not be republished. The amendments to §§21.39, 21.52, and 21.55 are adopted with changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7729).

EXPLANATION OF ADOPTED AMENDMENTS

Title 43 TAC Chapter 21, Subchapter C, Utility Accommodation, was adopted in 1976 to prescribe minimum requirements for the accommodation, method, materials, and location for the installation, adjustment, and maintenance of public and private utilities within the right of way of the state highway system. Some of the provisions in the subchapter use terminology that is currently outdated and contain procedures that imply certain obligations but are not specific. The amendments are necessary to clarify existing language, to maintain consistency between federal and state regulations, to better reflect current practice, and to update standards to implement the intent of the rules. Similarly, there are changes to Subchapter O, Utility Accommodation for Rail Facilities that are necessary to maintain consistency in treatment of utilities in both highway and railroad rights of way.

The amendment to §21.31(2) changes the definition of "abandoned utility" to be more general and to meet the common understanding of abandonment as being the result of both actual non-use and the utility owner's intent. The requirements that the utility owner first request an abandonment in place and then obtain the department's approval are deleted.

A definition of "joint use agreement" is added as new §21.31(30). There is no current definition for this term or for "use and occupancy agreement," and use of these and other similar terms to describe required forms in different provisions in this subchapter creates potential conflict and confusion. The definition of a "joint use agreement" is limited to a type of "use and occupancy agreement" that is used only for situations in which the utility has a compensable interest in the land occupied by its facilities. The definition is consistent with federal regulation 23 C.F.R. §645.209(i). The remaining definitions in §21.31 are renumbered.

A definition of "use and occupancy agreement" is added as new §21.31(45). There is no current definition for this term or for "joint use agreement," and use of these and other similar terms to describe required forms in different provisions in this subchapter creates potential conflict and confusion. The definition of a "use and occupancy agreement" includes all documents by which the department approves the use of highway right of way by utility facilities. The definition is consistent with federal regulations 23 C.F.R. §§645.105, 645.203, 645.207, and 645.213.

The words "pipelines, conduits, cables," are added to the descriptive list of "lines" in the definition of "utility facilities" in §21.31(48). This addition clarifies that all types and variations of lines, as those words are used in other sections of this subchapter to describe utility facilities, are included in the definition.

The word "facility" is added after the word "utility" in the definition of "utility structure" in §21.31(50). The word was mistakenly omitted in the original text and its addition clarifies the meaning.

Amendments to §21.35(a)(2) delete the phrase "Utility Installation Request form or any other instrument" and replace it with the newly defined general term "use and occupancy agreement." A "Utility Installation Request" is the current name for a particular type of use and occupancy agreement that has been re-named several times in the past. One of the prior names for the same kind of agreement ("notice") appears in various locations in this subchapter. The change to §21.35(a)(2) brings consistency to the use of the term and avoids confusion in the event of future name changes for the form.

Amendments to §21.37(d)(2) delete the term "utility installation request" and replace it with the newly defined general term "use and occupancy agreement." A "utility installation request" is the current name for a particular type of use and occupancy agreement that has been re-named several times in the past. One of the prior names for the same kind of agreement ("notice") appears in various locations in this subchapter. The change to this §21.37(d)(2) brings consistency to the use of the term and avoids confusion in the event of future name changes for the form.

Amendments to §21.38(d)(1) delete the phrase "Utility Joint Use Acknowledgement or Utility Installation Request" and replaces it with the newly defined general term "use and occupancy agreement." The existing terms are specific names for two forms that together are intended to cover all types of use and occupancy agreements. The change to the new general term will clearly cover all types of these agreements and avoids confusion in the event of future name changes for either or both forms.

The title of §21.39 is updated to more completely describe the nature of the section. Subsection (a) of §21.39 is deleted. This provision dealing with the department's acquisition of a utility's abandoned real property interest is already included in §21.55. Section 21.39 deals primarily with the abandonment of utility facilities rather than real property interests and the provision is more appropriately located in §21.55. The COMMENTS section of this Preamble describes revisions to this section.

New §21.39(a), clarifies that the new owner of a utility facility must provide the owner's name to the department, and requires the new owner to acknowledge whether it is a public utility. Only public utilities (as currently defined in §21.31(37)) have the right under §21.36 to place utility facilities longitudinally on highway rights of way. The additional information required by this amendment will enable the department to better monitor use of its right of way. The COMMENTS section of this Preamble describes revisions to this section.

New §21.39(b) requires a utility to submit a request for a new use and occupancy agreement if it wishes to materially change the character, use, or function of an existing approved utility facility. Requirements for the accommodation, method, materials, and location of utility facilities vary depending on their use. For example, the requirements for a high pressure gas line are more stringent than low pressure lines because of the increased safety risk. It is critical for the department to be aware of any change in use and be able to ensure that the new use complies with the ap-

propriate accommodation requirements. The COMMENTS section of this Preamble describes revisions to this section.

New §21.39(c)(1) adds a requirement that a utility provide written notice to the department if it abandons or idles a utility facility, and in the case of abandonment, indicate whether the facility will be removed or abandoned in place. Although this step was implied in the current rule dealing with abandonment in place, the amendment clarifies the process. The remaining paragraphs under this subsection (c) are renumbered.

New §21.39(c)(3) clarifies that the department will pay the costs of removing an abandoned line if the removal is caused by an active highway project and the adjustment costs are otherwise eligible for reimbursement.

The amendments to new §21.39(c)(5) and (6) merely add descriptive words that clarify the scope of the current provisions.

The words "and handholds" are deleted in the title to §21.40(a)(3) because there is no discussion of handholds or handholes in the paragraph.

Amendments to §21.40(f)(2)(D)(i) delete the term "utility installation request" and replace it with the newly defined general term "use and occupancy agreement." A "utility installation request" is the current name for a particular type of use and occupancy agreement that has been re-named several times in the past. One of the prior names for the same kind of agreement ("notice") appears in various locations in the subchapter. The change to §21.40(f)(2)(D)(i) brings consistency to the use of the term and avoids confusion in the event of future name changes for the form.

Amendments to §21.52 delete the term "notice forms." It is a prior name for the currently named "utility installation request" and is duplicative of the existing term "use and occupancy agreement." The change to this §21.52 brings consistency to the use of the term "use and occupancy agreement" and avoids confusion in the event of future name changes for the forms. The amendments also replace the word "provided" with "required" to clarify that a use and occupancy agreement is mandatory for all utility facilities installed, adjusted, relocated, or retained within the highway right of way, and delete the hyphen between the words "right of way" to be consistent with other provisions of this subchapter in which the words right of way are used. The COMMENTS section of this Preamble describes revisions to this section.

Amendments to §21.53 limit the use of "joint use agreements" to situations in which the utility has a prior property interest which is being retained within the highway right of way. This is consistent with federal regulation 23 C.F.R. §645.209(i). The amendment also clarifies that the form should contain utility location plans. This is consistent with current language for other use and occupancy agreements described in §21.54 and is also consistent with existing practice.

Amendments to §21.54 replace the term "notice forms" with the newly defined general term "use and occupancy agreement." A "notice form" is the prior name used for a particular type of use and occupancy agreement that is currently named "Utility Installation Request." The change to "use and occupancy agreement" brings consistency to the use of the term and avoids confusion in the event of future name changes for the form. This amendment, together with changes to the definitions in §21.31 and the limited use of "joint use agreements" in §21.53, also changes the department's existing practice of using a joint use agreement in more situations than just when the utility has a prior property interest which is being retained within the highway right of way. The existing practice requires a utility to sign a joint use agreement when its utility facility is adjusted, relocated, or retained in connection with active highway projects - even though the utility may not have a prior property interest. The new policy adopted by this amendment would use the more general "use and occupancy agreement" in all situations except when the utility has a prior property interest. The changes to the use of these forms are consistent with federal regulations 23 C.F.R. §§645.105, 645.203, 645.207, 645.209, and 645.213.

Amendments to §21.55 delete the hyphen between the words "right of way" to be consistent with other provisions of this subchapter in which the words "right of way" are used. The COMMENTS section of this Preamble describes revisions to this section.

New §21.902(21) adds a definition of "joint use agreement." There is no current definition for this term or for "use and occupancy agreement," and use of these terms in this subchapter creates potential conflict and confusion. The definition of a "joint use agreement" is limited to a type of "use and occupancy agreement" that is used only for situations in which the utility has a compensable interest in the land occupied by its facilities. The definition is consistent with treatment of utilities in Subchapter C dealing with Utility Accommodation for highways. The remaining definitions in §21.902 are renumbered.

New §21.902(30) adds a definition of "use and occupancy agreement." There is no current definition for this term or for "joint use agreement," and use of these terms in this subchapter creates potential conflict and confusion. The definition of a "use and occupancy agreement" includes all documents by which the department approves the use of railroad right of way by utility facilities. The definition is consistent with treatment of utilities in Subchapter C dealing with Utility Accommodation for highways.

Amendments to §21.905 replace the term "joint-use agreement" with the newly defined general term "use and occupancy agreement." It then describes that a joint use agreement should be used in situations when the utility has a prior property interest which is being retained in the railroad right of way. The amendment also incorporates a requirement that the forms include such terms, conditions, and utility location plans as necessary to protect and preserve the railroad and the safety of its use. All of these changes are designed to make treatment of utilities in railroad right of way consistent with treatment of utilities in Subchapter C dealing with Utility Accommodation for highways. Finally, the amendments add a requirement that the utility provide written notice of any material change in the character, use, or function of the utility facility. Requirements for the accommodation, method, materials, and location of utility facilities vary depending on their use. For example, the requirements for a high pressure gas line are more stringent than low pressure lines because of the increased safety risk. It is critical for the department to be aware of any change in use and be able to ensure that the new use complies with the appropriate accommodation requirements.

COMMENTS

Comments on the proposed amendments were received from the Executive Director of the Texas Pipeline Association and the Assistant General Counsel of CenterPoint Energy.

COMMENT:

Existing §21.39(a), General - The proposed deletion of existing §21.39(a) and retention of §21.55 changes the meaning of the state's obligation to acquire and pay for any abandoned utility property interests. Texas Pipeline Association requests that the concept of compensation for a property interest be included in §21.55.

RESPONSE:

The purpose of deleting existing §21.39(a) and retaining §21.55 is to avoid duplication of the same concept and maintain the requirement in the appropriate section. There is no intent to change the meaning or dilute the state's obligation to pay for the abandoned property interests. In order to resolve Texas Pipeline Association's concern, §21.55 is revised to use the same "acquisition" language contained in the deleted §21.39(a).

COMMENT:

Amended §21.39(a), Change of Ownership - The additional requirement in amended §21.39(a) that imposes an obligation on the utility to disclose whether the new owner is a "public utility," together with the preamble comment dealing with a utility's legal authority to place its lines longitudinally in the highway, operates to confuse the issue relating to the right of a gas utility in the business of transporting or distributing gas for public consumption to place its lines longitudinally in the highway, and implies that Texas Department of Transportation (TxDOT) will use the new rules to deny qualified entities from exercising their rights.

RESPONSE:

The department does not agree that the proposed amendment to §21.39(a) or the preamble changes the legal authority of a gas utility in the business of transporting or distributing gas for public consumption to place its lines longitudinally in the highway. The proposed change to §21.39(a) is only asking for information as the status of the utility. The existing §21.34 expressly states that this subchapter does not alter current authority for installation of utilities on state highway rights of way. Additionally, the existing §21.36(a) and definitions of "private utility" and "public utility" in existing §21.31(36) and (37) are consistent with the legal position expressed in the Texas Pipeline Association's letter. In order to provide further clarification, §21.39(a)(2)is revised to expressly cover all possible utilities that might be authorized to use highway right of way under §21.36(a).

COMMENT:

Amended §21.39(b), Change of Function - The additional requirement in amended §21.39(b) that imposes an obligation on the utility to disclose whether the utility is planning to "materially change the character, use or function of an approved utility facility" is too vague and the utility will not know when it is required to provide the information and new application. Texas Pipeline Association suggests that the standard for triggering the requirement for a new use and occupancy agreement should be a "physical change in the facilities" rather than the proposed "materially change the character, use or function of an approved utility facility".

RESPONSE:

The use of "material change" was intentionally used to generally cover all situations in which the change would cause the application of different and more stringent accommodation requirements. The requested use of a "physical change" standard does not cover all situations. For example, the utility could increase the gas pressure to a level in excess of 60 pounds per square inch without first physically changing the gas lines to be in compliance with more stringent high pressure requirements. Section 21.39(b) is revised to expressly cover only those changes that would result in the application of more stringent accommodation requirements.

COMMENT:

CenterPoint Energy requests that TxDOT clarify the definition of a "use and occupancy agreement" in §21.31(45) to include a statement that the agreement does not convey any ownership interest in real property.

RESPONSE:

The department agrees that the "use and occupancy agreement" should not be construed to operate as a conveyance of an interest in real property. However, instead of placing this concept in §21.31(45) as part of the definition, it is more appropriate to include it in §21.52(a). Section 21.52 already contains provisions describing the purpose and limitations of the use and occupancy agreement.

SUBCHAPTER C. UTILITY ACCOMMODATION

43 TAC §§21.31, 21.35, 21.37 - 21.40, 21.52 - 21.55

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which directs the department to adopt rules to implement Transportation Code, Chapter 203, Subchapter E concerning relocation of utility facilities required by improvements of the state highway system, and Transportation Code, §91.003, which directs the department to adopt rules to implement Transportation Code, Chapter 91 concerning the development, operation, and maintenance of a rail facility.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91, Subchapter F, and Transportation Code, Chapter 203, Subchapter E.

§21.39. Ownership, Function, Abandonment, and Idling of Facilities.

(a) Change of ownership. If a utility sells, assigns, or conveys its facility to another company, the new owner must, within a reasonable period of time, notify the department of the sale in writing and:

(1) provide the name, address, and phone number of the new owner and a person to be contacted on matters concerning the utility facility;

(2) acknowledge whether the new owner is a public utility, common carrier, or other entity authorized by state law to operate, construct, and maintain its lines over, under, across, on, or along state highways as specified in §21.36(a) of this subchapter; and

(3) update all call signs and markers.

(b) Change of function. If a utility wishes to materially change the character, use, or function of an approved utility facility and that new character, use, or function would result in the application of more stringent requirements under the provisions of this subchapter than are applicable to the approved facility, the utility must submit to the department a written request for a new use and occupancy agreement and

otherwise comply with the requirements contained in this subchapter concerning utility accommodation.

(c) Abandonment or idling of facility.

(1) Notice. If a utility abandons or idles a utility facility, it must, within a reasonable period of time, notify the department of that status in writing and in the case of abandonment, indicate whether the facility will be removed or abandoned in place.

(2) Abandonment in place.

(A) A utility that wishes to abandon a utility facility in place must submit a written request to the district engineer for each type of facility. The request must include the following detailed information for each facility proposed for abandonment:

(i) offsets from property lines and the centerline of the highway;

(ii) coordinates based on the global positioning system (GPS) or a survey datum as directed by the department;

(iii) the age, condition, material type, current status, quantity, and size of the facility;

(iv) a legend explaining symbols, characters, abbreviations, scale, and other data shown on any as-built drawing or record mapping;

(v) a statement certifying that the facility does not contain, or is not composed of, hazardous or contaminated materials; and

(vi) any additional information requested by the department.

(B) If the district engineer approves the abandonment in place, the utility facility owner shall continue to map, locate, and mark its abandoned facilities as required by this subchapter, federal regulations, or standards adopted by industry organizations, whichever is more restrictive.

(C) Abandonment shall not be construed as a change in ownership of the facility.

(3) Abandonment costs and restoration of public right of way. The utility shall be responsible for all costs associated with the maintenance or removal of its abandoned or idled lines within the right of way, unless removal of the line is caused by an active highway project and adjustment is the financial responsibility of the department.

(4) Voids. Significant voids beneath the right of way are prohibited. The department, at the discretion of the district engineer, may require that a facility be filled with cement slurry or backfilled in accordance with department standards.

(5) High and low pressure gas pipeline abandonment. Each owner/operator shall conduct abandonment or deactivation of gas pipelines within the right of way in compliance with the requirements of this section, current federal, state, or local laws or codes, or industry standards, whichever are more stringent. If the line is approved for abandonment in place, the utility shall:

(A) purge, cut, and cap or plug the ends of all facilities at the right of way lines;

(B) submit to the department a written certification that the abandonment conforms with all requirements of this section, current federal, state, or local laws or codes, or industry standards, whichever are more stringent;

(C) slurry-fill the facility, if the department determines it is needed due to the age, condition, material type, quantity, and size of the facility; and

(D) disconnect each pipeline from all sources and supplies of gas, purge each pipeline of gas and, in the case of submerged pipelines, fill each pipeline with water or other approved materials, and seal it at the ends.

(6) Abandoned gas service lines. For each gas service line approved for abandonment in place, the utility shall:

(A) provide a locking device or other means designed to prevent opening on each valve that is closed, to prevent the flow of gas to the customer;

(B) install in the service line or in the meter assembly a mechanical device or fitting that will prevent the flow of gas;

(C) physically disconnect the customer's piping from the gas supply and seal the open pipe ends;

(D) insure that a combustible mixture is not present after purging; and

(E) fill each abandoned vault with a suitable compacted material.

(7) Record keeping for abandoned facilities. A record of underground utility facilities abandoned in the right of way shall be maintained in a utility's permanent files until the facility is completely removed from the ground, and shall be provided to the department promptly upon request. This record must include:

(A) offsets from property lines and the centerline of the right of way;

(B) coordinates derived from the global positioning system being used by the department or a survey datum as directed by the department;

(C) the type, quantity, and size of the equipment;

(D) a legend explaining symbols, characters, abbreviations, scale, and other data shown on map;

(E) the location of the abandoned facilities; and

(F) any additional information requested by the department.

§21.52. Forms--General.

(a) Use and occupancy agreement forms are required for use for utility facilities installed, adjusted, relocated, or retained within highway right of way. These forms provide for a definite understanding as to the location and manner in which utilities will be installed and/or maintained and, where applicable, provide the necessary rights needed by the state to occupy the property interests held by the utility company. No term or condition of a use and occupancy agreement will be construed to grant, convey, or extinguish an interest in real property held by either the state or a utility.

(b) On highway routes within the corporate limits of municipalities all utility installations are to be in accordance with this part and subject to the state's approval.

(c) Other forms are also provided for conveyance of utility company property interests to the state when such interests within highway rights of way are abandoned.

§21.55. Abandoned Interests.

When, due to a highway construction project, a utility is required to relocate its facility from property in which it owns a property interest,

the department will acquire the utility's abandoned property interest within the new highway right of way.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806095
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 11, 2008
Proposal publication date: September 12, 2008
For further information, please call: (512) 463-8683

SUBCHAPTER O. UTILITY ACCOMMODATION FOR RAIL FACILITIES

43 TAC §21.902, §21.905

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which directs the department to adopt rules to implement Transportation Code, Chapter 203, Subchapter E concerning relocation of utility facilities required by improvements of the state highway system, and Transportation Code, §91.003, which directs the department to adopt rules to implement Transportation Code, Chapter 91 concerning the development, operation, and maintenance of a rail facility.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91, Subchapter F, and Transportation Code, Chapter 203, Subchapter E.

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

Filed with the Office of the Secretary of State on November 21, 2008.

TRD-200806096
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 11, 2008
Proposal publication date: September 12, 2008
For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Board of Professional Land Surveying

Title 22, Part 29

The Texas Board of Professional Land Surveying (TBPLS) files this notice of intent to review Chapter 661 - General Rules of Procedures and Practices, Chapter 663 - Standards of Responsibility and Rules of Conduct, Chapter 664 - Continuing Education and Chapter 665 - Examination Advisory Committee, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

Comments regarding whether the reason for adopting the rules continues to exist must be received within 30 days of this publication and may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, Texas 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us.

Proposed amendments will be published in the *Texas Register* as required by law.

TRD-200806084
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Filed: November 20, 2008

Texas Department of Public Safety

Title 37, Part 1

Pursuant to Government Code, §2001.039, the Texas Department of Public Safety (department) files this notice of intent to review and consider for readoption, amendment, or repeal 37 TAC Chapter 1 (Organization and Administration); Chapter 14 (School Bus Safety Standards); Chapter 17 (Administrative License Revocation); Chapter 18 (Driver Education); Chapter 23 (Vehicle Inspection); Chapter 27 (Crime Records); and Chapter 35 (Private Security).

The department will determine whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department. Any changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register.*

Written comments relating to this rule review will be accepted for a 30-day period following publication of this notice in the *Texas Register*. Comments should be directed to Pat Holmes, Inspector, Office of General Counsel, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0140.

TRD-200806077
Stanley E. Clark
Director
Texas Department of Public Safety
Filed: November 20, 2008

Adopted Rule Reviews

Commission on State Emergency Communications

Title 1, Part 12

The Commission on State Emergency Communications (CSEC) notice of intent to review its Chapter 251 rules was published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 951).

Based on its statutory review, CSEC readopts without amendment §251.2 and §252.7, concerning the guidelines for changing or extending 9-1-1 service and implementing integrated services.

CSEC published amendments to §§251.1, 251.3 - 251.5, 251.8, 251.9, and 251.11 - 251.13, concerning the guidelines governing the relationship between CSEC and the Regional Planning Commissions regarding the submission of regional strategic plans and amendments; use of revenue; procurement, management, and disposition of 9-1-1 equipment and controlled assets; use of funds for database maintenance; monitoring policies; and emergency notification services. The proposed amendments were published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6481) and are expected to be adopted without further amendment.

CSEC is proposing the repeal of and new §251.10, concerning guidelines for implementing wireless E9-1-1 service. CSEC is repealing and re-proposing §251.10 due to the nearly complete re-writing of the rule.

CSEC is proposing the repeal of §251.14, concerning general provisions and definitions and intends to propose new §252.7, concerning Definitions as a replacement rule.

No comments were received regarding CSEC's notice of review.

CSEC has determined that the reasons for initially adopting the rules continue to exist.

This concludes CSEC's review of its Chapter 251 rules.

TRD-200805983

Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: November 17, 2008

♦ ♦ ♦

Texas Department of Public Safety

Title 37, Part 1

Pursuant to the notice of proposed rule review published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4245), the Texas Department of Public Safety has reviewed and considered for readoption, revision or repeal all sections as they existed on July 6, 2007, of the following chapters of Title 37, Part 1 of the Texas Administrative Code, in accordance with Texas Government Code, §2001.039; Chapter 3 (Texas Highway Patrol); Chapter 4 (Commercial Vehicle Regulations and Enforcement Procedures); Chapter 5 (Criminal Law Enforcement); and Chapter 25 (Safety Responsibility Regulations).

The Department considered, among other things, whether the reasons for adoption of these rules continue to exist. The Department received no written comments regarding the review of its rules.

As a result of the rule review, the Department did identify and publish proposed amendments in other issues of the *Texas Register* in accordance with the Administrative Procedure Act.

This concludes the Department's review of 37 TAC Part 1, Chapters 3, 4, 5, and 25.

TRD-200806078
Stanley E. Clark
Director
Texas Department of Public Safety
Filed: November 20, 2008

♦ ♦ ♦

Pursuant to the notice of proposed rule review published in the May 9, 2008, issue of the *Texas Register* (33 TexReg 3788), the Texas Department of Public Safety has reviewed and considered for readoption, revision or repeal all sections as they existed on May 9, 2008, of the following chapters of Title 37, Part 1 of the Texas Administrative Code, in accordance with Texas Government Code, §2001.039: Chapter 6 (License to Carry Handgun); Chapter 15 (Driver License Rules); Chapter 16 (Commercial Driver License); Chapter 19 (Breath Alcohol Testing Regulations); Chapter 21 (Equipment and Vehicle Standards); Chapter 28 (DNA, CODIS, Forensic Analysis and Crime Lab); Chapter 29 (Practice and Procedure); Chapter 31 (Standards for an Approved M/C Operator Training Course); Chapter 32 (Bicycles--Use and Safety); and Chapter 33 (All-Terrain Vehicle Operator Education and Certification).

The Department considered, among other things, whether the reasons for adoption of these rules continue to exist. The Department received no written comments regarding the review of its rules.

As a result of the rule review, the Department did identify and publish proposed amendments in other issues of the *Texas Register* in accordance with the Administrative Procedure Act.

This concludes the Department's review of 37 TAC Part 1, Chapters 6, 15, 16, 19, 21, 28, 29, 31, 32, and 33.

TRD-200806080
Stanley E. Clark
Director
Texas Department of Public Safety
Filed: November 20, 2008

♦ ♦ ♦

Pursuant to the notice of proposed rule review published in the February 9, 2007, issue of the *Texas Register* (32 TexReg 557), the Texas Department of Public Safety has reviewed and considered for readoption, revision or repeal all sections as they existed on February 9, 2007, of the following chapters of Title 37, Part 1 of the Texas Administrative Code, in accordance with Texas Government Code, §2001.039; Chapter 7 (Division of Emergency Management); Chapter 9 (Public Safety Communications); Chapter 13 (Controlled Substances); and Chapter 34 (Negotiation and Mediation of Certain Contract Disputes).

The Department considered, among other things, whether the reasons for adoption of these rules continue to exist. The Department received no written comments regarding the review of its rules.

As a result of the rule review, the Department did identify and publish proposed amendments in other issues of the *Texas Register* in accordance with the Administrative Procedure Act.

This concludes the Department's review of 37 TAC Part 1, Chapters 7, 9, 13, and 34.

TRD-200806079
Stanley E. Clark
Director
Texas Department of Public Safety
Filed: November 20, 2008

♦ ♦ ♦

Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) has completed the review of Texas Administrative Code, Title 16, Part 2, Chapter 22, Procedural Rules, pursuant to the Texas Government Code §2001.039, *Agency Review of Existing Rules* as noticed in the May 23, 2008, issue of the *Texas Register* (33 TexReg 4199). The text of the rules may be found in the Texas Administrative Code, Title 16, Economic Regulation, Part 2, or through the commission's website at www.puc.state.tx.us. Project Number 35576, *Review of Chapter 22, Procedural Rules, Pursuant to Texas Government Code §2001.039*, is assigned to this rule review project.

Texas Government Code §2001.039 requires that each state agency review and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to Texas Government Code, Chapter 2001, Subchapter B, Rulemaking. As required by §2001.039(e), this review is to assess whether the reason for adopting or readopting Chapter 22, Procedural Rules, continues to exist. The commission requested specific comments from interested persons on whether the reasons for adopting each section in Chapter 22 continue to exist. The commission's Procedural Rules, Texas Administrative Code, Title 16, Part 2, Chapter 22 establish procedures for practice before the Public Utility Commission of Texas. Chapter 22 governs the initiation, conduct, and determination of proceedings required or permitted by law, including proceedings referred to the State Office of Administrative Hearings (SOAH), whether instituted by order of the commission or by the filing of an application, complaint, petition or any other pleading.

The commission finds that the reason for adopting Chapter 22 continues to exist and readopts these rules without change in accordance with the requirement of the Texas Government Code.

The commission received comments on the notice of intention to review from the Office of Public Utility Counsel (OPC); CenterPoint Energy Houston Electric, LLC (CenterPoint); Southwestern Bell Tele-

phone Company d/b/a AT&T Texas (AT&T); and GTE Southwest Incorporated d/b/a Verizon Southwest (Verizon).

OPC commented that the need for the rules continues to exist. In addition, OPC suggested: (1) allowing parties to serve voluminous documents only on those parties that request them and (2) reviewing the treatment of confidential information, specifically highly sensitive protected materials, and including a comprehensive section to address the treatment of such information.

CenterPoint did not comment on whether the reason for adopting Chapter 22 continues to exist but did propose various changes to the rules to make proceedings more efficient and to reflect changes in the Texas Rules of Civil Procedure (TRCP) and the Texas Rules of Evidence (TRE). The proposals include: reducing the amount of time for filing motions to intervene to 30 days; allowing electronic filings instead of requiring hard copies; reviewing methods of service and considering electronic methods; requiring authorized representatives to provide an e-mail address; promoting alignment of parties early in a proceeding; limiting discovery to material facts in dispute as opposed to the subject matter of the proceeding; allowing alternative forms of information exchange in addition to traditional discovery methods; permitting a person other than a party from whom discovery is sought to request a protective order; authorizing the presiding officer to address discovery abuse by assessing costs in addition to denying discovery; providing for discovery control plans to guide the parties on timing, extent, form, and limits of discovery; expanding §22.142(d)(3) to include careless conduct as well as intentional conduct; providing guidance and limits on the scope of electronic document discovery during a pre-hearing conference as part of a discovery plan; requiring the party noticing a deposition to pay for the cost of the discovery and provide a copy of the transcript to the deposed party; allowing parties to provide information to parties using alternative methods in addition to traditional single witness depositions; limiting the deposition of a witness to six hours; propounding discovery only after entry of a discovery control plan, unless the parties agree otherwise; replacing "impossible" with "unreasonably burdensome" in §22.144(c)(2), regarding whether a party is required to answer a discovery request; adopting TRCP 193 for asserting privilege in place of the current procedure in §22.144(d) and (g); including other applicable defenses as grounds for dismissal under §22.181(a)(1)(D); clarifying §22.182 to apply the same summary judgment standard as the TRCP and allowing the presiding officer to shorten the time between the filing of the motion and the decision on the motion; authorizing the presiding officers to have same powers as a Texas court in controlling a docket and to clarify that the presiding officer may allow testimony by panels; requiring the presiding officer to apply current legal standards for the admissibility of expert testimony; applying the TRE (CenterPoint noted that the exception in §22.221(a) for evidence "of a type commonly relied upon by reasonably prudent persons" is unnecessary); allowing a party that properly/timely notices and takes a deposition to file a deposition transcript after testimony is due if the transcript is not available until after the due date; and clarifying that demonstrative exhibits must be exchanged the day before the exhibit is used.

AT&T stated that the reasons for adopting Chapter 22 continue to exist and recommended readoption of the rules. AT&T also recommended: applying the standards under the Texas Disciplinary Rules of Professional Conduct to all representatives appearing in commission proceedings; prohibiting knowingly false, misleading, or abusive statements or threatening, obscene, or vulgar language; allowing filing of an electronic copy of pleadings rather than multiple paper copies or alternatively, reducing the paper copies required; requiring the signatory of the pleading/document to provide an e-mail address; permitting service by e-mail and including "sent messages" as prima facie evidence of service; prohibiting the presiding officer from ruling on a motion before the time to respond to the motion expires except when the motion is unopposed or an emergency exists; requiring authorized representative to be a licensed attorney in cases involving the practice of law; clarifying the date of issuance of an order in §22.123 as the date the presiding officer signs the order and allowing service by e-mail; permitting service of RFIs by e-mail; eliminating the requirement to file responses to RFIs under oath or to stipulate that the answers can be treated as if filed under oath; changing the time to object to an RFI from 10 days to 20 days; modifying §22.144(d)(2) and (d)(3) to mirror the assertion of privilege in TRCP 193.3; extending the time to file motions to compel to 10 days from five working days from receipt of response; and including failure to comply with the standards of conduct for parties in §22.3(a) in the list of sanctionable conduct under §22.161.

Verizon noted that the rules are fundamental to the administrative law process and the basis for the rule continues. In addition, Verizon recommended: replacing references to "facsimile" with "facsimile or electronic mail;" revising §22.4(a) to reflect a presumption that deadlines of five days or less refer to business days and six days or more refer to calendar days; allowing agreed extension of deadlines without a motion under §22.4(b); revising §22.33(a) to include §26.230 one-day informational filings; reviewing the number of copies required in §22.71(c); including a highly confidential category of documents in §22.71(d); expanding the types of media permitted under §22.72(i); and requiring good faith negotiation for motions to compel under §22.145(d).

Commission Response

As described in the notice of publication, the amendment of any particular section of Chapter 22 will be considered in a separate proceeding.

The commission readopts Chapter 22, Procedural Rules, pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 2007 and Supplement 2008) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052; Texas Government Code §2001.039.

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§22.181. Dismissal of a Proceeding.

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Subchapter K. HEARINGS

§22.201. Place and Nature of Hearings.

§22.202. Presiding Officer.

§22.203. Order of Procedure.

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Subchapter L. EVIDENCE AND EXHIBITS IN CONTESTED CASES

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§22.252. Procedures for Approval of ERCOT Fees and Rates.

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TRD-200806193

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 24, 2008

State Seed and Plant Board

Title 4, Part 5

The Texas Department of Agriculture (the department) adopts the review of Title 4, Texas Administrative Code, Part 5, Chapter 81, concerning Certification Procedures and Chapter 82, concerning Administrative Procedures, pursuant to the Texas Government Code, §2001.039, without changes to the proposed review published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4533). No comments were received on the proposed rule review.

Section 2001.039 requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

As a part of the adoption of the review of Chapter 81, the department is adopting the repeal of §81.1, relating to Certification of Seed in Texas. The proposed repeal was also published in the June 6, 2008, issue of the *Texas Register* (33 TexReg 4438). No comments were received on the proposal.

The assessment of Chapters 81 and 82 by the department at this time indicates that, with the exception of the repeal of §81.1, the reason for readopting without changes all remaining sections in Chapters 81 and 82 continues to exist.

TRD-200806028
Dolores Alvarado Hibbs
General Counsel, Texas Department of Agriculture
State Seed and Plant Board
Filed: November 18, 2008

Texas Youth Commission

Title 37, Part 3

Pursuant to Government Code §2001.039, the Texas Youth Commission files this notice of readoption for 37 TAC Chapter 111 (Contracting for Services Other Than Youth Services), Chapter 117 (Interstate Compact on Juveniles), and Chapter 119 (Agreements with Other Agencies). The proposed review was published in the October 10, 2008, issue of the *Texas Register* (33 TexReg 8562). No public comments were received regarding this review.

The Commission has determined that the reasons for adopting the rules contained in these chapters continue to exist.

This concludes the agency's review of Chapters 111, 117, and 119.

TRD-200806112
Steve Foster
General Counsel
Texas Youth Commission
Filed: November 21, 2008

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 4 TAC §20.22(a)(2)(B)(ii)

Pest Mgmt Zone	**Earliest Planting Date**	**Destruction Deadline**	**End Date for Destruction Requirements**
1	February 1	September 1	March 1
2 - Area 1	February 1	September 1	March 1
2 - Area 2	February 1	September 1	March 1
2 - Area 3	February 1	September 15	March 1
2 - Area 4	February 1	October 1	March 1
3 - Area 1	February 1	October 1	Emergence of new crop
3 - Area 2	February 1	October 15	Emergence of new crop
3 – Area 3	February 1	October 20	Emergence of new crop
4	February 1	October 10	Emergence of new crop
6	February 1	October 31	Emergence of new crop
7 - Area 1	February 1	November 30	Emergence of new crop
7 – Area 2	February 1	October 31	Emergence of new crop
8 - Area 1	February 1	October 31	Emergence of new crop
8 - Area 2	February 1	November 30	Emergence of new crop
9	April 1	March 1	May 1
10	March 25	February 1	March 25

Figure: 25 TAC §135.56(a)

TABLE 1
VENTILATION REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS [1]

Area Designation	Air movement relationship to adjacent areas [2,11]	Minimum air changes of outdoor air per hour [3]	Minimum total air changes per hour [4]	All air exhausted directly to outdoors [5]	Recirculated by means of room units [6]	Relative humidity [7] (%)	Design temperature [8] (degrees F)
Operating/Surgical, cystoscopic rooms [9,11]	Out	4	20	----	No	30-60	68-73 [12]
Postanesthesia Recovery room [9]	----	2	6	----	No	30-60	70-75
Special Procedure room	Out	4	20	----	No	30-60	70-75
Laser eye room	Out	4	20	----	No	30-60	70-75
Endoscopy	Out	2	6	----	No	30-60	68-73
Bronchoscopy	In	2	12	Yes	No	30-60	68-73
Fluoroscopy	In	2	6	----	----	30-60	68-73
X-ray (Surgical/Critical care, catheterization)	Out	3	15	----	No	30-60	70-75
Examination, Treatment, and preoperative rooms	----	----	6	----	----	30-60	70-75
Observation room	----	2	6	----	----	----	70-75
Clean linen storage	Out	----	2	----	----	----	----
Pharmacy	Out	----	4	----	----	----	75
Medication room	Out	----	4	----	----	----	75
Laboratory General [10]	----	2	6	----	----	----	75
Sterilizer equipment room [2]	In	----	10	Yes	No	----	----
Anesthesia gas storage	In	----	8	Yes	----	----	----
Radiology [10] X-ray (diagnostic and treatment)	----	----	6	----	----	----	75
Darkroom	In	----	10	Yes	No	----	----
Toilet room	In	----	10	Yes	----	----	70-75
Janitor's closet	In	----	10	Yes	No	----	----
Decontamination room	In	----	6	Yes	No	----	68-73
Soiled linen (sorting and storage)	In	----	10	Yes	No	----	----
Soiled linen and trash chute room	In	----	10	Yes	No	----	----
Soiled workroom or soil holding	In	----	10	Yes	No	----	----
Clean workroom or clean holding	Out	----	4	----	----	----	----
Sterile Supply/Storage	Out	----	4	----	----	70 Max	----
Equipment storage	----	----	2	----	----	----	----
Administrative and support service	----	----	2	----	----	30 Min	68-73

Notes applicable to Table 1: "Ventilation Requirements for Ambulatory Surgical Centers"

[1] The ventilation rates in this table cover ventilation for comfort, as well as for asepsis and odor control in areas of ambulatory surgical centers that directly affect patient care and are determined based on health care facilities being predominantly "No Smoking" facilities. Where smoking may be allowed, ventilation rates will need adjustment. Areas where specific ventilation rates are not given in the table shall be ventilated in accordance with American Society of Heating Refrigeration and Air-Conditioning Engineers (ASHRAE) Standard 62.1, 2004 edition, Ventilation for Acceptable Indoor Air Quality, and American Society of Heating Refrigeration and Air-Conditioning Engineers, Handbook of Applications, 2003 edition. Specialized patient care areas, specialty procedure rooms, etc. shall have additional ventilation provisions for air quality control as may be appropriate. Occupational Safety and Health Administration (OSHA) standards and/or The National Institute for Occupational Safety and Health (NIOSH) criteria require special ventilation requirements or employee health and safety within health care facilities.

[2] Design of the ventilation system shall provide air movement which is generally from clean to less clean areas. If any form of variable air volume or load shedding system is used for energy conservation, it must not compromise the corridor-to-room pressure balancing relationships or the minimum air changes required by the table. Except where specifically permitted by exit corridor plenum provisions of National Fire Protection Association (NFPA) 90A, 2002 Edition, the volume of infiltration or exfiltration shall be the volume necessary to maintain a minimum of 0.01 inch water gauge.

[3] To satisfy exhaust needs, replacement air from the outside is necessary. Table 1 does not attempt to describe specific amounts of outside air to be supplied to individual spaces except for certain areas such as those listed. Distribution of the outside air, added to the system to balance required exhaust, shall be as required by good engineering practice. Minimum outside air quantities shall remain constant while the system is in operation. In variable volume systems, the minimum outside air setting on the air handling unit shall be calculated using the ASHRAE Standard 62.1, 2004 edition.

[4] Number of air changes may be reduced when the room is unoccupied if provisions are made to ensure that the number of air changes indicated is reestablished any time the space is being utilized. Adjustments shall include provisions so that the direction of air movement shall remain the same when the number of air changes is reduced. Areas not indicated as having continuous directional control may have ventilation systems shut down when space is unoccupied and ventilation is not otherwise needed, if the maximum infiltration or exfiltration permitted in Note 2 is not exceeded and if adjacent pressure balancing relationships are not compromised. Air quantity calculations must account for filter loading such that the indicated air change rates are provided up until the time of filter change-out. The minimum total air change requirements shall be based on the supply air quantity in positive pressure rooms and the exhaust air quantity in negative pressure rooms. Air change requirements indicated are minimum values. Higher values

shall be used when required to maintain indicated room conditions (temperature and humidity, based on the cooling load of the space: lights, equipment, people, exterior walls and windows, etc.).

[5] Air from areas with contamination and/or odor problems shall be exhausted to the outside and not recirculated to other areas. Note that individual circumstances may require special consideration for air exhaust to the outside.

[6] Recirculating room heating, ventilating, and air conditioning (HVAC) units refers to those local units that are used primarily for heating and cooling of air, and not disinfection of air. Because of cleaning difficulty and potential for buildup of contamination, recirculating room units shall not be used in areas marked "No." Gravity-type heating or cooling units such as radiators or convectors shall not be used in operating rooms and other special care areas.

[7] The ranges listed are the minimum and maximum limits where control is specifically needed. The minimum and maximum limits are not intended to be independent of a space's associated temperature. The relative humidity is expected to be at the lower end of the range when the temperature is at the higher end, and vice versa.

[8] Where temperature ranges are indicated, the systems shall be capable of maintaining the rooms at any point within the range. A single figure indicates a heating or cooling capacity of at least the indicated temperature. This is usually applicable when patients may be undressed and require a warmer environment. Additional heating may be required in these areas to maintain temperature range. Nothing in these rules shall be construed as precluding the use of temperatures lower than those noted when the patients' comfort and medical conditions make lower temperatures desirable. Unoccupied areas such as storage rooms shall have temperatures appropriate for the function intended.

[9] NIOSH Criteria Documents regarding Occupational Exposure to Waste Anesthetic Gases and Vapors, and Control of Occupational Exposure to Nitrous Oxide indicate a need for both local exhaust (scavenging) systems and general ventilation of the areas in which the respective gases are utilized.

[10] When required, appropriate hoods and exhaust devices for the removal of noxious gases or chemical vapors shall be provided. Laboratory hoods shall meet the following general standards.

1. Have an average face velocity of at least 75 feet per minute.
2. Be connected to an exhaust system to the outside which is separate from the building exhaust system.
3. Have an exhaust fan located at the discharge end of the system.
4. Have an exhaust duct system of noncombustible corrosion-resistant material as needed to meet the planned usage of the hood.

Laboratory hoods shall meet the following special standards:

1. Fume hoods and their associated equipment in the air stream, intended for use with perchloric acid and other strong oxidants, shall be constructed of stainless steel or other material consistent with special exposures, and be provided with a water wash and drain system to permit periodic flushing of duct and hood. Electrical equipment intended for installation within the duct shall be designed and constructed to resist penetration by water. Lubricants and seals shall not contain organic materials. When perchloric acid or other strong oxidants are only transferred from one container to another, standard laboratory fume hoods and associated equipment may be used in lieu of stainless steel construction. Fume hood intended for use with radioactive isotopes shall be constructed of stainless steel or other material suitable for the particular exposure and shall comply with National Fire Protection Association 801, Facilities for Handling Radioactive Materials, 2003 Edition (NFPA 801).

NOTE: RADIOACTIVE ISOTOPES USED FOR INJECTIONS, ETC. WITHOUT PROBABILITY OF AIRBORNE PARTICULATES OR GASES MAY BE PROCESSED IN A CLEAN WORKBENCH-TYPE HOOD WHERE ACCEPTABLE TO THE NUCLEAR REGULATORY COMMISSION.

2. In new installations and construction or major renovation work, each hood used to process infectious or radioactive materials shall have a minimum face velocity of 150 feet per minute with suitable static pressure operated dampers and alarms to alert staff of fan shutdown. Each hood shall have filters with an efficiency of 99.97% (based on the dioctyl-phtalate test method) in the exhaust stream, and be designed and equipped to permit the removal, disposal, and replacement of contaminated filters. Filters shall be as close to the hood as practical to minimize duct contamination. Hoods that process radioactive materials shall meet the requirements of the Nuclear Regulatory Commission.

[11] Differential pressure shall be a minimum of 0.01 inch water gauge. If alarms are installed, allowances shall be made to prevent nuisance alarms of monitoring devices.

[12] Some surgeons may require room temperatures that are outside of the indicated range. All operating room design conditions shall be developed in consultation with surgeons, anesthesiologists, infection control and nursing staff.

Figure: 25 TAC §135.56(b)

TABLE 2
FILTER EFFICIENCIES FOR CENTRAL VENTILATION AND AIR CONDITIONING SYSTEMS

Area Designation	**Number of Filter Beds**	**Filter Bed No. 1 (Percent, MERV*)**	**Filter Bed No. 2 (Percent, MERV*)**
General procedure operating rooms, patient care areas, treatment, diagnostic, those areas providing direct service or clean supplies such as sterile and clean processing, and related areas.	2	30, 8	90, 14
Laboratories	1	80, 13	----
Administrative, bulk storage, soiled holding areas, and laundries	1	30, 8	----

* MERV - Minimum efficiency rating value (American Society of Heating Refrigeration and Air-Conditioning Engineers (ASHRAE) Standard 52.2, 1999 edition.

NOTES:

- Additional roughing or prefilters should be considered to reduce maintenance required for filters with efficiency higher than 75%.

- The filtration efficiency ratings are based on ASHRAE Standard 52.1, 1992 edition.

Figure: 25 TAC §135.56(c)

TABLE 3
STATION OUTLETS FOR OXYGEN, VACUUM, AND MEDICAL AIR SYSTEMS

	Station Outlets		
Location	**Oxygen** see notes 1, 4	**Vacuum** see notes 1, 4	**Medical Air** see notes 1, 2, 3, 4
Operating room (general, cardio-vascular, neurological and orthopedic surgery)	2/room	3/room	1/room
Operating room (cystoscopic and endoscopic surgery)	1/room	3/room	---
Postanesthetic care unit	1/bed	3/bed	1/bed
Special procedure rooms	2/room	2/room	1/room
Special procedure recovery	1/bed	1/bed	---
Endoscopic procedure room	2/room	2/room	1/room
Endoscopy work room	---	1	1 (note 3)
Treatment rooms	1/room	1/room	---
Decontamination room (part of sterile processing)	---	1	1 (note 3)

Notes:

1. Prohibited uses of medical gases include fueling torches, blowing down or drying any equipment such as lab equipment, endoscopy or other scopes, or any other purposes. Also prohibited is using the oxygen or medical air to raise, lower, or otherwise operate booms or other devices in operating rooms (ORs) or other areas.

2. Medical air sources shall be connected to the medical air distribution system only and shall be used only for air in the application of human respiration, and calibration of medical devices for respiratory application. The medical air piping distribution system shall support only the intended need for breathable air for such items as intermittent positive pressure breathing (IPPB) and long-term respiratory assistance needs, anesthesia machines, and so forth. The system shall not be used to provide engineering, maintenance, and equipment needs for general facility support use. The life safety nature of the medical air system shall be protected by a system dedicated solely for its specific use.

3. Instrument air shall be used for purposes such as the powering of medical devices unrelated to human respiration (e.g., surgical tools, ceiling arms). Medical air and instrument air are distinct systems for mutually exclusive applications. Nitrogen shall be allowed for decontamination and endoscopy workroom uses if provided with reducing regulator. This shall be supplied from existing medical gas support nitrogen system and installed in accordance to NFPA 99, 2002 Edition.

4. Central supply systems for oxygen, medical air, nitrous oxide, carbon dioxide, nitrogen and all other medical gases shall not be piped to, or used for, any other purpose except patient care applications.

Figure: 25 TAC §135.56(d)

TABLE 4
FLAME SPREAD AND SMOKE PRODUCTION LIMITATIONS FOR INTERIOR FINISHES

		Flame Spread Rating	**Smoke Development Rating**
Walls and Ceilings [1]	Exit Access, Storage Rooms, and Areas of Unusual Fire Hazard	Class A[2] NFPA 255	450 or less NFPA 258 [3]
	All other Areas	Class B[2] NFPA 255	450 or less NFPA 258 [3]
Floors[4]		No requirements	No requirements

[1] Textile materials having a napped, tufted, looped, woven, nonwoven, or similar surface shall not be applied to walls or ceilings unless such materials have a Class A rating and are installed in rooms or areas protected by an approved automatic sprinkler system. Cellular or foamed plastic materials shall not be used as interior wall and ceiling finishes.

[2] Products required to be tested in accordance with National Fire Protection Association 255, Standard Method of Test of Surface Burning Characteristics of Building Materials, 2000 Edition, shall be Class A (flame spread 0 - 25) or Class B (flame spread 26 - 75).

[3] Smoke development rating, an average of flaming and nonflaming values as determined by National Fire Protection Association 258, Standard Research Test Method for Determining Smoke Generation of Solid Materials, 2001 Edition.

[4] See §135.52(b)(2)(B) of this title for requirements relative to carpeting in areas that may be subject to use by handicapped individuals. Such areas include offices and waiting spaces as well as corridors that might be used by handicapped employees, visitors, or staff.

Figure: 37 TAC §14.12

Medical Examination Report FOR COMMERCIAL DRIVER FITNESS DETERMINATION

649-F (6045)

1. DRIVER'S INFORMATION Driver completes this section

Driver's Name (Last, First, Middle)	Social Security No.	Birthdate M / D / Y	Age	Sex ☐ M ☐ F	New Certification ☐ Recertification ☐ Follow-up ☐	Date of Exam
Address	City, State, Zip Code	Work Tel: ( ) Home Tel: ( )	Driver License No.		License Class ☐ A ☐ C ☐ B ☐ D ☐ Other	State of Issue

2. HEALTH HISTORY Driver completes this section, but medical examiner is encouraged to discuss with driver.

Yes	No	
☐	☐	Any illness or injury in the last 5 years?
☐	☐	Head/Brain injuries, disorders or illnesses
☐	☐	Seizures, epilepsy ☐ medication______
☐	☐	Eye disorders or impaired vision (except corrective lenses)
☐	☐	Ear disorders, loss of hearing or balance
☐	☐	Heart disease or heart attack; other cardiovascular condition ☐ medication______
☐	☐	Heart surgery (valve replacement/bypass, angioplasty, pacemaker)
☐	☐	High blood pressure ☐ medication______
☐	☐	Muscular disease
☐	☐	Shortness of breath
☐	☐	Lung disease, emphysema, asthma, chronic bronchitis
☐	☐	Kidney disease, dialysis
☐	☐	Liver disease
☐	☐	Digestive problems
☐	☐	Diabetes or elevated blood sugar controlled by: ☐ diet ☐ pills ☐ insulin
☐	☐	Nervous or psychiatric disorders, e.g., severe depression
☐	☐	medication______
☐	☐	Loss of, or altered consciousness
☐	☐	Fainting, dizziness
☐	☐	Sleep disorders, pauses in breathing while asleep, daytime sleepiness, loud snoring
☐	☐	Stroke or paralysis
☐	☐	Missing or impaired hand, arm, foot, leg, finger, toe
☐	☐	Spinal injury or disease
☐	☐	Chronic low back pain
☐	☐	Regular, frequent alcohol use
☐	☐	Narcotic or habit forming drug use

For any YES answer, indicate onset date, diagnosis, treating physician's name and address, and any current limitation. List all medications (including over-the-counter medications) used regularly or recently.

______

______

______

I certify that the above information is complete and true. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner's Certificate.

Driver's Signature______ Date______

Medical Examiner's Comments on Health History (The medical examiner must review and discuss with the driver any "yes" answers and potential hazards of medications, including over-the-counter medications, while driving. This discussion must be documented below.)

______

______

______

______

TESTING (Medical Examiner completes Section 3 through 7) Name: Last, First, Middle,

3. VISION

Standard: At least 20/40 acuity (Snellen) in each eye with or without correction. At least 70 degrees peripheral in horizontal meridian measured in each eye. The use of corrective lenses should be noted on the Medical Examiner's Certificate.

INSTRUCTIONS: When other than the Snellen chart is used, give test results in Snellen-comparable values. In recording distance vision, use 20 feet as normal. Report visual acuity as a ratio with 20 as numerator and the smallest type read at 20 feet as denominator. If the applicant wears corrective lenses, these should be worn while visual acuity is being tested. If the driver habitually wears contact lenses, or intends to do so while driving, sufficient evidence of good tolerance and adaptation to their use must be obvious. ***Monocular drivers are not qualified.***

Numerical readings must be provided.

ACUITY	UNCORRECTED	CORRECTED	HORIZONTAL FIELD OF VISION
Right Eye	20/	20/	Right Eye °
Left Eye	20/	20/	Left Eye °
Both Eyes	20/	20/	

Applicant can recognize and distinguish among traffic control signals and devices showing standard red, green, and amber colors ? ☐ Yes ☐ No

Applicant meets visual acuity requirement only when wearing:
☐ Corrective Lenses

Monocular Vision: ☐ Yes ☐ No

Complete next line only if vision testing is done by an opthalmologist or optometrist

Date of Examination | Name of Ophthalmologist or Optometrist (print) | Tel. No. | License No./ State of Issue | Signature

4. HEARING

Standard: a) Must first perceive forced whispered voice ≥ 5 ft., with or without hearing aid, or b) average hearing loss in better ear ≤ 40 dB
☐ Check if hearing aid used for tests. ☐ Check if hearing aid required to meet standard.

INSTRUCTIONS: To convert audiometric test results from ISO to ANSI, -14 dB from ISO for 500Hz, -10dB for 1,000 Hz, -8.5 dB for 2000 Hz. To average, add the readings for 3 frequencies tested and divide by 3.

Numerical readings must be recorded.

a) Record distance from individual at which forced whispered voice can first be heard.	Right ear \ Feet	Left Ear \ Feet

b) If audiometer is used, record hearing loss in decibels. (acc. to ANSI Z24.5-1951)	Right Ear			Left Ear		
	500 Hz	1000 Hz	2000 Hz	500 Hz	1000 Hz	2000 Hz
	Average:			Average:		

5. BLOOD PRESSURE/ PULSE RATE

Numerical readings must be recorded. Medical Examiner should take at least two readings to confirm BP.

Blood Pressure	Systolic	Diastolic

Driver qualified if ≤140/90.

Pulse Rate: ☐ Regular ☐ Irregular

Record Pulse Rate:__________

Reading	Category	Expiration Date	Recertification
140-159/90-99	Stage 1	1 year	1 year if ≤140/90. One-time certificate for 3 months if 141-159/91-99.
160-179/100-109	Stage 2	One-time certificate for 3 months.	1 year from date of exam if ≤140/90
≥180/110	Stage 3	6 months from date of exam if ≤140/90	6 months if ≤ 140/90

6. LABORATORY AND OTHER TEST FINDINGS

Numerical readings must be recorded.

URINE SPECIMEN	SP. GR.	PROTEIN	BLOOD	SUGAR

Urinalysis is required. Protein, blood or sugar in the urine may be an indication for further testing to rule out any underlying medical problem.

Other Testing (Describe and record)

7. PHYSICAL EXAMINATION Height:________ (in.) Weight:________ (lbs.) Name: Last, First, Middle,

The presence of a certain condition may not necessarily disqualify a driver, particularly if the condition is controlled adequately, is not likely to worsen or is readily amenable to treatment. Even if a condition does not disqualify a driver, the medical examiner may consider deferring the driver temporarily. Also, the driver should be advised to take the necessary steps to correct the condition as soon as possible particularly if the condition, if neglected, could result in more serious illness that might affect driving.

Check YES if there are any abnormalities. Check NO if the body system is normal. Discuss any YES answers in detail in the space below, and indicate whether it would affect the driver's ability to operate a commercial motor vehicle safely. Enter applicable item number before each comment. If organic disease is present, note that it has been compensated for. See *Instructions to the Medical Examiner* for guidance.

BODY SYSTEM	CHECK FOR:	YES*	NO
1. General Appearance	Marked overweight, tremor, signs of alcoholism, problem drinking, or drug abuse.		
2. Eyes	Pupillary equality, reaction to light, accommodation, ocular motility, ocular muscle imbalance, extraocular movement, nystagmus, exophthalmos. Ask about retinopathy, cataracts, aphakia, glaucoma, macular degeneration and refer to a specialist if appropriate.		
3. Ears	Scarring of tympanic membrane, occlusion of external canal, perforated eardrums.		
4. Mouth and Throat	Irremediable deformities likely to interfere with breathing or swallowing.		
5. Heart	Murmurs, extra sounds, enlarged heart, pacemaker, implantable defibrillator.		
6. Lungs and chest, not including breast examination	Abnormal chest wall expansion, abnormal respiratory rate, abnormal breath sounds including wheezes or alveolar rales, impaired respiratory function, cyanosis. Abnormal findings on physical exam may require further testing such as pulmonary tests and/ or xray of chest.		
7. Abdomen and Viscera	Enlarged liver, enlarged spleen, masses, bruits, hernia, significant abdominal wall muscle weakness.		
8. Vascular System	Abnormal pulse and amplitude, cartoid or arterial bruits, varicose veins.		
9. Genito-urinary System	Hernias.		
10. Extremities- Limb impaired. Driver may be subject to SPE certificate if otherwise qualified.	Loss or impairment of leg, foot, toe, arm, hand, finger, Perceptible limp, deformities, atrophy, weakness, paralysis, clubbing, edema, hypotonia. Insufficient grasp and prehension in upper limb to maintain steering wheel grip. Insufficient mobility and strength in lower limb to operate pedals properly.		
11. Spine, other musculoskeletal	Previous surgery, deformities, limitation of motion, tenderness.		
12. Neurological	Impaired equilibrium, coordination or speech pattern; asymmetric deep tendon reflexes, sensory or positional abnormalities, abnormal patellar and Babinki's reflexes, ataxia.		

*COMMENTS: ____________________

____

____

____

Note certification status here. See Instructions to the Medical Examiner for guidance.

- ☐ Meets standards in 49 CFR 391.41; qualifies for 2 year certificate
- ☐ Does not meet standards
- ☐ Meets standards, but periodic monitoring required due to ____________
  Driver qualified only for: ☐3 months ☐6 months ☐1 year ☐ Other

Temporarily disqualified due to (condition or medication):____________

Return to medical examiner's office for follow up on ____________

- ☐ Wearing corrective lense
- ☐ Wearing hearing aid
- ☐ Accompanied by a ____________waiver/ exemption. Driver must present exemption at time of certification.
- ☐ Skill Performance Evaluation (SPE) Certificate
- ☐ Driving within an exempt intracity zone (See 49 CFR 391.62)
- ☐ Qualified by operation of 49 CFR 391.64

Medical Examiner's signature ____________

Medical Examiner's name ____________

Address ____________

Telephone Number ____________

If meets standards, complete a Medical Examiner's Certificate as stated in 49 CFR 391.43(h). (Driver must carry certificate when operating a commercial vehicle.)

49 CFR 391.41 Physical Qualifications for Drivers

THE DRIVER'S ROLE

Responsibilities, work schedules, physical and emotional demands, and lifestyles among commercial drivers vary by the type of driving that they do. Some of the main types of drivers include the following: turn around or short relay (drivers return to their home base each evening); long relay (drivers drive 9-11 hours and then have at least a 10-hour off-duty period), straight through haul (cross country drivers); and team drivers (drivers share the driving by alternating their 5-hour driving periods and 5-hour rest periods.)

The following factors may be involved in a driver's performance of duties: abrupt schedule changes and rotating work schedules, which may result in irregular sleep patterns and a driver beginning a trip in a fatigued condition; long hours; extended time away from family and friends, which may result in lack of social support; tight pickup and delivery schedules, with irregularity in work, rest, and eating patterns, adverse road, weather and traffic conditions, which may cause delays and lead to hurriedly loading or unloading cargo in order to compensate for the lost time; and environmental conditions such as excessive vibration, noise, and extremes in temperature. Transporting passengers or hazardous materials may add to the demands on the commercial driver.

There may be duties in addition to the driving task for which a driver is responsible and needs to be fit. Some of these responsibilities are: coupling and uncoupling trailer(s) from the tractor, loading and unloading trailer(s) (sometimes a driver may lift a heavy load or unload as much as 50,000 lbs. of freight after sitting for a long period of time without any stretching period); inspecting the operating condition of tractor and/or trailer(s) before, during and after delivery of cargo; lifting, installing, and removing heavy tire chains; and, lifting heavy tarpaulins to cover open top trailers. The above tasks demand agility, the ability to bend and stoop, the ability to maintain a crouching position to inspect the underside of the vehicle, frequent entering and exiting of the cab, and the ability to climb ladders on the tractor and/or trailer(s).

In addition, a driver must have the perceptual skills to monitor a sometimes complex driving situation, the judgment skills to make quick decisions, when necessary, and the manipulative skills to control an oversize steering wheel, shift gears using a manual transmission, and maneuver a vehicle in crowded areas.

§391.45 PHYSICAL QUALIFICATIONS FOR DRIVERS

(a) A person shall not drive a commercial motor vehicle unless he is physically qualified to do so and, except as provided in §391.67, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a commercial motor vehicle.

(b) A person is physically qualified to drive a motor vehicle if that person:

(1) Has no loss of a foot, a leg, a hand, or an arm, or has been granted a Skill Performance Evaluation (SPE) Certificate (formerly Limb Waiver Program) pursuant to §391.49.

(2) Has no impairment of: (i) A hand or finger which interferes with prehension or power grasping; or (ii) An arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or has been granted a SPE Certificate pursuant to §391.49.

(3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;

(4) Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure.

(5) Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his ability to control and drive a commercial motor vehicle safely.

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a commercial motor vehicle safely.

(7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his ability to control and operate a commercial motor vehicle safely.

(8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle;

(9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his ability to drive a commercial motor vehicle safely;

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber;

(11) First perceives a forced whispered voice in the better ear not less than 5 feet with or without the use of a hearing aid, or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz and 2,000 Hz with or without a hearing device when the audiometric device is calibrated to the American National Standard (formerly ASA Standard) Z24.5-1951;

(12) (i) Does not use a controlled substance identified in 21 CFR 1308.11 Schedule I, an amphetamine, a narcotic, or any other habit-forming drug. (ii) Exception: A driver may use such a substance or drug, if the substance or drug is prescribed by a licensed medical practitioner who: (A) Is familiar with the driver's medical history and assigned duties; and (B) Has advised the driver that the prescribed substance or drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle; and

(13) Has no current clinical diagnosis of alcoholism.

INSTRUCTIONS TO THE MEDICAL EXAMINER

General Information
The purpose of this examination is to determine a driver's physical qualification to operate a commercial motor vehicle (CMV) in interstate commerce according to the requirements in 49 CFR 391.41-49. Therefore, the medical examiner must be knowledgeable of these requirements and guidelines developed by the FMCSA to assist the medical examiner in making the qualification determination. The medical examiner should be familiar with the driver's responsibilities and work environment and is referred to the section on the form, **The Driver's Role**.

In addition to reviewing the **Health History** section with the driver and conducting the physical examination, the medical examiner should discuss common prescriptions and over-the-counter medications relative to the side effects and hazards of these medications while driving. Educate the driver to read warning labels on all medications. History of certain conditions may be cause for rejection, particularly if required by regulation, or may indicate the need for additional laboratory tests or more stringent examination perhaps by a medical specialist. These decisions are usually made by the medical examiner in light of the driver's job responsibilities, work schedule and potential for the conditions to render the driver unsafe.

Medical conditions should be recorded even if they are not cause for denial, and they should be discussed with the driver to encourage appropriate remedial care. This advice is especially needed when a condition, if neglected, could develop into a serious illness that could affect driving.

If the medical examiner determines that the driver is fit to drive and is also able to perform non-driving responsibilities as may be required, the medical examiner signs the medical certificate which the driver must carry with his/her license. The certificate must be dated. **Under current regulations, the certificate is valid for two years, unless the driver has a medical condition that does not prohibit driving but does require more frequent monitoring**. In such situations, the medical certificate should be issued for a shorter length of time. The physical examination should be done carefully and at least as complete as is indicated by the attached form. Contact the FMCSA at (202) 366-1790 for further information (a vision exemption, qualifying drivers under 49 CFR 391.64, etc.).

Interpretation of Medical Standards
Since the issuance of the regulations for physical qualifications of commercial drivers, the Federal Motor Carrier Safety Administration (FMCSA) has published recommendations called Advisory Criteria to help medical examiners in determining whether a driver meets the physical qualifications for commercial driving. These recommendations have been condensed to provide information to medical examiners that (1) is directly relevant to the physical examination and (2) is not already included in the medical examination form. The specific regulation is printed in italics and it's reference by section is highlighted.

Federal Motor Carrier Safety Regulations
-Advisory Criteria-

Loss of Limb:
§391.41(b)(1)
A person is physically qualified to drive a commercial motor vehicle if that person:
Has no loss of a foot, leg, hand or an arm, or has been granted a Skill Performance Evaluation (SPE) Certificate pursuant to Section 391.49.

Limb Impairment:
§391.41(b)(2)
A person is physically qualified to drive a commercial motor vehicle if that person:
Has no impairment of: (i) A hand or finger which interferes with prehension or power grasping; or (ii) An arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or (iii) Any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or (iv) Has been granted a Skill Performance Evaluation (SPE) Certificate pursuant to Section 391.49.

A person who suffers loss of a foot, leg, hand or arm or whose limb impairment in any way interferes with the safe performance of normal tasks associated with operating a commercial motor vehicle is subject to the Skill Performance Evaluation Certification Program pursuant to section 391.49, assuming the person is otherwise qualified.

With the advancement of technology, medical aids and equipment modifications have been developed to compensate for certain disabilities. The SPE Certification Program (formerly the Limb Waiver Program) was designed to allow persons with the loss of a foot or limb or with functional impairment to qualify under the Federal Motor Carrier Safety Regulations (FMCSRs) by use of prosthetic devices or equipment modifications which enable them to safely operate a commercial motor vehicle. Since there are no medical aids equivalent to the original body or limb, certain risks are still present, and thus restrictions may be included on individual SPE certificates when a State Director for the FMCSA determines they are necessary to be consistent with safety and public interest.

If the driver is found otherwise medically qualified (391.41(b)(3) through (13)), the medical examiner must check on the medical certificate that the driver is qualified only if accompanied by a SPE certificate. The driver and the employing motor carrier are subject to appropriate penalty if the driver operates a motor vehicle in interstate or foreign commerce without a curent SPE certificate for his/her physical disability.

Diabetes
§391.41(b)(3)
A person is physically qualified to drive a commercial motor vehicle if that person:
Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control.

Diabetes mellitus is a disease which, on occasion, can result in a loss of consciousness or disorientation in time and space. Individuals who require insulin for control have conditions which can get out of control by the use of too much or too little insulin, or food intake not consistent with the insulin dosage. Incapacitation may occur from symptoms of hyperglycemic or hypoglycemic reactions (drowsiness, semiconsciousness, diabetic coma or insulin shock).

The administration of insulin is, within itself, a complicated process requiring insulin, syringe, needle, alcohol sponge and a sterile technique. Factors related to long-haul commercial motor vehicle operations, such as fatigue, lack of sleep, poor diet, emotional conditions, stress, and concomitant illness, compound the dangers, the FMCSA has consistently held that a diabetic who uses insulin for control does not meet the minimum physical requirements of the FMCSRs.

Hypoglycemic drugs, taken orally, are sometimes prescribed for diabetic individuals to help stimulate natural body production of insulin. If the condition can be controlled by the use of oral medication and diet, then an individual may be qualified under the present rule. CMV drivers who do not meet the Federal diabetes standard may call (202) 366-1790 for an application for a diabetes exemption.
(See Conference Report on Diabetic Disorders and Commercial Drivers and Insulin-Using Commercial Motor Vehicle Drivers at:
http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Cardiovascular Condition
§391.41(b)(4)
A person is physically qualified to drive a commercial motor vehicle if that person:
Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse or congestive cardiac failure.

The term "has no current clinical diagnosis of" is specifically designed to encompass: "*a clinical diagnosis of*" (1) a current cardiovascular condition, or (2) a cardiovascular condition which has not fully stabilized regardless of the time limit The term "*known to be*

accompanied by" is designed to include a clinical diagnosis of a cardiovascular disease (1) which is accompanied by symptoms of syncope, dyspnea, collapse or congestive cardiac failure; and/or (2) which is likely to cause syncope, dyspnea, collapse or congestive cardiac failure.

It is the intent of the FMCSRs to render unqualified, a driver who has a current cardiovascular disease which is accompanied by and/or likely to cause symptoms of syncope, dyspnea, collapse, or congestive cardiac failure. However, the subjective decision of whether the nature and severity of an individual's condition will likely cause symptoms of cardiovascular insufficiency is on an individual basis and qualification rests with the medical examiner and the motor carrier. In those cases where there is an occurrence of cardiovascular insufficiency (myocardial infarction, thrombosis, etc.), it is suggested before a driver is certified that he or she have a normal resting and stress electrocardiogram (ECG), no residual complications and no physical limitations, and is taking no medication likely to interfere with safe driving.

Coronary artery bypass surgery and pacemaker implantation are remedial procedures and thus, not unqualifying. Implantable cardioverter defibrillators are disqualifying due to risk of syncope. Coumadin is a medical treatment which can improve the health and safety of the driver and should not, by its use, medically disqualify the commercial driver. The emphasis should be on the underlying medical condition(s) which require treatment and the general health of the driver. The FMCSA should be contacted at (202) 366-1790 for additional recommendations regarding the physical qualification of drivers on coumadin.

(See Cardiovasular Advisory Panel Guidelines for the Medical examination of Commercial Motor Vehicle Drivers at: http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Respiratory Dysfunction
§391.41(b)(5)

A person is physically qualified to drive a commercial motor vehicle if that person:

Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with ability to control and drive a commercial motor vehicle safely.

Since a driver must be alert at all times, any change in his or her mental state is in direct conflict with highway safety. Even the slightest impairment in respiratory function under emergency conditions (when greater oxygen supply is necessary for performance) may be detrimental to safe driving.

There are many conditions that interfere with oxygen exchange and may result in incapacitation, including emphysema, chronic asthma, carcinoma, tuberculosis, chronic bronchitis and sleep apnea. If the medical examiner detects a respiratory dysfunction, that in any way is likely to interfere with the driver's ability to safely control and drive a commercial motor vehicle, the driver must be referred to a specialist for further evaluation and therapy. Anticoagulation therapy for deep vein thrombosis and/or pulmonary thromboembolism is not unqualifying once optimum dose is achieved, provided lower extremity venous examinations remain normal and the treating physician gives a favorable recommendation.

(See Conference on Pulmonary/Respiratory Disorders and Commercial Drivers at:
http://www.fmcsa.dot.gov/rulesregs/medreports.htm

Hypertension
§391.41(b)(6)

A person is physically qualified to drive a commercial motor vehicle if that person:

Has no current clinical diagnosis of high blood pressure likely to interfere with ability to operate a commercial motor vehicle safely.

Hypertension alone is unlikely to cause sudden collapse; however, the likelihood increases when target organ damage, particularly cerebral vascular disease, is present. This regulatory criteria is based on FMCSA's Cardiovascular Advisory Guidelines for the Examination of CMV Drivers, which used the Sixth Report of the Joint National Committee on Detection, Evaluation, and Treatment of High Blood Pressure (1997).

Stage 1 hypertension corresponds to a systolic BP of 140-159 mmHg and/or a diastolic BP of 90-99 mmHg. The driver with a BP in this range is at low risk for hypertension-related acute incapacitation and may be medically certified to drive for a one-year period. Certification examinations should be done annually thereafter and should be at or less than 140/90. If less than 160/100, certification may be extended one time for 3 months.

A blood pressure of 160-179 systolic and/or 100-109 diastolic is considered Stage 2 hypertension, and the driver is not necessarily unqualified during evaluation and institution of treatment. The driver is given a one time certification of three months to reduce his or her blood pressure to less than or equal to 140/90. A blood pressure in this range is an absolute indication for anti-hypertensive drug therapy. Provided treatment is well tolerated and the driver demonstrates a BP value of 140/90 or less, he or she may be certified for one year from date of the initial exam. The driver is certified annually thereafter.

A blood pressure at or greater than 180 (systolic) and 110 (diastolic) is considered Stage 3, high risk for an acute BP-related event. The driver may **not** be qualified, even temporarily, until reduced to 140/90 or less and treatment is well tolerated. The driver may be certified for 6 months and biannually (every 6 months) thereafter if at recheck BP is 140/90 or less.

Annual recertification is recommended if the medical examiner does not know the severity of hypertension prior to treatment.

An elevated blood pressure finding should be confirmed by at least two subsequent measurements on different days.

Treatment includes nonpharmacologic and pharmacologic modalities as well as counseling to reduce other risk factors. Most antihypertensive medications also have side effects, the importance of which must be judged on an individual basis. Individuals must be alerted to the hazards of these medications while driving. Side effects of somnolence or syncope are particulary undesirable in commercial drivers.

Secondary hypertension is based on the above stages. Evaluation is warranted if patient is persistently hypertensive on maximal or near-maximal doses of 2-3 pharmacologic agents. Some causes of secondary hypertension may be amenable to surgical intervention or specific pharmacologic disease.

(See Cardiovascular Advisory Panel Guidelines for the Medical Examination of Commercial Motor Vehicle Drivers at:
http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Rheumatic, Arthritic, Orthopedic, Muscular, Neuromuscular or Vascular Disease §391.41(b)(7)

A person is physically qualified to drive a commercial motor vehicle if that person:

Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular or vascular disease which interferes with the ability to control and operate a commercial motor vehicle safely.

Certain diseases are known to have acute episodes of transient muscle weakness, poor muscular coordination (ataxia), abnormal sensations (paresthesia), decreased muscular tone (hypotonia), visual disturbances and pain which may be suddenly incapacitating. With each recurring episode, these symptoms may become more pronounced and remain for longer periods of time. Other diseases have more insidious onsets and display symptoms of muscle wasting (atrophy), swelling and paresthesia which may not suddenly incapacitate a person but may restrict his/her movements and eventually interfere with the ability to safely operate a motor vehicle. In many instances these diseases are degenerative in nature or may result in deterioration of the involved area.

Once the individual has been diagnosed as having a rheumatic, arthritic, orthopedic, muscular, neuromuscular or vascular disease, then he/she has an established history of that disease. The physician, when examining an individual, should consider the following: (1) the nature and severity of the individual's condition (such as sensory loss or loss of strength); (2) the degree of limitation present (such as range of motion); (3) the likelihood of progressive limitation (not always present initially but may manifest itself over time); and (4) the likelihood of sudden incapacitation. If severe functional impairment exists, the driver does not qualify. In cases where more frequent monitoring is required, a certificate for a shorter period of time may be issued. (See Conference on Neurological Disorders and Commercial Drivers at:
http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Epilepsy
§391.41(b)(8)
A person is physically qualified to drive a commercial motor vehicle if that person:
Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle.

Epilepsy is a chronic functional disease characterized by seizures or episodes that occur without warning, resulting in loss of voluntary control which may lead to loss of consciousness and/or seizures. Therefore, the following drivers cannot be qualified: (1) a driver who has a medical history of epilepsy; (2) a driver who has a current clinical diagnosis of epilepsy; or (3) a driver who is taking antiseizure medication.

If an individual has had a sudden episode of a nonepileptic seizure or loss of consciousness of unknown cause which did not require antiseizure medication, the decision as to whether that person's condition will likely cause loss of consciousness or loss of ability to control a motor vehicle is made on an individual basis by the medical examiner in consultation with the treating physician. Before certification is considered, it is suggested that a 6 month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and antiseizure medication is not required, then the driver may be qualified.

In those individual cases where a driver has a seizure or an episode of loss of consciousness that resulted from a known medical condition (e.g., drug reaction, high temperature, acute infectious disease, dehydration or acute metabolic disturbance), certification should be deferred until the driver has fully recovered from that condition and has no existing residual complications, and not taking antiseizure medication.

Drivers with a history of epilepsy/seizures off antiseizure medication **and** seizure-free for 10 years may be qualified to drive a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free **and** off antiseizure medication for a 5-year period or more.
(See Conference on Neurological Disorders and Commercial Drivers at:
http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Mental Disorders
§391.41(b)(9)
A person is physically qualified to drive a commercial motor vehicle if that person:
Has no mental, nervous, organic or functional disease or psychiatric disorder likely to interfere with ability to drive a motor vehicle safely.

Emotional or adjustment problems contribute directly to an individual's level of memory, reasoning, attention, and judgment. These problems often underlie physical disorders. A variety of functional disorders can cause drowsiness, dizziness, confusion, weakness or paralysis that may lead to incoordination, inattention, loss of functional control and susceptibility to accidents while driving. Physical fatigue, headache, impaired coordination, recurring physical ailments and chronic "nagging" pain may be present to such a degree that certification for commercial driving is inadvisable. Somatic and psychosomatic complaints should be thoroughly examined when determining an individual's overall fitness to drive. Disorders of a periodically incapacitating nature, even in the early stages of development, may warrant disqualification.

Many bus and truck drivers have documented that "nervous trouble" related to neurotic, personality, or emotional or adjustment problems is responsible for a significant fraction of their preventable accidents. The degree to which an individual is able to appreciate, evaluate and adequately respond to environmental strain and emotional stress is critical when assessing an individual's mental alertness and flexibility to cope with the stresses of commercial motor vehicle driving.

When examining the driver, it should be kept in mind that individuals who live under chronic emotional upsets may have deeply ingrained maladaptive or erratic behavior patterns. Excessively antagonistic, instinctive, impulsive, openly aggressive, paranoid or severely depressed behavior greatly interfere with the driver's ability to drive safely. Those individuals who are highly susceptible to frequent states of emotional instability (schizophrenia, affective psychoses, paranoia, anxiety or depressive neuroses) may warrant disqualification. Careful consideration should be given to the side effects and interactions of medications in the overall qualification determination. See Psychiatric Conference Report for specific recommendations on the use of medications and potential hazards for driving.
(See Conference on Psychiatric Disorders and Commercial Drivers at:
http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Vision
§391.41(b)(10)
A person is physically qualified to drive a commercial motor vehicle if that person:
Has distant visual acuity of at least 20/40 (Snellen) in each eye with or without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

The term "ability to recognize the colors of" is interpreted to mean if a person can recognize and distinguish among traffic control signals and devices showing standard red, green and amber, he or she meets the minimum standard, even though he or she may have some type of color perception deficiency. If certain color perception tests are administered, (such as Ishihara, Pseudoisochromatic, Yarn) and doubtful findings are discovered, a controlled test using signal red, green and amber may be employed to determine the driver's ability to recognize these colors.

Contact lenses are permissible if there is sufficient evidence to indicate that the driver has good tolerance and is well adapted to their use. Use of a contact lens in one eye for distance visual acuity and another lens in the other eye for near vision is not acceptable, nor telescopic lenses acceptable for the driving of commercial motor vehicles.

If an individual meets the criteria by the use of glasses or contact lenses, the following statement shall appear on the Medical Examiner's Certificate: "Qualified only if wearing corrective lenses."

CMV drivers who do not meet the Federal vision standard may call (202) 366-1790 for an application for a vision exemption.
(See Visual Disorders and Commercial Drivers at:
http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Hearing
§391.41(b)(11)
A person is physically qualified to drive a commercial motor vehicle if that person:
First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid, or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ADA Standard) Z24.5-1951.

Since the prescribed standard under the FMCSRs is the American Standards Association (ANSI), it may be necessary to convert the audiometric results from the ISO standard to the ANSI standard. Instructions are included on the Medical Examination report form.

If an individual meets the criteria by using a hearing aid, the driver must wear that hearing aid and have it in operation at all times while driving. Also, the driver must be in possession of a spare power source for the hearing aid.

For the whispered voice test, the individual should be stationed at least 5 feet from the examiner with the ear being tested turned toward the examiner. The other ear is covered. Using the breath which remains after a normal expiration, the examiner whispers words or random numbers such as 66, 18,

23, etc. The examiner should not use only sibilants (s sounding materials). The opposite ear should be tested in the same manner. If the individual fails the whispered voice test, the audiometric test should be administered.

If an individual meets the criteria by the use of a hearing aid, the following statement must appear on the Medical Examiner's Certificate "Qualified only when wearing a hearing aid."

(See Hearing Disorders and Commercial Motor Vehicle Drivers at: http://www/fmcsa.dot.gov/rulesregs/medrports.htm)

Drug Use

§391.41(b)(12)

A person is physically qualified to drive a commercial motor vehicle if that person:

Does not use a controlled substance identified in 21 CFR 1308.II. *Schedule I, an amphetamine, a narcotic, or any other habit-forming drug. Exception: A driver may use such a substance or drug, if the substance or drug is prescribed by a licensed medical practitioner who is familiar with the driver's medical history and assigned duties; and has advised the driver that the prescribed substance or drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle.*

This exception does not apply to methadone. The intent of the medical certification process is to medically evaluate a driver to ensure that the driver has no medical condition which interferes with the safe performance of driving tasks on a public road. If a driver uses a Schedule I drug or other substance, an amphetamine, a narcotic, or any other habit-forming drug, it may be cause for the driver to be found medically unqualified. Motor carriers are encouraged to obtain a practitioner's written statement about the effects on transportation safety of the use of a particular drug.

A test for controlled substances is not required as part of this biennial certification process. The FMCSA or the driver's employer should be contacted directly for information on controlled substances and alcohol testing under Part 382 of the FMCSRs.

The term "uses" is designed to encompass instances of prohibited drug use determined by a physician through established medical means. This may or may not involve body fluid testing. If body fluid testing takes place, positive test results should be confirmed by a second test of greater specificity. The term "habit-forming" is intended to include any drug or medication generally recognized as capable of becoming habitual, and which may impair the user's ability to operate a commercial motor vehicle safely.

The driver is medically unqualified for the duration of the prohibited drug(s) use and until a second examination shows the driver is free from the prohibited drug(s) use. Recertification may involve a substance abuse evaluation, the successful completion of a drug rehabilitation program, and a negative drug test result. Additionally, given that the certification period is normally two years, the examiner has the option to certify for a period of less than 2 years if this examiner determines more frequent monitoring is required.

(See Conference on Neurological Disorders and Commercial Drivers and Conference on Psychiatric Disorders and Commercial Drivers at: http://www.fmcsa.dot.gov/rulesregs/medreports.htm)

Alcoholism

§391.41(b)(13)

A person is physically qualified to drive a commercial motor vehicle if that person:

Has no current clinical diagnosis of alcoholism.

The term "current clinical diagnosis of" is specifically designed to encompass a current alcoholic illness or those instances where the individual's physical condition has not fully stabilized, regardless of the time element. If an individual shows signs of having an alcohol-use problem, he or she should be referred to a specialist. After counseling and/or treatment, he or she may be considered for certification.

MEDICAL EXAMINER'S CERTIFICATE

I certify that I have examined ______________________ In accordance with the Federal Motor Carrier Safety Regulations (49 CFR 391.41-391.49) and with knowledge of the driving duties, I find this person is qualified; and, if applicable, only when:

- ☐ wearing corrective lenses
- ☐ wearing hearing aid
- ☐ accompanied by a __________ waiver exemption
- ☐ driving within an exempt intracity zone (49 CFR 391.62)
- ☐ accompanied by a Skill Performance Evaluation Certificate (SPE)
- ☐ Qualified by operation of 49 CFR 391.64

The information I have provided regarding this physical examination is true and complete. A complete examination form with any attachment embodies my findings completely and correctly, and is on file in my office.

SIGNATURE OF MEDICAL EXAMINER	TELEPHONE	DATE

MEDICAL EXAMINER'S NAME (PRINT)	☐ MD ☐ DO ☐ Chiropractor ☐ Physician Assistant ☐ Advanced Practice Nurse

MEDICAL EXAMINER'S LICENSE OR CERTIFICATE NO./ISSUING STATE

SIGNATURE OF DRIVER	DRIVER'S LICENSE NO.	STATE

ADDRESS OF DRIVER

MEDICAL CERTIFICATE EXPIRATION DATE

Figure: 37 TAC §14.13(a)(1)

TEXAS MEDICAL ADVISORY BOARD

Release Authorization for School Bus Drivers

(For use when requesting review)

TO SCHOOL BUS DRIVER APPLICANT:

I hereby authorize Dr. ______________________________ to give any examination he/she deems necessary for the purpose of determining my fitness to operate a school bus for the transportation of school pupils. I also authorize any other physicians who have attended me, or any hospital or clinic in which I may have been treated, to give the Texas Department of Health any information they may request concerning my condition.

I understand that this authorization includes permission for the Texas Department of Health to have this information reviewed by the Medical Advisory Board for the purpose of giving a medical opinion on my physical and/or mental capabilities to safely operate a school bus.

I also understand that I am to pay any professional fees or charges connected with this examination.

	______________________ Printed Name of Applicant
NOTE: **Physicians signature is required as acknowledgement that he/she has completed medical examination report.**	______________________ Mailing Address
	______________________ City State Zip Code
	______________________ (Area Code) Daytime Phone Number
______________________ Printed Name of Physician	______________________ Name of Employing School District
______________________ Signature of Physician	______________________ Signature of Applicant
______________________ State Board Number Specialty	______________________ Date

Figure: 37 TAC §14.34(c)

INSTRUCTOR'S CERTIFICATE FOR SCHOOL BUS DRIVER SAFETY TRAINING IN TEXAS

This is to certify that

____

has satisfactorily completed all program requirements
as specified by the Texas Department of Public Safety
and is hereby approved to provide
driver training course instruction
in school bus safety education
in the State of Texas

______________________________	______________________________
Training Agency Official's Signature	**Name of Training Agency**
______________________________	______________________________
Date of Issuance	**Instructor's Driver's License Number**

Figure: 37 TAC §14.35(a)

TEXAS SCHOOL BUS DRIVER SAFETY TRAINING CERTIFICATE EXAMPLE

TEXAS SCHOOL BUS DRIVER
SAFETY TRAINING CERTIFICATE

This is to certify that the driver identified hereinafter has satisfactorily completed a driver training course in school bus safety education approved by the Texas Department of Public Safety.

____
Director, Department of Public Safety

(front)

Training Agency: RESC ____ * Training Date:
____
Certification Expiration Date:
____
Instructor:
____
(print name)_
RESC Training:
____
Coordinator (signature)

Driver Name
____
D. L.#: TX ____________ * County/Dist.:
____

Driver's Signature
____

(back)

Figure: 37 TAC §14.36(a)(6)

APPENDIX D

Texas Department of Public Safety

Application for School Bus Driver Enrollment Certificate

Authority for Data Collection: Vernon's Texas Civil Statutes, Article 6687b, § 5(a); recodified as Texas Transportation Code Annotated § 521.022 (Vernon 1996) and Title 37, Texas Administrative Code, Section 14.35.
Planned Use of Data: Request by employer for approval of temporary and provisional safety training certificate status to operate a school bus on an emergency basis which will expire based on program guide criteria.
Instructions: Please read carefully all information given below before completing this form. For assistance, please contact the School Transportation Unit at (512) 424-7396 or (512) 424-7395. Mail or fax the completed form to your Regional Education Service Center.

Applicants **must** satisfy **each** of the following prerequisites before their employer may request approval for the issuance of an enrollment certificate from the designated training agency. **Mark the box by each requirement the applicant has met:**

- ☐ At least 18 years of age;
- ☐ Possess a valid driver's license designating a class appropriate (with applicable endorsement, if commercial driver's license) for the gross vehicle weight rating and manufacturer's designed passenger capacity of motor vehicle to be operated;
- ☐ An acceptable "driving history record" (secured from the Texas Department of Public Safety) determined in accordance with the provisions of the most current Texas Department of Public Safety publication entitled *School Bus Driver's Driving Record Evaluation;*
- ☐ An acceptable "criminal history record" (secured from any state law enforcement agency) reviewed in accordance with the current provisions of Texas Education Code Annotated, Section 22.084;
- ☐ An acceptable physical examination conducted by a licensed physician and evaluated in accordance with all qualifications and standards specified on the most current Texas Department of Public Safety form titled *Medical Examination Report for School Bus Drivers*, and pre-employment/pre-duty drug testing (evaluated in accordance with current federal law); and
- ☐ A school district or contractor must ensure drivers have an acceptable level of knowledge and skill regarding the safe operation of school buses. It is the employer's inherent responsibility to ensure that the driver understands the contents of Units II, IV, V, VIII and X of the current *Course Guide for School Bus Driver Training in Texas.*

Except as approved by the designated training agency, the following eligibility requirements **shall** apply to the issuance of **all** enrollment certificates:

- All recipients shall be registered for the first available basic (20-hour training) certification course as determined by the training agency; this includes anyone issued an enrollment certificate during the twelve-month interval (grace period for renewal) immediately following certification expiration. Failure to satisfactorily complete the course as scheduled shall result in immediate revocation of the certificate, and it ***cannot*** be reissued.
- It is highly recommended that all enrollment certificates shall be dated to expire *no later than 180 days* passed the date issued. In the event a class is not scheduled within 180 days, the enrollment certificate may be dated to expire within a reasonable period of time following the conclusion of the first available certification course. Except as approved by the Regional Education Service Center, a minimum of five years must elapse between the issuance of consecutive enrollment certificates.

Please *print* or *type* all information requested below and forward the completed application to your designated training agency for processing. Please keep on file a copy of this form and any verification received from the training agency to document approval for enrollment certification.

Applicant's Name: ______________________________
(Last) (First) (Middle)

Date of Birth ____/____/____ Driver's License Information: ______________________
(Month) (Day) (Year) (State) (Identification number)

This applicant needs the class taught in: English ☐ Spanish ☐

Employer/District: ______________________ Telephone: ______________________
(Name and county / district number, if applicable) (Area code, number, and extension, if applicable)

I affirm that this applicant has fulfilled all of the above requirements (which I indicated by an X in the box next to each requirement) necessary for the issuance of an enrollment certificate. Pending official notification of approval for an enrollment certificate from the designated agency, it shall be unlawful for the applicant to operate a school bus for the purpose of transporting students.

______________________________ ______________
(Name, title, and signature of authorized employer/district official) (Date Submitted)

Revised 3/2008

SB-7

Figure: 37 TAC §14.36(b)(4)

TEXAS SCHOOL BUS DRIVER SAFETY TRAINING CERTIFICATE EXAMPLE

TEXAS SCHOOL BUS DRIVER
SAFETY TRAINING CERTIFICATE

This is to certify that the driver identified hereinafter has satisfactorily completed a driver training course in school bus safety education approved by the Texas Department of Public Safety.

____

Director, Department of Public Safety

Enrollment Certificate

(front)

Training Agency: RESC ____ * Training Date: ________

Certification Expiration Date: ______________________

Instructor: ______________________ (print name)_

RESC Training ______________________ Coordinator (signature)

Driver Name ______________________

D. L.#: TX__________ * County/Dist.: ________

Driver's Signature ______________________

Enrollment Certificate

(back)

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.

Texas State Affordable Housing Corporation

Notice of Request for Proposals

Notice is hereby given that the Texas State Affordable Housing Corporation (the "Corporation") has approved its 2009 Requesting for Proposals for our multifamily Private Activity Bond Program. The program seeks applications from qualified developers for the creation or preservation of multifamily affordable rental developments. The Request for Proposals outlines the Corporation's process and guidelines for selecting qualified development to receive residential rental bond financing.

The Corporation will begin accepting applications immediately. Application materials are posted on the Corporation's website at: http://tsahc.org/multi/multi_bond.php.

Staff is available to talk with interested developers about their development proposals. Please contact David Danenfelzer, by phone at (512) 477-3555 ext. 403, or by email at: ddanenfelzer@tsahc.org.

TRD-200806115
David Long
President
Texas State Affordable Housing Corporation
Filed: November 21, 2008

Notice of Updated Bond Program Policies

The Texas State Affordable Housing Corporation has adopted new policies regarding the administration of its §501(c)(3) Bond Program. The Corporation issues tax-exempt §501(c)(3) bonds to finance multifamily affordable housing in the state of Texas under the authority granted to it under Government Code Title 10, Chapter 2306, Subchapter Y. The 78th Legislature amended Subchapter Y to require the Corporation to review its §501(c)(3) bond issuance policies, including the public benefit requirement implemented under Section 2306.563, and required that notice shall be given through the *Texas Register* when policy revisions are proposed.

To view the new policies, please visit www.tsahc.org. For further information, please contact David Danenfelzer at (512) 477-3555 ext. 403 or by email at ddanenfelzer@tsahc.org.

TRD-200806116
David Long
President
Texas State Affordable Housing Corporation
Filed: November 21, 2008

Comptroller of Public Accounts

Notice of Contract Amendment

The Comptroller of Public Accounts (Comptroller), State Energy Conservation Office, announces this notice of contract amendment in connection with the Request for Proposals (RFP #180c) for technical assistance and services for the Texas Energy Partnership Program. The notice of Request for Proposals (RFP #180c) was published in the August 17, 2007, issue of the *Texas Register* (32 TexReg 5202). A Notice of Award was published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8184).

The amended contract is with Lockheed Martin Services, Inc., 2339 Route 70 West, Cherry Hill, New Jersey 08002-3315. The original total amount of the contract was not to exceed $198,200.00. The term of the contract is October 22, 2007 to August 31, 2009. The amendment adds $200,000.00 to the Agreement for a new total amount of not to exceed $398,200.00.

TRD-200806081
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: November 20, 2008

Notice of Legal Banking Holidays

Texas Tax Code Annotated §111.053(b) requires that, before January 1 of each year, the Comptroller of Public Accounts publish a list of the legal holidays for banking purposes for that year. This is the 2009 Eleventh District Holiday Schedule. Pursuant to the Federal Reserve Bank of Dallas Notice 08-26 dated August 26, 2008, the Federal Reserve Bank of Dallas and its branches at El Paso, Houston, and San Antonio, Texas, will observe the following holidays for calendar year 2009 and will not be open on the dates indicated below.

Thursday, January 1, New Year's Day

Monday, January 19, Martin Luther King, Jr. Day

Monday, February 16, Presidents Day

Monday, May 25, Memorial Day

Monday, September 7, Labor Day

Monday, October 12, Columbus Day

Wednesday, November 11, Veterans Day

Thursday, November 26, Thanksgiving Day

Friday, December 25, Christmas Day

The Federal Reserve standard holiday schedule mandates that if January 1, July 4, November 11, or December 25 falls on a Sunday, the following Monday will be observed as a holiday. If January 1, July 4, November 11, or December 25 occurs on a Saturday, the preceding Friday will not be observed as a holiday. For 2009, July 4 occurs on a Saturday; therefore, the preceding Friday will not be observed as a holiday.

TRD-200806111
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: November 21, 2008

♦ ♦ ♦

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 **January 5, 2009**. 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 January 5, 2009**. 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: AWAD ENTERPRISES INC dba A Madco Food Store; DOCKET NUMBER: 2008-1381-PST-E; IDENTIFIER: RN102045598; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; and 30 TAC §334.50(d)(4)(A)(ii)(II) and the Code, §26.3475(c)(1), by failing to perform an automatic test for substance loss that can detect a release; PENALTY: $2,550; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: BASF Fina Petrochemicals Limited Partnership; DOCKET NUMBER: 2008-1147-AIR-E; IDENTIFIER: RN100216977; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petrochemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), Federal Operating Permit (FOP) Number O-1877, General Terms and Conditions (GTC), New Source Review (NSR) Permit Number 36644/PSD-TX-903M1, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain an emission below the allowable limit for nitrogen oxides; PENALTY: $36,050; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Doug Bowden; DOCKET NUMBER: 2008-1756-WOC-E; IDENTIFIER: RN104268743; LOCATION: Sidney, Comanche County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(4) COMPANY: Crystal Falls Car Wash Inc.; DOCKET NUMBER: 2008-1550-PST-E; IDENTIFIER: RN102370301; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: car wash with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection; 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 initial/renewal UST registration and self-certification form; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(5) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2008-1003-AIR-E; IDENTIFIER: RN100216720; LOCATION: near Dumas, Sherman County; TYPE OF FACILITY: natural gas compression station; RULE VIOLATED: 30 TAC §116.115(c), Permit Number 73352, SC Number 4, and THSC, §382.085(b), by failing to maintain engine maintenance records; 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization for two storage tanks; 30 TAC §106.511 and THSC, §382.085(b), by failing to maintain a record of the hours of operation; and 30 TAC §122.210(a) and THSC, §382.085(b), by failing to submit a revision to FOP Number O-002479 to include the two storage tanks and the engine/emergency generator; PENALTY: $7,600; Supplemental Environmental Project (SEP) offset amount of $3,040 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: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(6) COMPANY: Eastman Chemical Company; DOCKET NUMBER: 2008-1120-AIR-E; IDENTIFIER: RN100219815; LOCATION: Longview, Harrison County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2) and (c) and §122.143(4), NSR Permit Number 18528, SC Number 1, FOP Number O-01968, Special Terms and Conditions Number 5A, and THSC, §382.085(b), by failing to meet the volatile organic compound annual maximum allowable emissions rate; and 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-01968, GTC, and THSC, §382.085(b), by failing to report all instances of deviation; PENALTY: $39,290; SEP offset amount of $15,716 applied to Texas Parent Teacher Association ("PTA") - *Clean School Bus Program*; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: Enterprise Products Operating LLC; DOCKET NUMBER: 2008-1148-AIR-E; IDENTIFIER: RN104199674; LOCATION: near Baytown, Liberty County; TYPE OF FACILITY: pipeline segment; RULE VIOLATED: THSC, §382.085(a), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(2)(F) and THSC, §382.085(b), by failing to comply with the reporting requirements for the emissions event; PENALTY: $10,100; SEP offset amount of $5,050 applied to Barbers Hill Independent School District-Alternative Fueled Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Dale K. Farrow; DOCKET NUMBER: 2008-1759-WR-E; IDENTIFIER: RN105598031; LOCATION: Cherokee

County; TYPE OF FACILITY: construction sand and gravel; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(9) COMPANY: Flint Hills Resources, LP; DOCKET NUMBER: 2008-1222-AIR-E; IDENTIFIER: RN100235266; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(c), Air Permit Number 8803A, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $5,075; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(10) COMPANY: Boyd R. Freitag dba Friday's General Store; DOCKET NUMBER: 2008-1391-PWS-E; IDENTIFIER: RN104711163; LOCATION: Blanco County; TYPE OF FACILITY: convenience store and restaurant; RULE VIOLATED: 30 TAC §290.39(c) and (h)(1) and §290.46(a) and THSC, §341.035(a), by failing to obtain commission approval of the rainwater collection system and the groundwater source prior to commencing construction and utilizing the sources; PENALTY: $200; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 2800 South Interstate 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(11) COMPANY: Greenwood Ventures Inc.; DOCKET NUMBER: 2008-1213-PWS-E; IDENTIFIER: RN102689213; LOCATION: Midland County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the consumer confidence report (CCR) to each bill paying customer and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers; PENALTY: $541; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(12) COMPANY: Harris County; DOCKET NUMBER: 2008-0983-MWD-E; IDENTIFIER: RN102079423; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010932001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for total suspended solids and flow; PENALTY: $3,340; SEP offset amount of $2,672 applied to Keep Texas Beautiful - Waterway Cleanup Program; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(13) COMPANY: Hereford Highway Properties, Ltd.; DOCKET NUMBER: 2008-1030-WQ-E; IDENTIFIER: RN105129373; LOCATION: Randall County; TYPE OF FACILITY: residential construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), 40 Code of Federal Regulations (CFR) §122.26, TPDES General Permit Number TXR15EK73, Part II Section E.3(c), by failing to post a copy of the signed notice of intent at the site; 30 TAC §281.25(a)(4), 40 CFR §122.26, and TPDES General Permit Number TXR15EK73, Part II Section E.3(d), by failing to post a completed construction site notice; 30 TAC §281.25(a)(4), 40 CFR §122.26, TPDES General Permit Number TXR15EK73, Part III Section F.6(d), and the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of sediment and to remove accumulated sediment; 30 TAC §281.25(a)(4), TPDES General Permit Number TXR15EK73, Part III Section F.2(b)(iii), 40 CFR §122.26, and the Code, §26.121(a)(1), by failing to initiate erosion control and stabilization measures; 30 TAC §281.25(a)(4), TPDES General Permit Number TXR15EK73, Part III Section F.2.c(i)(B), and 40 CFR §122.26, by failing to install or maintain perimeter sediment controls; 30 TAC §281.25(a)(4), TPDES General Permit Number TXR15EK73, Part III Section F.6.a, and 40 CFR §122.26, by failing to maintain protective measures at the site; 30 TAC §281.25(a)(4), TPDES General Permit Number TXR15EK73, Part V.2, and 40 CFR §122.26, by failing to prevent the discharge of concrete wash out water to areas where structural controls have been established to prevent discharge to surface waters or to areas that have minimal slope that allow infiltration and filtering of wash out water; and 30 TAC §281.25(a)(4), TPDES General Permit Number TXR15EK73, and 40 CFR §122.26, by failing to include, at a minimum, site or project information in the storm water pollution prevention plan and a description of best management practices; PENALTY: $5,600; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(14) COMPANY: INEOS USA LLC; DOCKET NUMBER: 2008-1074-AIR-E; IDENTIFIER: RN102326972; LOCATION: Clute, Brazoria County; TYPE OF FACILITY: petroleum bulk storage terminal; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 535, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Jo Ann Davis dba Jo Ann's Daycare and Camp; DOCKET NUMBER: 2008-1258-PWS-E; IDENTIFIER: RN101265171; LOCATION: Houston, Harris County; TYPE OF FACILITY: daycare with public water supply; RULE VIOLATED: 30 TAC §290.39(j) and §290.41(c)(3)(A), by failing to submit plans and specifications upon request prior to a significant change to the system's production facilities and by failing to obtain approval prior to placing a new well into service; PENALTY: $114; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Kempenaar Real Estate, LTD. dba Still Meadow Dairy; DOCKET NUMBER: 2008-1041-AGR-E; IDENTIFIER: RN101523629; LOCATION: Hopkins County; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.31(a), TPDES Confined Animal Feeding Operation (CAFO) General Permit Number TXG920117, Part II, A, and the Code, §26.121(a), by failing to prevent the unauthorized discharge of agricultural wastewater; 30 TAC §321.39(b)(5) and TPDES CAFO General Permit Number TXG920117, Part III.A.9(b)(2), by failing to ensure that retention control structures (RCS) liners are protected from animals by fences or other protective devices and that no tree is allowed to grow such that the root zone would intrude or compromise the structure of the liner; 30 TAC §321.38(g)(3)(E) and TPDES CAFO General Permit Number TXG920117, Part IIIA.6(a)(2), by failing to provide a capacity certification; and 30 TAC §321.36(c), TPDES CAFO General Permit Number TXG920117, Part V.B, and the Code, §26.121(a), by failing to construct and manage the control facilities in a manner that will protect surface water; PENALTY: $8,085; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(17) COMPANY: Metroplex Quarry's Inc.; DOCKET NUMBER: 2008-1090-WQ-E; IDENTIFIER: RN101915148; LOCATION: Palo Pinto County; TYPE OF FACILITY: rock quarry; RULE VIOLATED:

30 TAC §311.82(a) and the Code, §26.121(a)(2), by failing to maintain authorization to discharge storm water associated with industrial activity; PENALTY: $14,311; SEP offset amount of $5,724 applied to RC&D - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Douglas Wayne Harris dba MO-ROCK; DOCKET NUMBER: 2008-1271-AIR-E; IDENTIFIER: RN104967492; LOCATION: Hico, Hamilton County; TYPE OF FACILITY: rock crusher; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518, by failing to obtain authorization prior to operating a rock crusher; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Carlie Konkel, (361) 825-3100; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(19) COMPANY: Robert D. Myers; DOCKET NUMBER: 2008-1755-OSI-E; IDENTIFIER: RN104421722; LOCATION: McLennan County; TYPE OF FACILITY: on site sewage; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20) COMPANY: Jim Oxford; DOCKET NUMBER: 2008-1757-WOC-E; IDENTIFIER: RN105600928; LOCATION: Bee County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(21) COMPANY: Petrus Adrianus Boekhorst dba Petal Dairy; DOCKET NUMBER: 2008-0972-MLM-E; IDENTIFIER: RN101716298; LOCATION: Hopkins County; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.31(a), General Permit Number TXG920170, Part II.A, and the Code, §26.121(a), by failing to prevent an unauthorized discharge of wastewater; 30 TAC §321.39(b) and General Permit Number TXG920170, Part III.A.9.(a)(1), by failing to restore the required capacity of an RCS after each rainfall event or accumulation of manure or process generated wastewater that reduces such capacity; 30 TAC §321.44(b) and General Permit Number TXG920170, Part III.A.5.(c), by failing to sample and analyze all discharges to surface water in the state; 30 TAC §321.44(a) and General Permit Number TXG920170, Part IV.B.5, by failing to notify the Tyler regional office orally within 24 hours of the discharge and submit written notice within 14 working days of the discharge; 30 TAC §321.39(f) and General Permit Number TXG920170, Part III.B.4, by failing to locate compost areas within the drainage of the RCS when the compost area is not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff; 30 TAC §330.15(a), by failing to prevent the disposal of municipal solid waste (MSW); 30 TAC §321.38(g)(3)(E) and General Permit Number TXG920170, Part IV.A.7.(d), by failing to retain completed documentation of either no significant hydrologic connection or liner certifications by a Texas professional engineer or licensed Texas professional geoscientist for each RCS and capacity certifications; and 30 TAC §321.31(a) and §321.40(d), General Permit Number TXG920170, Part III.A.11.(b)(1) and (d)(1), and the Code, §26.121(a), by failing to prevent an unauthorized discharge of wastewater; PENALTY: $11,776; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(22) COMPANY: Postoak Retailer's Inc. dba Welcome Food Mart; DOCKET NUMBER: 2008-1302-PST-E; IDENTIFIER: RN102372299; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the USTs; 30 TAC §334.8(c)(4)(C) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; and 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to the common carrier a valid, current TCEQ delivery certificate; PENALTY: $7,740; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: Maclovio Ramon; DOCKET NUMBER: 2008-1057-MSW-E; IDENTIFIER: RN105137780; LOCATION: Duval County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the disposal of MSW; PENALTY: $1,050; ENFORCEMENT COORDINATOR: John Shelton, (512) 239-2563; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(24) COMPANY: Rogelio Ramon; DOCKET NUMBER: 2008-1197-MLM-E; IDENTIFIER: RN105554810; LOCATION: Jackson County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning; and 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $3,740; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-5100.

(25) COMPANY: Steve Simpson & Associates Inc; DOCKET NUMBER: 2008-1758-WR-E; IDENTIFIER: RN104689054; LOCATION: Tyler County; TYPE OF FACILITY: water rights; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(26) COMPANY: City of Terrell; DOCKET NUMBER: 2008-0802-MLM-E; IDENTIFIER: RN102975075; LOCATION: Terrell, Kaufman County; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §330.15(c), by failing to properly dispose of MSW at an authorized facility; 30 TAC §330.954(e)(1), by failing to maintain the integrity of the final cover of a closed MSW landfill; 30 TAC §330.463(a)(1), by failing to correct a lack of vegetative growth and ponding of water at the closed landfill; 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the prohibition on outdoor burning; and 30 TAC §330.15(c), by failing to prevent the discharge of MSW at the site; PENALTY: $6,500; SEP offset amount of $5,200 applied to Cleanup of Unauthorized Dumpsite; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-1194-AIR-E; IDENTIFIER: RN104964267; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Air Permit Number 20485, SC Number 1, FOP Number 1327, SC Number 15, and THSC, §382.085(b), by failing to prevent unauthorized emissions of 1, 3 butadiene; PENALTY: $3,625; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838;

REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(28) COMPANY: Valero Refining-Texas, L.P.; DOCKET NUMBER: 2008-1437-AIR-E; IDENTIFIER: RN100219310; LOCATION: Houston, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 2507A, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $4,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(29) COMPANY: William S. Crouch dba Value Cleaners; DOCKET NUMBER: 2008-0640-MLM-E; IDENTIFIER: RN102215704; LOCATION: Texarkana, Bowie County; TYPE OF FACILITY: dry cleaning; RULE VIOLATED: 30 TAC §335.4(1), by failing to prevent the unauthorized discharge of industrial solid waste; 30 TAC §335.69(a)(1)(A), by failing to transfer hazardous waste from a failing container to a container in good condition; 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; and 30 TAC §337.20(e)(3)(A), by failing to install a dike or other secondary containment structure around each dry cleaning unit and around each storage area for dry cleaning solvents, dry cleaning waste, or dry cleaning wastewater; PENALTY: $5,817; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(30) COMPANY: Wyman-Gordon Forgings, Inc.; DOCKET NUMBER: 2008-1351-AIR-E; IDENTIFIER: RN100217413; LOCATION: Houston, Harris County; TYPE OF FACILITY: iron and steel forging plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(C) and Federal Operating Permit Number O-01031, GTC, by failing to submit a deviation report; PENALTY: $3,725; SEP offset amount of $1,490 applied to Texas PTA - *Clean School Bus Program*; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-200806158
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 24, 2008

Notice of District Petition

Notices issued November 4, 2008 through November 19, 2008.

TCEQ Internal Control No. 06232008-D01; Varner Creek Utility District of Brazoria County has applied to the Texas Commission on Environmental Quality (TCEQ) for authority to adopt and impose an annual uniform operations and maintenance standby fee up to $5 per equivalent single family connection per month for calendar years 2009-2011, on unimproved property within the District. The application was filed pursuant to Chapter 49 of the Texas Water Code, 30 Texas Administrative Code Chapter 293, and the procedural rules of the TCEQ. The purpose of standby fees is to distribute a fair portion of the cost burden for operations and maintenance costs and debt service of the District facilities to owners of property who have not constructed vertical improvements but have water, wastewater or drainage facilities or services available. Any revenues collected from the operations and maintenance standby fees shall be used to supplement the District's operations and maintenance account.

TCEQ Internal Control No. 06192008-D01; LH 800 Partners, Ltd. and LH 440 Partners, Ltd. (Petitioners) filed a petition for creation of Harris County Municipal Utility District No. 504 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioners are the owner of a majority in value of the land, consisting of one tract, to be included in the proposed District; (2) there is one lien holder, RFC Construction Funding Corp., on the property to be included in the proposed District; (3) the proposed District will contain approximately 494.18 acres located in Harris County, Texas; and (4) the land within the proposed District is within the extraterritorial jurisdiction of the City of Houston, Texas (City). By separate certificate, the lien holder has indicated consent to the creation of the proposed District. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $35,500,000.

TCEQ Internal Control No. 06182008-D06; LH 800 Partners, Ltd. (Petitioner) filed a petition for creation of Harris County Municipal Utility District No. 505 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land, consisting of one tract, to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District; (3) the proposed District will contain approximately 439.41 acres located in Harris County, Texas; and (4) the land within the proposed District is within the extraterritorial jurisdiction of the City of Houston, Texas (City). According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $30,100,000.

TCEQ Internal Control No. 04232008-D02; RCC Brockdale Park Estates, (Petitioner) filed a petition with the Texas Commission on Environmental Quality (TCEQ) for the annexation of land into Seis Lagos Utility District of Collin County under Chapter 54 of the Texas Water Code and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner holds title to the Property (the proposed annexation area) and is owner of a majority in value of the land to be included in the District; (2) there is one lien holder (Texas Capital Bank, N.A.) on the Property; (3) the Property contains approximately 136.060 acres located in Collin County, Texas; and (4) the Property is within the extraterritorial jurisdiction of the City of Lucas (City). By affidavit dated April 10, 2008, the lien holder has consented to the proposed annexation of the property into Seis Lagos Utility District.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a

brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200806174
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 24, 2008

Notice of Water Quality Applications

The following notices were issued during the period of November 5, 2008 through November 20, 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

ALLIED PETROCHEMICAL LLC which operates a facility that recycles non-hazardous used oil, has applied for a renewal of TPDES Permit No. WQ0003903000, which authorizes the discharge of treated process wastewater and storm water at a daily average flow not to exceed 21,000 gallons per day via Outfall 001. The facility is located in the southwest quadrant of the intersection of Farm-to-Market Road 2917 and the Missouri Pacific Railroad Tracks and northeast of the City of Liverpool, Brazoria County, Texas.

BP AMOCO CHEMICAL COMPANY which operates the BP Amoco Chemical Texas City Plant, a tank farm and dock area, has applied for a major amendment to TPDES Permit No. WQ0000452000 to authorize the discharge of cooling tower blowdown, steam condensate, and non-process area storm water via a new proposed Outfall 005. The current permit authorizes the discharge of storm water on an intermittent and flow variable basis via Outfalls 001, 002, 003, and 004. The facility is located on the north bank of the Texas City Barge Canal, approximately 3200 feet east of the termination of the barge canal along Docks 50 through 53 in the City of Texas City, Galveston County, Texas.

BROOKELAND FRESH WATER SUPPLY DISTRICT has applied for a major amendment to TPDES Permit No. WQ0010998001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 50,000 gallons per day to a daily average flow not to exceed 65,000 gallons per day. The facility is located approximately 400 feet south of Recreational Road 255 and approximately five miles west of the intersection of Recreational Road 255 and U.S. Highway 96 in Jasper County, Texas.

CHUSEI USA INC which operates CHUSEI (U.S.A.) Inc., has applied for a major amendment to TPDES Permit No. WQ0003686000 to authorize the removal of all non-storm water wastestreams from Outfalls 001 and 002; the removal of effluent limits for total aluminum, total copper, and total zinc at Outfalls 001 and 002; the removal of biomonitoring requirements from Outfalls 001 and 002; and the removal of internal Outfalls 101 and 102 and associate limits from the permit. The current permit authorizes the discharge of storm water and previously monitored effluents (cooling tower blowdown and filter backwash) on an intermittent and flow variable basis via Outfall 001, the discharge of storm water and previously monitored effluents (cooling tower blowdown, boiler blowdown, filter backwash, and reverse osmosis reject water) via Outfall 002, and the discharge of storm water on an intermittent and flow variable basis via Outfall 003. The facility is located approximately one mile southeast of the intersection of State Highway 146 and Fairmont Parkway in the Bayport Industrial Park, and bordered on the east by the Southern Pacific Railroad 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.

CITY OF BRYAN has applied for a renewal of TPDES Permit No. WQ0010426002, 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 northwest of State Highway 21 and approximately 2,300 feet west-southwest of the intersection of State Highway 21 and Farm-to-Market Road 2818 in Brazos County, Texas.

CITY OF MOODY has applied for a renewal of Permit No. WQ0004526000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 39 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located approximately two miles south of the City of Moody, adjacent to the east side of Farm-to-Market Road 317 and adjacent to the north side of Payne Branch Road, in Bell County, Texas.

FLINT HILLS RESOURCES LP which operates the Flint Hills Resources Port Arthur Chemicals, a chemical manufacturing facility, has applied for a major amendment to TPDES Permit No. WQ0003057000 to authorize the extension of the due date for the DMR reports; to reduce the frequency of monitoring requirements for parameters via Outfalls 001 and 002; the removal of internal Outfalls 101 and 102; and modified sampling location for Outfall 002. The current permit authorizes the discharge of non-process area storm water runoff, hydrostatic test water, steam condensates, potable waterline flushing, other utility wastewater, and construction storm water runoff on an intermittent and flow variable basis via Outfalls 001 and 002; and the discharge of storm water runoff associated with industrial activities from a concrete batch plant located on the permitted site and supporting construction activities on an intermittent and flow variable basis via internal Outfalls 101 and 102. The facility is located at the northwest end of 4241 Savannah Avenue in the City of Port Arthur, Jefferson County, Texas.

KLAAS TALSMA has applied for a Renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0003145000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing Dairy facility at a maximum capacity of 2,200 head of which 2,200 head are milking cows. The facil-

ity is located on the south side of County Road 540, approximately three-tenths mile southwest from the intersection of County Road 540 and County Road 209. This intersection is located approximately four miles from the intersection of County Road 209 and US Highway 67 in Erath County, Texas.

NJB AND SONS INC has applied for a renewal of TPDES Permit No. WQ0010888001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of 5.0 acres of golf course. The facility is located 0.75 mile west of State Highway 317 and approximately 2.25 miles north of the intersection of State Highway 317 and Farm-to-Market Road 107 in McLennan County, Texas. The disposal site is located beside the facility.

NORTHWEST AIRPORT MANAGEMENT LP which operates Northwest Airport Facility, has applied for a renewal of TPDES Permit No. WQ0004313000, which authorizes the discharge of wash water from an airport wash rack and storm water on an intermittent and flow variable basis via Outfall 001. The facility is located immediately south of the intersection of Farm-to-Market Road 2920 and Stuebner-Airline Road, approximately 3.75 miles southeast of the City of Tomball, Harris County, Texas.

PARKER COUNTY SPECIAL UTILITY DISTRICT which proposes to operate Parker County SUD WTP, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004852000, to authorize the discharge of backwash water from microfilters and reject water from reverse osmosis system at a daily average flow not to exceed 143,000 gallons via Outfall 001. The facility is located at the southwest side of the intersection of Spur 1189 and Tidwell Road in Parker County, Texas.

RV RESORTS AMERICA INC has applied for a renewal of TPDES Permit No. WQ0014088001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,500 gallons per day. The facility is located at 4202 Del Bello Road, approximately 0.5 mile southwest of the intersection of Del Bello Road and Bahler Road in Brazoria County, Texas.

SWWC UTILITIES INC has applied for a renewal of TPDES Permit No. WQ0013866001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located east of the City of Round Rock, two miles south of State Highway 79 and 1.7 miles east of County Road 122 in Williamson County, Texas.

US STEEL TUBULAR PRODUCTS INC which operates Bellville Operations Division, a low carbon-steel tubing and mechanical line pipe manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0003716000 to authorize the addition of a wastestream (equipment wash rack wash water) to Outfall 004 and increase the daily average dry weather flow to 7,000 gallons per day and daily maximum dry weather flow to 10,000 gallons per day via Outfall 004. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,000 gallons per day of via Outfall 001 and cooling tower blowdown and storm water at a daily average dry weather flow not to exceed 6,300 gallons per day via Outfall 004. The facility is located approximately 3.0 miles southeast of the intersection of State Highway 36 and Farm-to-Market Road 2429 and adjacent to the intersection of State Highway 36 and Miller Road, approximately 5.2 miles southeast of the City of Bellville, Austin 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-200806173
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 24, 2008

Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on November 19, 2008, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Lupe Mercado; SOAH Docket No. 582-08-4453; TCEQ Docket No. 2007-1653-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Lupe Mercado on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200806175
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 24, 2008

Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on November 20, 2008, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. M.V.K., Inc. dba EZ Express 1; SOAH Docket No. 582-08-3469; TCEQ Docket No. 2004-0694-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against M.V.K., Inc. dba EZ Express 1 on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200806176
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 24, 2008

Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: Semiannual Report due July 15, 2008, for Candidates and Officeholders

Susan Delgado, 2284 Jean St., Houston, Texas 77023-5009

Bonnie Rangel, 500 E. San Antonio Ave., Room 601, El Paso, Texas 79901-2429

David C. Rankin, 3111 Skyline Dr., Nacogdoches, Texas 75965-3169

James D. Schull, 8507 Hwy 377 S., Ste. F, Benbrook, Texas 76126-2560

Deadline: 30-Day Pre-Election Report due October 6, 2008 for Candidates and Officeholders

Jeffrey S. Joyner, 2600 E. Renner Rd., Apt. 145, Richardson, Texas 75082

Todd A. Litteken, 1036 Bannack Dr., Arlington, Texas 76001

Deadline: 30-Day Pre-Election Report due October 6, 2008 for Political Action Committees

James C. Shaw, Texas Alliance for Life, P.O. Box 202252, Austin, Texas 78720

Deadline: Lobby Activities Report due April 10, 2008

Douglas Dunsavage, 8200 Brookriver Dr., Ste. N100, Dallas, Texas 75247

Deadline: Personal Financial Statement due June 30, 2008

Billy W. McClendon, 7401 Sevilla Dr., Austin, Texas 78752

Deadline: Personal Financial Statement due August 28, 2008

Richard R. Nedelkoff, 702 N. Washington St., LaGrange, Texas 78945

TRD-200806073
David Reisman
Executive Director
Texas Ethics Commission
Filed: November 19, 2008

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Texas Facilities Commission

Request for Proposals #303-9-10411-A

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-9-10411-A. TFC seeks a five (5) year lease of approximately 10,733 square feet of office space in Houston, Texas.

The deadline for questions is December 5, 2008, and the deadline for proposals is December 19, 2008 at 3:00 p.m. The award date is January 21, 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 an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting 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=79947*.

TRD-200806107
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 21, 2008

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Request for Proposals #303-9-10656

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice, announces the issuance of Request for Proposals (RFP) #303-9-10656. TFC seeks a five (5) or ten (10) year lease of approximately 6,194 square feet of office space in Galveston County, Texas.

The deadline for questions is December 5, 2008 and the deadline for proposals is December 16, 2008 at 3:00 p.m. The award date is January 21, 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 an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting 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=79943*.

TRD-200806108
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 21, 2008

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Texas Lottery Commission

Instant Game Number 1173 "Celebrate"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1173 is "CELEBRATE". The play style is "match 3 of 9 with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1173 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1173.

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: $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $200, $1,000 and GIFT SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1173 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$1,000	ONE THOU

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 $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 and $200.

H. High-Tier Prize - A prize of $1,000.

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 (1173), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1173-0000001-001.

K. Pack - A pack of "CELEBRATE" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed.

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 "CELEBRATE" Instant Game No. 1173 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 "CELEBRATE" Instant Game is determined once the latex on the ticket is scratched off to expose 9 (nine) Play Symbols. If a player reveals 3 matching prize amounts play symbols, the player wins that amount. If a player reveals 2 matching prize amounts play symbols and a "GIFT" play symbol, the player wins that amount instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 9 (nine) 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 9 (nine) 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 9 (nine) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 9 (nine) 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. No more than two pairs of matching play symbols on a ticket.

C. No more than three matching play symbols on a ticket.

D. A ticket may only win once.

E. No more than one pair of matching play symbols on a ticket that contains the "GIFT" (auto win) play symbol.

F. No more than two matching play symbols on a ticket that contains the "GIFT" (auto win) play symbol.

G. The "GIFT" (auto win) play symbol will never appear more than once on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "CELEBRATE" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100 or $200, 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 $50.00, $100 or $200 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 "CELEBRATE" Instant Game prize of $1,000, 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 "CELEBRATE" 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;

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 "CEL-

EBRATE" 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 "CELEBRATE" 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 9,120,000 tickets in the Instant Game No. 1173. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1173 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	790,400	11.54
$2	820,800	11.11
$4	243,200	37.50
$5	106,400	85.71
$10	45,600	200.00
$20	15,200	600.00
$50	7,144	1,276.60
$100	2,280	4,000.00
$200	380	24,000.00
$1,000	114	80,000.00

*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 4.49. 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. 1173 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. 1173, 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-200806166
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 24, 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 November 20, 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 Northland Cable Television LLC to Amend a State-Issued Certificate of Franchise Authority, Project Number 36417 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the municipal boundaries of the City of Kaufman, 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 36417.

TRD-200806142
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2008

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 19, 2008, for 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 Hill Country Telecommunications, LLC for a State-Issued Certificate of Franchise Authority, Project Number 36411 before the Public Utility Commission of Texas.

The requested CFA service area includes the following 15 exchanges encompassed by the telephone exchange serving areas of Hill Country Telephone Cooperative, Inc.: Streeter, Katemcy, Fredonia, Pontotoc, Doss, Garven Store, Frio Canyon, Mountain Home, Ingram, Hunt, Medina, Tarpley, CenterPoint, Comfort, and Sisterdale.

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 36411.

TRD-200806141
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2008

Notice of Appeal of Decision of ERCOT Board Assigning Oklaunion Generating Station to the West Zone

Notice is given to the public of an appeal of the decision of the Electric Reliability Council of Texas, Inc. (ERCOT) Board assigning Oklaunion Generating Station to the West Zone and request for expedited consideration and emergency remand with instructions on November 19, 2008, pursuant to Public Utility Regulatory Act §14.001 and P.U.C. Procedural Rule §22.251.

Docket Style and Number: AEP Energy Partners' Appeal of the Decision of the ERCOT Board Assigning Oklaunion Generating Station to the West Zone and Request for Expedited Consideration and Emergency Remand with Instructions, Docket Number 36416.

The Application: AEP Energy Partners filed an appeal of the decision of ERCOT regarding the Board's approval of 2009 Commercially Significant Constraints (CSCs), Transmission Congestion Zones, Closely Related Elements (CREs), and Boundary Generation Resources in the ERCOT transmission systems, which assigned the Oklaunion Generating Station (Oklaunion) to the West Congestion Zone, and its request for expedited consideration and emergency remand with instructions to the ERCOT Board.

AEP Energy Partners stated that the ERCOT Board voted on October 21, 2008, to approve the January 1, 2009 CSCs, Transmission Congestion Zones, CREs, and Boundary Generation Resources in the ERCOT transmission system, which decision was based on a load-flow study known as Scenario 3i. The conduct complained of here resulted from the Technical Advisory Committee's (TAC's) and ERCOT's Board's application of ERCOT Protocol §7.2, which establishes the CSC Zone determination process. The process, applied this year, resulted in approval of Scenario 3i, whereby several generators were moved from the West Zone to the North Congestion Zone, but not Oklaunion. AEP Energy Partners argues that Scenario 3h would have moved all of the foregoing generators to the North Congestion Zone, plus Oklaunion and that the ERCOT Staff and Board were incorrect in the process and analysis they used to determine the zone to which Oklaunion was assigned

AEP Energy Partners stated that this proceeding is timely-filed within the 35 days of the date of the ERCOT conduct complained of pursuant to P.U.C. Procedural Rule §22.251(d) and requests expedited commission consideration pursuant to P.U.C. Procedural Rule §22.251(k). AEP Energy Partners stated that expedited consideration would ensure that any reversal of the ERCOT Board's decision would occur before other market participants conduct transactions based on the current decision constitutes good cause for consideration on an expedited basis.

AEP Energy Partners' requests that the commission enter an order granting its appeal, finding that TAC's and the ERCOT Board's approval of Scenario 3i was not justified, remand this proceeding to the ERCOT Board and TAC on an emergency basis with instructions that TAC and the ERCOT Board reconsider the decision, and that the ERCOT Board be instructed to make its determination by December 31, 2008 or as soon as possible thereafter. In the alternative, AEP Energy Partners requests that the commission order that the ERCOT Board adopt Scenario 3h for the 2009 calendar year.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 36416.

TRD-200806156
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2008

Notice of Application for Approval of a Revised Nodal Market Implementation Surcharge and Request for Interim Relief

On November 19, 2008, the Electric Reliability Council of Texas, Inc. (ERCOT) filed with the Public Utility Commission of Texas (commission) an application for approval of a revised nodal market implementation surcharge and request for interim relief.

Pursuant to the *Order Nunc Pro Tunc* issued in Docket Number 32686, "ERCOT may initiate commission proceedings to change the nodal surcharge only if the change in the nodal program cost estimate leading to the request is more than 10 percent higher or lower than the amounts presented in this proceeding." In Docket Number 35428, the commission approved the current nodal surcharge of $0.169 per megawatt-hour (MWh). ERCOT requests interim approval to change the nodal surcharge to $0.38 per MWh. ERCOT requests that the interim nodal surcharge become effective by February 1, 2009, and remain in effect until the commission approves a final nodal surcharge based on review of the ERCOT nodal implementation schedule and budget developed after the commission issues its recommendations based on the cost-benefit analysis study. ERCOT stated that the current surcharge is not sufficient to recover additional nodal implementation costs because it was formulated based on the assumption that nodal implementation activities funded by the nodal surcharge would be complete by January 1, 2009.

Persons who wish to intervene or comment 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. 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 and interventions should reference Docket Number 36412.

ERCOT has posted notice and a copy of its application on its website at http://www.ercot.com/about/governance/legal_notices.html. Interested parties may also access ERCOT's application through the Public Utility Commission's web site at http://www.puc.state.tx.us under Docket No. 36412 - *Application of the Electric Reliability Council of Texas for Approval of a Revised Nodal Market Implementation Surcharge and Request for Interim Relief.*

TRD-200806157
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2008

Notice of ERCOT Request for Interim Relief Regarding Ordering Paragraph Number 2 of the Final Order in Docket Number 31540 Approving Nodal Protocols

Notice is given to the public of a request by the Electric Reliability Council of Texas, Inc. (ERCOT) for interim relief regarding Ordering Paragraph Number 2 of the Final Order in Docket Number 31540 approving Nodal Protocols with the Public Utility Commission of Texas (commission) on November 3, 2008, pursuant to Public Utility Regulatory Act §14.001 and P.U.C. Procedural Rule §22.125.

Docket Style and Number: ERCOT Request for Interim Relief Regarding Ordering Paragraph Number 2 of the Final Order in Docket Number 31540 Approving Nodal Protocols, Docket Number 36345.

The Application: The Electric Reliability Council of Texas, Inc. (ERCOT) filed, pursuant to P.U.C. Procedural Rule §22.125, a request that the commission grant ERCOT interim relief from a prior commission order in Docket Number 31540 regarding the implementation date for the nodal market in the ERCOT region. Ordering Paragraph Number 2 in Docket Number 31540 includes the following directive: "The nodal market created by the protocols as adopted by this order will be implemented by ERCOT no later than January 1, 2009."

ERCOT stated that the commission was made aware, on May 20, 2008, that the nodal market will not open on December 1, 2008, due to critical software deliveries being later than expected and the cascading effects of those late deliveries on program completion. Further, ERCOT stated, since the May 20, 2008 announcement, the delay has been extensively discussed among Market Participants, at Commission Open Meetings, and at ERCOT Board of Directors and committee meetings.

ERCOT requested issuance of an interim order lifting the January 1, 2009, nodal market completion date, in that the interim relief requested by ERCOT will: (1) permit ERCOT to remain in compliance with the commission's order in Docket Number 31540 as it continues to work on nodal market implementation; (2) recognize the reality of the delay in nodal market operations; and (3) enable the commission to revisit the issue of a nodal implementation deadline once the additional facts now being developed--as part of the cost-benefit analysis process and ERCOT's comprehensive nodal program review--are before the Commission.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477 by no later than December 8, 2008. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 36345.

TRD-200806140
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 21, 2008

Public Notice of Request for Comments on Commission's Legal Authority to Adopt Alternative Ratemaking Methodologies

The Public Utility Commission of Texas (commission) is interested in receiving comments in Project Number 36358 - *Consideration of Alternative Ratemaking Mechanisms*.

The commission recognizes that a high quality infrastructure, one that provides highly reliable service, requires the utility to spend significant sums of money on both capital investment and operations and maintenance expense. While mechanisms are currently in place to expedite recovery of costs associated with electric transmission systems, no similar mechanisms exist for the distribution infrastructure facilities of electric utilities.

Under the traditional rate-setting process, which utilizes an historical test year, the commission recognizes that significant regulatory lag can occur between the time investments are made and expenses incurred and the recovery of these expenditures through rates. In addition, the commission is concerned with the magnitude of the expense associated with rate proceedings, much of which is passed on to electric customers. Consequently, the commission is interested in exploring alternative ratemaking methodologies that may have a positive impact on a utility's investment in distribution infrastructure facilities and maintenance expense while maintaining full regulatory oversight of the utility.

Adoption of alternative ratemaking mechanisms would require amendments to existing commission rules or adoption of new rules. Before

determining whether to pursue adoption of the necessary rules to implement such methodologies, the commission requests that interested persons file responses to the following questions regarding the commission's legal authority to adopt alternate ratemaking methodologies for electric utilities:

1. Does the commission have authority to adopt a rule that permits electric utilities to periodically adjust their rates outside of a full, traditional rate proceeding to account for a discrete set of costs, such as additional investment in the utility's distribution infrastructure or distribution operation and maintenance expense?

2. If the answer to question 1 is in the affirmative, what elements, procedural or otherwise, are required by law?

3. Would the periodic adjustment of a utility's rates as contemplated in question 1 constitute an automatic pass-through of costs in violation of PURA §36.201?

4. If the answer to question 3 is in the affirmative, are there actions the commission could take in adjusting a utility's rates, *e.g.*, pre-approval of certain costs or projects, that would not constitute an automatic pass-through of costs?

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 by Tuesday, January 6, 2009. All responses should reference Project Number 36358. This notice is not a formal notice of proposed rulemaking, but the parties' responses to the questions will assist the commission in developing commission policies or determining the necessity for a related rulemaking.

Questions concerning this notice should be referred to Andres Medrano; (512) 936-7285; andres.medrano@puc.state.tx.us in the Legal Division or Darryl Tietjen; (512) 936-7436; darryl.tietjen@puc.state.tx.us in the Rate Regulation Division.

TRD-200806087
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2008

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Stephen F. Austin State University

Notice of Consultant Contract Amendment

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of amendment of the University's contract with consultant Dr. Marianne Schmudde, 1230 Wright Circle #307, Celebration, Florida 34747. The original contract was in an amount not to exceed $45,000, and the Notice of Award was published in the December 29, 2006, issue of the *Texas Register* (31 TexReg 10986). The contract was amended in an amount not to exceed $13,000, excluding travel and per diem in the May 11, 2007, issue of the *Texas Register* (32 TexReg 2729). The contract was further amended to include evaluation of the ENLACE Project beginning on August 27, 2007, and terminating on July 1, 2012, with a total amount not to exceed $24,950, inclusive of travel and per diem, in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8979). The contract was further amended to include evaluation of the project "Consortium for Excellence in Rural Teacher Preparation (CERT-Prep)" beginning on October 1, 2007 and terminating on September 30, 2008, with an automatic renewal of one year, pending availability of grant funding and successful completion of evaluation activities for the initial contract period. This amendment was made for a total not to exceed $17,000, exclusive of travel and per diem in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9870). The contract will be amended to provide CERT Prep services in amount not to exceed $19,000 for a contract period of October 1, 2007 through September 30, 2009.

Documents, films, recording, or reports of intangible results may be presented by the outside consultant. Services will be on an as needed basis.

All inquiries should be directed to Marie Davenport, Coordinator of Project CERT-Prep, Stephen F. Austin State University, P.O. Box 13023, SFA Station, Nacogdoches, Texas 75962; email: davenpormd@sfasu.edu; phone (936) 468-5494.

TRD-200806162
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: November 24, 2008

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Notice of Consultant Contract Renewal

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of renewal of the University's contract with The Pursuant Group, 2600 Technology Drive, Suite 700, Plano, Texas 75074. The original contract was dated October 5, 2006 and was in the sum of $4760. The contract was renewed on September 11, 2007 and was in the sum of $3480. The contract was renewed on April 18, 2008 and was in the sum of $14,771. The contract will be renewed in an additional estimated amount of $3,600.

Documents, films, recording, or reports of intangible results may be required to be presented by the outside consultant. Services are provided on an as-needed basis.

For further information, please call April Smith at (936) 468-2278.

TRD-200806163
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: November 24, 2008

♦ ♦ ♦

Supreme Court of Texas

Order Amending Rule of Judicial Administration 12.7

Misc. Docket No. 08-9165

It is hereby ORDERED that:

1. Pursuant to Section 31(a) of Article V of the Texas Constitution and Section 74.024 of the Texas Government Code, Subdivision 12.7(a)(2) of the Texas Rules of Judicial Administration is amended, as follows.

2. Comments on these revisions may be submitted to the Court in writing on or before January 30, 2009. Comments should be directed to Kennon L. Peterson, Rules Attorney, at P.O. Box 12248, Austin TX 78711, or kennon.peterson@courts.state.tx.us.

3. This rule, with any changes made after public comments are received, takes effect on March 31, 2009.

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 before December 1, 2008; and

d. submit a copy of this Order for publication in the *Texas Register.*

SIGNED AND ENTERED, this 17th day of November, 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

____

David M. Medina, Justice

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Paul W. Green, Justice

____

Phil Johnson, Justice

____

Don R. Willett, Justice

12.7 Costs for Copies of Judicial Records; Appeal of Assessment.

(a) *Cost.* The cost for a copy of a judicial record is either:

(1) the cost prescribed by statute, or

(2) if no statute prescribes the cost, the ~~actual~~ cost~~, as~~ the Office of the Attorney General prescribes by rule ~~defined~~ in the ~~section 111.62, Title 1,~~ Texas Administrative Code~~, not to exceed 125 percent of the amount prescribed by the General Services Commission for providing public information under Title 1, Texas Administrative Code, Sections 111.63, 111.69, and 111.70~~.

Comment to 2008 change: The Attorney General's rule, adopted in accordance with Section 552.262 of the Government Code, is in Section 70.3 of Title 1 of the Texas Administrative Code.

TRD-200806216
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: November 25, 2008

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

www.txdot.gov/about_us/public_hearings_and_meetings/aviation.htm

Or visit **www.txdot.gov**, click on Citizen, click on Public Hearings, and then click on Aviation.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-200806161
Jack Ingram
Associate General Counsel
Texas Department of Transportation
Filed: November 24, 2008

♦ ♦ ♦

Workforce Solutions Brazos Valley Board

Public Notice

Workforce Solutions Brazos Valley Board (WSBVB) routinely issues requests for proposals (RFP)/request for quotes (RFQ) to secure contractors to provide operational, administrative, and workforce development services for the Brazos Valley region.

The WSBVB maintains a bidders' list of all potential bidders who have contacted the WSBVB and requested to be included on the list. The WSBVB is committed to improving the workforce development system in the seven county region, Brazos, Burleson, Grimes, Leon, Madison, Robertson, and Washington by increasing the availability of workforce programs and services.

If you wish to be included on the bidders' list, complete and submit the Pre-Procurement Questionnaire located on our website, www.bvjobs.org or by mail to Pegi Wolbrueck, P.O. Box 4128, Bryan, Texas 77805, by fax to (979) 595-2810, ATTN: PEGI or by email at pwolbrueck@bvcog.org. The following vendor categories are listed on the questionnaire:

- Adaptive Equipment and Services for People with Disabilities

- Attorneys

- Automation equipment and services

- Consultants for services in the areas of Advertisement, Assessments, Baldrige, Marketing, Monitoring, Planners, Procurement and Public Relations

- Management of Childcare Vendors

- Management of Workforce Centers

- Personnel Leasing Agents

- Printing Services

- Public Relations, Marketing and Advertisement

- Services for Workforce Investment Act (WIA) Adult/Dislocated and Youth; Choices; Temporary Assistance for Needy Families (TANF); and Food Stamp Employment and Training

- Training Services (Workforce Board, Board Staff, Workforce Center Staff)

- Administrative Legal Services

Additional questions should be directed to Pegi Wolbrueck at (979) 595-2800.

TRD-200806082
Tom Wilkinson
Executive Director
Workforce Solutions Brazos Valley Board
Filed: November 20, 2008

Public Notice

INVITATION TO APPLY

The Workforce Solutions Brazos Valley Board invites all training providers in Brazos, Grimes, Washington, Burleson, Robertson, Madison, and Leon counties to apply to be Eligible Training Providers as defined by the Texas Workforce Commission.

In order to receive referrals of training, participants from Workforce Solutions Brazos Valley, training programs must be certified. To apply for certification or learn more about the process, please visit the following website:

http://tpcs.twc.state.tx.us

For additional information, please contact Pegi Wolbrueck at: Workforce Solutions Brazos Valley Board, (979) 595-2801, x2011, pwolbrueck@bvcog.org.

TRD-200806083
Tom Wilkinson
Executive Director
Workforce Solutions Brazos Valley Board
Filed: November 20, 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 Affected***. 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).