Texas Register

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Steven Rickman
8th Grade

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

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

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THE GOVERNOR

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

Appointments

Appointments for September 28, 2005

Appointed to the Texas Commission on Law Enforcement Officer Standards and Education for a term to expire August 30, 2011, Allan D. Cain of Carthage (replacing William Jackson of Arlington whose term expired).

Appointed to the Texas Commission on Law Enforcement Officer Standards and Education for a term to expire August 30, 2011, Charles R. Hall of Midland (Reappointment).

Appointed to the Texas State University System Board of Regents, for a term to expire February 1, 2011, Robert Greg Wilkinson of Dallas (replacing James Haley of Texas City whose term expired).

Appointed to the State Commission on Judicial Conduct for a term to expire November 19, 2009, Ann Appling Bradford of Midland (replacing Gilbert Herrera who no longer qualifies to serve).

Appointed to the Texas Parks and Wildlife Commission for a term to expire February 1, 2011, Mark Bivins of Amarillo (replacing Alvin Henry whose term expired).

Appointed as Judge of the 428th Judicial District Court, Hays County, pursuant to SB 1189, 79th Legislature, Regular Session, for a term until the next General Election and until his successor shall be duly elected and qualified, William R. "Bill" Henry of San Marcos.

Appointed as Justice of the 11th Court of Appeals, Place 2, for a term until the next General Election and until his successor shall be duly elected and qualified, Rick Gene Strange of Midland. Mr. Strange is replacing Justice Jim Wright who was appointed as Chief Justice.

Appointed as Chief Justice of the 11th Court of Appeals, for a term until the next General Election and until his successor shall be duly elected and qualified, Jim R. Wright of Eastland. Justice Wright is replacing Chief Justice William Arnot who resigned.

Appointed as Judge of the 424th Judicial District Court, Blanco, Burnet, Llano and San Saba Counties, pursuant to SB 1189, 79th Legislature, Regular Session, for a term until the next General Election and until his successor shall be duly elected and qualified, Daniel H. Mills of Johnson City.

Appointed as Judge of the Criminal District Court #6, Dallas County, pursuant to SB 1189, 79th Legislature, Regular Session, for a term until the next General Election and until his successor shall be duly elected and qualified, Daniel Patrick Clancy of Dallas.

Appointed as Judge of the Criminal District Court #7, Dallas County, pursuant to SB 1189, 79th Legislature, Regular Session, for a term until the next General Election and until his successor shall be duly elected and qualified, Livia Liu of Dallas.

Rick Perry, Governor

TRD-200504363

THE ATTORNEY GENERAL

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

Request for Opinion

RQ-0398-GA

Requestor:

Mr. Murray Walton

Executive Director

Texas Structural Pest Control Board

Post Office Box 1927

Austin, Texas 78767-1927

Re: Whether the Structural Pest Control Board may require a license for employees of an apartment building to apply pesticides to the apartment landscape (RQ-0398-GA)

Briefs requested by October 28, 2005

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

TRD-200504495
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: October 5, 2005

Opinions

Opinion No. GA-0358

The Honorable Jane Nelson, Chair

Committee on Health and Human Services

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether the legislature, in the absence of a constitutional amendment, may authorize the creation of county gaming districts on a local option basis to administer a state video lottery (RQ-0332-GA)

S U M M A R Y

The legislature may not, absent a constitutional amendment, authorize the creation of county gaming districts on a local option basis that would then permit the Texas Lottery Commission to administer a video lottery in those counties.

Opinion No. GA-0359

The Honorable Mark E. Price

San Jacinto County Criminal District Attorney

1 State Highway 150, Room 21

Coldspring, Texas 77331

Re: Whether a county may repair a subdivision or neighborhood road, both of which are open to the public, or a private road, and if so whether the roads thereby will become county roads (RQ-0328-GA)

S U M M A R Y

San Jacinto County, with a population of approximately 22,000, may repair a subdivision road and may accept donated road material for the repairs. The County must comply with Transportation Code chapter 253's procedural requirements, however, and the repaired road will become part of the county road system.

If a neighborhood road has been accepted into the county road system under chapter 232 of the Local Government Code, the county must maintain the road. If the county repaired the neighborhood road, which is also a subdivision road, consistently with chapter 253, Transportation Code, the road has become part of the county road system by virtue of the repairs.

The County may not repair a private road.

Opinion No. GA-0360

The Honorable Mark E. Price

San Jacinto County Criminal District Attorney

1 State Highway 150, Room 21

Coldspring, Texas 77331

Re: Whether the San Jacinto County Auditor may serve as the accountant for the San Jacinto County Emergency Services District (RQ-0329-GA)

S U M M A R Y

Neither article XVI, section 40 of the Texas Constitution nor the common-law doctrine of incompatibility bars a county auditor from serving as the accountant for an emergency services district, assuming the accountant is an at-will district employee and not a district officer.

An emergency services district, a political subdivision of the state created under and governed by chapter 775 of the Health and Safety Code, is not a business entity under chapter 171 of the Local Government Code, and chapter 171 does not affect a county auditor's employment with such a district.

The oath of office set forth in section 84.007 of the Local Government Code requires a county auditor to state in writing that he or she "will not be personally interested in a contract with the county." TEX. LOC. GOV'T CODE ANN. §84.007(b)(2) (Vernon 1999). This provision does not apply to a contract between the county and another local government such as an emergency services district.

A certified public accountant ("CPA") is subject to rules of the Texas State Board of Public Accountancy concerning ethical conduct for accountants. The application of these rules to a CPA who serves as county auditor and as an accountant for an ESD is a matter for the Texas State Board of Public Accountancy in the first instance. The district judges who appointed the county auditor have statutory authority to remove the county auditor for official misconduct or incompetence. The county auditor's work may be audited by an outside accountant in certain circumstances.

Opinion No. GA-0361

The Honorable Tim R. Taylor

Titus County Attorney

100 West First Street

Mount Pleasant, Texas 75455

Re: Whether a county election commission, created under chapter 31 of the Election Code, is a governmental body subject to the Open Meetings Act, Government Code chapter 551 (RQ-0331-GA)

S U M M A R Y

Because a county election commission is not a county commissioners court, a committee thereof, or a deliberative body with rulemaking or quasi-judicial power, it is not a governmental body for purposes of Government Code section 551.001(3) as a matter of law. Accordingly, a county election commission need not comply with the Open Meetings Act's requirements.

Opinion No. GA-0362

The Honorable Carlos I. Uresti

Chair, Committee on Government Reform

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a provision of a home-rule city charter regulating dual office holding is inconsistent with article XVI, section 40 of the Texas Constitution to the extent the charter provision prohibits a municipal judge from serving as justice of the peace (RQ-0335-GA)

S U M M A R Y

A provision of a home-rule city charter regulating dual office holding that prohibits a municipal judge from serving as justice of the peace is not inconsistent with article XVI, section 40 of the Texas Constitution.

Opinion No. GA-0363

The Honorable Jeff Wentworth

Chair, Committee on Jurisprudence

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether a city that has not established a residence homestead exemption under article VIII, section 1-b of the Texas Constitution is authorized to establish the property tax limitation under article VIII, section 1-b(h) (RQ-0336-GA)

S U M M A R Y

A city is authorized to establish the property tax limitation under article VIII, section 1-b(h) of the Texas Constitution even if it has not previously enacted a residence homestead exemption under article VIII, section 1-b of the Texas Constitution.

Opinion No. GA-0364

The Honorable Will Hartnett

Chair, Committee on the Judiciary

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether constables may receive, in addition to their salaries, fees for delivering notices required by Property Code section 24.005 (RQ-0337-GA)

S U M M A R Y

Section 154.005(d) of the Local Government Code permits a constable to retain in addition to his or her salary a fee for delivering a notice to vacate required by section 24.005 of the Property Code. Article XVI, section 61 of the Texas Constitution precludes a constable from retaining any fee of office in addition to his or her salary. That prohibition does not apply to a fee for delivering a notice to vacate required by section 24.005 of the Property Code, which is not a fee of office.

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

TRD-200504493
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: October 5, 2005

TEXAS ETHICS COMMISSION

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

Ethics Advisory Opinion

EAO-464. The Texas Ethics Commission has been asked whether a legislative advertising disclosure statement is required to be included on segments of radio broadcasts and on articles that are available on a website and that are included in an e-mail newsletter. (AOR-525)

SUMMARY

A radio segment supporting or opposing legislation that is part of a communication that is broadcast in return for consideration must include a legislative advertising disclosure statement. Articles supporting or opposing legislation that appear on a website or that are made by e-mail are not required to include a legislative advertising disclosure statement.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes:

(1) Chapter 572, Government Code;

(2) Chapter 302, Government Code;

(3) Chapter 303, Government Code;

(4) Chapter 305, Government Code;

(5) Chapter 2004, Government Code;

(6) Title 15, Election Code;

(7) Chapter 36, Penal Code; and

(8) Chapter 39, Penal Code.

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

TRD-200504334
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: September 28, 2005

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 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 133. FORMS

7 TAC §133.24

The Texas State Securities Board adopts by reference on an emergency basis new §133.24, a form concerning the Hurricane Rita exemption notice.

The new form enables dealers, agents, investment advisers, or investment adviser representatives effecting securities transactions with preexisting clients who have been displaced as a result of Hurricane Rita to file for an exemption from registration. This form must be filed by dealers, agents, investment advisers, and investment adviser representatives before conducting transactions permitted by emergency new §139.24. The rule provides an exemption for dealers, agents, investment advisers, or investment adviser representatives effecting securities transactions with preexisting clients who have been displaced as a result of Hurricane Rita. Although §139.24 requires the filing of Form 133.24, no registration fee is required.

The form allows affected dealers, agents, investment advisers, or investment adviser representatives to continue transacting business with their preexisting clients who were displaced by the disaster without registration.

Form 133.24 is adopted in response to the disaster proclamation issued by Governor Rick Perry on September 20, 2005, in accordance with §418.014 of the Texas Government Code. As provided in §418.016, all rules and regulations that may inhibit or prevent prompt response to a threat are suspended for the duration of the incident. The Texas State Securities Board is taking emergency action pursuant to the Texas Government Code, §551.125.

Statutory authority: Texas Civil Statutes, Articles 581-5.T and 12.C. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, and investment adviser representative registration exemptions by rule.

Cross reference to Statute: Texas Civil Statutes, Article 581-5 and Article 581-12.

§133.24. Hurricane Rita Exemption Notice.

The State Securities Board adopts by reference the Hurricane Rita exemption notice form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 and at www.ssb.state.tx.us.

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 September 28, 2005.

TRD-200504343
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective Date: September 28, 2005
For further information, please call: (512) 305-8303

CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

7 TAC §139.24

The Texas State Securities Board adopts on an emergency basis new §139.24, concerning an exemption for a dealer, agent, investment adviser, or investment adviser representative effecting securities transactions with preexisting clients who have been displaced as a result of Hurricane Rita. The new rule adopts by reference new Form 133.24, which must be filed by dealers, agents, investment advisers, and investment adviser representatives before conducting transactions allowed by this exemption.

The rule provides an exemption from registration for the dealer, agent, investment adviser, or investment adviser representative who (1) has been displaced by Hurricane Rita and is temporarily located in Texas while doing business with his or her preexisting clients who live outside Texas and/or (2) is effecting securities transactions solely with preexisting clients who have been displaced into Texas as a result of the hurricane. The rule is intended to provide registration relief so that dealers, agents, investment advisers, and investment adviser representatives may continue to transact business with their preexisting clients who were displaced by the disaster.

Affected dealers, agents, investment advisers, and investment adviser representatives may continue to transact business with their preexisting clients who were displaced by the disaster without registration. Although Hurricane Rita Exemption Notice Form 133.24 must be filed, no registration fee is required. The rule is temporary and expires January 6, 2006, unless extended by the State Securities Board.

The rule is in response to the disaster proclamation issued by Governor Rick Perry on September 20, 2005, in accordance with §418.014 of the Texas Government Code. As provided in §418.016, all rules and regulations that may inhibit or prevent prompt response to a threat are suspended for the duration of

the incident. The State Securities Board is taking emergency action pursuant to the Texas Government Code, §551.125.

Statutory authority: Texas Civil Statutes, Articles 581-5.T and 12.C. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, and investment adviser representative registration exemptions by rule.

Cross reference to Statute: Texas Civil Statutes, Article 581-5 and Article 581-12.

§139.24. Exemption for Dealer, Agent, Investment Adviser, or Investment Adviser Representative Effecting Securities Transactions with Preexisting Clients Who Have Been Displaced as a Result of Hurricane Rita.

(a) The State Securities Board, pursuant to the Texas Securities Act, §5.T and §12.C, exempts dealers, agents, investment advisers, and investment adviser representatives from the registration requirements of the Texas Securities Act, when such persons comply with subsections (b) - (g) of this section and are conducting a transaction with a client who is present in this state and with whom the dealer, agent, investment adviser, or investment adviser representative has a preexisting client relationship.

(b) The dealer, agent, investment adviser, or investment adviser representative at all times is registered or notice filed (if required) and in good standing with the home state from which they or their client has been displaced.

(c) The dealer, agent, investment adviser or investment adviser representative:

(1) has been displaced by Hurricane Rita and is temporarily located in Texas while doing business with his or her preexisting clients who reside outside of Texas, and/or

(2) is effecting securities transactions solely with preexisting clients who have been displaced into Texas as a result of Hurricane Rita.

(d) The dealer, agent, investment adviser, or investment adviser representative is not otherwise in violation of the Texas Securities Act or the securities laws in any other jurisdiction in which they are registered or notice filed.

(e) The dealer, agent, investment adviser or investment adviser representative shall file Form 133.24 prior to conducting a transaction allowed by this section.

(f) The Texas Securities Act prohibits fraud or fraudulent practices in connection with the offer for sale or the rendering of investment advice covered by this exemption.

(g) Any solicitation of new clients is subject to the registration requirements of the Texas Securities Act.

(h) Any other non-exempt securities-related activity will constitute unregistered activity and be subject to both state enforcement action and civil liability.

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 September 28, 2005.

TRD-200504357

Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective Date: September 28, 2005
For further information, please call: (512) 305-8303

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 7. GAS SERVICES DIVISION

SUBCHAPTER B. SPECIAL PROCEDURAL RULES

16 TAC §7.46

The Railroad Commission of Texas adopts, on an emergency basis, new 16 Texas Administrative Code §7.46, relating to Relief for Victims of Hurricane Katrina. This emergency rule is effective immediately upon filing with the Secretary of State and will be in effect for 120 days. In support of the emergency adoption of new §7.46, the Commission makes the following findings:

1. On Monday August 29, 2005, Hurricane Katrina struck the Gulf Coast of the United States causing significant damage in Louisiana, Mississippi and Alabama. Many of the residents of those states displaced by Hurricane Katrina have been evacuated or have relocated to Texas.

2. The recent destruction of large areas of the U.S. Gulf Coast by Hurricane Katrina has caused tens of thousands of displaced residents to be evacuated to Texas. The Federal Emergency Management Agency (FEMA) has registered over 147,000 heads of households who are now situated in Texas. Many of these evacuees may not be able to return to their homes for an indefinite length of time.

3. On September 1, 2005, Governor Perry issued a disaster proclamation certifying that Hurricane Katrina has created emergency conditions for the people of Texas.

4. Many of the evacuees will need to find semi-permanent housing. The Internal Revenue Service has granted a waiver for the use of Housing Tax Credit units to be used for transitional housing for evacuees, with approximately 18,000 units having been identified so far. In addition, the state of Texas is working with the Texas Apartment Association to identify vacant units, which evacuees will be able to pay for with vouchers from the Federal Emergency Management Agency (FEMA).

5. A potential hurdle for evacuees trying to transition from shelters to more permanent housing will be deposits for utility services. Under the Commission's current rules, a deposit for residential gas service can equal two months of service. Many evacuees who might otherwise have had the means to pay a deposit likely have been cut off from bank accounts and other financial resources. Many of those on fixed incomes likely have been temporarily cut off from retirement and other benefits such as Social Security and Veteran's benefits. Finally, many of the evacuees are low-income and simply do not have the financial means to pay a service deposit now that they are homeless and unemployed.

6. Hurricane Katrina is one of the largest natural disasters in U.S. history. Texas has been made eligible for federal disaster aid from FEMA to assist the state and local governments in their efforts to assist evacuees. It is clear that even under the best of conditions that the shelters cannot be used to house people on a long-term basis.

7. Waiving the deposit requirements for gas utility service at this time and allowing evacuees to establish satisfactory credit simply by demonstrating their status as a victim of this disaster would remove a significant hurdle for individuals moving out of the emergency shelters and therefore is a reasonable and necessary step to help these stranded people get out of the shelters and regain control of their lives.

8. Because Texas Utilities Code, §104.005, provides that a gas utility may not charge or receive from a person a lesser compensation for a service than the compensation prescribed by the applicable schedule of rates, and a person may not knowingly receive or accept a service from a gas utility for a lesser compensation than that prescribed by the schedules, it is necessary and appropriate for the Commission to adopt a rule authorizing utilities to deviate from the deposit requirements and amounts set forth in their tariffs, to the extent permitted in the emergency rule.

9. Many of the persons who have evacuated to Texas may have limited means of identifying themselves as having been displaced from their homes due to Hurricane Katrina. Accordingly, it is the Commission's intent that, in determining whether a person has evacuated to Texas as a result of Hurricane Katrina, gas utilities recognize a driver's license from Alabama, Louisiana, and Mississippi, or documentation of a person's status as a claimant of benefits offered by FEMA; the American Red Cross or other recognized, legitimate private relief agency; or a state or local jurisdiction or other public aid agency as sufficient to obtain the benefits of the emergency rule.

10. It is the intent of the Commission that this emergency rule, 16 Texas Administrative Code §7.46, be effective for a period of 120 days, from September 27, 2005, the date of adoption and of filing with the Office of the Secretary of State, through January 24, 2006.

The Commission adopts new §7.46 on an emergency basis pursuant to Texas Government Code, §2001.034, which authorizes a state agency to 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, and states in writing the reasons for its findings; Texas Government Code, §2001.036, which provides that if a state agency finds that an expedited effective date is necessary because of imminent peril to the public health, safety, or welfare, and subject to applicable constitutional or statutory provisions, a rule is effective immediately on filing with the secretary of state; Texas Utilities Code, §102.001, which gives the Railroad Commission exclusive original jurisdiction over the rates and services of a gas utility that distributes natural gas or synthetic natural gas in areas outside a municipality and areas inside a municipality that surrenders its jurisdiction to the Railroad Commission, and over the rates and services of a gas utility that transmits, transports, delivers, or sells natural gas or synthetic natural gas to a gas utility that distributes the gas to the public; Texas Utilities Code, §102.151, which requires gas utilities to file schedules showing all rates for a gas utility service, product, or commodity offered by the gas utility and each rule or regulation that relates to or affects a rate of the gas utility or a gas utility service, product, or commodity furnished by the gas utility; Texas Utilities Code, §104.001, which vests the Railroad Commission with all the authority and power of this state to ensure compliance with the obligations of gas utilities in Texas Utilities Code, Title 3, Subtitle A, and which authorizes the Railroad Commission, as a regulatory authority, to establish and regulate the rates of a gas utility and to adopt rules for determining the classification of customers and services and the applicability of rates; Texas Utilities Code, §104.005, which prohibits a gas utility from directly or indirectly charging, demanding, collecting, or receiving from a person a greater or lesser compensation for a service provided or to be provided by the utility than the compensation prescribed by the applicable schedule of rates filed under Texas Utilities Code, §102.151; and Texas Utilities Code, §104.251, which requires gas utilities to furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable.

Cross reference to statute: Texas Government Code, Chapter 2001, and Texas Utilities Code, Chapters 102 and 104.

Cross reference to sections affected: Texas Government Code, §2001.034 and §2001.036, and Texas Utilities Code, §§102.001, 102.003, 102.151, 104.001, 104.005, and 104.251.

Issued in Austin, Texas, on September 27, 2005.

§7.46. Relief for Victims of Hurricane Katrina.

(a) The benefits of this rule are intended for an applicant for residential gas utility service who resided within affected areas within federally declared disaster areas in Louisiana, Mississippi, or Alabama, and who has been determined to be a victim of Hurricane Katrina as evidenced by proof of:

(1) prior residency within one of these affected areas;

(2) application for or receipt of disaster assistance from the Federal Emergency Management Agency (FEMA); the American Red Cross or other recognized, legitimate private relief agency; or a state or local jurisdiction or other public aid agency related to damages suffered in one of these affected areas; or

(3) residing or having resided in a designated emergency shelter within Texas or one of these affected areas as a result of Hurricane Katrina.

(b) In determining whether an applicant qualifies as a victim of Hurricane Katrina for purposes of establishing satisfactory credit, the utility shall accept:

(1) the applicant's driver's license from Alabama, Louisiana, and Mississippi; or

(2) any documentation submitted by the applicant from a federal, state, or local government assistance agency or the American Red Cross or another recognized, legitimate private relief agency that substantiates one of the conditions listed in subsection (a) of this section.

(c) Provisions to the contrary in this chapter and in tariffs subject to Railroad Commission jurisdiction notwithstanding, each gas utility shall:

(1) notify all applicants for residential service of this provision; and

(2) waive any requirement that an applicant who meets the standards and requirements set forth in subsections (a) and (b) of this section make or pay any deposit for residential gas utility service.

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 September 27, 2005.

TRD-200504302
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective Date: September 27, 2005
For further information, please call: (512) 475-1295

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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 §15.13

The General Land Office adopts, on an emergency basis, new §15.13, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures in the aftermath of Hurricane Rita. The General Land Office recognizes that the following jurisdictions with authority to issue beachfront construction certificates and dune protections permits have areas where structures and public infrastructure are in need of emergency stabilization and repair: Jefferson County, Galveston County, the City of Galveston, the City of the Village of Jamaica Beach, Brazoria County, the Village of Surfside Beach, and the Village of Quintana Beach This emergency rule is necessary to help local governments prevent imminent peril to the public health, safety, and welfare, and permit the repair of residential structures necessary to maintain habitability.

The section is adopted on an emergency basis due to the imminent peril to public health, safety and welfare caused by high winds, storm surge, high tides and erosion resulting from Hurricane Rita. As a result of Hurricane Rita, September 23-25, 2005, hurricane and tropical storm winds, storm surge, extreme tides and wave action caused substantial property damage, coastal flooding and erosion. Hurricane Rita made landfall at 3 a.m. on Saturday, September 24, 2005, near Sabine Pass, Texas. Its widespread destructive force impacted the upper Texas coast. The local jurisdictions listed above experienced loss in elevation of beach sand. The structural integrity of many houses have been impacted as a result of these natural forces.

The General Land Office staff recognized the need for an emergency rule as Hurricane Rita approached the Texas coast, and conferred with local government officials. The General Land Office has determined the necessity for an emergency rule that allows emergency stabilization and repair of structures and provides for temporary suspension of the permit and certificate application requirements for these emergency stabilization and repair techniques and methods, as well as other hazard mitigation measures.

Emergency §15.13 provides procedures and requirements for issuance of authorization to undertake emergency stabilization and repairs of structures impacted by Hurricane Rita. The emergency rule is applicable only to Jefferson County, Galveston County, the City of Galveston, the City of the Village of Jamaica Beach, Brazoria County, the Village of Surfside Beach, and the Village of Quintana Beach. Section 15.13(b) provides that this section shall be effective for 120 days, and may be extended by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare. Section 15.13(c) provides definitions applicable to this section. Section 15.13(d) allows the local government to issue authorizations for emergency stabilization and repair of residential structures as necessary to eliminate the danger and threat to public health, safety, and welfare if the local government determines that the residential structure appears to be located wholly or partially seaward of the line of vegetation solely because of the effects of Hurricane Rita (or Hurricanes Katrina and Rita in the Village of Surfside Beach) and the local government provides a written statement to that effect with the written record described in subsection (f). Section 15.13(e) provides that the normal permit process shall not apply to emergency authorizations, and that emergency authorizations are valid for no more than six months from issuance. Section 15.13(f) provides that the local government is required to maintain a written record of the names and addresses of property owners who have been authorized to undertake emergency stabilization and repair actions. They are also required to maintain a written record of the specific activities that have been authorized, including pictures of the structure before and after the repairs are completed. Section 15.13(g) provides requirements and limitations with regard to emergency authorizations by the local government of emergency stabilization and repair. Section 15.13(h) provides additional limitations with regard to structures located on the public beach, and requirements related to the placement of beach quality sand. Except as permitted under §15.12, a local government may not authorize emergency stabilization and repair under this section for a house that is subject to a pending enforcement action under this subchapter, the Open Beaches Act (Texas Natural Resources Code, Chapter 61), or the Dune Protection Act (Texas Natural Resources Code, Chapter 63). Section 15.13(i), (j), (k) and (l) provide additional limitations and prohibitions related to the repair of hard structures, septic and sewage systems, the placement of materials on the public beach, and the removal of beach debris.

Under emergency §15.13(g), a local government may permit the repair of a structure that appears to be partially or wholly seaward of the line of vegetation; however, a local government is prohibited from authorizing the following: repairing or constructing a slab of concrete or other impervious material; repairing or constructing an enclosed space, including a space with breakaway walls, below the base flood elevation, as identified on the pertinent community's flood insurance rate map, and seaward of the line of vegetation; increasing the footprint of the structure; repairing a structure without a functioning septic system or sewer connection as determined by the local government or the Texas Commission on Environmental Quality (TCEQ), unless the structure's septic system may be repaired as provided in §15.13(j); repairing a structure previously built, repaired, or renovated in violation of the Land Office's beach/dune rules or the local government's dune protection and beach access plan or without an approved certificate or permit; or constructing, repairing, or maintaining an erosion response structure. While the emergency rule prohibits the repair or construction of a slab or

other impervious surface of concrete or other impervious materials seaward of the line of vegetation, the emergency rule does not require that an owner remove an existing slab or other impervious surface when no repairs to the slab or other impervious surface is proposed. A local government may authorize the repair of a septic system landward of the line of vegetation if the system complies with the rules of the TCEQ and the local government governing on-site sewage facilities.

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

The new section is adopted on an emergency basis under the Texas Natural Resources Code §§63.121, 61.011, and 61.015(b), which provide the General Land Office with the authority to: identify and protect critical dune areas; preserve and enhance the public's right to use and have access to and from Texas' public beaches; protect the public easement from erosion or reduction caused by development or other activities on adjacent land; and other measures needed to mitigate for adverse effects on access to public beaches and the beach/dune system. The new section is also adopted on an emergency basis pursuant to the Texas Natural Resources Code §33.601, which provides the General Land Office with the authority to adopt rules on erosion, and the Texas Water Code §16.321, which provides the General Land Office with the authority to adopt rules on coastal flood protection. Finally, the new section is adopted on an emergency basis pursuant to Texas Government Code §2001.034, which authorizes the adoption of a rule on an emergency basis without prior notice and comment based upon a determination of imminent peril to the public health, safety or welfare.

§15.13. Emergency Provisions for Stabilization and Repair of Damaged Residential Structures.

(a) Purpose. The purpose of this section is to allow a local government to grant to a property owner the ability immediately to undertake emergency stabilization and repair of a residential structure damaged as the result of Hurricane Rita.

(b) Applicability. This section applies only to structures located in Jefferson County, Galveston County, the City of Galveston, the City of the Village of Jamaica Beach, Brazoria County, the Village of Surfside Beach, and the Village of Quintana Beach, Texas. This section shall be in effect for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare.

(c) Definitions. The following words and terms, as used in this section, shall have the following meanings:

(1) The Code--The Texas Natural Resources Code.

(2) Habitable--The condition of the premises which permits the inhabitants to live free of serious threats to health and safety.

(3) House--A single or multi-family structure that serves as living quarters for one or more persons or families.

(4) Emergency repair--Those immediate response actions that must be undertaken to render a structure habitable or to prevent further damage.

(5) Emergency stabilization--Those immediate response actions that must be undertaken to stabilize a residential structure that is subject to imminent collapse or substantial damage as a result of erosion or undermining caused by waves or currents of water exceeding normally anticipated cyclical levels.

(d) Local government authorization. The local governments with jurisdiction to issue dune protection permits and beachfront construction certificates may, in accordance with this section, authorize emergency stabilization and repair of a residential structure damaged by Hurricane Rita. All authorizations issued under this section must otherwise be in accordance with applicable state and local law. The local government is responsible for assessing damage to such structures, determining whether the structures are eligible for approval of emergency stabilization and repair, and determining appropriate emergency stabilization and repair procedures. If a house appears to be located wholly or partially seaward of the line of vegetation solely because of the effects of Hurricane Rita (or Hurricanes Katrina and Rita in the Village of Surfside Beach) and the local government provides a written statement to that effect with the written record described in subsection (f) of this section, the local government may only authorize emergency stabilization and repair as necessary to eliminate the danger and threat to public health, safety, and welfare as permitted in subsections (g), (h), and (j) of this section. Any proposed stabilization and repair method or technique must comply with the standards provided in this section and §15.6(e) and (f) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards).

(e) Procedure. The permit and certificate application requirements of §15.3(s)(4) of this title (relating to Administration) are not applicable to the emergency stabilization and repair of residential structures under this rule. However, all property owners eligible to undertake emergency stabilization efforts and repair must receive prior approval for such actions from the local government officials responsible for approving such actions. Any action that is not necessary for the emergency stabilization and repair of residential structures will require a permit and/or certificate before such action is undertaken. An authorization issued by a local government under this section shall be valid for no more than 6 months from the date of issuance. A local government shall not renew an authorization issued under this section.

(f) Written Record. The local government authorizing emergency stabilization and repair of residential structures shall compile and maintain a record of the names and addresses of the property owners that receive such authorization. For each authorization, the local government must maintain a written record of the actions that it authorized, including pictures of the structure before and after completion of the authorized activities, and will make such record available for inspection by the General Land Office upon request. Within one week of the expiration of this rule, the local government shall submit to the General Land Office copies of the complete written record of actions authorized under this section.

(g) Authorized Repairs. The local government may authorize emergency stabilization and repair of a residential structure only if the local government determines that the proposed action:

(1) is solely to make the house habitable or prevent further damage, including reconnecting the house to utilities;

(2) does not increase the footprint of the house;

(3) does not include the use of impervious material, including but not limited to concrete or fibercrete, seaward of the natural line of vegetation;

(4) does not include the construction of an enclosed space below the base flood elevation and seaward of the natural line of vegetation;

(5) does not include the repair, construction, or maintenance of an erosion response structure seaward of the natural line of vegetation;

(6) does not occur seaward of mean high water; and

(7) does not include construction underneath, outside or around the house other than for reasonable access to the house.

(h) Repair of existing structures on the public beach.

(1) A local government may grant authorization in accordance with this section for emergency stabilization of a structure that encroaches or may encroach on the public beach, but only to the limited extent necessary to prevent an immediate threat to public health, safety, and welfare.

(2) A local government may grant authorization in accordance with this section for emergency repair of a residential structure that encroaches or may encroach on the public beach, but only if the structure is:

(A) a house;

(B) not in imminent danger of collapse or other imminent threat to public health and safety; and

(C) is not subject to a pending enforcement action under this subchapter, the Open Beaches Act (Texas Natural Resources Code, Chapter 61), or the Dune Protection Act (Texas Natural Resources Code, Chapter 63). An enforcement action includes a pending suit in district court or an active referral of a matter for enforcement to the attorney general or other public prosecutor; provided, that repairs may be authorized under §15.12 of this title (relating to Temporary Order Issued by the Land Commissioner) if that section applies.

(3) Beach-quality sand may be placed on the lot in the area twenty feet seaward of a structure where necessary to prevent further erosion due to wind or water. The beach-quality sand must remain loose and cannot be placed in bags. Such actions are authorized in situations where protection of the land immediately seaward of a structure is required to prevent foreseeable undermining of habitable structures in the event of such erosion.

(i) The local government is not authorized under this rule to allow the use of concrete or the construction or repair of bulkheads or hard protective structures.

(j) Repair of sewage or septic systems. If the Texas Commission on Environmental Quality or its designated local authority, the Department of State Health Services, or a local health department has made a determination that a sewage or septic system located on or adjacent to the public beach poses a threat to the health of the occupants of the property or public health, safety or welfare, and requires removal of the sewage or septic system, the sewage or septic system shall be located in accordance with §15.5(b)(1) of this title (relating to Beachfront Construction Standards) and §15.6(b) and (e)(1) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards).

(k) Prohibitions. This emergency rule does not authorize the placement of materials on the public beach except in conjunction with authorized emergency stabilization and repair of residential structures.

(l) Removal of beach debris. Beach debris moved by wind or water can threaten Gulf-fronting properties. The local government, therefore, shall coordinate with the Texas Department of Emergency Management, the Texas General Land Office and property owners to remove debris such as pilings, concrete and garbage from the public beach as soon as possible.

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 September 26, 2005.

TRD-200504286
Trace Finley
Policy Director
General Land Office
Effective Date: September 26, 2005
Expiration Date: January 23, 2006
For further information, please call: (512) 475-1859

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 23. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT (EPSDT) MEDICAL PHASE

The Texas Health and Human Services Commission (HHSC) proposes to repeal 1 TAC §355.8443 (Maximum Payment) and 1 TAC §355.8445 (Explanation of Maximum Payment Terms) regarding the payment for Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program (EPSDT-CCP) dental services. HHSC further proposes to repeal the current version of §355.8441 and proposes a new version of §355.8441, concerning the reimbursement methodologies for EPSDT-CCP services, also known as Texas Health Steps-CCP (THSteps-CCP) services, in Chapter 355, Reimbursement Rates.

Background and Purpose

The three rules proposed for repeal all relate to providers and reimbursement for Texas Health Steps-CCP (THSteps-CCP). THSteps-CCP provides medically necessary care to children through age 21 who are enrolled in Medicaid. The newly proposed §355.8441 consolidates the dental reimbursement information that had previously been in §355.8443 and §355.8445 with the reimbursement information for other THSteps-CCP providers that had been in the previous version of §355.8441.

HHSC proposes that the title of the new rule at §355.8441 be "Reimbursement Methodologies for Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program (EPSDT-CCP) Services" to better describe the purpose and content of the new rule.

Most of the differences between the rules proposed for repeal and the new proposed version of §355.8441 are intended to clarify current reimbursement methodologies for services, to remove program policy wording that is not appropriate for reimbursement methodology rules, and to provide additional information regarding how various providers are reimbursed for each type of service. There are, however, three sets of substantive changes to these reimbursement methodology rules that result in an estimated fiscal impact to THSteps-CCP.

The first set of substantive changes is to the reimbursement methodology for private duty nursing (PDN) services. This set of changes adds the provision of reimbursement for PDN services through delegation by a registered nurse (RN) to a qualified aide, which provides an additional and cost-effective resource for the delivery of PDN services. It also allows a different fee for PDN services delivered by a home health agency (HHA) licensed vocational nurse/licensed practical nurse (LVN/LPN) from the fee for PDN services delivered by a HHA RN. Finally, this set of changes allows for the reimbursement of assessment services delivered by RNs, which have not previously been reimbursable.

The second set of substantive changes is to the reimbursement methodology for Medicare-certified outpatient rehabilitation facilities known as comprehensive outpatient rehabilitation facilities (CORFs) and outpatient rehabilitation facilities (ORFs). CORFs and ORFs are currently reimbursed by the Texas Medicaid Program for THSteps-CCP physical therapy, occupational therapy, and speech-language-pathology services. The current CORF and ORF reimbursement is based on reasonable costs. CORFs and ORFs are reimbursed at an interim payment rate based on the provider's most recent Medicaid cost settlements. The interim rate is applied to the provider's billed charges to determine the provider's allowed amount per claim detail. Any applicable adjustments are then applied to result in the actual payment to the provider. HHSC proposes to reimburse CORFs and ORFs based on a prospective payment system (PPS) fee schedule, using the same methodology used for physicians and certain other practitioners at 1 TAC §355.8085, which allows for resource-based fees or access-based fees.

The third set of substantive changes is to the reimbursement methodology for THSteps-CCP therapy services delivered by HHAs. Currently, the Texas Medicaid Program reimburses HHAs for all professional services delivered, excluding PDN services, based on statewide visit rates. HHSC proposes to reimburse HHAs for THSteps-CCP therapies using a PPS fee schedule based on actual face-to-face time spent with each client and in accordance with 1 TAC §355.8085.

Section-by-Section Summary

HHSC proposes that the title of §355.8441 be changed from "Early and Periodic Screening, Diagnosis and Treatment Comprehensive Care Program Providers (EPSDT-CCP)" to "Reimbursement Methodologies for Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program (EPSDT-CCP) Services." This change better describes the information provided within the rule.

The changes proposed for counseling and psychotherapy services list the various providers of these services under THSteps-CCP and reference the existing Medicaid reimbursement methodology applicable to each provider type. While licensed marriage and family therapists (LMFTs) are providers of these services, the previous version of the rule did not

include them. This paragraph also corrects the licensure title of licensed master social workers-advanced clinical practitioners to licensed clinical social workers (LCSWs). The program policy wording included in the previous version regarding freestanding psychiatric hospitals and facilities has been removed.

The changes proposed to the reimbursement methodology of expendable medical supplies and durable medical equipment clarify that the reimbursement methodologies for these services under THSteps-CCP are the same as the reimbursement methodologies for similar services under Texas Medicaid home health services at 1 TAC §355.8021.

The changes to the reimbursement methodology for PDN services add the provision of reimbursement for PDN services delegated by an RN to a qualified aide in accordance with the licensure standards promulgated by the Texas Board of Nurse Examiners (BNE), add the provision of reimbursement for assessment services delivered by RNs, and allow a separate fee to be calculated for PDN services delivered by a HHA LVN/LPN from the fee calculated for PDN services delivered by a HHA RN.

The changes to the reimbursement methodologies for THSteps-CCP physical therapy, occupational therapy, and speech-language-pathology services list the various providers of these services and provide the Medicaid reimbursement methodology applicable to each provider type. The proposed reimbursement methodologies for HHA therapies, CORFs, and ORFs are revised to be based on PPS fee schedules.

The changes to the reimbursement methodology for THSteps-CCP nutritional services provided by licensed dietitians remove program policy wording and state that the fees for these services are determined in accordance with 1 TAC §355.8085.

The changes to the reimbursement methodology for administration of immunizations clarify that the fees are determined in accordance with 1 TAC §355.8085.

The changes to the reimbursement for vaccines not covered elsewhere are formatting changes.

The reimbursement methodology for dental services was moved from the repealed 1 TAC §355.8443 and repealed 1 TAC §355.8445 to be included with the all the other reimbursement methodologies for THSteps-CCP services.

Fiscal Note

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first 5-year period the amended rule is in effect there will be a fiscal impact to state government of estimated savings of ($1.4 million) for SFY06 and ($2.6 million) in estimated savings for each year of the period SFY07-SFY10. The proposed rule will result in no fiscal implications for local health and human services agencies. Local governments will incur no additional costs.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses, or on businesses of any size, as a result of enforcing or administering the amendment. While the revisions to the reimbursement methodologies for THSteps-CCP therapies delivered by HHAs, CORFs, and ORFs propose the payments to be based on PPS fee schedules, the proposed revisions do not actually establish the PPS fee schedules and the proposed revisions to the reimbursement methodology for PDN services do not actually change any payment rates.

Cost to Persons and Effect on Local Economics

HHSC does not anticipate that there will be an economic cost to persons who are required to comply with this amendment. While the revisions to the reimbursement methodologies for THSteps-CCP therapies delivered by HHAs, CORFs, and ORFs propose the payments to be based on PPS fee schedules, the proposed revisions do not actually establish the PPS fee schedules and the proposed revisions to the reimbursement methodology for PDN services do not actually change any payment rates. The amendment will not affect a local economy.

Public Benefit

Ed White, Director of Rate Setting and Forecasting, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that there will be additional providers available to deliver PDN services by allowing reimbursement for services delivered through RN delegation to a qualified aide and providers will receive additional payments through the reimbursement of assessment services not previously reimbursed. Also, providers will have a clearer understanding of the various reimbursement methodologies applicable to each provider type and providers of THSteps-CCP therapies will be reimbursed in a more consistent manner.

Takings Impact Assessment

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

Public Comment

Questions about the content of this proposal may be directed to Nancy Kimble (telephone: 512-491-1363; FAX: 512-491-1983) in HHSC Rate Analysis for Acute Care Services. Written comments on the proposal may be submitted to Ms. Kimble via facsimile, E-mail to nancy.kimble@hhsc.state.tx.us, or mail to HHSC Rate Analysis for Acute Care Services, Mail Code H-400, P.O. Box 85200, Austin, TX 78708-5200, within 30 days of publication in the *Texas Register*. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services (DADS).

A public hearing is scheduled for Wednesday, October 26, 2005, at 1:30 pm. The hearing will be held in the Lone Star Conference Room of the Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021. Entrance is through the Security Desk at the front of the building facing Metric.

1 TAC §§355.8441, 355.8443, 355.8445

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

Statutory Authority

The repeals are proposed under the Texas Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The repeals implement the Government Code, §§531.033 and 531.021(b).

§355.8441. Early and Periodic Screening, Diagnosis and Treatment Comprehensive Care Program Providers (EPSDT-CCP).

§355.8443. Maximum Payment.

§355.8445. Explanation of Maximum Payment Terms.

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

Filed with the Office of the Secretary of State on October 3, 2005.

TRD-200504451
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 424-6900

1 TAC §355.8441

Statutory Authority

The new rule is proposed under the Texas Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The new rule implements the Government Code, §§531.033 and 531.021(b).

§355.8441. Reimbursement Methodologies for Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program (EPSDT-CCP) Services.

The following are reimbursement methodologies for services provided under the Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program (EPSDT-CCP), also known as Texas Health Steps-CCP (THSteps-CCP).

(1) Counseling and psychotherapy services are reimbursed in accordance with the existing Medicaid reimbursement methodologies for the applicable provider type as follows:

(A) licensed professional counselors (LPCs), licensed clinical social workers (LCSWs), and licensed marriage and family therapists (LMFTs), 1 TAC §355.8091 of this title (relating to Reimbursement to Licensed Professional Counselors, Licensed Master Social Worker-Advanced Clinical Practitioners, and Licensed Marriage and Family Therapists);

(B) psychiatrists, 1 TAC §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners);

(C) psychologists, 1 TAC §355.8081 of this title (relating to Payments for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, and Psychologists' Services);

(D) freestanding psychiatric hospitals and facilities accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), 1 TAC §355.8063 of this title (relating to Reimbursement Methodology for Inpatient Hospital Services); and

(E) outpatient hospitals, 1 TAC §355.8061 of this title (relating to Payment for Hospital Services).

(2) Expendable medical supplies, including nutritional products, are reimbursed in the same manner as expendable medical supplies under home health services at §355.8021(b) of this title (relating to Reimbursement Methodology for Home Health Services).

(3) Durable medical equipment is reimbursed in the same manner as durable medical equipment under home health services at §355.8021(c) of this title (relating to Reimbursement Methodology for Home Health Services).

(4) Private duty nursing services, including, but not limited to, registered nurse (RN) services, licensed vocational nurse/licensed practical nurse (LVN/LPN) services, skilled nursing services delegated to qualified aides by RNs in accordance with the licensure standards promulgated by the Texas Board of Nurse Examiners (BNE), and nursing assessment services, are reimbursed based on the lesser of the provider's billed charges or fees established by the Texas Health and Human Services Commission (HHSC) to independently enrolled RNs, independently enrolled LVNs/LPNs, and home health agencies (HHAs). Fees for these services will be reviewed every two years and will be adjusted, subject to available funding, based on historical charges, a review of Medicaid fees paid by other states, a survey of costs for a sample of providers, an analysis of cost reports provided by HHAs for similar nursing services, a review of Medicaid fees for similar services, modeling using an analysis of other data available to HHSC, or a combination thereof.

(5) Physical therapy (PT) services are reimbursed in accordance with the existing Medicaid reimbursement methodologies for the applicable provider type as follows:

(A) independently enrolled therapists, 1 TAC §355.8081 of this title;

(B) HHAs and Medicare-certified outpatient facilities known as comprehensive outpatient rehabilitation facilities (CORFs) and outpatient rehabilitation facilities (ORFs), 1 TAC §355.8085 of this title;

(C) Medicare-certified freestanding rehabilitation hospitals, 1 TAC §355.8063 of this title; and

(D) outpatient hospitals, 1 TAC §355.8061 of this title.

(6) Occupational therapy (OT) services are reimbursed in accordance with the existing Medicaid reimbursement methodologies for the applicable provider type as follows:

(A) independently enrolled therapists, 1 TAC §355.8081 of this title;

(B) HHAs and Medicare-certified outpatient facilities known as comprehensive outpatient rehabilitation facilities (CORFs) and outpatient rehabilitation facilities (ORFs), 1 TAC §355.8085 of this title;

(C) Medicare-certified freestanding rehabilitation hospitals, 1 TAC §355.8063 of this title; and

(D) outpatient hospitals, 1 TAC §355.8061 of this title.

(7) Speech-language pathology (SLP) services are reimbursed in accordance with the existing Medicaid reimbursement methodologies for the applicable provider type as follows:

(A) independently enrolled therapists, 1 TAC §355.8081 of this title;

(B) HHAs and Medicare-certified outpatient facilities known as comprehensive outpatient rehabilitation facilities (CORFs) and outpatient rehabilitation facilities (ORFs), 1 TAC §355.8085 of this title;

(C) Medicare-certified freestanding rehabilitation hospitals, 1 TAC §355.8063 of this title; and

(D) outpatient hospitals, 1 TAC §355.8061 of this title.

(8) Nutritional services provided by licensed dietitians for the purpose of treating, preventing or minimizing the effects of illness, injuries, or other impairments are reimbursed according to the lesser of the provider's billed charges or fees determined by HHSC in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners).

(9) Providers are reimbursed for the administration of immunizations according to the lesser of the provider's billed charges or fees determined by HHSC in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners).

(10) Vaccines not covered elsewhere are reimbursed according to the lesser of the provider's billed charges or the actual cost of the vaccine.

(11) Dental services provided by independently enrolled dentists are reimbursed in accordance with §355.8081 of this title (relating to Payments for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, and Psychologists' Services). The fees are calculated as access-based fees under §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners) and are based on a percentage of the billed charges (i.e., the usual-and-customary amount providers charge non-Medicaid clients for similar services) reported on Medicaid dental claims for each dental service, excluding billed charges that are less than or equal to the published Medicaid fee for that service. The fees are reviewed at least every two years. Dental services provided by federally qualified health centers (FQHCs) are reimbursed in accordance with §355.8261 of this title (relating to Reimbursement).

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

Filed with the Office of the Secretary of State on October 3, 2005.

TRD-200504452
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 424-6900

CHAPTER 363. COMPREHENSIVE CARE PROGRAM

SUBCHAPTER C. PRIVATE DUTY NURSING SERVICES

1 TAC §§363.303, 363.307, 363.311, 363.313, 363.315

The Texas Health and Human Services Commission (HHSC) proposes to amend Chapter 363, Comprehensive Care Program, Subchapter C, Private Duty Nursing, §363.303, Definitions; §363.307, Client Eligibility Criteria; §363.311, Private Duty Nursing Benefits and Limitations; §363.313, Plan of Care; and §363.315, Termination of Authorization for Private Duty Nursing.

Background and Justification

The purpose of these amendments is to provide an additional resource in the delivery of private duty nursing services to Medicaid recipients under age 21 by adding delegation of skilled nursing services by a registered nurse (RN) to a qualified aide. The proposed amendments define nurse delegation in accordance with RN delegated tasks criteria as determined by the Board of Nurse Examiners. The proposed amendments also remove obsolete language, include revisions necessary to better describe current processes and procedures related to the provision of private duty nursing (PDN) services, and add the word "services" to "private duty nursing" where appropriate to better reflect the array of options available to deliver PDN services: RN, licensed vocational nurse/licensed practical nurse, or RN delegation. Also, the amendments replace the term "department" with "HHSC."

Section-by-Section Summary

The Health and Human Services Commission proposes the following amendments to the rules:

Amend each section of the rules to add the word "Services" to the heading title.

The amendment to §363.303, Definitions, includes adding the definitions of a qualified aide and delegated nursing, along with reference updates and technical changes. The amendment also clarifies current PDN processes and procedures.

Section 363.307, Client Eligibility Criteria, subsection (a)(3)(E) is amended to clarify care activity and remove language regarding extension of private duty nursing services. The amendment also updates references and replaces the term "department" with "HHSC."

Section 363.311, Private Duty Nursing Benefits and Limitations, is amended to clarify that HHSC or its designee currently provides notice of the approval, reduction, modification, or denial of requested PDN services to the client/family and provider.

Section 363.313, Plan of Care, is amended to revise references and replace the term "department" with "HHSC."

Section 363.315, Termination of Authorization for Private Duty Nursing, is amended to replace the term "department" with "HHSC."

Fiscal Note

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rules are in effect there will be a cost to the state of $26,700,725 general revenue and an all funds fiscal impact of $67,906,291 in State Fiscal Year 2006. The fiscal impact to general revenue for State Fiscal Year 2007 is $38,581,145 and $38,511,034 for each State Fiscal Year from 2008 through 2010. All funds fiscal impact for each State Fiscal Year 2007 through 2010 is $100,158,737. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small Business and Micro-business Impact Analysis

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

Public Benefit

David Balland, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the section. The anticipated public benefit, as a result of enforcing the new sections, will provide an additional resource in the delivery of private duty nursing services.

Takings Impact Assessment

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

Public Comment

Questions about the content of this proposal may be directed to Arnulfo Gomez (telephone: 512-491-1166; FAX: 512-491-1953) in HHSC Medicaid/CHIP Division Program Development Support. Written comments on the proposal may be submitted to Mr. Gomez via facsimile or mail to HHSC Medicaid/CHIP Division Program Development Support, Mail Code H-600, P.O. Box 85200, Austin, TX 78708-5200, within 30 days of publication in the *Texas Register.* Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aged and Disabled Services (DADS).

A public hearing is scheduled for the November 8, 2005, at 1:30 p.m. The hearing will be held in the Lone Star Public Conference Room of the Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas.

Statutory Authority

The amendments are proposed under the Texas Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the Commission's duties, and §531.021(b), which established HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The proposed rules affect the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by the proposed amendments.

§363.303. Definitions.

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

(1) Alternate care giver--An individual identified by the primary care giver who agrees to be trained and to maintain the skills necessary to provide care competently for the client when the primary care giver is unable to do so. An alternate caregiver living with the client is not eligible for Medicaid (Title XIX) reimbursement for rendering care to the client.

(2) Client--An individual who is eligible to receive private duty nursing services under THSteps-CCP from a provider enrolled in the Texas Medicaid program.

(3) Commission--Health and Human Services Commission.

(4) Continuous--Ongoing throughout a 24-hour period.

(5) Delegated Nursing--Nursing services delegated by a Registered Nurse (RN) in accordance with RN delegated nursing tasks criteria as determined by the Board of Nurse Examiners to a qualified aide.

(6) [~~(5)~~] Dependent on technology--Requiring medical devices to compensate for the loss or impairment of a vital body function.

(7) [~~(6)~~] Early and Periodic Screening, Diagnosis and Treatment - Comprehensive Care Program (EPSDT-CCP)--A mandatory Medicaid program for persons under 21 years of age who meet certain economic eligibility criteria. In Texas EPSDT-CCP is called the Texas Health Steps Comprehensive Care Program (THSteps-CCP).

(8) [~~(7)~~] Home and Community Support Services Agency--[~~Effective September 1, 2003,~~] A [a] public or private agency or organization licensed by the Department of Human Services under 40 TAC Chapter 97 (relating to Home and Community Support Services Agencies) to provide licensed home health or licensed and certified home health services.

(9) [~~(8)~~] Individualized comprehensive case management--A structured process by which the orderly provision of services and supports intended to facilitate individual well-being and functioning is planned by a provider other than the service provider.

(10) [~~(9)~~] Plan of care--A written regimen established and periodically reviewed by a physician in consultation with the home health agency staff or an enrolled independently practicing nurse provider which meets the plan of care standards at §363.313 [~~§33.607~~] of this title (relating to Plan of Care).

(11) [~~(10)~~] Primary care giver--An individual(s) who has agreed to accept the responsibility for a client's routine daily care and the provision of food, shelter, clothing, health care, education, nurturing, and supervision. Primary care givers may include but are not limited to parents, foster parents, guardians, or other family members by birth or marriage. A primary care giver provides daily, uncompensated care for the client, and participates in the development and implementation of the client's plan of care. The primary care giver or other person living with the client is not eligible for Medicaid (Title XIX) reimbursement for rendering care to the client.

(12) [~~(11)~~] Primary physician--A doctor of medicine or doctor of osteopathy (MD or DO) legally authorized to practice medicine or osteopathy at the time and place the service is provided, who in addition provides continuing medical care of the client and continuing medical supervision of the client's plan of care.

(13) [~~(12)~~] Private duty nursing--Skilled nursing reimbursed hourly for clients who meet the THSteps-CCP medical necessity criteria and who require individualized, continuous skilled care beyond the level of skilled nursing visits normally authorized under §§354.1031-354.1041 of this title (relating to Medicaid Home Health Services). Skilled nursing services are provided by a registered nurse, [~~or~~] licensed vocational nurse, or as a delegated service provided by a qualified aide through a licensed home and community support services agency, by a registered nurse enrolled as an independent provider, or by a licensed vocational nurse enrolled as an independent provider in the Texas Medicaid Program.

(14) [~~(13)~~] Provider--A licensed home and community support services agency enrolled in the Texas Medicaid Program or an independently practicing registered nurse or licensed vocational nurse enrolled in the Texas Medicaid Program.

(15) Qualified Aide--an unlicensed person, in accordance with 40 TAC Chapter 94, Nurses Aides, 40 TAC Chapter 95, Medication Aides-Program Requirements, and 40 TAC Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

(16) [~~(14)~~] Respite--Services provided for the purpose of relief to the primary care giver.

(17) [~~(15)~~] Skilled nursing--Services provided by a registered nurse or by a licensed vocational nurse, as authorized by Chapter 301 of the Occupations Code, regulating the practice of nursing, section §301.002, Definitions. [~~as authorized by the Texas Nursing Practice Act, Texas Civil Statutes, Article 4513 et seq., or by a licensed vocational nurse as authorized by the Vocational Nurse Act, Texas Civil Statutes, Article 4528c.~~]

(18) [~~(16)~~] Stable and predictable--A situation in which the client's clinical and behavioral status and nursing care needs are non-fluctuating and consistent, including settings where the client's deteriorating condition is expected.

(19) [~~(17)~~] Texas Health Steps Comprehensive Care Program (THSteps-CCP)--A federal program known as EPSDT which is required of states by Medicaid for children under 21 years of age who meet certain economic criteria for eligibility. See definition for Early and Periodic Screening, Diagnosis, and Treatment - Comprehensive Care Program (EPSDT-CCP).

§363.307. Client Eligibility Criteria.

(a) To be eligible for private duty nursing services, a client must:

(1) be under 21 years of age and eligible for THSteps-CCP;

(2) meet medical necessity criteria for private duty nursing;

(3) have a primary physician who:

(A) provides a prescription for private duty nursing services;

(B) establishes a plan of care;

(C) provides a statement that private duty nursing services as defined in this section are medically necessary for the client;

(D) provides a statement that the client's medical condition is sufficiently stable to permit safe delivery of private duty nursing as described in the plan of care;

(E) provides continuing care and medical supervision including but not limited to examination or treatment within 30 days prior to the start of private duty nursing services. Medical [~~For extensions of private duty nursing services, medical~~] care must comply with the American Academy of Pediatrics recommended schedule of visits that [~~which~~] are applicable to the client's age, or within six months, whichever [~~which ever~~] is sooner; and

(F) provides specific written, dated orders for clients receiving private duty nursing services.

(4) require care beyond the level of services delivered under §354.103 and §354.1041 [~~§§29.301-29.307~~] of this title (relating to Medicaid Home Health Services); and

(5) have an identified primary care giver residing in the client's residence and an identified alternate care giver who is or can be trained to provide part of the client's care, or if no alternate care giver is identified, a current plan to enable the client to receive care in an alternate setting or situation if the primary care giver is unable to fulfill his or her role.

(b) HHSC [~~The department~~] may waive any client eligibility criteria in subsection (a)(3)(E) of this section upon review of a client's specific circumstances.

§363.311. Private Duty Nursing Benefits and Limitations.

(a) Private duty nursing benefits include the following services.

(1) [~~Services.~~] Direct skilled nursing care and care giver training and education intended to:

(A) optimize client health status and outcomes; and

(B) promote and support family-centered, community-based care as a component of an array of service options by: [~~;~~]

(i) preventing prolonged and/or frequent hospitalizations or institutionalization;

(ii) providing cost-effective, quality care in the most appropriate environment; and

(iii) providing training and education of caregivers.

(2) Amount and duration.

(A) The amount and duration of private duty nursing services requested will be evaluated based upon review of the following documentation:

(i) frequency of skilled nursing interventions;

(ii) complexity and intensity of the client's care;

(iii) stability and predictability of the client's condition; and

(iv) identified problems and goals.

(B) The amount of private duty nursing should be re-evaluated [~~decrease~~] when:

(i) one or more of the client's problems documented in the plan of care are resolved;

(ii) one or more of the goals documented in the plan of care are met;

(iii) there is a change [~~reduction~~] in the frequency of skilled nursing interventions, or the complexity and intensity of the client's care;

(iv) alternate resources for comparable care become available; or

(v) the primary care giver becomes able to meet more of the client's needs.

(C) 24-hour private duty nursing will be authorized only:

(i) for limited periods of time with defined end dates when medically necessary and appropriate based on the needs of the client;

(ii) for limited periods of time with defined end dates related to the medical needs of the primary care giver, only when the alternate care giver is not available; and

(iii) in the absence of both the primary care giver and the alternate caregiver, if another alternate person is designated who can legally make decisions on behalf of the client and who will reside in the client's home during the time 24-hour private duty nursing will be provided.

(b) Private duty nursing service limitations include the following:

(1) THSteps-CCP will not reimburse for private duty nursing services used for or intended to provide:

(A) respite care;

(B) child care;

(C) activities of daily living for the client;

(D) housekeeping service; or

(E) individualized, comprehensive case management beyond the service coordination required by the Texas Nursing Practice Act, Texas Civil Statutes, Article 4513 et seq.

(2) Private duty nursing shall neither replace parents or guardians as the primary care giver nor provide all the care that a client requires to live at home. Primary care givers remain responsible for a portion of a client's daily care, and private duty nursing is intended to support the care of the client living at home.

(3) Authorization of services.

(A) Authorization is required for payment of services.

(B) Only those services that are determined by HHSC [the department] or its designee to be medically necessary and appropriate will be reimbursed.

(C) No authorization for payment of private duty nursing services may be issued for a single service period exceeding six months. Specific authorizations may be limited to a time period less than the established maximum based on the stability and predictability of the client.

(D) The family will be notified in writing by HHSC [the department] or its designee of the approval, [a] reduction, modification or denial of requested private duty nursing services.

(E) The provider will be notified in writing by the HHSC [department] or its designee of the [authorization] approval, modification, reduction, or denial of requested private duty nursing services.

[(F) The provider will notify the primary physician and family upon receipt of the authorization or denial of private duty nursing services.]

(F) [(G)] Authorization requests for private duty nursing services must include the following:

(i) current HHSC [department] authorization form, completed by the primary physician and provider;

(ii) plan of care, recommended, signed and dated by the client's primary physician. The primary physician reviews and revises the plan of care with each authorization, or more frequently as the physician deems necessary; and

(iii) current HHSC [department] form, THSteps-CCP Private Duty Nursing Services Addendum to Plan of Care.

(G) [(H)] If inadequate or incomplete information is provided, the provider will be requested to furnish additional documentation to enable HHSC [the department] to make a decision on the request.

(H) [(I)] For authorization of extensions beyond the initial authorization period or revisions to an existing authorization, the provider must submit requests in writing. Required documentation for extending or revising authorization includes:

(i) current HHSC [department] authorization form;

(ii) plan of care, recommended, signed and dated by the client's primary physician; and

(iii) current HHSC [department] form, THSteps-CCP Private Duty Nursing Services Addendum to Plan of Care, signed and dated by the client's primary physician.

(I) [(J)] During the authorization process, providers are required to deliver the requested services from the start of care date. Providers are responsible for a safe transition of services when the authorization decision is a denial or reduction in the private duty nursing services being delivered.

§363.313. Plan of Care.

(a) A plan of care must be recommended, signed, and dated by the client's primary physician.

(b) A plan of care must meet the plan of care standards at Code of Federal Regulations, Title 42, §484.18, and §354.1037 [§29.304] of this title (relating to Written Plan of Care) and must contain the following elements:

(1) all pertinent diagnoses;

(2) mental status;

(3) types of services, including amount, duration, and frequency;

(4) equipment required;

(5) prognosis;

(6) rehabilitation potential;

(7) functional limitations;

(8) activities permitted;

(9) nutritional requirements;

(10) medications;

(11) treatments, including amount and frequency;

(12) safety measures to protect against injury;

(13) instructions for timely discharge or referral;

(14) date the client was last seen by the primary physician;

(15) other medical orders; and

(16) current HHSC [department] form, THSteps-CCP Private Duty Nursing Services Addendum to Plan of Care.

§363.315. Termination of Authorization for Private Duty Nursing Services.

Authorization for private duty nursing will be terminated by HHSC [the department] or its designee when:

(1) the client is no longer eligible for THSteps-CCP;

(2) the client no longer meets the medical necessity criteria for private duty nursing;

(3) the place of service(s) can no longer accommodate the health and safety of the client; or

(4) the client or caregiver refuses to comply with the primary physician's plan of care.

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

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Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900

CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM

The Texas Health and Human Services Commission (HHSC) proposes to amend Chapter 370, State Children's Health Insurance Program. HHSC proposes to amend the following rules: §370.1, Purpose, §370.4, Definitions, §370.10, Duties and Responsibilities of the Commission, §370.20, Availability and Method of Initiating an Application, §370.21, Application Assistance, §370.22, Completion of Telephone Applications, §370.23, Contents of Completed Applications, §370.25, Incomplete Applications, §370.30, Applicant Rights, §370.42, Age Limits, §370.43, Citizenship and Residency, §370.44, Income and Assets, §370.45, Medicaid Eligibility, §370.46, Waiting Period, §370.49, Medicaid Referrals, §370.50, Matters Subject to Review and Reconsideration of Eligibility denials and Temporary Enrollment, §370.51, Deadline and Method for Requesting Review of Initial Decision, §370.52, Disposition of Request for Review, §370.53, Request for Consideration by HHSC, §370.54, Temporary Enrollment Pending Disposition of Review or Reconsideration, §370.301, CHIP Enrollment Packet, §370.303, Completion of Enrollment Process, §370.305, Children with Complex Special Health Care Needs (CCSHCN), §370.307, Continuous Enrollment Period, and §370.309, Incomplete or Missing Information.

HHSC proposes to repeal the following rules: §370.2, Scope, §370.3, Non-Entitlement, §370.31, Applicant Responsibilities, §370.40, Determining Eligibility, and §370.48, Completion of Application Process. In each case, the rule proposed for repeal has been incorporated in another rule. Section 370.24, Electronic Entry of Application Information, is repealed as it includes obsolete information.

Background and Justification

Most changes are to update terminology and to reorganize content. A number of changes are being made to align CHIP more closely with Medicaid. This should facilitate the ongoing HHSC project to integrate eligibility determinations, allowing a single point of application to determine eligibility for multiple assistance programs.

Section-by-Section Summary

Amended §370.1 consolidates the information currently contained in §§370.1, 370.2, and 370.3. Sections 370.2 and 370.3 will, therefore, be deleted. The list of definitions in §370.4 is revised: to include terms related to request for reviews or reconsiderations, to specify the age of a sibling included in the Budget Group, to exclude student income from consideration in determining eligibility; to delete the definitions that are no longer relevant. The definitions of Alien, Child, Cost-Sharing, Day, and Designee are added.

Since implementation of CHIP has been accomplished, the references in §370.10 to implementation are obsolete and are, therefore, deleted. Basic application information appears in §§370.20, 370.21, and 370.22 including information concerning establishing a file date. In §370.23 an exception to the requirement for a social security number is added for newborns and an obsolete reference to 90-day prior insurance coverage is deleted. Changes are made to the process and time frames outlined in §370.25 in an effort to expedite the application process. Those changes include shortening the deadline for HHSC action on incomplete applications from 90 to 45 days.

The information in §370.31 is consolidated into §370.30. Wording in §370.42 is clarified slightly. In §370.43 the provision concerning temporary absence is amended to provide a reasonable time limit for such an absence, i.e., not longer than 12 months.

Changes in §370.44 include deleting the deduction for business expenses from self-employment income, adding interest income to the list of countable income components, and including Office of Attorney General data to the list of deduction verification sources. Section 370.45 is expanded by consolidating revised information from §370.48 with §370.45. An obsolete reference to 90-day prior insurance coverage is deleted in §370.46. Special procedures for moving pregnant CHIP members from CHIP to Medicaid are added to §370.49. Wording in §§370.50, 370.51, 370.52, 370.53 and 370.54 is updated.

The information in §370.301 is clarified, as is §370.303 and §370.305. Exceptions to continuous enrollment are added to §370.307. A terminology change throughout the chapter replaced the term "TexCare" with HHSC, the Commission, or designee. References to TDHS were deleted.

Fiscal Note

Tom Suehs, Deputy Commissioner for Financial Services, has determined that during the first five-year period the proposed rules are in effect there will be minimal fiscal impact to state government. The proposed rules will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

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

Public Benefit

Linda Franco, Associate Commissioner for the Office of Family Services, has determined that for each year of the first five years the proposed rules are in effect, the public will benefit from the adoption of the proposed rules. The anticipated public benefit, as a result of enforcing the proposed rules, will be the consistency of information required from applicants for health care coverage, and clarification of application enrollment requirements.

Regulatory Analysis

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

economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Mary Haifley at MHMR/HHSC, Policy and Program, 909 West 45th Street, Austin, Texas 78751, by fax to (512) 206-4556, or by e-mail to mary.haifley@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

SUBCHAPTER A. PROGRAM ADMINISTRATION

1 TAC §§370.1, 370.4, 370.10

Statutory Authority (CHIP)

The amendments are proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendments affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed amendments.

§370.1. Purpose and Scope.

(a) This chapter implements the State Children's Health Insurance Program [~~Plan~~] (CHIP), authorized under chapters 62 and 63, Health and Safety Code, in a manner that is timely, efficient, fair, and that promotes access to quality and economical health care for eligible children and their families in Texas.

(b) CHIP is a state-designed child health insurance plan authorized under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa, et seq.), and chapters 62 and 63, Health and Safety Code, which provides access to low-cost preventive and primary health care to children, including children with special health care needs, in certain low-income families of this state.

(c) CHIP is administered, in part, in accordance with the state plan for children's health insurance, filed by the Health and Human Services Commission with the federal Secretary of Health and Human Services, which describes the general conditions under which joint federal state child health insurance program funds will be administered in Texas.

(d) Nothing in this chapter shall be construed as providing an individual with an entitlement to health insurance benefits or health care or to assistance in obtaining health insurance or health benefits.

§370.4. Definitions.

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

(1) Action--

(A) Denial CHIP eligibility;

(B) Disenrollment from CHIP:

(C) The failure of the Health Human Services Commission (HHSC) or its designee to act within 45 days on an Applicant's request for CHIP eligibility determination.

(D) "Action" does not include expiration of a time-limited service.

[~~(1) "Administrative Contractor"--means the entity that performs administrative services for the CHIP under contract with the Commission.~~]

(2) Alien--A person who is not a native born or naturalized citizen of the United States of America.

(3) [~~(2)~~] [~~"~~]Applicant[~~"~~]--An [~~means an~~] individual who lives with the child and applies for health care [~~insurance~~] coverage on behalf of the child. An applicant can only be:

(A) a child's [~~custodial~~] parent, whether biological [~~natural~~] or adoptive;

(B) a child's grandparent, relative or other adult who provides care for the child;

(C) a [~~an emancipated~~] minor not living with an adult relative applying for himself/herself; or

(D) a child's step-parent.

(4) [~~(3)~~] [~~"~~]Application[~~"~~] --The [~~means the~~] standardized, written document [~~issued by TexCare~~] that an applicant must complete to apply for health care [~~benefits or~~] coverage through CHIP.

[~~(4) "Application completion date" means the calendar date a completed CHIP application is entered into the TexCare database.~~]

(5) [~~"~~]Budget Group[~~"~~] --The [~~means the~~] group of individuals who live in the home with the child for whom an application for health care coverage [~~insurance~~] is submitted and whose information is used to establish family size and calculate income. Individuals receiving Supplemental Security Income payments are not included in the Budget Group [~~group~~]. Budget Group [~~group~~] members include only:

(A) the child seeking health coverage [~~insurance benefits~~];

(B) the child's siblings under age 19 who live with the child (biological, adopted, or step-siblings);

(C) the child's biological [~~natural~~] or adoptive parents; [~~or~~]

(D) the child's step-parent; [~~.~~]

(E) the child's spouse, if married, and they have children.

(6) Child--An individual under the age of 19.

(7) [~~(6)~~] [~~"~~]Children's Health Insurance Program[~~"~~] or [~~"~~]CHIP[~~"~~] or Program--The [~~means the~~] Texas State Children's Health Insurance Program established under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa, et seq.) and chapters 62 and 63, Health and Safety Code.

(8) [~~(7)~~] [~~"~~]Children's Health Insurance Program Service Area[~~"~~] or [~~"~~]CSA[~~"~~] -- [~~means one~~] One of the designated areas in the state that is served by one or more of the CHIP Health Plans or the CHIP Exclusive Provider Organization.

(9) [~~(8)~~] [~~"~~]Commission[~~"~~] or [~~"~~]HHSC[~~"~~] --The Texas [~~means the~~] Health and Human Services Commission.

[(9) "Community-based Organization" or "CBO" means an organization that contracts with the Commission to provide outreach services to applicants for CHIP coverage.]

(10) Cost Sharing--Any enrollment fees or co-payments the enrollee is responsible for paying.

[(10) "Completed application" means an application entered into the TexCare database that includes all information required under §370.23.]

(11) ["]Countable Income [income"] --For the month of receipt any [means any] type of payment that is a regular and predictable gain or a benefit to a Budget Group [budget group] that is not specifically exempted. Regular and predictable income is income received in one month that is either likely to be received in the next month and [/or] was received on a regular and predictable basis in past months. It does not include income that was [is not] received on an irregular [a regular] and unpredictable [predictable] basis in past months, or is received by the child or sibling member of the Budget Group [budget group] who is under age 18 and enrolled in school fulltime, or in school part-time and working less than 30 hours per week.

(12) ["]Countable Liquid Assets [liquid assets"] --Personal Property that is cash or [means resources] that an Applicant [applicant] can readily convert to cash that is [to meet immediate needs and whose values are] used in calculating a child's eligibility for CHIP.

(A) Countable liquid assets include the balances, less income received or deposited in the current month [as of the last day of the month prior to the date of submission of an application (either initial or renewal)] of the following:

(i) cash on hand;

(ii) cash in the bank;

(iii) cash in a Temporary Assistance to Needy Families (TANF) [TANF (Temporary Assistance to Needy Families)] Electronic Benefit Transfer account;

(iv) money remaining from the sale of a homestead; and

(v) accessible trust funds.

(B) Countable Liquid Assets [liquid assets] do not include:

(i) any resource exempted by federal law from consideration for purposes of determining eligibility or benefit levels for any federally funded needs-based program, such as TANF and Assets for Independence Act (AFIA) Individual Development Accounts; or

(ii) any financial instrument subject to rules limiting use of its proceeds, including penalties and/or tax liabilities incurred for early liquidation, such as individual retirement accounts and Keogh plans; or

(iii) the cash value of any insurance policy; or

(iv) Internal Revenue Code 529 qualified college savings program accounts, such as Texas Guaranteed Tuition Plan [Tomorrow Fund] accounts; or

(v) funds received as educational grants or scholarships.

(13) Day--Calendar day, unless otherwise specified.

(14) Designee--A contractor of HHSC authorized to act on behalf of HHSC under this chapter.

(15) [(13)] ["]Enrollment["] --The [means the] process by which a child determined to be eligible for CHIP is enrolled in a CHIP health plan serving the CHIP Service Area in which the child resides.

[(14) "Entrant" means a person who is not a native born or naturalized citizen of the United States of America.]

[(15) "Excess vehicle value" means a vehicle's wholesale value minus any allowable exemption.]

(16) ["]Exempt Income [income"] --Income [means income] received by the Budget Group [budget group] that is not counted in determining income eligibility.

(17) ["]FPL["] -- [means] Federal Poverty Level Income Guidelines.

(18) ["]Gross Budget Group Income--Monthly Countable Income [budget group income" means monthly countable income] before any payroll deductions.

(19) ["]Health Plan["] --A [means a] licensed health maintenance organization, indemnity carrier, or authorized exclusive provider organization that contracts with the Commission to provide health benefits coverage to CHIP members.

(20) ["]Household["] --The Budget Group [means the budget group] plus any SSI recipient who is the child's:

(A) [the child's] sibling who lives with the child (biological, adopted, or step-sibling);

(B) biological [the child's natural] or adoptive parent; or

(C) [the child's] step-parent.

[(21) "Income eligibility standard" means monthly gross budget group at or below 200% of current FPL. A child meets the CHIP income eligibility standard if the budget group's monthly gross income exceeds the income eligibility standard if the budget group's monthly gross income exceeds the income eligibility standard applied to the child in the Texas Medicaid Program and is at or below the 200% FPL CHIP monthly income standard.]

(21) [(22)] ["]Member["] --A [means a] child enrolled in a CHIP Health Plan.

(22) [(23)] ["]Qualified Alien--An [Entrant " means an] alien [who applies for CHIP coverage and] who, at the time of [such] application, satisfies the criteria established under 8 U.S.C. §1641(b).

(23) [(24)] ["]SSI["] -- [means] Supplemental Security Income.

(24) [(25)] ["]State Fiscal Year--The [fiscal year" means the] 12-month period beginning September 1 of each calendar year and ending August 31 of the following calendar year.

[(26) "TDHS" means the Texas Department of Human Services.]

[(27) "TexCare" means the name designated to publicly identify the operational entity that provides administrative services for the CHIP program.]

§370.10. Duties and Responsibilities of the Commission.

The Commission is the single state agency responsible for the Program. The [whose] responsibilities include, but are not limited to the following:

(1) maintaining [developing] a state-designed Program [CHIP] to obtain health care [benefits] coverage for children in

low-income families in a manner that qualifies for federal funding under Title XXI of the Social Security Act;

(2) making policy [~~for CHIP~~], including policy related to covered benefits provided under the Program [~~program~~], a duty which the Commission may not delegate to another agency or entity;

~~[(3) overseeing the implementation of CHIP;]~~

~~[(4) adopting necessary rules to implement CHIP;]~~

(3) [~~(5)~~] contracting with appropriate individuals and organizations to provide health care [~~CHIP benefits~~] coverage, [~~community-based outreach,~~] and other services related to the implementation or operation of the Program [~~Chip program~~];

(4) [~~(6)~~] conducting a review of each entity that enters into a contract with the Commission to ensure that the entity is available, prepared, and able to fulfill the entity's obligations under the contract; and

(5) [~~(7)~~] ensuring that amounts spent for CHIP administration do not exceed any limit on administrative expenditures imposed by federal law.

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

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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1 TAC §370.2, §370.3

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

Statutory Authority (CHIP)

The repeals are proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed repeals affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed repeals.

§370.2. Scope.

§370.3. Non-entitlement.

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

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SUBCHAPTER B. APPLICATION SCREENING, REFERRAL AND PROCESSING DIVISION 1. APPLICATION PROCESS

1 TAC §§370.20 - 370.23, 370.25

Statutory Authority (CHIP)

The amendments are proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendments affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed amendments.

§370.20. Application Availability and File Date [~~method of initiating and application~~].

(a) The [~~TexCare~~] application [~~process~~] may be obtained via the following methods [~~initiated~~]:

(1) in writing using [~~from~~] an Application [~~application~~] obtained via telephone, an internet request, or other means [~~booklet available from TexCare upon telephone request. The application booklet may also be available through CBOs, local organizations that support CBO outreach efforts, and participating CHIP health care providers~~];

(2) by computer using printable Applications or an online application process [~~applications~~] available over the Internet [~~from the TexCare website~~]; [~~or~~]

(3) by telephone through the State's [~~TexCare's~~] toll-free telephone number or through TDD[~~.~~] ; or

(4) in person, by visiting an HHSC authorized agent.

(b) Establishing a file date

(1) For applications received via fax, internet, or mail, the file date if the date HHSC, DADS or an HHSC agent receives an application that contains, at a minimum, the applicant's name, address, and signature. An HHSC agent means HHSC's designee or an HHSC contractor that is authorized to receive applications for HHSC.

(2) For applications received via telephone, the filed date is established in one of the following two ways:

(A) The date all information required under §370.23 of this title (relating to Application Contents) is provided except for a signature, as long as the applicant provides a signature by the 39th day.

(B) The date the applicant provides, at a minimum, the applicant's name and address, as long as a signature is provided within 10 calendar days of the date the name and address is provided. HHSC's designee sends the applicant a pre-populated application requesting a signature, enclosing a letter that explains the file date policy. If it is not returned by the 10th day, the vendor denies eligibility on the basis that

no valid application has been received. If a signature is not provided until after the 10-day deadline, the filed date is the date the signature is received.

§370.21. Application Assistance.

An applicant applying for health care [CHIP] coverage under this chapter may obtain assistance completing the Application [application:]

[(1)] by telephone or in person from HHSC or its designee [TexCare staff] during hours that are posted on the websites of HHSC and its designee [TexCare website] or published in applications, brochures, or other marketing media issued or approved by HHSC. [TexCare. Telephone applications may also be accepted by TexCare staff;]

[(2) by telephone or in person from a local CBO; or]

[(3) by telephone or in person from a licensed insurance agent or broker that contracts with a CHIP health plan or CBO, provided the applicant is not directly or indirectly induced to enroll in a specific health plan.]

§370.22. Completion of Telephone Applications.

If an Applicant [applicant] telephones to apply, the State or its designee [TexCare] completes as much of the application as possible over the telephone, prints it, and mails it to the Applicant [applicant]. The Applicant [applicant] is responsible for submitting to HHSC or its designee all information required under §370.23 of this chapter (relating to Application Contents). [completing any missing information, signing the application, attaching all required verifications, and returning it to TexCare.]

§370.23. Application Contents [Contents of completed applications].

In order to be considered complete, an Application must include the following: [A completed application must include the following:]

(1) Information concerning the Applicant [applicant], consisting of:

(A) The Applicant's [applicant's] full name;

(B) The Applicant's [applicant's] home address (including city, county, state and zip code); and

(C) The Applicant's [applicant's] mailing address (including city, county, state, and zip code) if different from the home address;

(2) Information concerning each child for whom an Application [application] is filed, consisting of:

(A) The child's full name;

(B) A description of the Applicant's [applicant's] relationship to the child;

(C) The child's date of birth;

(D) The child's Social Security Number or proof of application to the Social Security Administration to receive a social security number. A social security number is not required for newborns until six months after birth or the next eligibility determination, whichever occurs earlier;

(E) The child's citizenship or immigration status [as a United States citizen or legal resident];

(F) The full name of the child's mother or father; and

(G) If the child has income reported on the Application [application], the child's school status. [; and]

[(H) Confirmation by the applicant whether the child currently has health insurance, or had health insurance within 90 days prior to the date the application is being completed for Medicaid.]

(3) Information concerning the Budget Group [budget group], including:

(A) [budget group] income, [including] the name of the person receiving the income, the employer or source of the income, the amount received, and the frequency of receipt; [and]

(B) whether anyone in the Budget Group [budget group] is pregnant;

(C) whether anyone in the Budget Group [budget group] pays for child or disabled adult care to permit a budget group member to work or receive training; (This [this] information is not used to determine [for the] CHIP income eligibility [determination] but is used to screen for Medicaid eligibility);

(D) whether anyone in the Budget Group [budget group] pays child support and/or alimony to anyone outside the home; (This [this] information is not used to determine [for the] CHIP [income] eligibility [determination] but is used to screen for Medicaid eligibility); and

(E) Countable assets.

(4) the Applicant's [applicant's original] signature and the date of signature; and

(5) required verification of income, immigration status, and income deductions [deduction verifications].

§370.25. Missing Information [Incomplete applications]

[(a) Missing information.]

(a) [(1)] HHSC or its designee enters incomplete applications into the State's database and sends a follow-up letter to the Applicant, requesting the missing information and stating a deadline by which it must be provided. [TexCare monitors the status of entered, incomplete application information.]

[(2) If it receives an incomplete application, TexCare sends the applicant an initial follow-up letter requesting the missing information. TexCare will send the initial follow-up letter within two working days from the date the application information is entered into the database.]

[(3) If TexCare does not receive the requested missing information within 14 calendar days, TexCare sends the applicant a second follow-up letter requesting the missing information.]

(b) Disposition [Missing signatures.]

(1) HHSC will certify or deny an Application no later than 45 calendar days from the application file date. [If an application is incomplete because it lacks the signature of the applicant, or a parent, or the step-parent in the budget group, TexCare enters the application information into the database, then produces and mails an application back to the applicant for signature.]

(2) If missing information is not provided by the deadline as explained in subsection (a) of this section, HHSC may deny the application by the deadline.

(3) [(2)] An application that is denied based on missing information may be reopened, upon request, within 60 calendar days of the file date. [The application remains incomplete until TexCare receives the signed application and enters receipt of the signed application into the database.]

[(c) Termination of an incomplete application.]

[(1) If an application remains incomplete 90 calendar days from the date TexCare entered the incomplete application information into the database, the application process is terminated.]

[(2) An applicant whose application is terminated because it is incomplete must complete a new TexCare application before CHIP coverage is provided.]

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

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DIVISION 1. TEXCARE PARTNERSHIP APPLICATION PROCESS

1 TAC §370.24

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

Statutory Authority (CHIP)

The repeal is proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed repeal affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed repeal.

§370.24. Electronic Entry of Application Information.

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

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DIVISION 2. APPLICANT RIGHTS AND RESPONSIBILITIES REGARDING APPLICATION AND ELIGIBILITY

1 TAC §370.30

Statutory Authority (CHIP)

The amendment is proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendment affects the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed amendment.

§370.30. Applicant Rights and Responsibilities.

(a) An Applicant [applicant] has the right to:

(1) be treated fairly and equally regardless of race, color, religion, national origin, gender, political beliefs, or disability;

(2) request a review of an action; and [and/or reconsideration of an adverse decision related to CHIP eligibility, disenrollment, or increased cost-sharing.]

(3) file a complaint with HHSC or it's designee[, in writing or by telephone, about the application process for reasons other than an eligibility decision, disenrollment, or an increase in cost-sharing] within 30 working days from the date of an incident. [TexCare must respond in writing within 15 working days.]

(b) An Applicant is responsible for:

(1) correctly and truthfully completing the Application regardless of where the Application was obtained;

(2) submitting the completed, signed Application; and

(3) providing all required verifications.

(c) If an Applicant intentionally misrepresents information on an Application to receive a program benefit, HHSC may terminate eligibility. The Applicant:

(1) is responsible for reimbursing the State for the cost of improperly paid benefits; and

(2) may be subject to prosecution under the Texas Penal 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.

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For further information, please call: (512) 424-6900

1 TAC §370.31

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

Statutory Authority (CHIP)

The repeal is proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed repeal affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed repeal.

§370.31. Applicant responsibilities.

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

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Steve Aragón
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DIVISION 3. ELIGIBILITY DETERMINATION

1 TAC §370.40

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

Statutory Authority (CHIP)

The repeal is proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed repeal affects the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed repeal.

§370.40. Determining Eligibility .

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

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DIVISION 4. ELIGIBILITY CRITERIA

1 TAC §§370.42 - 370.46, 370.49

Statutory Authority (CHIP)

The amendments are proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendments affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed amendments.

§370.42. Age limits.

[~~(a)~~] A child can be [~~is~~] eligible for CHIP from the day the child [~~he or she~~] is born until the end of the month in which the child reaches age nineteen.

[~~(b) The applicant states the child's birth date on the application form. Verification of age is not required.~~]

§370.43. Citizenship and residency.

(a) An eligible [~~CHIP~~] child must be a U.S. citizen [~~of the United States of America~~] or a non-citizen who is a Qualified Alien [~~qualified alien~~].

(b) An eligible [~~CHIP~~] child must be a Texas resident. A child is a Texas resident if:

(1) the child's fixed residence is located in Texas and the child's family intends for the child to return to Texas after any temporary absences;

(2) the child has no fixed residence but the child's family intends to remain in the state; or

(3) the child has recently moved to Texas and the child's family intends to remain in the state.

(c) A child does not lose status as a state resident because of temporary absences from the state. An absence longer than 12 months is not considered temporary. [~~No time limits are placed on a child's temporary absence from the state.~~]

(d) There are no durational requirements for residency. A child without a fixed residence or a new resident in the state who intends to remain in the state is considered a Texas resident.

(e) The Applicant [~~applicant~~] states the child's citizenship, immigration [~~lawful resident~~] status and Texas residency on the [~~TCP~~] Application. [~~application form. If the applicant states that the child is a United States citizen and a Texas resident, no verification of this status if required.~~] If the applicant states the child is not a United States citizen, the applicant must provide a Bureau of Citizenship and Immigration Services (formerly known [~~(formally know~~] as the U.S. Immigration and Naturalization Service) approved document that demonstrates that the child is a Qualified Alien [~~qualified alien~~].

§370.44. Income and Assets.

(a) General principles.

(1) Income is either Countable Income or Exempt Income. [~~countable income or exempt income.~~]

(2) The [~~TexCare must consider the~~] income of all persons included in the Budget Group [~~budget group~~] must be considered in determining a child's eligibility.

(b) Earned Income means Countable Income received by the Budget Group and includes: [~~Earned income is countable income received by the budget group and includes:~~]

(1) Military pay and allowances for housing, food, base pay, and flight pay;

(2) Self-employment income [~~(minus business expenses)~~]. A person is self-employed if he/she is engaged in an enterprise for gain, either as an independent contractor, franchise holder, or owner-operator. If someone other than the earner withholds either income taxes or FICA from the earner's earnings, the earner is an employee and is not self-employed;

(3) Wages, salaries, and commissions; and

(4) On-the-Job Training payments funded under the Workforce Investment Act of 1998, 29 U.S.C. §§2801-2872, if received by an adult member of the budget group.

(c) Unearned Income means Countable Income received by the Budget Group and includes: [~~Unearned income is countable income received by the budget group and includes:~~]

(1) Cash contributions received on a regular and predictable basis;

(2) Child support payments;

(3) Disability insurance benefits;

(4) Government-sponsored program payments, (except for Supplemental Security Income payments). Payments [~~; however, payments~~] from crisis intervention programs are exempt;

(5) Pensions;

(6) Retirement, survivors, and disability insurance (RSDI) benefits and other retirement benefits; [~~(minus the amount deducted from the RSDI check for the Medicare premium and any amount that is being recouped for a prior overpayment);~~]

(7) Income from property, whether from rent, lease, or sale on an installment plan;

(8) Unemployment compensation;

(9) Veterans Administration (VA) benefits other than benefits that meet a special need;

(10) Worker's compensation benefits; [~~and~~]

(11) Alimony, and [~~.~~]

(12) Interest income.

[~~(d) All income that is not included as countable earned income or countable unearned income is exempt income.~~]

(d) [~~(e)~~] Gross Income Test.

[~~(1) Gross income is used to determine eligibility.~~]

[~~(2) Gross monthly income is monthly income before any payroll deduction.~~]

(1) [~~(3)~~] A child is income eligible if the gross budget group [~~group's gross monthly~~] income, after rounding down cents, is equal to or less than the 200% of FPL for the Budget Group's [~~budget group's~~] size. All Budget Groups [~~budget groups~~] must pass the gross income test.

(2) [~~(4)~~] Budget Groups [~~groups~~] with a gross monthly income greater than 150% of FPL will be subject to an assets test in accordance with subsection (h) [~~(i)~~] of this section.

(e) [~~(f)~~] Computing Countable Income [~~countable income~~]. Income received non-monthly is converted to monthly amounts by: [~~TexCare converts income received non-monthly to monthly amounts by:~~]

(1) dividing yearly income by 12;

(2) multiplying weekly income by 4.33;

(3) adding amounts received twice a month; or

(4) multiplying amounts received every other week by 2.17.

(f) [~~(g)~~] Verification of current Countable Income [~~countable income~~].

(1) Countable Income [~~income~~] must be verified unless the amount of income reported by the Applicant [~~applicant~~] makes the child ineligible.

[~~(2) TexCare verifies all countable income at initial application.~~]

(2) [~~(3)~~] Verification may include, but is not limited to, obtaining:

(A) copies of one or more paycheck stubs issued within the immediately preceding 60-day period;

(B) a copy of the most recent federal income tax return;

(C) a copy of the [~~applicant's~~] most recent Social Security Award Letter; [~~statement;~~]

(D) copies of one or more child support checks; or

(E) written confirmation from an employer of the employee's [~~applicant's~~] income.

(g) [~~(h)~~] Verification of income deductions. Verification may include, but is not limited to, obtaining:

(1) a copy of a paycheck stub showing garnishment of wages for a child support deduction if the paycheck clearly indicates the deduction is for child support; or

[~~(2) a copy of a hand written statement authored and signed by the custodial parent verifying the child support deduction; or~~]

(2) [~~(3)~~] Office of the Attorney General (OAG) data or other documents HHSC considers reliable. [~~a copy of a divorce decree specifying child support payments.~~]

(h) [~~(i)~~] Assets test.

(1) In order to be eligible for CHIP, a Budget Group [~~budget group~~] with a gross monthly income greater than 150% FPL must own $5,000.00 or less in Countable Liquid Assets and Excess Vehicle Value combined.[~~countable liquid assets and excess vehicle value combined.~~]

[~~(2) Determination of countable liquid assets. Budget groups will provide a single value that represents the total value of their countable liquid assets.~~]

(2) [~~(3)~~] Determination of Excess Vehicle Value. [~~excess vehicle value.~~]

(A) Vehicles whose value must be considered include: any operable, licensed automobile, truck, motorcycle, SUV, van, motor home or boat that is owned by a member of the Budget Group [~~budget group~~]. Vehicles whose value is not considered in the determination of Excess Vehicle Value [~~excess vehicle value~~] include vehicles that are:

(i) leased;

(ii) owned by a business; or

(iii) trailers, mobile homes, ATVs or [and] tractors/farm equipment.

(B) Vehicle values will be taken from the *Hearst Corporation National Auto Research Division Black Book*. The vehicle value taken from the *Black Book* will be the lowest wholesale price in the average quality range listed for the make, model and year of the vehicle. [provided by the budget group.] If the *Black Book* has no listing for the [a particular] vehicle, the value is self-declared by the applicant. [budget group will be used.] No deductions are allowed for amounts owed on a vehicle.

(C) Excess value is determined only for vehicles that are not fully exempt.

(3) [(4)] Exempt [Fully exempt] vehicles.

(A) A vehicle is [fully] exempt from the determination of Excess Vehicle Value [excess vehicle value] if:

(i) the vehicle is used more than 50% of the time to produce income for the Budget Group [budget group]. Examples of income producing vehicles are taxis, and delivery vans. [, glazier's trucks, etc.] A vehicle used simply to travel back and forth to a place of work is not exempt;

(ii) the vehicle is used by a self-employed person more than 50% of the time to carry equipment or employees to work-sites;

(iii) the vehicle is the family's only home;

(iv) the vehicle is necessary to carry fuel or water; or

(v) the vehicle has been modified to provide transportation for a household member with a disability. Such modifications may include lifts, ramps, and hand controls.[, etc.]

(B) A Budget Group [budget group] may claim an exemption under subparagraph (A)(i) - (iv) of this paragraph for only one vehicle worth $15,000.00 or more.

(C) A Budget Group [budget group] may claim an exemption under subparagraph (A) of this paragraph for all vehicles worth less than $15,000.00.

(D) A Budget Group [budget group] may claim an exemption for all vehicles described in subparagraph (A)(v) of this paragraph, regardless of their value.

(4) [(5)] Other exemptions for vehicles. If a Budget Group [budget group] has no fully exempt vehicle:

(A) the first $15,000.00 of the value of the Budget Group's [budget group's] highest valued countable vehicle is exempt. Any value over $15,000.00 is considered Excess Vehicle Value [excess vehicle value] and is counted towards the Budget Group's [budget group's] $5,000.00 assets limit; and

(B) the first $4,650.00 of the value of each additional vehicle owned by the Budget Group [budget group] is exempt. The value in excess of $4,650.00 is considered Excess Vehicle Value [excess vehicle value] and is counted towards the Budget Group's [budget group's] $5,000.00 assets limit.

§370.45. Medicaid Eligibility.

(a) HHSC or its designee will review all applications to determine eligibility for either Medicaid or CHIP.

(1) All children on the Application requesting health care coverage will be tested for Medicaid eligibility. If any child meets Medicaid eligibility criteria, the child will be determined Medicaid eligible.

(2) If a child does not meet Medicaid eligibility, the Application will be tested for CHIP eligibility. If any child meets CHIP eligibility criteria, the child will be determined CHIP eligible.

(b) Once eligibility has been determined, a letter is sent to the Applicant containing the results of the determination, effective dates and enrollment information, where appropriate.

(c) A child who meets all Medicaid eligibility requirements is not eligible for CHIP.

§370.46. Waiting period.

(a) The waiting period is a delay in the start of health care [insurance] coverage and applies to a child determined to be CHIP eligible, and extends for a period of 90-days after:

(1) the first day of the month in which the child [applicant] is determined eligible for CHIP, if the day of eligibility is on or before the 15th day of the month; or

(2) the first day of the month after which the child [applicant] is determined eligible for CHIP, if the day of eligibility is after the 15th day of the month

[(b) A child who is otherwise eligible for CHIP may not be enrolled if the child was covered by health insurance at any time within the 90 days immediately preceding the submission of a CHIP application. After the 90 day waiting period, the child may be enrolled. This provision does not apply to any child participating in any premium assistance program implemented by HHSC.]

(b) [(c)] Health Insurance, for purposes of this section, is not [Collateral health benefits provided to a CHIP eligible child under a different type of insurance, such as] workers compensation or personal injury protection under an automobile insurance policy. [, is not health insurance coverage for purposes of this section.]

(c) [(d)] The 90-day waiting period specified in subsection [paragraph] (a) of this section does not apply to a child under the following circumstances:

(1) The child's Budget Group [budget group] lost health insurance coverage for the child because:

(A) The employment of a member of the budget group [Budget Group] was terminated due to:

(i) a layoff;

(ii) a reduction-in-force; or

(iii) a business closure;

(B) Insurance benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. No. 99-272) terminated;

(C) The marital status of a parent of the child has changed;

(D) The child's Medicaid eligibility was terminated because:

(i) the Budget Group's [budget group's] earnings or resources exceed allowable amounts for Medicaid eligibility; or

(ii) the child reached an age for which Medicaid benefits are no longer available; or

(E) Other circumstances similar to those described in this subparagraph that result in an involuntary loss of insurance coverage;

(2) The child had health insurance coverage provided by ERS, or CHIP in another state;

(3) The child's health insurance coverage costs more than 10 percent of the Budget Group's [budget group's] gross monthly income;

(4) The child has access to group-based health insurance [benefits plan] coverage and will participate in the premium payment reimbursement program administered by the Commission; or

(5) The Commission grants an exception to the waiting period under subsection (d) of this section.

(d) [(e)] The Commission may grant an exception to the 90-day waiting period prescribed by this section if it determines good cause exists to grant an exception and either:

(1) An Applicant [applicant] requests an exception:

(A) Prior to submission of an Application [application];

(B) At the time of Application [application]; or

(C) As part of a request for review or reconsideration of a denial of eligibility under sections 370.52 or 370.54 of this chapter; or

(2) The Commission reaches a determination that good cause exists based either on information provided by an Applicant [applicant] or information otherwise obtained by the Commission.

§370.49. Medicaid Referrals for Pregnant CHIP Members.

Pregnant CHIP members may be referred for a Medicaid for eligibility determination. Those pregnant CHIP members who are determined to be Medicaid eligible will be disenrolled from CHIP. Medicaid coverage will be coordinated to begin when CHIP enrollment ends to avoid gaps in health care coverage. In the event HHSC or its designee remains unaware of a member's pregnancy until delivery, the delivery will be covered by CHIP. HHSC or it's designee will suspend the member's eligibility expiration date after notification of the delivery is received. HHSC or its designee will reinstate the mother's eligibility expiration date and set the mother's eligibility expiration date at the later of

(1) the end of the second month following the month of the baby's birth or

(2) the date when the mother's eligibility would have expired. [If a TexCare applicant child is referred to Medicaid and subsequently determined ineligible for Medicaid, Medicaid denies eligibility and may deem the child eligible for CHIP based on the budget group's income and/or assets, or the child's citizenship or immigration status.]

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

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1 TAC §370.48

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Statutory Authority (CHIP)

The repeal is proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed repeal affects the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed repeal.

§370.48. Completion of Application Process.

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

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DIVISION 5. REVIEW AND RECONSIDERATION OF ELIGIBILITY DENIALS AND TEMPORARY ENROLLMENT

1 TAC §§370.50 - 370.54

Statutory Authority (CHIP)

The amendments are proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendments affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed amendments.

§370.50. Matters subject to review [and reconsideration of Eligibility denials and Temporary Enrollment].

[(a)] An applicant may request review of an action. [that is dissatisfied or disagrees with certain decisions made by or on behalf of the CHIP program may request:]

[(1) a review of the initial decision; and]

[(2) if the applicant is dissatisfied with the outcome of the review, a reconsideration of the review of the decision.]

[(b) An applicant may request a review and/or reconsideration of the following decisions:]

[(1) denial of CHIP eligibility;]

[(2) disenrollment of a child; or]

[(3) increase in the budget group's cost-sharing obligation.]

§370.51. Deadline and method for requesting review [of initial decision].

[(a) An applicant may request a review of an initial CHIP decision described in section 370.50(a) within 30 working days from the date the applicant received written notice of the decision.]

[(b)] An applicant may request a review by contacting HHSC's designee [TexCare] in writing within 30 working days from the date of the action.

§370.52. Disposition of a request for review.

(a) HHSC's designee [TexCare] must complete its review [of the initial decision] within 10 working days of receipt of the request for review.

(b) HHSC's designee [TexCare] must notify the requester in writing of the results of its review [of the initial decision] not later than the 10th day following receipt of the request. The written notification must:

(1) explain the reason for the action; [initial decision;]

(2) inform the requester whether the action [initial decision] was reversed following the review; and

(3) if the action [initial decision] is upheld, inform the requester of the [its] right to request reconsideration within 15 working days [of the decision by HHSC if the requestor disagrees with the decision] and provide instructions on how to [for submitting a written] request [for] reconsideration by HHSC.

§370.53. Reconsideration [Request for reconsideration] by HHSC.

[(a) An applicant that is dissatisfied or disagrees with the result of the review of an initial decision may request reconsideration of the TexCare review by HHSC.]

[(b) An applicant must request reconsideration by HHSC in writing within 20 working days from the date the applicant received the written notice of the result of the TexCare review.]

[(c)] Within 15 [20] working days from the date HHSC's designee [TexCare] receives the written request for reconsideration, HHSC must complete the reconsideration and notify the applicant in writing of its final decision.

§370.54. Temporary enrollment pending disposition of review or reconsideration.

(a) There is no retroactive enrollment in CHIP.

(b) If HSHC determines that an applicants request for review indicates the action was in error, HHSC may [If an applicant's request for review by TexCare of an adverse eligibility decision includes factual information that could have an impact on the decision, TexCare will] approve temporary enrollment of the child pending completion of the review and [/or] reconsideration by HHSC. [of the eligibility decision.]

(c) A child will remain enrolled until the [TexCare] review and any [and/or] HHSC reconsideration [process] is complete.

(d) [if the initial eligibility decision is reversed, the child's 6 months of eligibility continues.] If the review/reconsideration upholds the action, [confirms the initial decision of ineligibility,] the child is disenrolled as of the next cut-off date.

[(e) TexCare will not approve temporary enrollment if the applicant's request for review/reconsideration includes no factual basis for reversing the initial eligibility decision.]

(e) [(f)] Temporary [TexCare may approve temporary] enrollment for a child on the basis of a review is limited to only once every 6 months.

(f) [(g)] If a child who is temporarily enrolled under this section ultimately is determined ineligible for CHIP, no repayment for health care costs during the period of temporary enrollment will be sought by HHSC's or its designee [TexCare or HHSC].

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

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SUBCHAPTER C. ENROLLMENT, DISENROLLMENT, AND RENEWAL OF MEMBERSHIP

DIVISION 1. ENROLLMENT

1 TAC §§370.301, 370.303, 370.305, 370.307, 370.309

Statutory Authority (CHIP)

The amendments are proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendments affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed amendments.

§370.301. CHIP Enrollment Packet.

Within 5 business days of determining a child is CHIP eligible, HHSC's designee [TexCare] must send the Applicant [applicant] a CHIP enrollment packet containing:

(1) an explanation of CHIP benefits;

(2) information about the value-added services provided by Health Plans [health plans] in areas where there is a choice of Health Plans [health plans];

(3) an enrollment form and instructions for completing the form;

(4) a provider directory for each health plan available in the Applicant's [applicant's] CHIP Service Area (CSA);

(5) a CHIP member guide;

(6) cost-sharing information specific to the Budget Group's [budget group's] Federal Poverty Level (FPL), which includes:

(A) the enrollment fee, [monthly premium amount,] if any;

(B) a schedule of co-payments, if any; [(e.g., Native Americans have no cost-sharing)] and

(C) information about the cost-sharing cap. [; and]

[(D) the disenrollment process for non-payment of monthly premiums]

(7) the process for requesting review [by TexCare] of an action; [unfavorable eligibility or enrollment decision or filing a complaint or an appeal of an adverse determination with the member's Health maintenance Organization (HMO) or Exclusive Provider Organization (EPO) plan;] and

(8) information specifying the earliest date coverage can begin and the latest date [by which] the completed enrollment form must be received by HHSC or its designee [by TexCare] to ensure enrollment on the first day of the appropriate [following] month; and [and that summarizes the importance of appropriate health plan and Primary Care Provider (PCP) choices for applicants who live in CSAs covered by more than one HMO.]

(9) information summarizing the importance of appropriate Health Plan and Primary Care Provider (PCP) choices for Applicants who live in CSAs covered by more than one Health Plan.

§370.303. Completion of Enrollment [Process].

(a) To complete [the] enrollment [process] in a CSA with a choice of health plans [plan choice], an Applicant [applicant] must:

(1) select and indicate on the enrollment form, a single health plan to cover all eligible children, regardless of the number of eligible children in the Budget Group [budget group];

(2) select a PCP and place the name on the enrollment form; [and]

(3) indicate if an eligible child has special health care needs based on criteria in the member guide; and

(4) [(3)] sign and return the enrollment form [to TexCare].

(b) To complete [the] enrollment [process] in a CSA without a choice of Health Plans [health plan choice], an Applicant [applicant] must: [sign and return the enrollment form and select a PCP.]

(1) select a PCP and place the name on the enrollment form;

(2) indicate if an eligible child has special health care needs based on criteria in the member guide; and

(3) sign and return the enrollment form.

(c) An Applicant [applicant] may return the enrollment form [to TexCare] either by mail, [in the postage paid envelope enclosed] with the enrollment packet, or by facsimile.

(d) If an Applicant [applicant who lives in a CSA covered by an HMO] fails to choose a PCP, or if the chosen PCP is not accepting new members, the Health Plan [health plan] must assign a PCP to each member in the Budget Group [budget group] and inform the Applicant [applicant]. [The health plan will send the member a health plan identification card by no later than the 5th business day following the receipt of the Enrollment Filed by the contractor.]

(e) Enrollment [The enrollment process] for a particular child is closed 90 calendar days after that [a] child is determined eligible for CHIP if the Applicant [applicant] has not completed [the] enrollment [process] by that time. An Applicant [applicant] who fails to complete [the] enrollment [process] must initiate a new Application [application] for health care coverage [CHIP].

§370.305. Enrollment of Children with [Complex] Special Health Care Needs ([C]CSHCN).

[The enrollment process for an eligible child with complex special health care needs is the same as described in section 370.303 of this subchapter, except for the addition of the following:]

[(1) based on the criteria identified in the member guide, which is sent as part of the enrollment packet, an applicant may indicate on the enrollment form that an eligible child has special health care needs;]

(a) HHSC or its designee will notify health plans of members identified through enrollment as having special health care needs;

[(2) TexCare will notify each HMO and EPO of members identified through the enrollment process as having complex special health care needs;]

(b) [(3) within 10 business days of the effective date of coverage,] Each [each HMO and EPO] health plan will contact each member identified on the enrollment form as having [complex] special health care needs to confirm his or her health care needs status; and

(c) [(4)] Each [each HMO and EPO] health plan will notify HHSC or its designee [TexCare] of members identified through enrollment as having special health care needs who are not confirmed as having [complex] special health care needs.

§370.307. Continuous Enrollment Period.

(a) CHIP enrollment always begins on the first calendar day of the month and continues for 6 consecutive months. [unless:]

(b) Exceptions to continuous enrollment include, but are not limited to:

(1) a sibling member in the home has an earlier initial date of coverage, in which case the coverage period for the newly enrolled child will be the remaining period of coverage of the already enrolled sibling; [or]

(2) aging out when the member turns 19;

(3) change in health insurance status (parent acquires employer coverage);

(4) family moves out of state;

(5) death of the member;

(6) data match reveals member is enrolled in both CHIP and Medicaid;

(7) notification of member's pregnancy;

(8) failure to drop current health insurance if member was determined to be CHIP-eligible due to the 10 percent rule regarding the cost of the current insurance; or

(9) direction by HHSC based on evidence that the member's original eligibility determination was incorrect.

[(2) one of the circumstances described in section 370.341, concerning reasons for disenrollment, occurs.]

§370.309. Incomplete or Missing Information.

(a) HHSC or its designee [~~Fourteen calendar days after the enrollment packet is mailed, TexCare~~] sends a reminder notice to Applicants [~~applicants~~] who have failed to:

(1) sign the enrollment form; [~~or~~]

(2) return the enrollment form; or

(3) complete the enrollment form [~~it~~] properly.

(b) If the Applicant [~~applicant~~] does not respond to the initial reminder notice, HHSC or its designee will [~~TexCare~~] sends a second reminder notice. [~~14 calendar days after the date of the initial reminder notice.~~]

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

Filed with the Office of the Secretary of State on October 3, 2005.

TRD-200504465
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 424-6900

DIVISION 2. COST-SHARING REQUIREMENTS

The Texas Health and Human Services Commission (HHSC) proposes to amend Chapter 370, State Children's Health Insurance Program. HHSC proposes to amend the following rules: §370.321, Cost-Sharing Requirements, and §370.325, Annual Cost-Sharing Cap. HHSC proposes to repeal the following rule: §370.323, Cost-Sharing Exemptions. The rule proposed for repeal has been incorporated into §370.321.

Background and Justification

This amendment establishes an enrollment fee to replace monthly premium payments for the Children's Health Insurance Program (CHIP). This provides for a single payment at each certification, rather than multiple monthly payments over the period of eligibility. Additionally, cost-sharing cap percentages are updated to reflect current caps for each 6-month CHIP coverage period. Other changes are to update terminology and to reorganize content.

Section-by-Section Summary

Section 370.321 replaces the CHIP monthly premium with an enrollment fee and incorporates the cost-sharing exemption information now in §370.323, which is then deleted.

A change is made in §370.325 to reflect the current cost-sharing caps for each 6-month CHIP coverage period.

Terminology changes are made throughout the chapter, including replacing the term "TexCare" with HHSC, the Commission, or its designee.

Fiscal Note

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first 5-year period the amended and repealed rules are in effect there will be a fiscal impact to state government. Under current rules, we would estimate cost sharing collections of $26.7 million in FY06, $27.2 million in FY07, $27.7 million in FY08, $28.2 million in FY09, and $28.7 million in FY10. Under proposed rule changes, we estimate cost sharing collections to be $7.9 million in FY06, $8.1 million in FY07, $8.2 million in FY08, $8.4 million in FY09, and $8.5 million in FY10. This change is funded for 2006-07.

The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

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

Public Benefit

Kimberly Davis, Acting Deputy Director of Policy Development, has determined that for each year of the first five years the proposed rules are in effect, the public will benefit from the adoption of the proposed rules. The anticipated public benefit, as a result of enforcing the proposed rules, is the continuity of coverage resulting from simplifying the cost-sharing requirement.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Lesa Ledbetter at H-600, P.O. Box 85200, Austin, TX 78708, by fax to (512) 491-1953, or by e-mail to lesa.ledbetter@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for November 1, 2005 from 10:00 A.M. to 12:00 Noon (central time) in the public hearing room of the Texas Department of Aging and Disability Services (DADS), 701 West 51st Street, Austin, TX. Persons requiring further information, special assistance, or accommodations should contact Kyna Belcher at (512) 491-1884.

1 TAC §370.321, §370.325

Statutory Authority (CHIP)

The amendments are proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendments affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by these proposed amendments.

§370.321. [~~Cost-Sharing~~] Requirements and Exemptions.

Cost-sharing requirements are based on a Budget Group's [~~budget group's~~] percentage of FPL. Except for costs associated with unauthorized, non-emergency services provided to a member by out-of-network providers, the co-payments [~~and deductibles~~] identified in this section are the only amounts a provider may collect from an Applicant in regard to services provided to a member.

(1) An Applicant [~~General cost-sharing requirements. A member~~] may be required to pay any of the following costs of CHIP coverage for a member:

(A) an enrollment fee [~~a monthly premium~~]; and

(B) co-payments.

(2) HHSC [~~Basic cost-sharing obligations. The Health and Human Services Commission (HHSC)~~] determines the cost sharing amounts [~~a member may be required to pay~~] for enrollment in and services provided through CHIP. When determining cost sharing charges, HHSC will solicit public input by publishing proposed cost-sharing amounts and requesting comments. Cost sharing may be determined based on the maximum levels authorized under federal law and applied to income levels so as to minimize administrative costs.

(3) A member who is an American Indian/Alaska Native, as defined in 42 C.F.R. §457.10, is exempt from cost-sharing.

(4) HHSC or its designee notifies each Health Plan which of its members are exempt from cost-sharing.

(5) Co-payments do not apply, at any income level, to preventive health services, such as well-child or well-baby care visits and immunizations.

(6) A member's exemption from cost sharing is noted on the member's Health Plan Member Identification Card.

[~~(3) Monthly premium. Monthly premiums are due the first calendar day of each month and are applicable to that month's coverage. Premiums may be prepaid up to the total amount due for a coverage year.~~]

§370.325. [~~Annual~~] Cost-Sharing Cap.

(a) There is a [~~an annual~~] cost-sharing cap based on the Budget Group's [~~budget group's~~] percentage of FPL. The Applicant [~~applicant~~] is responsible for tracking the member's cost-sharing expenditures on the form provided by HHSC or its designee [~~TexCare~~] and advising HHSC's designee [~~TexCare~~] when the cap is reached. HHSC's designee [~~TexCare~~] is responsible for:

(1) computing the cost-sharing cap for each member and informing the Applicant [~~applicant~~] of the amount at enrollment [~~of the amount of their cost-sharing cap~~];

(2) providing the Applicant [~~applicant~~] with a form for keeping track of each member's [~~their~~] co-payments and enrollment fee payment; [~~monthly premiums;~~]

(3) notifying the affected Health Plan [~~health plan~~] within two business days of receiving notice from the Applicant that a member has reached [~~member's reaching~~] the cost-sharing cap; and

(4) informing HHSC [~~the Health and Human Services Commission~~] that an Applicant [~~applicant~~] is owed a [~~premium~~] refund in the form of a warrant issued by the State Comptroller's Office, if the Applicant [~~applicant~~] notifies HHSC's designee [~~TexCare~~] that the Applicant [~~applicant~~] has exceeded his or her cost-sharing cap and an enrollment fee [~~a monthly premium~~] has been received from the Applicant [~~applicant~~] that is in excess of the cost-sharing cap.

(b) A Budget Group [~~budget group~~] with gross income at or below 150% of FPL has a cost-sharing cap during the 6-month coverage period of 1.25% [~~2.5%~~] of its annual gross income [~~during the 6-month coverage period~~].

(c) A Budget Group [~~budget group~~] with gross income greater than 150% of FPL has a cost-sharing cap during the 6-month coverage period equal to 2.5% [~~5%~~] of its annual gross income [~~during the 6-month coverage period~~].

(d) On notification by HHSC's designee [~~TexCare~~] that a member has reached the cost-sharing cap, a Health Plan [~~health plan~~] will issue a new Health Plan Member Identification Card reflecting the absence of a co-payment requirement.

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

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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1 TAC §370.323

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

Statutory Authority (CHIP)

The repeal is proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed repeal affect the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by the proposed repeal.

§370.323. Cost-Sharing Exemptions.

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

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Steve Aragón
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Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER D. ELIGIBILITY FOR UNBORN CHILDREN

1 TAC §370.401

The Texas Health and Human Services Commission (HHSC) proposes to amend Chapter 370, State Children's Health Insurance Program. HHSC proposes to add new Subchapter D, Eligibility for Unborn Children, and new rule §370.401, Perinates.

Background and Justification

On October 22, 2002, the federal Centers for Medicare and Medicaid Services adopted a final rule relating to an unborn child's eligibility for benefits under the State Children's Health Insurance Program (SCHIP). The federal rule, found at 42 Code of Federal Regulations §457.10, changed the definition of a "Child" (meaning a child potentially eligible for SCHIP federal funding) to read as follows, "Child means an individual under the age of 19 including the period from conception to birth."

As authorized by Rider 70 to HHSC's appropriations for the 2006-2007 biennium, HHSC proposes to amend the CHIP chapter to implement this federal option to cover an eligible unborn child whose pregnant mother is not eligible for Medicaid. HHSC's adoption of this proposal is contingent on approval of the proposal by the federal Centers for Medicare and Medicaid Services.

Section-by-Section Summary

New §370.401 establishes CHIP eligibility for an unborn child, referred to as a "perinate," and describes additional policy that applies to the perinate. This includes a 12-month continuous eligibility period, expedited eligibility and enrollment, exemption from an assets test, exemption from a waiting period, and exemption from cost sharing requirements. It also indicates when the child may enroll in Medicaid.

Fiscal Note

Tom Suehs, Deputy Commissioner for Financial Services, has determined that during the first 2-year period the new rule is in effect there will be a fiscal impact of ($8,502,765) to state government, $15,225,944 all funds for state fiscal year 2006; and ($51,517,339) to state government, ($40,913,768) all funds or state fiscal year 2007. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

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

Public Benefit

Kimberly Davis, Acting Deputy Director of Policy Development, has determined that for each year of the first five years the proposed rule is in effect, the public will benefit from the adoption of the proposed rule. The anticipated public benefit, as a result of enforcing the proposed rule is improved health outcomes of newborns of non-Medicaid eligible women.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Lesa Ledbetter at H-600, P.O. Box 85200, Austin, TX 78708, by fax to (512) 491-1953, or by e-mail to lesa.ledbetter@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for November 1, 2005 from 1:00 P.M. to 3:00 P.M. (central time) in the public hearing room of the Texas Department of Aging and Disability Services (DADS), 701 West 51st Street, Austin, TX. Persons requiring further information, special assistance, or accommodations should contact Kyna Belcher at (512) 491-1884.

Statutory Authority (CHIP)

The new rule is proposed under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed new rule affects the Texas Health and Safety Code, Chapter 62, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposed new rule.

§370.401. Perinates.

(a) An unborn child, also referred to as a "perinate," is eligible for CHIP based on the following criteria.

(1) The mother of the perinate is not eligible for Medicaid; and

(2) The Budget Group meets CHIP income eligibility requirements in §370.44 of this title (relating to Income and Assets).

(b) A perinate who is CHIP eligible under subsection (a) of this section is:

(1) eligible for a 12-month continuous period;

(2) exempt from the CHIP assets test in §370.44 of this title;

(3) exempt from the 90-day waiting period in §370.46 of this title (relating to Waiting Period); and

(4) exempt from cost sharing in §370.321 of this title (relating to Requirements and Exemptions).

(c) HHSC's designee is required to expedite eligibility and enrollment for perinates so as to allow quick access to healthcare.

(d) The Applicant for a perinate has the right to file a Medicaid application at any time after the child is born. If the child is eligible for Medicaid, the child will be enrolled in Medicaid.

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

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.16

The Railroad Commission of Texas proposes to amend §3.16, relating to Log and Completion or Plugging Report.

The Commission proposes the amendments pursuant to the provisions of Texas Natural Resources Code, §§91.551 - 91.556, relating to filing and availability of electric logs. The proposed amendments are necessary to implement changes in Texas Natural Resources Code, §§91.551 - 91.554 and 91.556, made by House Bill (HB) 484, 79th Legislature, Regular Session (2005), effective September 1, 2005.

The proposed amendments add new subsection (a) to §3.16, which provides definitions. The proposed definitions of "basic electric log," "drilling operation," "operator," and "well" are consistent with definitions in Texas Natural Resources Code, §91.551, as amended by HB 484. Current subsection (a) is proposed to be deleted, but its provisions, with some amendments, are proposed in new subsections (b) and (c). Proposed new subsection (b) requires that completion reports be filed within 30 days after the completion of a well or within 90 days after the date on which the drilling operation is completed, whichever is earlier. Amended completion reports must be filed for any change in perforations, or openhole or casing records within 30 days after recompletion of a well, and plugging reports must be filed for a well that is a dry hole within 30 days after the well is plugged.

Proposed new subsection (c) requires, subject to the confidentiality provisions of new subsection (d), that operators file basic electric logs not later than the 90th day after the date a drilling operation is completed. This is consistent with Texas Natural Resources Code, §91.552(a), as amended by HB 484. "Basic electric log" is proposed to be defined in new subsection (a) as a density, sonic, or resistivity (except dip meter) log run over the entire wellbore. However, new subsection (c) provides that in the event a basic electric log as defined in new subsection (a) has not been run, subject to the Commission's approval, an operator shall file a lithology log or gamma ray log of the entire wellbore. In addition, new subsection (c) provides that in the event no log has been run over the entire wellbore, subject to the Commission's approval, an operator shall file the log which is the most nearly complete of the logs run.

Current subsection (b) is proposed to be redesignated as subsection (d) and is proposed to be amended to clarify that this subsection applies to requests for delayed filing of logs based on confidentiality and to clarify the time periods in which such requests must be made.

Current subsection (c) is proposed to be redesignated as subsection (e) with amendments to clarify that this subsection applies to sanctions that may be imposed if an operator fails to file either a completion report or log as required by §3.16, as proposed to be amended. Proposed new subsection (e) is consistent with current Commission policy.

The proposed amendments are necessary to conform §3.16 to changes in Texas Natural Resources Code, §§91.551 - 91.554 and 91.556, made by HB 484. These amendments clarify the duty of operators to timely file completion and plugging reports and basic electric logs. Current subsection (a) of §3.16 requires that a completion report be filed within 30 days after the completion of a well and that a basic electric log be attached to the completion report. However, current §3.16 contains no clear standard as to when a well is "completed," and this has caused some operators to delay unreasonably the filing of completion reports and logs. This, in turn, has resulted in some requests for delayed filing of logs based on confidentiality for periods of time beyond that contemplated by current §3.16.

Timely filing of completion reports and logs is deemed important to the accomplishment of the Commission's mission. Information in completion reports assists the Commission in making a determination that a well has been drilled, cased, cemented, and otherwise equipped in conformity with Commission rules to protect usable quality water. Completion information is also necessary to enable the Commission's Field Operations staff to determine the manner in which a well should be plugged or reworked to solve a particular wellbore problem that may pose a threat of pollution of usable quality water or other hazard to the public health and safety. Completion reports also provide test information required by Commission rules, are used to create a well record in the Commission's database, and provide information necessary for the setting of well allowables.

Logs filed by operators are used by Commission staff for multiple purposes, including, among others, new or proper field designations, discovery allowable determinations, two-factor allocation determinations, high cost gas determinations, determinations of formation characteristics relative to fluid injection or storage wells, and determinations as to whether wells have been properly cased and cemented. Logs filed with the Commission also provide information useful to the industry regulated by the Commission for purposes of reservoir engineering or geological assessment and provide a source of information potentially useful to the Commission in making determinations as to well density

and well spacing in field rules and/or applications for exceptions to well density or well spacing requirements.

Proposed new subsection (b) of §3.16 would clarify that completion reports are required to be filed within 30 days after the completion of a well or within 90 days after the date on which the drilling operation is completed, whichever is earlier. Proposed new subsection (c) will require that, subject to a request for delayed filing based on confidentiality, basic electric logs be filed not later than the 90th day after the date on which a continuous effort to drill or deepen a wellbore has ended. The definition of "Basic electric log" in new subsection (a) is proposed because density, sonic, or resistivity (except dip meter) logs are the type of logs that provide the most useful information for the Commission's purposes. The intent of the proposed amendments is that one of these types of logs be filed if such a log has been run. Lithology logs and gamma ray logs are less useful, but, subject to the Commission's approval, proposed new subsection (c) would allow the filing of such logs in the event that no density, sonic, or resistivity log has been run.

Leslie Savage, Planning and Administration, Oil and Gas Division, has determined that for each year of the first five years the amendment as proposed will be in effect, there will be minimal fiscal implications as a result of enforcing or administering the amendment because this rule currently requires the filing of completion and plugging reports and logs, and the amendments simply conform the rule to statutory changes made by HB 484 and provide clarification as to the time within which such reports and logs must be filed. The minimal fiscal impact to the Commission (approximately $6,000 in fiscal year 2006) would result from mainframe programming to change the date on which the clock starts for the purpose of filing of electric logs or requesting delayed filing of logs based on confidentiality.

There will be no fiscal effect on local government.

Texas Government Code, §2006.002, requires a state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses to reduce the effect if doing so is legal and feasible considering the purpose of the statutes under which the rule is to be adopted. Before adopting a rule that would have an adverse economic effect on small businesses, a state agency must prepare a statement of the effect of the rule on small businesses, which must include an analysis of the cost of compliance with the rule for small businesses and a comparison of that cost with the cost of compliance for the largest businesses affected by the rule, using cost for each employee, cost for each hour of labor, or cost for each $100 of sales.

Ms. Savage has determined that the proposed amendments to §3.16 will not have an adverse economic effect on small businesses or micro-businesses. Current §3.16 already requires filing of completion and plugging reports and logs, and the proposed amendments merely clarify the time period in which such reports and logs, or a request for a delay in the filing of logs based on confidentiality, must be filed. No additional cost of compliance will be incurred by small businesses, micro-businesses or large businesses as a result of the proposed amendments. In addition, Texas Natural Resources Code, §§91.551 - 91.556, as amended by HB 484 effective September 1, 2005, do not expressly allow the Commission to create any exception to log filing requirements for small businesses and micro-businesses. In addition, the importance of the information provided in completion reports and logs, as previously explained, does not vary based on the status of an operator as a small business or micro-business.

James M. Doherty, Hearings Examiner, Hearings Section, Office of General Counsel, has determined that for each year of the first five years that the amendments will be in effect the primary public benefit will be a more easily understood and applied rule relating to the filing of completion and plugging reports and logs, more prompt filing of these reports and logs, and improved efficiency of the Commission in carrying out its mission.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967, online at www.rrc.state.tx.us/rules/commissionform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. Comments should refer to Docket No. 20-0244125. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call James M. Doherty at (512) 463-7152. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendments to §3.16 pursuant to Texas Natural Resources Code, §§91.551 - 91.556, relating to electric logs, and §§81.051 - 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission. Texas Natural Resources Code, §§91.551 - 91.556, as amended by HB 484 effective September 1, 2005, authorize the Commission to require the filing of electric logs. In addition, Texas Natural Resources Code, §§85.201 - 85.202, require the Commission to adopt and enforce rules and orders for the conservation and prevention of waste of oil and gas, and specifically for drilling of wells, preserving a record of the drilling of wells, and requiring records to be kept and reports to be made. Texas Natural Resources Code, §§86.041 - 86.042, give the Commission broad discretion in administering the provisions of Chapter 86 of the Code, and authorize the Commission, generally, to adopt any rule or order necessary to effectuate the provisions and purposes of this Chapter. The Commission is required to adopt and enforce rules and orders to conserve and prevent the waste of gas, provide for drilling wells and preserving a record of them, requiring wells to be drilled and operated in a manner that prevents injury to adjoining property, and requiring records to be kept and reports to be made.

In addition, Texas Natural Resources Code, §§141.011 - 141.012, authorize the Commission to regulate the exploration, development, and production of geothermal energy and associated resources and to make and enforce rules associated therewith. Pursuant to Texas Water Code, §26.131, the Commission is solely responsible for the control and disposition of waste and the abatement and prevention of pollution of surface and subsurface water resulting from activities associated with the exploration, development, and production of oil or gas or geothermal resources. Pursuant to Texas Water Code, §§27.031 - 27.032 and 27.034, the Commission has authority to permit disposal wells to dispose of oil and gas waste, to require applicants for disposal well permits to furnish any information necessary to the discharge of the Commission's duties under Chapter 27, and to adopt rules required for the performance

of the Commission's duties under this Chapter. Texas Natural Resources Code, §91.101, provides that to prevent the pollution of surface or subsurface water in the state, the Commission shall adopt and enforce rules relating to, among other things, the drilling of exploratory wells and oil and gas wells or any purpose in connection with them and the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the Commission.

Texas Natural Resources Code, §§81.051, 81.052, 85.201, 85.202, 86.041, 86.042, 91.101, 91.551, 91.552. 91.553. 91.554. 91.555, 91.556, 141.011, and 141.012, and Texas Water Code, §§26.131, 27.031, 27.032, and 27.034, are affected by the proposed amendments.

Statutory Authority: §§81.051, 81.052, 85.201, 85.202, 86.041, 86.042, 91.101, 91.551, 91.552. 91.553. 91.554. 91.555, 91.556, 141.011, and 141.012, and Texas Water Code, §§26.131, 27.031, 27.032, and 27.034.

Cross-reference to statutes: §§81.051, 81.052, 85.201, 85.202, 86.041, 86.042, 91.101, 91.551, 91.552. 91.553. 91.554. 91.555, 91.556, 141.011, and 141.012, and Texas Water Code, §§26.131, 27.031, 27.032, and 27.034.

Issued in Austin, Texas on September 27, 2005.

§3.16. Log and Completion or Plugging Report.

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

(1) Basic electric log--A density, sonic, or resistivity (except dip meter) log run over the entire wellbore.

(2) Drilling operation--A continuous effort to drill or deepen a wellbore for which the commission has issued a permit.

(3) Operator--A person who assumes responsibility for the regulatory compliance of a well as shown by a form the person files with the commission and the commission approves.

(4) Well--A well drilled for any purpose related to exploration for or production or storage of oil or gas or geothermal resources, including a well drilled for injection of fluids to enhance hydrocarbon recovery, disposal of produced fluids, disposal of waste from exploration or production activity, or brine mining.

[~~(a) The owner or operator of an oil, gas, or geothermal resource well, within 30 days after the completion of such well or the plugging of such well, if the well is a dry hole, shall file with the commission the appropriate completion or plugging report, and if a basic electric log is run on the well, a legible, unaltered final copy of such a log shall be attached. A basic electric log means a lithology, porosity, or resistivity log run over the entire wellbore or in the alternative, if no such log is run over the entire wellbore, the log which is the most complete of such logs run. Amended completion reports must be filed for any change in perforations, or openhole or casing records within 30 days after recompleting the well. In addition, if the well is deepened, a copy of a basic electric log run after September 1, 1985, should be submitted if such log is run over a deeper interval than the interval covered by a basic electric log already on file with the commission for that wellbore.~~]

(b) Completion and plugging reports. The operator of a well shall file with the commission the appropriate completion report within 30 days after completion of the well or within 90 days after the date on which the drilling operation is completed, whichever is earlier. Amended completion reports must be filed for any change in perforations, or openhole or casing records within 30 days after recompletion of a well. If the well is a dry hole, the operator shall file with the commission an appropriate plugging report within 30 days after the well is plugged.

(c) Basic electric logs. Except as otherwise provided in this section, not later than the 90th day after the date a drilling operation is completed, the operator shall file with the commission a legible and unaltered copy of a basic electric log, except that where a well is deepened, a legible and unaltered copy of a basic electric log shall be filed if such log is run over a deeper interval than the interval covered by a basic electric log for the well already on file with the commission. In the event a basic electric log, as defined in this section, has not been run, subject to the commission's approval, the operator shall file a lithology log or gamma ray log of the entire wellbore. In the event no log has been run over the entire wellbore, subject to the commission's approval, the operator shall file the log which is the most nearly complete of the logs run.

(d) [~~(b)~~] Delayed filing based on confidentiality. Each log filed with the commission shall be considered public information and shall be available to the public during normal business hours. If the [~~owner or~~] operator of a [~~such~~] well [~~described in subsection (a) of this section~~] desires a log [~~log(s)~~] to be confidential, on or before the 90th day after the date a drilling operation is completed, the [~~owner or~~] operator must submit a written request for a delayed filing of the log [~~log(s)~~]. When filing such a request, the [~~owner or~~] operator must retain the log [~~log(s)~~] and may delay filing such log [~~log(s)~~] for one year beginning from the date the drilling operation was completed [~~completion or plugging report is required to be filed with the commission~~]. The [~~owner or~~] operator of such well may request an additional filing delay of two years, provided the written request is filed prior to the expiration date of the initial confidentiality period. If a well is drilled on land submerged in state water, the [~~owner or~~] operator may request an additional filing delay of two years so that a possible total delay of five years may be obtained. A request for the additional two year filing delay period must be in writing and be filed with the commission [~~received~~] prior to the expiration of the first two year filing delay. Logs must be filed with the commission within 30 days after the expiration of the final confidentiality period, except that an operator who fails to timely file with the commission a written request under this subsection for an extension of the period of log confidentiality shall file the log with the commission immediately after the conclusion of the period for filing the request.

(e) [~~(c)~~] Sanctions. If an operator fails to file a completion report or log [~~the logs are not filed~~] in accordance with the provisions of this section, the commission may refuse to assign an allowable to a well, [~~or may~~] set the allowable for such well at zero, and/or initiate penalty action pursuant to the Texas Natural Resources Code, Title 3. [~~If the well is a dry hole and the logs are not filed in accordance with the provisions of this section, the commission may initiate penalty action pursuant to the Texas Natural Resources Code, Title 3.~~]

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 September 27, 2005.

TRD-200504307
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 475-1295

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CHAPTER 5. RAIL SAFETY RULES

The Texas Department of Transportation (department) proposes the repeal of Title 16, Chapter 5, §5.101, §5.105, §5.110, §5.115, §5.201, §5.205, §5.210, §5.215, §5.220, §5.225, §5.230, §5.235, §5.240, §5.245, and §5.301, concerning rail safety.

EXPLANATION OF PROPOSED REPEALS

House Bill 2702, 79th Legislature, Regular Session, 2005, transferred all powers and duties of the Railroad Commission that relate primarily to railroads and the regulation of railroads, to the department effective October 1, 2005. Under the new law, the department is authorized to perform any act and issue any rules and orders as permitted by the Federal Railroad Safety Act of 1970 (49 U.S.C. 20101 et seq.). The department proposes the repeal of the Railroad Commission's rules concerning railroad safety because by separate action, the rules are being adopted in Title 43 in an amended form.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals. There are no anticipated economic costs for persons required to comply with the sections as proposed.

James L. Randall, P.E., Director, Transportation Planning and Programming, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Randall 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 repeals will be the avoidance of confusion. There will be no adverse economic effect on small businesses. Given that the legislature has transferred authority concerning railroad safety to the department, it would be confusing to the public to retain the rules in the Railroad Commission part of the Texas Administrative Code.

TAKINGS IMPACT ASSESSMENT

The department has prepared an analysis of the applicability of the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007, and concluded the rulemaking is within an exception to the applicability of the act.

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 October 21, 2005, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:00 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 Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to James L. Randall, P.E., Director, Transportation Planning and Programming, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2005.

SUBCHAPTER A. POLICIES, GOALS, AND OBJECTIVES

16 TAC §§5.101, 5.105, 5.110, 5.115

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

STATUTORY AUTHORITY

The repeals 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, Texas Civil Statutes, Articles 6445, and 6448a, which provides the department with the authority to adopt regulations and rules to perform its duties under these Articles.

CROSS REFERENCE TO STATUTE

Texas Civil Statutes, Articles 6419c, 6445, 6446, 6448a, 6448b, 6464, 6492a, 6506, 6507, and 6519.

§5.101. Statement of Philosophy.

§5.105. Statement of Goals.

§5.110. Statement of Objectives of Policies.

§5.115. Criteria for Screening and Ranking Alternatives to Abandonment.

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 September 30, 2005.

TRD-200504429

Richard D. Monroe
General Counsel, Texas Department of Transportation
Railroad Commission of Texas
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

SUBCHAPTER B. SAFETY RULES

16 TAC §§5.201, 5.205, 5.210, 5.215, 5.220, 5.225, 5.230, 5.235, 5.240, 5.245

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

STATUTORY AUTHORITY

The repeals 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, Texas Civil Statutes, Articles 6445, and 6448a, which provides the department with the authority to adopt regulations and rules to perform its duties under these Articles.

CROSS REFERENCE TO STATUTE

Texas Civil Statutes, Articles 6419c, 6445, 6446, 6448a, 6448b, 6464, 6492a, 6506, 6507, and 6519.

§5.201. Clearances of Structures Over and Alongside Railway Tracks.
§5.205. Reports of Railroad Accidents/Incidents.
§5.210. Railroad Safety Requirements.
§5.215. Right to Inspect Rail Property.
§5.220. Enforcement of Railroad Safety Requirements.
§5.225. Reporting/Filing Requirements.
§5.230. Wayside Detector Map, List or Chart.
§5.235. Visual Obstructions at Public Grade Crossings.
§5.240. Severability Clause.
§5.245. Hazardous Materials Reporting Requirements.

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

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Richard D. Monroe
General Counsel, Texas Department of Transportation
Railroad Commission of Texas
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

SUBCHAPTER C. RAIL SAFETY PROGRAM

16 TAC §5.301

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

STATUTORY AUTHORITY

The repeals 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, Texas Civil Statutes, Articles 6445, and 6448a, which provides the department with the authority to adopt regulations and rules to perform its duties under these Articles.

CROSS REFERENCE TO STATUTE

Texas Civil Statutes, Articles 6419c, 6445, 6446, 6448a, 6448b, 6464, 6492a, 6506, 6507, and 6519.

§5.301. Rail Safety Program 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.

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Richard D. Monroe
General Counsel, Texas Department of Transportation
Railroad Commission of Texas
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For further information, please call: (512) 463-8630

CHAPTER 8. PIPELINE SAFETY REGULATIONS
SUBCHAPTER C. REQUIREMENTS FOR NATURAL GAS PIPELINES ONLY

16 TAC §8.201

The Railroad Commission of Texas proposes amendments to §8.201, relating to Pipeline Safety Program Fees, pursuant to House Bill (HB) 872, 79th Legislature, Regular Session (2005), which amends Texas Utilities Code, §121.211(d) and (g).

The proposed amendments in §8.201(b) substitute the word "operator" for "investor-owned" or "municipally-owned" in identifying the natural gas distribution system obligated to comply with the rule; change the calendar year from 2004 to 2005; and change the deadline by which the annual pipeline safety program fee is to be filed from March 15, 2005, to March 15, 2006. In subsection (b)(6), the proposed amendments clarify that amounts recovered from customers under subsection (b) by an investor-owned natural gas distribution system or a cooperatively owned natural gas distribution system shall not be included in the revenue or gross receipts of the system for the purpose of calculating municipal franchise fees or any tax posed under Subchapter B, Chapter 182, Tax Code, or under Chapter 122, nor shall such amounts be subject to a sales and use tax imposed by Chapter 151, Tax Code, or Subtitle C, Title 3, Tax Code.

Mary McDaniel, Director, Safety Division, has determined that for the first five years the amendments will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments. The proposed amendments clarify the applicability of the existing pipeline safety program fee with respect to natural gas distribution systems.

Ms. McDaniel has determined that for each year of the first five years that the amendments will be in effect, the primary public benefit will be the continuation of the Commission's Pipeline Safety program to ensure public safety with regard to pipeline operations.

Texas Government Code, §2006.002, requires a state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses to reduce the effect if doing so is legal and feasible considering the purpose of the statutes under which the rule is to be adopted. Before adopting a rule that would have an adverse economic effect on small businesses, a state agency must prepare a statement of the effect of the rule on small businesses, which must include an analysis of the cost of compliance with the rule for small businesses and a comparison of that cost with the cost of compliance for the largest businesses affected by the rule, using cost for each employee, cost for each hour of labor, or cost for each $100 of sales.

Ms. McDaniel has determined that there will be no additional cost to individuals, small businesses, or micro-businesses of complying with the proposed amendments. The proposed amendments to §8.201 conform the rule language to the statutory changes made by HB 872, which clarify the applicability of the existing pipeline safety program fee with respect to natural gas distribution systems.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*; comments should refer to Docket No. 9614. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. McDaniel at (512) 463-7166. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendments under Texas Utilities Code, §§121.201 - 121.210, which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and to associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, *et seq.*; and Texas Utilities Code, §121.211, as amended by HB 872, which authorizes the Railroad Commission to adopt, by rule, an inspection fee to be assessed annually against operators of natural gas distribution pipelines and their pipeline facilities.

Texas Utilities Code, §§121.201 - 121.211; and 49 United States Code Annotated, §§60101, *et seq.*, are affected by the proposed amendments.

Statutory authority: Texas Utilities Code, §§121.201 - 121.211; and 49 United States Code Annotated, §§60101, *et seq.*

Cross-reference to statute: Texas Utilities Code, Chapter 121, and 49 United States Code Annotated, Chapter 601.

Issued in Austin, Texas on September 27, 2005.

§8.201. Pipeline Safety Program Fees.

(a) (No change.)

(b) The Commission hereby assesses each operator of a [~~investor-owned natural gas distribution system and each municipally owned~~] natural gas distribution system an annual pipeline safety program fee of $0.37 for each service (service line) reported to be in service at the end of calendar year 2005 [~~2004~~] by each system operator on the Distribution Annual Report, Form F7100.1-1, to be filed on March 15, 2006 [~~2005~~].

(1) Each operator of a [~~an investor-owned natural gas distribution system and each operator of a municipally-owned~~] natural gas distribution system shall calculate the total amount of the annual pipeline safety program fee to be paid to the Commission by multiplying the number of services listed in Part B, Section 3, of Department of Transportation (DOT) Distribution Annual Report, Form F7100.1-1, due to be filed on March 15, 2006 [~~2005~~], by $0.37.

(2) Each operator of a [~~an investor-owned natural gas distribution system and each operator of a municipally-owned~~] natural gas distribution system shall remit to the Commission on March 15, 2006 [~~2005~~], the amount calculated under paragraph (1) of this subsection.

(3) Each operator of a [~~an investor-owned natural gas distribution system and each operator of a municipally-owned~~] natural gas distribution system shall recover, by a surcharge to its existing rates, the amount the operator paid to the Commission under paragraph (1) of this subsection. The surcharge:

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

(4) No later than 90 days after the last billing cycle in which the pipeline safety program fee surcharge is billed to customers, each operator of a [~~an investor-owned natural gas distribution system and each operator of a municipally-owned~~] natural gas distribution system shall file with the Commission's Gas Services Division and the Safety Division a report showing:

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

(5) Each operator of a [~~investor-owned~~] natural gas distribution system that is a utility subject to the jurisdiction of the Commission pursuant to Texas Utilities Code, Chapters 101 - 105, shall file a generally applicable tariff for its surcharge in conformance with the requirements of §7.315 of this title, relating to Filing of Tariffs.

(6) Amounts recovered from customers [~~paid to the Commission~~] under this subsection by an investor-owned natural gas distribution system or a cooperatively owned natural gas distribution system [~~company~~] shall not be included in the revenue or gross receipts of the system [~~company~~] for the purpose of calculating municipal franchise fees or any tax imposed under Subchapter B, Chapter 182, Tax Code, or under Chapter 122, nor shall such amounts be [~~. Amounts paid to the Commission under this subsection are not~~] subject to a sales and use tax imposed by Chapter 151, Tax Code, or Subtitle C, Title 3 [~~Chapters 321 through 327~~], Tax Code.

(c) (No change.)

(d) If the [~~an~~] operator of a [~~an investor-owned or municipally owned~~] natural gas distribution system [~~company~~] or a natural gas master meter system [~~operator~~] does not submit payment of the annual inspection fee to the Commission within 30 days of the due date, the Commission shall assess a late payment penalty of 10 percent of the total assessment due under subsection (b) or (c) of this section, as applicable, and shall notify the operator.

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

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

CHAPTER 9. LP-GAS SAFETY RULES
SUBCHAPTER A. GENERAL REQUIREMENTS
16 TAC §9.5

The Railroad Commission of Texas proposes new §9.5, relating to Effect of Safety Violations, pursuant to House Bill (HB) 2172, 79th Legislature, Regular Session (2005), which amended Texas Natural Resources Code, §113.092 and §113.163, effective September 1, 2005. The new statutory provisions prohibit the Commission from approving an application for an initial or renewal LP-gas license or registration for an exemption from the LP-gas licensing requirements if the applicant or registrant for an exemption has violated a statute or Commission rule, order, license, permit, or certificate that relates to safety, or a person who holds a position of ownership or control in the applicant or registrant for an exemption has held a position of ownership or control in another person during the seven years preceding the date on which the application or registration for an exemption is filed and during that period of ownership or control the other person violated a statute or Commission rule, order, license, permit, or certificate that relates to safety. There are some exceptions to this prohibition, which are also set forth in the proposed new rule. Subsection (a) specifies that the proposed new section applies to a violation that occurs on or after September 1, 2005.

Proposed new subsection (c) provides that an applicant, registrant for an exemption, or other person has committed a violation described by subsection (b) if a final judgment or final administrative order finding the violation has been entered against the applicant, registrant for an exemption, or other person and all appeals have been exhausted, or the Commission and the applicant, registrant for an exemption, or other person have entered into an agreed order relating to the alleged violation.

Proposed new subsection (d) states that, regardless of whether the person's name appears or is required to appear on an application or registration for an exemption, a person holds a position of ownership or control in an applicant, registrant for an exemption, or other person if the person is an officer, director, general partner, sole owner, or trustee of, or the owner of at least 25 percent of the beneficial interest in the applicant, registrant for an exemption, or other person, or is the applicant, registrant, or other person and has been determined by a final judgment or final administrative order to have exerted actual control over the applicant, registrant, or other person.

Proposed new subsection (e) provides that the Commission must approve an application for a license or a registration for an exemption if all of the following conditions, if applicable, are met: (1) the conditions that constituted the violation have been corrected or are being corrected in accordance with a schedule to which the Commission and the applicant, registrant for an exemption, or other person have agreed; (2) all administrative, civil, and criminal penalties have been paid or are being paid in accordance with a payment schedule to which the Commission and the applicant, registrant for an exemption, or other person have agreed; and (3) the application or registration for an exemption complies with all other requirements of law and Commission rules.

Proposed new subsection (f) states that the Commission may issue a license to an applicant or approve a registration for an exemption for a registrant for a term specified by the Commission if the license or registration for an exemption is necessary to remedy a violation of law or Commission rules.

Proposed new subsection (g) states that if the Commission is prohibited from approving an application for a license or a registration for an exemption or would be prohibited from doing so if the applicant, licensee, or registrant for an exemption submitted an application or registration for an exemption, then the Commission, after notice and opportunity for a hearing, by order may refuse to renew or may revoke a license or registration for an exemption issued to the applicant, licensee, or registrant for an exemption under this chapter. In determining whether to refuse to renew or to revoke a person's license or registration for an exemption under this subsection, the Commission must consider the person's history of previous violations, the seriousness of previous violations, any hazard to the health or safety of the public, and the demonstrated good faith of the person. If an application or registration for an exemption is denied under this subsection, the Commission must provide the applicant or registrant for an exemption with a written statement explaining the reason for the denial. An order issued under proposed new subsection (g) must provide the applicant, licensee, or registrant for an exemption a reasonable period to comply with the judgment or order finding the violation before the order takes effect. The Commission's refusal to renew or revocation of a person's license or registration for an exemption under this subsection does not relieve the person of any existing or future duty under law, rules, or license or registration conditions. On refusal to renew or revocation of a person's license or registration for an exemption under this subsection, the person may not perform any activities under the jurisdiction of the Commission, except as necessary to remedy a violation of law or Commission rules and as authorized by the Commission under a license or registration for an exemption issued under subsection (f). A fee tendered in connection with an application or registration for an exemption that is denied under this section is nonrefundable. The Commission may not revoke or refuse to renew a license or registration for an exemption under this subsection if the Commission finds that the applicant, licensee, or registrant for an exemption has fulfilled the conditions set out in subsection (e).

Mary McDaniel, Director, Safety Division, and Steve Pitner, Director, Gas Services Division, have determined that for each year of the first five years the proposed new section is in effect any fiscal implications for state government as a result of enforcing or administering the new section will be *de minimis*. The fiscal implications, if any, would be in the form of lost revenue and would occur as a consequence of an entity being barred from licensure or registration for exemption because of an unresolved safety violation. Because these provisions apply only to violations that occur on or after September 1, 2005, the proposed rule does not currently apply to any entity; it is not possible to estimate for any fiscal year whether there will be any entities that will be barred from LP-gas licensure or registration for exemption because of

an unresolved safety violation. There are no fiscal implications for local governments.

Ms. McDaniel and Mr. Pitner have also determined that the public benefit anticipated as a result of the new section will be the ability to bar from licensure or registration for exemption for seven years those entities with unresolved LP-gas safety violations. This should enhance the safety of the general public with respect to LP-gas activities.

Texas Government Code, §2006.002, requires a state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses to reduce the effect if doing so is legal and feasible considering the purpose of the statutes under which the rule is to be adopted. Before adopting a rule that would have an adverse economic effect on small businesses, a state agency must prepare a statement of the effect of the rule on small businesses, which must include an analysis of the cost of compliance with the rule for small businesses and a comparison of that cost with the cost of compliance for the largest businesses affected by the rule, using cost for each employee, cost for each hour of labor, or cost for each $100 of sales.

The Commission assumes that there are LP-gas businesses or entities that would qualify to register as exempt that meet the definitions of "micro-business" and "small business" set forth in Texas Government Code, §2006.001(1) and (2), respectively. Ms. McDaniel and Mr. Pitner have determined that the proposed new rule could have an adverse economic effect on individuals, small businesses or micro-businesses, in that an individual, a small business or a micro-business LP-gas license applicant or registrant for exemption could be barred from obtaining an LP-gas license or from registering for an exemption because of an unresolved safety violation, either by the applicant or registrant for an exemption or by a person holding a position of ownership or control in the applicant or registrant for an exemption who has held a position of ownership or control in another person during the seven years preceding the date on which the application or registration for an exemption is filed and during that period of ownership or control the other person violated a statute or Commission rule, order, license, permit, or certificate that relates to safety. In that circumstance, the cost of compliance for the individual, small business, or micro-business LP-gas license applicant or registrant for exemption would be the cost of correcting the conditions that constituted the violation and paying all administrative, civil, and criminal penalties, or forgoing the ability to earn revenue by conducting LP-gas activities. These costs will vary depending on the nature, extent, and severity of the conditions constituting the safety violation and the amount of penalties and the revenue from LP-gas activities that would be lost. The Commission does not have data showing the expense for each employee, the expense for each hour of labor, or the total sales revenue for any LP-gas business or exempt entity that is an individual, small business, or micro-business. Therefore, the Commission is not able to determine the exact cost of compliance based on the cost for each employee, the cost for each hour of labor, or the cost for each $100 of sales pursuant to Texas Government Code, §2006.002(c). Further, pursuant to Texas Government Code, §2006.002, the Commission finds that, considering that the purpose of Texas Natural Resources Code, Chapter 113, is to ensure the safe use of LP-gas, it is not feasible to reduce any adverse effect the proposed new rule could have on individuals, small businesses, or micro-businesses based on the size of the business. The Commission further finds that Texas Natural Resources Code, §113.163, as amended by HB 2172, does not expressly allow the Commission to create any exception to the prohibition on licensure or registration for exemption for individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Mr. Richard Gilbert at (512) 463-6935. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the new section under Texas Natural Resources Code, §113.051, which authorizes the Commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public; and §113.163, as amended by House Bill 2172, 79th Legislature, Regular Session (2005), which prohibits the Commission from approving an application for an LP-gas license or approving a registration for an exemption from the LP-gas licensing requirements if the applicant or registrant for an exemption has violated a statute or Commission rule, order, license, permit, or certificate that relates to safety, or a person who holds a position of ownership or control in the applicant or registrant for an exemption has held a position of ownership or control in another person during the seven years preceding the date on which the application or registration for an exemption is filed and during that period of ownership or control the other person violated a statute or Commission rule, order, license, permit, or certificate that relates to safety.

Statutory authority: Texas Natural Resources Code, §113.051 and §113.163.

Cross-reference to statute: Texas Natural Resources Code, Chapter 113.

Issued in Austin, Texas on September 27, 2005.

§9.5. Effect of Safety Violations.

(a) This section implements the provisions of Texas Natural Resources Code, §113.163, and applies to a violation that occurs on or after September 1, 2005.

(b) Except as provided by subsections (e) and (f) of this section, the Commission may not approve an application for an initial or renewal license or registration for an exemption under this chapter if:

(1) the applicant or registrant for an exemption has violated a statute or Commission rule, order, license, permit, or certificate that relates to safety; or

(2) a person who holds a position of ownership or control in the applicant or registrant for an exemption has held a position of ownership or control in another person during the seven years preceding the date on which the application or registration for an exemption is filed and during that period of ownership or control the other person violated a statute or Commission rule, order, license, permit, or certificate that relates to safety.

(c) An applicant, registrant for an exemption, or other person has committed a violation described by subsection (b) of this section if:

(1) a final judgment or final administrative order finding the violation has been entered against the applicant, registrant for an exemption, or other person and all appeals have been exhausted; or

(2) the Commission and the applicant, registrant for an exemption, or other person have entered into an agreed order relating to the alleged violation.

(d) Regardless of whether the person's name appears or is required to appear on an application or registration for an exemption, a person holds a position of ownership or control in an applicant, registrant for an exemption, or other person if the person is:

(1) an officer, director, general partner, sole owner, or trustee of, or the owner of at least 25 percent of the beneficial interest in the applicant, registrant for an exemption, or other person; or

(2) the applicant, registrant, or other person and has been determined by a final judgment or final administrative order to have exerted actual control over the applicant, registrant, or other person.

(e) The Commission shall approve an application for a license or registration for an exemption under this chapter, if all of the following conditions, if applicable, are met:

(1) the conditions that constituted the violation have been corrected or are being corrected in accordance with a schedule to which the Commission and the applicant, registrant for an exemption, or other person have agreed;

(2) all administrative, civil, and criminal penalties have been paid or are being paid in accordance with a payment schedule to which the Commission and the applicant, registrant for an exemption, or other person have agreed; and

(3) the application or registration for an exemption complies with all other requirements of law and Commission rules.

(f) The Commission may issue a license to an applicant described by subsection (b) of this section or approve a registration for an exemption for a registrant for an exemption described by subsection (b) of this section for a term specified by the Commission if the license or registration for an exemption is necessary to remedy a violation of law or Commission rules.

(g) If the Commission is prohibited by subsection (b) of this section from approving an application for a license or a registration for an exemption or would be prohibited from doing so by that subsection if the applicant, licensee, or registrant for an exemption submitted an application or registration for an exemption, then the Commission, after notice and opportunity for a hearing, by order may refuse to renew or may revoke a license or registration for an exemption issued to the applicant, licensee, or registrant for an exemption under this chapter.

(1) In determining whether to refuse to renew or to revoke a person's license or registration for an exemption under this subsection, the Commission shall consider the person's history of previous violations, the seriousness of previous violations, any hazard to the health or safety of the public, and the demonstrated good faith of the person.

(2) If an application or registration for an exemption is denied under this subsection, the Commission shall provide the applicant or registrant for an exemption with a written statement explaining the reason for the denial.

(3) An order issued under this subsection must provide the applicant, licensee, or registrant for an exemption a reasonable period to comply with the judgment or order finding the violation before the order takes effect.

(4) The Commission's refusal to renew or revocation of a person's license or registration for an exemption under this subsection does not relieve the person of any existing or future duty under law, rules, or license or registration conditions.

(5) On refusal to renew or revocation of a person's license or registration for an exemption under this subsection, the person may not perform any activities under the jurisdiction of the Commission under this chapter, except as necessary to remedy a violation of law or Commission rules and as authorized by the Commission under a license or registration for an exemption issued under subsection (f) of this section.

(6) A fee tendered in connection with an application or registration for an exemption that is denied under this section is nonrefundable.

(7) The Commission may not revoke or refuse to renew a license or registration for an exemption under this subsection if the Commission finds that the applicant, licensee, or registrant for an exemption has fulfilled the conditions set out in subsection (e) 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 September 27, 2005.

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

CHAPTER 12. COAL MINING REGULATIONS

SUBCHAPTER G. SURFACE COAL MINING AND RECLAMATION OPERATIONS, PERMITS, AND COAL EXPLORATION PROCEDURES SYSTEMS

DIVISION 2. GENERAL REQUIREMENTS FOR PERMITS AND PERMIT APPLICATIONS

16 TAC §12.108

The Railroad Commission of Texas proposes to amend §12.108, relating to Permit Fees, to implement provisions of House Bill (HB) 472, 79th Texas Legislature, Regular Session (2005), which amends Texas Natural Resources Code, §134.055, relating to annual fees paid by a coal mining permit holder. HB 472 requires the collection of two new annual fees: a fee for each acre of land covered by a reclamation bond (bond acreage fee) and a fee for each mining permit in effect at the end of a calendar year. The bill also eliminates the minimum annual coal mined acreage fee of $120 per acre and allows the Commission to determine the amounts of all annual fees.

The Commission proposes to add the two new annual fees required by HB 472 as new subsection (b)(2) and (3). In subsection (b)(2), the Commission proposes a fee of $3 for each acre of

land within a permit area covered by a reclamation bond on December 31st of the year. In subsection (b)(3), the Commission proposes a fee of $3,550 for each permit in effect on December 31st of the year. The Commission also proposes to revise the annual fee for each acre of land from which coal or lignite has been removed (mined acreage fee) in subsection (b)(1) to $160 for each acre of land within the permit area on which coal or lignite was actually removed during the calendar year, a reduction from the current rate of $390. The proposed new fees go into effect on January 1, 2006.

Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, has determined that during each year of the first five years the proposed amendment would be in effect, the net effect on state government will be zero. The Commission's coal mining regulatory program is partially funded with a fifty per cent cost reimbursement grant from the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement. The State share cost for implementing this regulatory program, $1,180,000, is funded from fees paid by the regulated coal mining industry. These fees come from two general categories: application fees and annual fees. Application fees are specified in §12.108(a) and are not proposed to be revised in this rulemaking. The total amount in annual fees required to fund this regulatory program was determined by subtracting the total amount of application fees estimated for collection in 2006 ($115,000) from the estimated $1,180,000 State share cost to fund the program in year 2006. The remainder in State share expense of $1,065,000 is then allocated for collection from annual fees. The total amount of annual fees required is allocated for collection according to the following distribution: seven per cent for annual permit fees, 46.5 per cent for mined acreage fees, and 46.5 per cent for bonded acreage fees. The proposed annual fee rates were then derived based on the estimated area where coal or lignite will be removed during 2006 and the estimated permit status and bonded acres on December 31, 2006.

The seven per cent to be collected from annual permit fees ($74,550) was divided by 21, the estimated number of permits as of December 31, 2006, to derive the $3,550 individual permit fee proposed in subsection (b)(3). The 46.5 per cent to be collected from mined acreage fees ($495,225) was allocated across 3,095.1, the number of acres within the permit areas on which coal or lignite will be removed during the calendar year, to derive the $160 acreage fee proposed in subsection (b)(1). Finally, the remaining 46.5 per cent to be collected through the bonded acreage fee was divided by 165,350, the number of acres under bond, to derive the $3.00 per bonded acre fee proposed in subsection (b)(2).

Mr. Hodgkiss has determined that during each year of the first five years the proposed amendment would be in effect will reduce the economic cost to the mining industry by $142,089. This is based on a comparison of the revenue that would be generated under the current $390 annual mined acreage fee compared to the proposed amendment that would reduce this fee to $160 per mined acre and set new annual fees of $3 per bonded acre and $3,550 per issued permit. The cost comparison uses mining activity anticipated for year 2006 as follows: 21 mining permits on December 31, 2006; coal or lignite removed from 3,095.10 acres during 2006; and 165,350 acres covered by a reclamation bond on December 31, 2006. Not all operators will experience an economic savings. The new annual fees proposed will require operators that have ceased mining and therefore are not paying mined acreage fees to now pay annual permit and bonded acreage fees. There are no fiscal impacts on local governments.

Mr. Hodgkiss has determined that the public benefit resulting from the new fee structure for coal mining activities is a closer alignment of fees paid by the coal mining industry with the costs incurred by the Railroad Commission, which is a more equitable fee structure.

In accordance with Texas Government Code, §2006.002, Mr. Hodgkiss has determined that there will be no adverse economic effects on small businesses or micro-businesses because of the proposed amendment because there are no small businesses or micro-businesses, as those terms are defined in Texas Government Code, §2006.001, holding coal mining permits from the Commission. The proposed amendments also will not affect a local economy; therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2002.022.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at http://www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us and should refer to SMRD Docket No. 1-05. Comments will be accepted for 30 days after publication in the *Texas Register*. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. HB 472 mandates that the Commission adopt rules setting the fees pursuant to the bill no later than December 1, 2005. For further information, call Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, at (512) 463-6901. The status of the Commission rulemaking in progress is available at http://wwww.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendment under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations and §134.055, as amended by House Bill (HB) 472, 79th Texas Legislature, Regular Session (2005), which authorizes the Commission to obtain annual fees and mandates the structure set forth in the proposed amendment to §12.108.

Statutory authority: Texas Natural Resources Code, §134.013 and §134.055.

Cross-reference to statute: Texas Natural Resources Code, §134.013 and §134.055.

Issued in Austin, Texas, on September 27, 2005.

§12.108. Permit Fees.

(a) Application Fees. Each application for a surface coal mining and reclamation permit or renewal or revision of a permit shall be accompanied by a fee. The initial application fee and the application fee for renewal of a permit may be paid in equal annual installments during the term of the permit. The fee schedule is as follows:

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

(b) Annual Fees. In addition to application fees required by this section, each permittee shall pay to the Commission the following annual fees due and payable not later than March 15th of the year following the year for which these fees are applicable: [~~an annual fee in the amount of $390 for each acre of land within the permit area on which the permittee actually conducted operations for the removal of coal and lignite during the calendar year. The total amount of this fee is due and payable not later than March 15th of the year following the year of removal operations. For calendar year 2004 only, the annual fee shall be calculated as follows: for each acre of land on which a permittee~~

~~actually conducted operations for the removal of coal and lignite during the period January 1, 2004, through August 31, 2004, the permittee shall pay to the Commission an annual fee of $300 per acre. For each acre of land on which a permittee actually conducted operations for the removal of coal and lignite during the period September 1, 2004, through December 31, 2004, the permittee shall pay to the Commission an annual fee of $390 per acre.~~]

(1) a fee in the amount of $160 for each acre of land within the permit area on which coal or lignite was actually removed during the calendar year;

(2) a fee of $3 for each acre of land within a permit area covered by a reclamation bond on December 31st of the year, as shown on the map required by §12.142(2)(C) of this chapter (relating to Operation Plan: Maps and Plans); and

(3) a fee of $3,550 for each permit in effect on December 31st of the year.

(c) (No change.)

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

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PART 6. TEXAS MOTOR VEHICLE BOARD

CHAPTER 101. PRACTICE AND PROCEDURE

The Texas Department of Transportation (department) proposes the repeal of Title 16, Part 6, Chapter 101, which consists of §§101.1 - 101.16, concerning general rules, §§101.22 - 101.25, 101.27, and 101.28, concerning rulemaking proceedings and hearings, and §§101.41 - 101.64, 101.66, and 101.67, concerning adjudicative proceedings and hearings.

EXPLANATION OF PROPOSED REPEALS

House Bill 2702, 79th Legislature, Regular Session, 2005, dissolved the Motor Vehicle Board (board) and transferred its rulemaking responsibilities to the Texas Transportation Commission (commission). Therefore it is necessary to propose the repeal of Title 16, Part 6 and simultaneously propose new sections under Title 43 to reflect the new delegation of duties and to transfer the rules to the appropriate title. Some sections will not be reenacted because they are specific to board operations and are no longer necessary.

Subchapter A of Chapter 101, consisting of §§101.1 - 101.16, are the General Rules of Practice and Procedure relating to submissions to and practice before the director of the Motor Vehicle Division. These sections will be reenacted in Title 43, Chapter 8.

Subchapter B of Chapter 101, consisting of §§101.22 - 101.25, 101.27 and 101.28, relate to rulemaking by the board. Sections 101.22 - 101.25 and §101.27 are unnecessary and will not be reenacted. Section 101.28 will be reenacted in Chapter 8 of Title 43.

Subchapter C of Chapter 101, consisting of §§101.41 - 101.64, 101.66, and 101.67, relate to Adjudicative Proceedings and Hearings before the director of the Motor Vehicle Division. All sections except for §101.63, Filing of Documents for Consideration by Board Members, will be reenacted in Chapter 8 of Title 43. Section 101.63 imposed deadlines for submission of documents that no longer apply, inasmuch as contested cases are no longer considered at regularly scheduled board meetings.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals. There are no anticipated economic costs for persons required to comply with the repeals as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Bray has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be implementation of House Bill 2702 and a clearer understanding by the public and motor vehicle distribution industry of the location of rules relating to the Motor Vehicle Division of the department. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

The department will hold public hearings on the proposed repeals. A separate notice lists the date, times, and locations of the hearings.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 13, 2005.

SUBCHAPTER A. GENERAL RULES

16 TAC §§101.1 - 101.16

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

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §2301.005(e) and §2301.155, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.002 and §2301.005.

§101.1. Scope and Purpose.

§101.2. Definitions; Conformity with Statutory Requirements.

§101.3. Formal Opinions.

§101.4. Informal Opinions.

§101.5. Prohibited Disclosures and Communications.

§101.6. Appearances.

§101.7. Petitions.

§101.8. Affidavits.

§101.9. Form of Petitions, Pleadings, and the Like.

§101.10. Complaints.

§101.11. Hearing Docket.

§101.12. Computing Time.

§101.13. Filing of Documents.

§101.14. Cease and Desist Orders.

§101.15. Enlargement of Time.

§101.16. Expenses of Witness or Deponent.

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

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Richard D. Monroe
General Counsel, Texas Department of Transportation
Texas Motor Vehicle Board
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For further information, please call: (512) 463-8630

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SUBCHAPTER B. RULEMAKING PROCEEDINGS AND HEARINGS

16 TAC §§101.22 - 101.25, 101.27, 101.28

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

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §2301.005(e) and §2301.155, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.002 and §2301.005.

§101.22. Proceedings To Be Public.

§101.23. Written Presentation.

§101.24. Oral Presentation.

§101.25. Procedure.

§101.27. Publication.

§101.28. Exempted Actions.

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

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Richard D. Monroe
General Counsel, Texas Department of Transportation
Texas Motor Vehicle Board
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For further information, please call: (512) 463-8630

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SUBCHAPTER C. ADJUDICATIVE PROCEEDINGS AND HEARINGS

16 TAC §§101.41 - 101.64, 101.66, 101.67

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

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §2301.005(e) and §2301.155, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.002 and §2301.005.

§101.41. Institution of Adjudicative Proceedings.

§101.42. Notice of Hearing in Adjudicative Proceedings.

§101.43. Reply.

§101.44. Hearings To Be Public.

§101.45. Recording and Transcriptions of Hearing Cost.

§101.46. Joint Record.

§101.47. Waiver of Hearing.

§101.48. Postponement of Hearing.

§101.49. Presiding Officials.

§101.50. Conduct of Hearing.

§101.51. Conduct and Decorum.

§101.52. Evidence.

§101.53. Stipulation of Evidence.

§101.54. Objections and Exceptions.

§101.55. Motions.

§101.56. Briefs.

§101.57. Service of Pleadings, Petitions, Briefs, and the Like.

§101.58. Submission.

§101.59. Findings and Recommendations of Hearing Officer.

§101.60. Filing of Exceptions.

§101.61. Form of Exceptions.

§101.62. Replies to Exceptions.

§101.63. Filing of Documents for Consideration by Board Members.

§101.64. Final Decision.

§101.66. Submission of Amicus Briefs.

§101.67. Format for Documents Filed with the Board Subsequent to the Issuance of a Proposal for 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.

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CHAPTER 103. GENERAL RULES

16 TAC §§103.1 - 103.17

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

The Texas Department of Transportation (department) proposes the repeal of Title 16, Part 6, Chapter 103, which consists of §§103.1 - 103.17, concerning general rules related to the licensing of motor vehicle dealers. This chapter provides guidance to licensed dealers regarding motor vehicle license renewals, protests, and franchises governed by the Occupations Code, Chapter 2301.

EXPLANATION OF PROPOSED REPEALS

House Bill 2702, 79th Legislature, Regular Session, 2005, dissolved the Motor Vehicle Board (board) and transferred its rulemaking responsibilities to the Texas Transportation Commission (commission). Therefore it is necessary to propose the repeal of Title 16, Part 6 and simultaneously propose new sections under Title 43 to reflect the new delegation of duties and to transfer the rules to the appropriate title. Sections 103.1 - 103.16 will be reenacted in Title 43, Chapter 8. Section 103.17, Motorized Scooters, will not be reenacted.

House Bill 2702 also amended Transportation Code, Chapter 551, by defining "pocket bike or minimotorbike" as a self-propelled vehicle that is equipped with an electric motor or internal combustion engine having a piston displacement of less than 50 cubic centimeters, is designed to propel itself with not more than two wheels in contact with the ground, has a seat or saddle for the use of the operator, is not designed for use on a highway, and is ineligible for a certificate of title under Chapter 501. The amendments to Transportation Code, Chapter 551 further state that the statute may not be construed to authorize the operation of a pocket bike or minimotorbike on any highway, road, street, bicycle path or sidewalk.

Occupations Code, §2301.002(23)(A) defines a motor vehicle as "a fully self-propelled vehicle having two or more wheels that has as its primary purpose the transport of a person or persons, or property on a public highway . . ." The board previously adopted §103.17 to regulate sales of pocket bikes under the assumption that certain motorized scooters could be driven on public roadways based upon that statutory language.

House Bill 2702 makes it clear that pocket bikes may not be driven on public streets. Thus, pocket bikes do not fall under the definition of "motor vehicle" in Occupations Code, §2301.002(23)(A), and it is no longer necessary to regulate their distribution.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals. There are no anticipated economic costs for persons required to comply with the repeals as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Bray has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be implementation of House Bill 2702 and a clearer understanding by the public and motor vehicle distribution industry of the location of rules relating to the Motor Vehicle Division of the department. Small businesses will be relieved of the obligations and costs associated with obtaining a franchised or independent motor vehicle dealer's license ($175 or more); (2) amending licenses to add lines for any current franchised dealers ($25); (3) upgrading sales and service facilities, where necessary; and (4) administrative costs required to comply with the statute. There will be no measurable adverse economic effect on small businesses. However, existing dealers and manufacturers who must hold licenses to distribute comparable vehicles that are considered to be motor vehicles under the law, will have to compete with unlicensed dealers and manufacturers whose products are not deemed to be motor vehicles.

PUBLIC HEARING

The department will hold public hearings on the proposed repeals. A separate notice lists the date, times, and locations of the hearings.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 13, 2005.

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §2301.005(e) and §2301.155, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.002 and §2301.005.

§103.1. Representative Defined.
§103.2. Service-Only Facility.
§103.3. Amended License.
§103.4. Notification of License Application; Protest Requirements.
§103.5. Time for Filing Protest.
§103.6. Hearing.
§103.7. Addition or Relocation of Line-Make.
§103.8. Replacement Dealership.
§103.9. Franchise Verification.
§103.10. Brokering, New Motor Vehicles.
§103.11. Brokering, Used Motor Vehicles.
§103.12. Notice of Termination or Noncontinuance of Franchise and Time for Filing Protest.
§103.13. Motor Home Show Limitations and Restrictions.
§103.14. Manufacturer Ownership of Franchised Dealer; Good Cause Extension; Dealer Development.
§103.15. Administration of Licensing Fees.
§103.16. Renewal of Licenses.
§103.17. Motorized Scooters.

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

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TRD-200504368
Richard D. Monroe
General Counsel, Texas Department of Transportation
Texas Motor Vehicle Board
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CHAPTER 105. ADVERTISING

16 TAC §§105.1 - 105.17, 105.19 - 105.32

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

The Texas Department of Transportation (department) proposes the repeal of Title 16, Part 6, Chapter 105, which consists of §§105.1 - 105.17 and §§105.19 - 105.32, concerning advertising.

EXPLANATION OF PROPOSED REPEALS

House Bill 2702, 79th Legislature, Regular Session, 2005, dissolved the Motor Vehicle Board (board) and transferred its rule-making responsibilities to the Texas Transportation Commission (commission). Therefore it is necessary to propose the repeal of Title 16, Part 6 and simultaneously propose new sections under Title 43 to reflect the new delegation of duties and to transfer the rules to the appropriate title. Chapter 105 will be reenacted in Chapter 8 of Title 43.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals 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. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Bray 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 repeals will be implementation of HB 2702 and a clearer understanding by the public and motor vehicle distribution industry of the location of rules relating to the Motor Vehicle Division of the department. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

The department will hold public hearings on the proposed repeals. A separate notice lists the date, times, and locations of the hearings.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 13, 2005.

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §2301.005(e) and §2301.155, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301.

CROSS REFERENCE TO STATUTE

Occupations Code, §§2301.002, 2301.005 and 2301.203(c).

§105.1. Objective.
§105.2. General Prohibition.
§105.3. Specific Rules.
§105.4. Definitions.
§105.5. Availability of Vehicles.
§105.6. Accuracy.
§105.7. Untrue Claims.
§105.8. Layout.
§105.9. Manufacturer's Suggested Retail Price.
§105.10. Dealer Price Advertising.
§105.11. Identification.
§105.12. Advertising at Cost or Invoice.
§105.13. Trade-in Allowances.
§105.14. Used Vehicles.
§105.15. Demonstrators, Factory, Executives/Official Vehicles.
§105.16. Auction.
§105.17. Free Offers.
§105.19. Authorized Dealer.
§105.20. Manufacturer and Distributor Rebates.
§105.21. Rebate and Financing Rate Advertising by Dealers.
§105.22. Lease Advertisements.
§105.23. Manufacturer Sales; Wholesale Prices .
§105.24. Savings Claims; Discounts.
§105.25. Sales Payment Disclosures.
§105.26. Payment Disclosure--Lease.
§105.27. Bait Advertisement.
§105.28. Lowest Price Claims.

§105.29. Fleet Prices.
§105.30. Bankruptcy/Liquidation Sale.
§105.31. Finding of Violation.
§105.32. Enforcement.

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

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CHAPTER 107. WARRANTY PERFORMANCE OBLIGATIONS

16 TAC §§107.1 - 107.11

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

The Texas Department of Transportation (department) proposes the repeal of Title 16, Part 6, Chapter 107, which consists of §§107.1 - 107.11, concerning warranty performance obligations.

EXPLANATION OF PROPOSED REPEALS

House Bill 2702, 79th Legislature, Regular Session, 2005, dissolved the Motor Vehicle Board (board) and transferred its rulemaking responsibilities to the Texas Transportation Commission (commission). Therefore it is necessary to propose the repeal of Title 16, Part 6 and simultaneously propose new sections under Title 43 to reflect the new delegation of duties and to transfer the rules to the appropriate title. Sections 107.1 - 107.10 will be reenacted in Title 43, Chapter 8. Section 107.11, Reports to Board, will not be reenacted because it is specific to board operations and no longer necessary.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals 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. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Bray 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 repeals will be implementation of HB 2702 and a clearer understanding by the public and motor vehicle distribution industry of the location of rules relating to the Motor Vehicle Division of the department. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

The department will hold public hearings on the proposed repeals. A separate notice lists the date, times, and locations of the hearings.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 13, 2005.

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §§2301.005(e), 2301.155, and 2301.602, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301.

CROSS REFERENCE TO STATUTE

Occupations Code, §§2301.002, 2301.005, 2301.204 and 2301.601 - 2301.613.

§107.1. Objective.
§107.2. Filing of Complaints.
§107.3. Review of Complaint.
§107.4. Notification to Manufacturer and Distributor.
§107.5. Mediation; Settlement.
§107.6. Hearings.
§107.7. Contested Cases: Decisions and Final Orders.
§107.8. Decisions.
§107.9. Incidental Expenses.
§107.10. Compliance with Order Granting Relief .
§107.11. Reports to Board.

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

Filed with the Office of the Secretary of State on September 29, 2005.

TRD-200504370
Richard D. Monroe
General Counsel, Texas Department of Transportation
Texas Motor Vehicle Board
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

CHAPTER 109. LESSORS AND LEASE FACILITATORS

16 TAC §§109.1 - 109.12

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

The Texas Department of Transportation (department) proposes the repeal of Title 16, Part 6, Chapter 109, which consists of §§109.1 - 109.12, concerning lessors and lease facilitators.

EXPLANATION OF PROPOSED REPEALS

House Bill 2702, 79th Legislature, Regular Session, 2005, dissolved the Motor Vehicle Board (board) and transferred its rulemaking responsibilities to the Texas Transportation Commission (commission). Therefore it is necessary to propose the repeal of Title 16, Part 6 and simultaneously propose new sections under Title 43 to reflect the new delegation of duties and to transfer the rules to the appropriate title. Sections 109.1 - 109.7 and §§109.9 - 109.12 will be reenacted in Chapter 8 of Title 43. Section 109.8, Refund of Fees, will not be reenacted because it duplicates other rules regarding fees and is no longer necessary.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals 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. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Bray 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 repeals will be implementation of HB 2702 and a clearer understanding by the public and motor vehicle distribution industry of the location of rules relating to the Motor Vehicle Division of the department. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

The department will hold public hearings on the proposed repeals. A separate notice lists the date, times, and locations of the hearings.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 13, 2005.

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §2301.005(e) and §2301.155, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.002 and §2301.005.

§109.1. Objective.

§109.2. Definitions.

§109.3. License.

§109.4. Application for a License.

§109.5. Sanctions.

§109.6. More than One Location.

§109.7. Established and Permanent Place of Business.

§109.8. Refund of Fees.

§109.9. Records of Leasing.

§109.10. Change of Lessor or Lease Facilitator Status.

§109.11. Required Notice to Lessees.

§109.12. General Distinguishing Number Exception.

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 September 29, 2005.

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Richard D. Monroe
General Counsel, Texas Department of Transportation
Texas Motor Vehicle Board
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For further information, please call: (512) 463-8630

CHAPTER 111. GENERAL DISTINGUISHING NUMBERS

16 TAC §§111.1 - 111.12, 111.14 - 111.20

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

The Texas Department of Transportation (department) proposes the repeal of Title 16, Part 6, Chapter 111, which consists of §§111.1 - 111.12 and 111.14 - 111.20, concerning general distinguishing numbers.

EXPLANATION OF PROPOSED REPEALS

House Bill 2702, 79th Legislature, Regular Session, 2005, dissolved the Motor Vehicle Board (board) and transferred its rulemaking responsibilities to the Texas Transportation Commission (commission). Therefore it is necessary to propose the repeal of Title 16, Part 6 and simultaneously propose new sections under Title 43 to reflect the new delegation of duties and to transfer the rules to the appropriate title. Sections 111.1 - 111.20 will be reenacted in Chapter 8 of Title 43.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals 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. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Bray 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 repeals will be implementation of HB 2702 and a clearer understanding by the public and motor vehicle distribution industry of the location of rules relating to the Motor Vehicle Division of the department. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

The department will hold public hearings on the proposed repeals. A separate notice lists the date, times, and locations of the hearings.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P. O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 13, 2005.

STATUTORY AUTHORITY

The repeals 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, Occupations Code, §2301.005(e) and §2301.155, which provides the commission with the authority to adopt rules to administer Occupations Code, Chapter 2301; and Transportation Code, §503.002, which provides the commission with the authority to adopt rules to administer Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.002 and §2301.005, and Transportation Code, Chapter 503.

§111.1. Objective.
§111.2. Definitions.
§111.3. General Distinguishing Number.
§111.4. House Trailer; Travel Trailer; Towable Recreational Vehicle.
§111.5. More Than One Location.
§111.6. Off-site Sales.
§111.7. Security Requirements.
§111.8. Temporary Cardboard Tags.
§111.9. Metal Dealer License Plates and Temporary Cardboard Tags.
§111.10. Established and Permanent Place of Business.
§111.11. Sanctions.
§111.12. GDN Sanction and Qualification Hearing.
§111.14. Manufacturers License Plates.
§111.15. Record of Sales and Inventory.
§111.16. Change of Dealer's Status.
§111.17. Metal Converter's License Plates and Temporary Cardboard Tags.
§111.18. Proof of valid license required of foreign motor vehicle dealers.
§111.19. Processing of License Applications, Amendments, or Renewals.
§111.20. Dealer Agents.

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 September 29, 2005.

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Richard D. Monroe
General Counsel, Texas Department of Transportation
Texas Motor Vehicle Board
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 73. LABORATORIES

25 TAC §§73.11, 73.21, 73.31, 73.41, 73.51 - 73.55

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§73.11, 73.21, 73.31, 73.41 and 73.51 - 73.55, concerning fees for laboratory services, and the repeal of §73.25, concerning the certification and accreditation of environmental laboratories.

BACKGROUND AND PURPOSE

The repeal of §73.25 is necessary because the Texas Commission on Environmental Quality now administers environmental laboratory certification and accreditation. The amendments comply with Health and Safety Code, §§12.031, 12.032, and 12.0122 that allow the department to charge fees to a person who receives public health services from the department, and which is necessary for the department to recover costs for performing laboratory services. Since the last rules revision, the laboratory has experienced increased costs due to changes in technology for laboratory testing, new requirements for shipment of laboratory specimens, and price increases on supplies and test kits. It is necessary to increase fees to offset a portion of the cost of performing laboratory testing.

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 73.11, 73.21, 73.31, 73.41 and 73.51 - 73.55 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 73.25 was reviewed and the department has determined that reasons for adopting the section no longer exist because the responsibility for this section has been transferred to the Texas Commission for Environmental Quality.

SECTION-BY-SECTION SUMMARY

The proposed changes include editorial changes to existing rules, the deletion of laboratory tests, increases to the maximum cap on existing fees and new fees for clinical and environmental testing. Section 73.25 is repealed because the Texas Commission on Environmental Quality now administers the two-tiered program for the certification and accreditation of environmental laboratories. Amendments to §§73.11, 73.21, 73.31, 73.41 and 73.51 contain editorial changes to correct the name of the department and the laboratory and to correct spelling errors. Section 73.52 contains proposed maximum limits for fees for certification of milk and shellfish laboratories to replace the existing fees set at an exact amount. Section 73.53 establishes the fee schedule for training of laboratorians. Section 73.54 and §73.55 contain the fee schedules for clinical testing, newborn screening, environmental testing, and other laboratory services. These sections include proposed new fees, increased caps on some existing fees, and the deletion of some tests.

FISCAL NOTE

Dr. Susan Neill, Director, Laboratory Services Section, has determined that for each year of the first five year period the sections are in effect, there will be fiscal implications to the state as a result of administering the sections as proposed. The effect on state government will be an increase in revenue to the state if fees for laboratory testing are raised to the maximum allowable. These revenues will offset the cost of performing the laboratory tests. There will be no effect on existing contracts with other state agencies. Implementation of the proposed sections will not result in any fiscal implications for local governments unless they submit specimens for testing.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Neill has also determined that there are no anticipated costs to small businesses or micro-businesses (other than to those that submit specimens for testing) 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 (other than to those that submit specimens for testing) who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Dr. Neill 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 will be the availability of tests previously unavailable to local health departments, state agencies and contractors on a fee-for-service basis.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be directed to Sherry S. Clay, Manager, Quality Control Unit, Laboratory Services Section, 1100 West 49th Street, Austin, Texas 78756-3199, (512) 458-7318, extension 2423. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The amendments are authorized under Health and Safety Code, §12.031 and §12.032, which allow the department to charge fees to a person who receives public health services from the department, §12.034, which requires the department to establish collection procedures, §12.035, which requires the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the department's public health service fee fund, §12.0122, which allows the department to enter into a contract for laboratory services; 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 Chapter 1001, Health and Safety Code.

The proposed amendments affect the Health and Safety Code, Chapters 12 and 1001; and Government Code, Chapter 531.

§73.11. Certification of Milk and Shellfish Laboratories.

(a) (No change.)

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

(1) Assessment--A fact-finding process performed by the Department of State Health Services [~~Texas Department of Health~~] (department) in which information and observations are collected and evaluated for the purpose of judging the laboratory's conformance with established certification standards. Assessment includes an onsite inspection.

(2) (No change.)

(c) Certification application.

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

(3) Payment may be by check or money order made payable to the Department of State Health Services [~~Texas Department of Health~~].

(4) - (6) (No change.)

(d) Standards.

(1) The minimum standards for certification are as specified by the United States Food and Drug Administration (FDA). These specifications are available for review during normal business hours at the department's Laboratory Services Section [~~Bureau of Laboratories~~], 1100 West 49th Street, Austin, Texas 78756-3199.

(2) (No change.)

(e) - (f) (No change.)

§73.21. Newborn Screening.

(a) Purpose. This section establishes procedures for the purchase and submission of newborn screening test kits provided by the Laboratory Services Section (section) [~~Bureau of Laboratories (bureau)~~] of the Department of State Health Services [~~Texas Department of Health~~] (department).

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

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

(5) Test kit--The department-designed collection device, demographic information form and envelope used to submit a newborn's blood specimens for screening by the section [~~bureau~~].

(c) Test kits.

(1) The department through the section [~~bureau~~] will provide newborn screening test kits upon written request from a provider of newborn screening. A separate test kit is required for each screening panel.

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

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

§73.31. Specimen Submission.

(a) Specimens submitted to the Department of State Health Services [~~Texas Department of Health~~] (department) shall be in compliance with the Laboratory Services Section (section) [~~Bureau of Laboratories (bureau)~~] Manual of Reference Services (manual) and other written instructions established by the section [~~bureau~~].

(b) (No change.)

(c) The manual and other written instructions may be obtained upon request from the Department of State Health Services, Laboratory Services Section, [~~Texas Department of Health, Bureau of Laboratories,~~] 1100 West 49th Street, Austin, Texas 78756-3199, (512) 458-7318 or from the section's [~~bureau's~~] website, http://www.dshs.state.tx.us/lab. [~~http://www.tdh.state.tx.us/lab.~~]

§73.41. Sale of Laboratory Services.

(a) Purpose. This section implements the provisions of the Health and Safety Code, §12.0122 concerning the sale of specific laboratory services by the Department of State Health Services (department) Laboratory Services Section (section). [~~Texas Department of Health (department) Bureau of Laboratories (bureau).~~]

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

§73.51. Fees.

(a) Purpose. This section establishes fees pursuant to the Health and Safety Code, §§12.0122, 12.032 and 12.034 for laboratory services provided by the Laboratory Services Section (section) [~~Bureau of Laboratories (bureau)~~] of the Department of State Health Services [~~Texas Department of Health~~] (department) and provides for their payment.

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

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

(6) Reagent water metal suitability group--cadminum, chrominum, copper, iron, lead, manganese, nickel and zinc.

(7) [~~(6)~~] Routine water mineral group--Alkalinity, chloride, conductance, fluoride, nitrate, pH, sulfate, and total dissolved solids.

(8) [~~(7)~~] Semi-volatile organic compounds in fish--1,2,4,5-Tetrachlorobenzene, 1,2,3-trichlorobenzene, 1,2-dichlorobenzene, 1,3-dichlorobenzene, 1,4-dichlorobenzene, 2,4,5-trichlorophenol, 2,4,6-trichlorophenol, 2,4-dichlorophenol, 2,4-dimethylphenol, 2,4-dinitrophenol, 2,4-dinitrotoluene, 2,6-dinitrotoluene, 2-chloronaphthalene, 2-chlorophenol, 2-methylnaphthalene, 2-methylphenol, 2-nitroaniline, 2-nitrophenol, 3,4-methylphenol, 3,3'-dichlorobenzidine, 3-nitroaniline, 4,5-dinitro-2-methylphenol, 4-bromophenyl-phenylether, 4-chloro-3-methylphenol, 4-chloroaniline, 4-chlorophenyl-phenylether, 4-nitroaniline, 4-nitrophenol, acenaphthene, acenapthylene, aldrin, alpha-bhc, alpha-endosulfan, aniline, anthracene, benzidine, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)perylene, benzo(k)fluoranthene, benzoic acid, benzyl alcohol, beta-bhc, beta-endosulfan, bis(2-chloroethoxy)methane, bis(2-chloroethyl)ether, bis(2-chloroisopropyl)ether, bis(2-ethylhexyl)adipate, bis(2-ethylhexyl)phthalate, butylbenzylphthalate, chrysene, delta-bhc, dibenz(a,h)anthracene, dibenzofuran, dieldrin, diethylphthalate, dimethylphthalate, di-n-butylphthalate, di-n-octylphthalate, diphenylhydrazine, endosulfan sulfate, endrin, endrin aldehyde, endrin ketone, fluoranthene, fluorene, heptachlor, heptachlor epoxide, hexachlorobenzene, hexachlorobutadiene, hexachlorocyclopentadiene, hexachloroethane, hexachlorophene, indeno-(1,2,3-cd)pyrene, isophorone, lindane, napthalene, nitrobenzene, n-nitrosodiethylamine, n-nitrosodimethylamine, n-nitroso-di-n-butylamine, n-nitroso-di-n-propylamine, n-nitrosodiphenylamine, p,p'-ddd, p,p'-dde, p,p'-ddt, pentachlorophenol, phenanthrene, phenol, pyrene, pyridine.

(9) [~~(8)~~] Volatile organic compounds (VOC).

(A) In air--1,1,1-Trichloroethane, 1,2,4-trimethylbenzene, 1,4-dichlorobenzene, 2-ethoxyethylacetate, 2-heptanone, 2-propanol, acetone, alpha-pinene, benzene, butoxyethanol, butyl acetate, chloroform, cumene (isopropyl benzene), cyclohexane, cyclohexanone, ethanol, ethyl acetate, ethyl methacrylate, ethyl benzene, heptane, hexachloroethane, isoamyl acetate, iso-butanol, limonene, m/p-xylene, methyl ethyl ketone (MEK), methyl methacrylate, napththalene, n-propyl acetate, o-xylene, phenol, sec-butanol, styrene, tetrachloroethylene, tetrahydrofuran, toluene, trichloroethylene.

(B) In drinking water--

(i) Regulated compounds--1,1,1-Trichloroethane, 1,1,2-trichloroethane, 1,1-dichloroethene, 1,2,4-trichlorobenzene, 1,2-dichlorobenzene, 1,2-dichloroethane, 1,2-dichloropropane, 1,4-dichlorobenzene, benzene, carbon tetrachloride, chlorobenzene, cis-1,2-dichloroethene, ethyl benzene, m- and p-xylene, methylene chloride, o-xylene, styrene, tetrachloroethene, toluene, trans-1,2-dichloroethene, trichloroethene, vinyl chloride.

(ii) Monitor compounds--,1,1,2-Tetrachloroethane, 1,1,2,2-tetrachlorethane, 1,1-dichloroethane, 1,1-dichloropropene, 1,2,3-trichlorobenzene, 1,2,4-trichlorobenzene, 1,2-dibromo-3-chloropropane, 1,2-dibromoethane, 1,3,5-trimethylbenzene, 1,3-dichlorobenzene, 1,3-dichloropropane, 2,2-dichloropropane,2-chlorotoluene, 4-chlorotoluene, 4-isopropyltoluene, bromobenzene, bromochloromethane, Bromoform, bromomethane, chloromethane, chloroform, chloromethane, cis-1,3-dichloropropene, dibromochloromethane, dibromomethane, dichlorodifluoromethane, dichlorodifluoromethane, hexachlorobutadiene, isopropylbenzene, naphthalene, n-buthybenzene, n-propylbenzene, s-butylbenzene, t-butylbenzene, trans-1,3-dichloropropene, trichlorofluoromethane.

(iii) In fish--1,1,1,2-Tetrachloroethane, 1,1,1-trichloroethane, 1,1,2,2-tetrachloroethane, 1,1,2-trichloroethane, 1,1-dichloroethane, 1,1-dichloroethene, 1,1-dichloropropene, 1,2,3-trichlorobenzene, 1,2,3-trichloropropane, 1,2,4-trichlorobenzene, 1,2,4-trimethylbenzene, 1,2-dibromo-3-chloropropane, 1,2-dibromoethane, 1,2-dichlorobenzene, 1,2-dichloroethane, 1,2-dichloropropane, 1,3,5-trimethylbenzene, 1,3-dichlorobenzene, 1,3-dichloropropane, 1,4-dichlorobenzene, 2,2-dichloropropane, 2-butanone, 2-chlorotoulene, 2-hexanone, 4-chlorotoluene, 4-isopropyl toluene, 4-methyl-2-pentanone, acetone, acrylonitrile, benzene, bromobenzene, bromochloromethane, bromodichloromethane, bromoform, bromoethane, carbon disulfide, carbon tetrachloride, chlorobenzene,

chloroethane, chloroform, chloromethane, cis-1,2-dichloroethene, cis-1,3-dichloropropene, dibromochloromethane, dibromomethane, dichlorodifluromethane, ethyl methacrylate, ethylbenzene, hexachlorobutadiene, iodomethane, isopropylbenzene, m- and p-xylene, methyl methacrylate, methyl tert-butyl ether, methylene chloride, napthalene, n-butylbenzene, n-propylbenzene, o-xylene, sec-butylbenzene, styrene, tert-butylbenzene, tetrachloroethane, tetrahydrofuran, toluene, trans-1,2-dichloroethene, trans-1,3-dichloropropene, trichloroethene, trichlorofluoromethane, vinyl chloride.

(iv) Other compounds--2-Butanone (MEK), 2-hexanone, 4-methyl-2-pentanone (MIBK), acetone, acrylonitrile, carbon disulfide, ethyl methacrylate, iodomethane, methyl methacrylate, methyl-t-butyl ether (MTBE), tetrahydrofuran, vinyl acetate.

(c) (No change.)

(d) A schedule of all fees is available upon request from the Department of State Health Services, Laboratory Services Section, [Texas Department of Health, Bureau of Laboratories,] 1100 West 49th Street, Austin, Texas 78756, (512) 458-7318. It is also available online in the manual of reference services on the section's [bureaus] web site http://www.dshs.state.tx.us/lab. [http://www.tdh.state.tx.us/lab.]

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

(h) Pursuant to Health and Safety Code, §12.035, the department is required to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the Department of State Health Services [Texas Department of Health] Public Health Service Fee Fund.

§73.52. Fees for the Certification of Milk and Shellfish Laboratories.
Fees shall not exceed the following amounts.

(1) [(a)] Antibiotic milk laboratories--$900. [$350.]

(2) [(b)] Milk industry laboratories--$1300. [$525.]

(3) [(c)] Full service milk laboratories--$1900. [$685.]

(4) [(d)] Milk proficiency tests (non-Texas certified laboratories)--$500. [$375.]

(5) [(e)] Shellfish laboratory--$1100. [$500.]

(6) [(f)] Re-certification or supplemental certification--$300. [$200.]

§73.53. Fee Schedule for Training of Laboratorians.
Fees for training of laboratorians shall not exceed the following amounts:

(1) workshops--$200 [$150] per day; and

(2) individual, hands-on training--$200 [$150] per day.

§73.54. Fee Schedule for Clinical Testing and Newborn Screening.
Fees for clinical testing and newborn screening shall not exceed the following amounts.

(1) Human specimens.

(A) Bacteriology.

(i) (No change.)

(ii) Aerobic isolation, definitive I.D.--$35.

(iii) [(ii)] Anaerobic isolation, comprehensive--$94.

(iv) Anaerobic isolation, definitive I.D.--$35.

(v) [(iii)] Bioterrorism:

(I) culture--$119; and

(II) smear--$19.

(vi) [(iv)] *Bordetella pertussis*:

(I) culture--$138; and

(II) molecular testing--$125.

(vii) [(v)] *C. botulinum* isolation--$94.

(viii) [(vi)] Diphtheria culture--$113.

(ix) [(vii)] Drug susceptibility testing:

(I) VRE (vancomycin resistant enterococcus)--$63;

(II) VRSA (vancomycin resistant *Staphylococcus aureus*)--$63;

(III) MRSA (methicillin resistant *Staphylococcus aureus*)--$63;

(IV) *Neisseria gonorrhoeae*--$63; and

(V) One drug susceptibility testing--$63.

(x) [(viii)] Enteric pathogens--$88.

(xi) [(ix)] Magnetic bead enrichment for *E. coli, Enterohemorrhagic E. coli* (EHEC)--$50.

(xii) Fecal fat screen--$9.

(xiii) Fecal occult blood--$7.

(xiv) Fecal WBC smear--$10.

[*(x)* Fatty acid analysis--$63.]

(xv) [(xi)] Genetic probe:

(I) gonorrhea/chlamydia (GC/CT)--$31;

(II) amplified probe for gonorrhea--$31;

(III) amplified probe for chlamydia--$31; [and]

(IV) amplified probe for gonorrhea/chlamydia--$63; and[.]

(V) amplified probe for human papillomavirus (HPV)--$52.

(xvi) Gram stain smear with fecal WBC--$12.

(xvii) [(xii)] Identification and typing:

(I) Immuno method, *Salmonella and Shigella*--$13;

[*(I)* EHEC only--$128;]

(II) *Haemophilus influenzae*--$119;

(III) *Neisseria meningitides*--$119;

(IV) noncomplex typing (*Vibrio*, *Brucella*, etc.)--$63;

(V) other complex typing--$130;

(VI) *Salmonella*--$119;

(VII) *Shigella*--$73;

(VIII) *Streptococcus*, Group A (GAS)--$88; [and]

(IX) Streptococcus, typing Groups B, C, D, G--$88; and[.]

(X) Legionella--$88.

(xviii) KOH exam except for skin, hair and nails--$10.

(xix) KOH for skin, hair and nails--$10.

(xx) [(xiii)] Molecular studies:

(I) pulsed-field gel electrophoresis (PFGE)--$125; and

(II) polymerase chain reaction (PCR)--$56.

(xxi) [(xiv)] Mycolic acid studies--$31.

(xxii) [(xv)] *Neisseria gonorrhoeae* culture--$56.

(xxiii) [(xvi)] Pure culture identification:

(I) aerobes--$56;

(II) anaerobes--$100;

(III) *Campylobacter*--$69; and

(IV) *Neisseria gonorrhoeae*--$69.

(xxiv) Routine cultures:

(I) any source except urine--$22;

(II) blood--$22;

(III) stool, *Campylobacter* and *E. Coli* 0157--$34;

(IV) stool, *Salmonella* and *Shigella*--$34; and

(V) urine--$20.

(xxv) [(xvii)] *Streptococcus* screen--$25.

[(xviii) Tissue:]

[(I) Lyme disease--$75;]

[(II) Rocky Mountain Spotted Fever (RMSF)--$75; and]

[(III) relapsing fever--$113.]

(xxvi) [(xix)] Toxin studies:

(I) *Botulinum* toxin--$163;

(II) *Clostridium difficile* toxin--$21;

[(II) Clostridium toxin--$44;]

(III) Shiga toxin--$94;

(IV) Toxic Shock Syndrome Toxin-1 (TSST)--$160; [$88;] and

(V) *Vibrio cholera* toxin--$88.

(xxvii) [(xx)] *Vibrio* culture--$88.

(xxviii) Wet mount, vaginal--$10.

(B) Clinical chemistry.

(i) 5'nucleotidase--$61.

(ii) Acetone--$8.

(iii) Albumin, serum, urine or other source--$9.

(iv) Aldose--$52.

(v) Alkaline phosphatase isoenzymes--$37.

(vi) Alkaline phosphatase--$9.

(vii) ALT (Alanine aminotransferase)--$9.

(viii) AST (Aspartate aminotransferase)--$9.

(ix) Amylase, serum--$11.

(x) Ammonia--$35.

(xi) B-12--$12.

(xii) B-12 and folic acid--$59.

(xiii) Bilirubin direct--$9.

(xiv) Bilirubin, Total--$9.

(xv) [(i)] Blood typing:

(I) ABO typing--$9.00;

(II) antibody screen (blood type)--$25;

(III) antigen typing (blood type)--$13;

(IV) antigen titering--$13; [and]

(V) direct COOMBS--$54; and

(VI) [(V)] Rh typing--$13.

(xvi) Blood Urea Nitrogen (BUN)--$7.

(xvii) Calcium--$9.

(xviii) Calcium-125--$42.

(xix) Calcium, ionized--$80.

(xx) Carbon dioxide (CO2)--$9.

(xxi) CEA (carcinombryonic antigen)--$34.

(xxii) Chloride, serum--$9.

(xxiii) Chloride, urine--$10.

(xxiv) [(ii)] Cholesterol:

(I) cholesterol and high density lipoprotein (HDL)--$9.00; and

(II) cholesterol only--$8.00.

(xxv) Cholinesterase, RBC--$14.

(xxvi) Creatine Kinase (CK) assay--$11.

(xxvii) Creatine Kinase (CK) isoenzymes--$29.

(xxviii) Creatine Kinase (CK) MB fraction--$13.

(xxix) Creatinine assay--$9.

(xxx) Creatinine clearance test--$16.

(xxxi) Creatinine, urine--$9.

(xxxii) Cortisol--$29.

(xxxiii) Electrolyte Panel--$14.

(xxxiv) Estradiol, serum--$49.

(xxxv) Estradiol, free--$49.

(xxxvi) Estrogens, total--$100.

(xxxvii) Ferritin--$24.

(xxxviii) Folate--$12.

(xxxix) Folic acid, serum--$26.

(xl) Fructosamine--$26.

(xli) FSH (follicle stimulating hormone)--$32.

(xlii) G-6-PD--$24.

(xliii) Gastrin--$24.

(xliv) GGT (gamma-glutamyl transferase--$12.

(xlv) [~~(iii)~~] Glucose:

(I) glucose, postprandial, 0 and 2 hours--$14;

(II) glucose, random, fasting--$7.00;

(III) glucose tolerance test, 1 hour--$14;

(IV) glucose tolerance test, 2 hour--$21; and

(V) glucose tolerance test, 3 hour--$28.

(xlvi) Heavy metal screen, urine--$46.

(xlvii) Hantoglobin--$25.

(xlviii) [~~(iv)~~] Hemoglobin, total--$6.00.

(xlix) Hemoglobin A1C--$23.

(l) [~~(v)~~] Hemoglobinopathy--$15.

(li) Hematology:

(I) CBC with differential--$14;

(II) CBC complete, automated with differential--$13;

(III) CBC complete, automated with out differential--$11;

(IV) Differential, manual--$7;

(V) Erythropoietin--$46;

(VI) Platelet count--$9;

(VII) Prothrombin time--$9;

(VIII) PTT (partial pthromoplastin time)--$11;

(IX) Reticulocyte count--$10; and

(X) Sedimentation rate--$6.

(lii) Iron binding capacity--$16.

(liii) Iron panel--$87.

(liv) Iron, total--$11.

(lv) Lactic acid--$74.

(lvi) LDH (lactic acid dehydrogenase) isoenzymes--$41.

(lvii) LDH total--$10.

(lviii) lead, blood--$31.

(lix) [~~(vi)~~] Lead screen--$11.

(lx) [~~(vii)~~] Lipid profile, includes cholesterol; triglycerides; HDL; and low-density lipoprotein (LDL)--$28.

(lxi) LH (leutenizing hormone)--$32.

(lxii) Lipase--$14.

(lxiii) Liver (hepatic) function panel--$14.

(lxiv) Magnesium--$12.

(lxv) Osmolatity, blood--$63.

(lxvi) Osmolaity, urine--$87.

(lxvii) Parathyriod antibody, c-terminal, mid-mole--$92.

(lxviii) [~~(viii)~~] Phenylalanine--$38.

(lxix) Phosphorus--$9.00.

(lxx) Phosphorus, urine--$9.00.

(lxxi) Potassium, urine--$9.00.

(lxxii) Pregnancy test, serum--$13.

(lxxiii) Pregnancy test, urine (HCG-qualitative)--$13.

(lxxiv) Prolactin--$34.

(lxxv) Protein, total--$7.00

(lxxvi) Protein, total, 24 hour--$10.

(lxxvii) PSA (Prostatic specific antigen)--$26.

(lxxviii) Rheumatoid factor--$10.

(lxxix) Serum, protein electrophoresis--$24.

(lxxx) Sodium--$9.00.

(lxxxi) T3 (Tri-iodothyronine) uptake--$11.50.

(lxxxii) T3, reverse--$45.

(lxxxiii) T3, total--$45.

(lxxxiv) Testosterone, total--$51.

(lxxxv) Thyriod peroxidate AB--$37.

(lxxxvi) Thyroxin, T4, total--$12.

(lxxxvii) Transferrin--$42.

(lxxxviii) Triglycerides--$10.

(lxxxix) Uric acid--$8.00.

(xc) Urinalysis with microscopic--$9.00.

(xci) Urinalysis without microscopic--$7.00.

(xcii) Urinalysis, auto, without microscopic--$9.00.

(xciii) Valprroic acid--$31.

(lciv) VMA, (vanillylmandelic acid)--$39.

~~[(ix) Phenylalanine/Tyrosine--$38.]~~

~~[(x) Tyrosine--$38.]~~

~~[(xi) Thyroid profile includes total thyroxine (T4); free T4; and thyroid stimulating hormone (TSH)--$63.]~~

~~[(xii) TSH--$31.]~~

~~[(xiii) Free T4--$19.]~~

~~[(xiv) Total T4--$16.]~~

(C) Cytology:

(i) Fine needle aspiration, evaluation--$100;

(ii) Liquid based pap smear--$33;

(iii) Non-Gyn, smear, routine--$56;

(iv) Pap smear--$12;

(v) Pap smear with hormone evaluation--$112;

(vi) Pap smear, pathologist--$12; and

(vii) Pneumocystis, over 5 slides--$112.

(D) [(C)] DNA (Deoxyribonucleic acid) analysis:

(i) Beta-Globin 6 mutation panel (HbS, HbC, Hb E, HbD, Beta-Thalassemias-29 and -88)--$150;

(ii) Beta-Globin 5 mutation panel (HbS, HbC, Hb E, Beta-Thalassemias-29 and -88)--$138;

(iii) Hemoglobin S and C mutation Test--$88;

(iv) Hemoglobin E mutation test--$88;

(v) Beta-Thalassemia-29 and -88 mutation test--$100;

(vi) Beta-Thalassemia-29 mutation test--$63;

(vii) Beta-Thalassemia-88 mutation test--$63;

(viii) Hemoglobin D mutation test--$63;

(ix) Beta-Globin sequencing (from 105 of cap site to IVS-1-60)--$188;

(x) Beta-Globin sequencing (from 105 of cap site to IVS-1-60) added to another test--$100;

[(xi) Congenital adrenal hyperplasia--$538;]

[(xii) Congenital adrenal hyperplasia, DNA carrier analysis of family member--$206;]

(xi) [(xiii)] Galactosemia--$506;

(xii) [(xiv)] Galactosemia, DNA carrier analysis of family member--$206;

(xiii) [(xv)] Phenylketonuria--$600; and

(xiv) [(xvi)] Phenylketonuria, DNA carrier analysis of family member--$206.

(E) Drugs:

(i) Amikacin level--$155;

(ii) Blood alcohol--$19;

(iii) DHEAs--$82;

(iv) Dioxin drug level--$23;

(v) Dilantin (phenytoin) drug level--$23;

(vi) Drugs of abuse screens, urine:

(I) 1 drug--$19;

(II) 3 drugs--$58; and

(III) 7 drugs--$135.

(vii) Gentamicin level--$29;

(viii) Insulin level--$20;

(ix) Isoniazid (INH), urine test, qualitative--$62;

(x) Lithium level--$13;

(xi) Phenobarbital level--$20;

(xii) Procainamide, NAPA drug level--$66;

(xiii) Quinidine level--$25;

(xiv) Salicylate level--$18;

(xv) Tegretol (Carbemazepine) level--$17;

(xvi) Theophylline (aminophylline) level--$25;

(xvii) Tobramycin level--$29; and

(xviii) Vancomycin level--$31.

(F) [(D)] Genetics:

(i) alpha fetoprotein (AFP)--$31;

(ii) ß-human chorionic gonadotropin (ß-HCG)--$16;

(iii) unconjugated estriol-3 (UE3)--$22; and

(iv) triple screen, includes ß-HCG, UE3, and AFP--$63.

(G) [(E)] Mycobacteriology/mycology.

(i) Acid fast bacillus (AFB):

(I) amplification only--$69;

(II) concentration, any source--$12;

(III) culture, any source--$26;

(IV) culture probe only--$44;

(V) drug susceptibility studies:

(-a-) direct susceptibility, each drug--$10;

(-b-) disk method--$23;

(-c-) indirect susceptibility, each drug--$10;

(-d-) level 1 drugs:

(-1-) Ciprofloxacin--$100;

(-2-) Ethionamide--$100;

(-3-) Isoniazid--$100;

(-4-) Ofloxacin--$100;

(-5-) PAS (p-aminosalicylic acid)--$100;

(-6-) Pyrazinamide--$100; and

(-7-) Rifampin--$100.

(-e-) level 2 drugs:

(-1-) Azithromycin--$100;

(-2-) Clofazamine--$100;

(-3-) Cycloserine--$100;

(-4-) Ethambutol--$100;

(-5-) Kanamycin--$100; and

(-6-) Streptomycin--$100.

(-f-) level 3 drug, Capreomycin--$100;

(-g-) MIC (minimum inhibitory concentration)--$35;

(-h-) primary panel--$75; and

(-i-) secondary panel--$163.

(VI) [(II)] identification, referred isolates--$31;

[(III) primary drug panel--$56;]

[(IV) probe only--$44;]

[(V) Pyrazinamide (PZA) only--$19;]

[(VI) secondary drug panel--$163;]

(VII) smear and culture--$56; and

(VIII) smear only--$19. [; and]

[(IX) smear, culture and fungal culture--$131.]

(ii) Direct High Performance Liquid Chromatography (HPLC)[, only]--$31.

(iii) Fungus:

(I) reference:

(-a-) [(I)] culture--$75;
(-b-) [(II)] identification--$69; [and]
(-c-) identification, gen probe--$51; and
(-d-) [(III)] probe only--$44.

(II) clinical:

(-a-) culture, fungi, blood (isolation and presumptive I.D.)--$21;
(-b-) culture, fungi, definitive I.D., mold--$25;
(-c-) culture, fungi, definitive I.D., yeast--$25;
(-d-) culture, fungi, definitive I.D., mold--$25;
(-e-) culture, fungi, other source except blood, isolation and presumptive I.D.--$20;
(-f-) culture, fungi, skin, hair, nails, isolation and presumptive I.D.--$19;
(-g-) India ink smear--$15; and
(-h-) PAS, fungal smear--$17.

(iv) *M. kansasii* [*kansasi*] susceptibility, Rifampin--$13.

(H) [(F)] Newborn screening test kit, including screening panel--$40. [$38.] (Fees are based on the newborn screening test kits described in §73.21 of this title (relating to Newborn Screening), which includes the costs of the screening panel.)

(I) [(G)] Parasitology.

(i) Blood/tissue parasites--$156.

(ii) *Cryptosporidium* preparation acid fast smear--$12.

(iii) *Cryptosporidium screen, stool*--$13.

[(ii) *Giardia/Cryptosporidium* antigen screen--$94.]

(iv) [(iii)] Intestinal parasites--$119.

(v) [(iv)] Parasite culture--$169.

(vi) [(v)] Pinworm swab--$31.

(vii) [(vi)] Worm identification--$44.

(J) [(H)] Serology.

(i) Amoebic antibody--$31.

(ii) Anti-DNA, double stranded--$34.

(iii) ANA (antinuclear antibody)--$28.

(iv) [(i)] Arbovirus:

(I) immunoglobulin G (IgG)--$63;

(II) immunoglobulin M (IgM)--$88; and

(III) panel--$150.

(v) [(ii)] *Aspergillus*--$31.

(vi) ASO (antistreptolysin O)--$21.

(vii) ASO (antistreptolysin O) titer--$21.

(viii) [(iii)] *Brucella*--$16.

(ix) C4 compement, quantitative--$29.

(x) [(iv)] Cat scratch fever (*Bartonella*)--$50.

(xi) CH 50 Complement, total qualitative--$29.

(xii) C-reactive protein, quantative--$11.

(xiii) Culture typing, immunofluorescent method--$12.

(xiv) [(v)] Cytomegalovirus (CMV):

(I) IgG--$38;

(II) IgM--$44; and

(III) panel--$44.

(xv) Epstein-Barr panel--$156.

(xvi) Epstein-Barr virus antibody--$63.

(xvii) [(vi)] *Erlichia*--$50.

(xviii) [(vii)] FTA (fluorescent triponemal antibody) only--$38.

(xix) [(viii)] Fungus:

(I) identification--$69; and

(II) panel--$88.

(xx) [(ix)] Hantavirus, IgG/IgM--$94.

(xxi) *Heliobacter pylori*--$48.

(xxii) [(x)] Hepatitis A:

(I) IgM--$56; and

(II) total--$13.

(xxiii) [(xi)] Hepatitis B:

(I) core total antibody--$38;

(II) core IgM antibody--$56;

(III) [(II)] surface antibody (Ab)--$19; and

(IV) [(III)] surface antigen (Ag)--$20. [$13.]

(xxiv) [(xii)] Hepatitis B e Ab--$25.

(xxv) [(xiii)] Hepatitis B e Ag--$19.

(xxvi) [(xiv)] Hepatitis C (HCV)--$15.

(xxvii) [(xv)] Hepatitis C (RIBA)--$175.

(xxviii) Acute (comprehensive) hepatitis panel--$63.

(xxix) Herpes test, rapid method--$31.

(xxx) HSV (Herpes Simplex Virus) I, IgG AB--$128.

(xxxi) HSV I and II, IgG AB--$128.

(xxxii) HSV igM AB with reflex titer--$128.

(xxxiii) HSV II IgG AB--$128.

(xxxiv) [~~(xvi)~~] Human immunodeficiency virus (HIV):

(I) confirmation--$44;

(II) oral HIV, Orasure--$62;

(III) [~~(II)~~] screen--$13; and

(IV) [~~(III)~~] viral load--$175.

(xxxv) [~~(xvii)~~] HIV/HCV panel--$28.

(xxxvi) Immunoglobulins, quantitative, IgG, IgA, IgM--$54.

[~~*(xviii)* Influenza A and B--$50.~~]

(xxxvii) [~~(xix)~~] *Legionella*--$69.

(xxxviii) [~~(xx)~~] Lyme (*Borrelia*) IgG/IgM panel--$60. [~~$38.~~]

(xxxix) Malaria antibody--$31.

(xl) [~~(xxi)~~] Miscellaneous serological tests--$38.

(xli) Mononucleosis screen--$18.

(xlii) [~~(xxii)~~] Mumps:

(I) IgG--$38; and

(II) IgM--$38.

(xliii) Mycoplasma antibody panel--$26.

(xliv) [~~(xxiii)~~] Parvovirus B-19, IgG/IgM--$75.

(xlv) [~~(xxiv)~~] Plague (*Yersinia*)--$19.

[~~*(xxv)* Poliomyelitis (polio) I, II, III--$88.~~]

(xlvi) [~~(xxvi)~~] Q-fever--$63.

(xlvii) Rheumatoid factor--$11.

(xlviii) [~~(xxvii)~~] *Rickettsia* Panel--$69.

(xlix) [~~(xxviii)~~] *Rickettsia/Ehrlichia* Panel--$119.

(l) [~~(xxix)~~] RPR (rapid plasma reagent test)--$6.00.

(li) [~~(xxx)~~] RPR/syphilis confirmation--$16.

(lii) [~~(xxxi)~~] Rubella:

(I) IgG--$19;

(II) IgM--$38; and

(III) screen--$9.00.

(liii) [~~(xxxii)~~] Rubeola:

(I) IgG--$38; and

(II) IgM--$44.

(liv) [~~(xxxiii)~~] Toxoplasmosis:

(I) IgG--$50; and

(II) IgM--$50.

(lv) [~~(xxxiv)~~] Tularemia (*Francisela*)--$56.

(lvi) [~~(xxxv)~~] *Varicella zoster*--$56.

(lvii) [~~(xxxvi)~~] VDRL (venereal disease research laboratory) test--$28.

[~~*(xxxvii)* West Nile virus (WNV)--$19.~~]

(K) Surgical pathology:

(i) Level I, Global--$24;

(ii) Level II, Global--$60;

(iii) Level III, Global--$74;

(iv) Level IV, Global--$112;

(v) Level V, Global--$156; and

(vi) Level VI, Global--$227.

(L) [~~(I)~~] Virology.

(i) *Chlamydia* culture--$100.

(ii) *Dengue* isolation--$100.

(iii) Electron microscope studies only--$356.

(iv) Herpes simplex isolation--$106.

(v) Influenza:

(I) surveillance--$156; and

(II) subtyping--$131.

(vi) Virus:

(I) viral detection by PCR--$125; [~~$313;~~]

(II) virus identification on submitted isolate (reference specimen)--$313; and

(III) virus isolation, comprehensive--$263.

(2) Non-human specimens.

(A) (No change.)

(B) Entomology.

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

(iii) Mosquito identification:

(I) adult, per carton--$63; and

[~~*(II)* egg paddle, per paddle--$8.00; and~~]

(II) [~~(III)~~] larvae, per vial--$56.

[~~*(iv)* Tick examination:~~]

[~~*(I)* Lyme disease, *Borrelia* and Rocky Mountain Spotted Fever (RMSF)--$44;~~]

[~~*(II)* relapsing fever--$44; and~~]

[~~*(III)* tick identification, per vial--$31.~~]

(C) - (D) (No change.)

(E) Virology.

(i) Arbovirus isolation:

(I) (No change.)

(II) mosquito--$75; and [~~.~~]

(III) equine--$44.

(ii) (No change.)

[~~*(iii)* Avian serology:~~]

[~~*(I)* arbovirus--$69; and~~]

[~~*(II)* arbovirus (chicken)--$38.~~]

(iii) [(iv)] Rabies testing--$81.

(iv) [(v)] Rabies virus typing:

(I) molecular--$156; and

(II) monoclonal--$44.

[(F) Handling fees.]

[(i) Pathogenic agents--$75;]

[(ii) Clinical specimens and environmental samples--$38.]

(3) Handling fees.

(A) Clinical specimens and environmental samples--$38; and

(B) Pathogenic agents--$75.

(4) Service charges.

(A) A service charge of $15 will be added for work performed after hours (Monday - Friday 5:30 p.m. to 6:00 a.m. and Saturday and Sundays 12:00 p.m. to 7:00 a.m.).

(B) An additional charge of $15 will be added for after hours STAT analysis.

(C) A fee not to exceed $5.00 will be charged for venipuncture.

§73.55. Fee Schedule for Chemical Analyses [Testing of Environmental Samples].

Fees for chemical analyses and physical testing [testing of environmental samples] shall not exceed the following amounts.

(1) (No change.)

(2) The following fees apply to the analysis of drinking water (including bottled water) samples.

(A) Inorganic parameters.

(i) Individual tests:

(I) (No change.)

(II) ammonia, SM, 20th edition, 4500-NH3G--$35.00;

(III) [(II)] bicarbonate-carbonate, with alkalinity, SM, 18th edition, 2320B--$19;

(IV) [(III)] bicarbonate-carbonate, without alkalinity, SM, 18th edition, 2320B--$29;

[(IV) boron, SM, 18th edition, 4500B--$66;]

(V) bromate, Environmental Protection Agency (EPA) method 300.1--$69 [$138];

(VI) - (XVII) (No change.)

[(XVIII) hardness, EPA method 130.1--$54;]

(XVIII) [(XIX)] nitrate and nitrite as nitrogen, EPA method 353.2--$28;

(XIV) [(XX)] nitrate as nitrogen, EPA method 353.2--$28;

(XX) [(XXI)] nitrite as nitrogen, EPA method 353.2--$28;

(XXI) [(XXII)] odor, EPA method 140.1, 2150B--$63;

(XXII) [(XXIII)] perchlorate, EPA method 314.0--$69;

(XXIII) [(XXIV)] perchlorate, Unregulated Contamination Monitoring Regulation (UCMR), EPA method 314.0--$76;

(XXIV) [(XXV)] pH, EPA method 150.1--$24;

(XXV) [(XXVI)] phenolics, total recoverable, EPA method 420.1--$60;

[(XXVII) residue, total, SM, 18th edition, 2540B--$28;]

(XXVI) [(XXVIII)] silica, dissolved, SM, 18th edition, 4500Si F--$30;

(XXVII) [(XXIX)] solids, suspended, volatile or fixed, SM, 18th edition, 2540G--$39;

[(XXX) solids, total dissolved, calculated, SM, 18th edition, 1030F--$18;]

(XXVIII) [(XXXI)] solids, total dissolved, determined, SM, 18th edition, 2540C--$39;

(XXIX) [(XXXII)] solids, total suspended, SM, 18th edition, 2540D--$39;

(XXX) [(XXXIII)] sulfate, EPA method 300.0--$24; and

(XXXI) [(XXXIV)] turbidity, EPA method 180.1--$25.

(ii) Routine water mineral group, EPA methods 150.1, 300.0, and 353.2, and SM, 18th edition, 2320B, 2510B, and 2540C--$214.

(B) Metals analysis. A preparation fee applies to all drinking water samples analyzed by inductively coupled plasma (ICP) or by inductively coupled plasma-mass spectrometry (ICP-MS) with turbidity greater than or equal to 1 Nephelometric Turbidity Unit (NTU) or that contains visible particles. The total analysis cost includes the [sample preparation fee and the] per-element or per-group fee and any required sample preparation fee.

(i) Sample preparation fee, [--] total recoverable metals digestion, EPA method 200.2--$36.

(ii) (No change.)

(iii) Group fees:

(I) all metals drinking water group, EPA methods, 200.7, 200.8, and 245.1 and SM 19th edition 2340B--$330;

(II) ICP/ICP-MS metals drinking water group, EPA methods 200.7 and 200.8 and SM 19th edition 2340B--$238; [--$206; and]

(III) lead/copper, EPA method 200.8--$30; [.]

(IV) hardness, SM, 19th edition 2340B--$38; and

(V) reagent water metal suitability group, EPA methods 200.7 and 200.8--$145.

(C) Organic compounds:

(i) (No change.)

(ii) chlorophenoxy herbicides, [EPA method 515.1 or] EPA method 515.4--$275;

[(iii) ~~chlorophenoxy herbicides, UCMR, EPA method 515.1~~ or ~~EPA method 515.4--$303;~~]

(iii) [~~(iv)~~] diquat and paraquat EPA method 549--$303;

(iv) [~~(v)~~] ethylene dibromide (EDB) and dibromochloropropane (DBCP), EPA method 504.1--$195;

(v) [~~(vi)~~] endothall, EPA method 548.1 [548]--$446;

(vi) [~~(vii)~~] glyphosate, EPA method 547--211;

(vii) [~~(viii)~~] haloacetic acids and dalapon, EPA method 552.2--$275;

(viii) [~~(ix)~~] chlorinated disinfection-by-products (haloacetonitriles) EPA method 551.1--$235;

(ix) [~~(x)~~] methylcarbamoyloximes and n-methylcarbamates (carbamate) pesticides, EPA method 531.1--$250;

(x) [~~(xi)~~] organochlorine pesticides, EPA method [~~methods 505 and~~] 508--$230;

[(xii) ~~phenols, UCMR List 2, EPA method 528.1--$263;~~]

[(xiii) ~~phenylurea, UCMR List 2, EPA method 532.1--$263;~~]

[(xiv) ~~PHA and phthalates, UCMR, EPA method 525.2--$396;~~]

(xi) [~~(xv)~~] PCB screening by perchlorination, EPA method 508A--$366;

[(xvi) ~~polynuclear aromatic hydrocarbons (PHA) and phthalates, EPA method 525.2--$360;~~]

(xii) [~~(xvii)~~] semi-volatile organic compounds, EPA method 525.2--$360;

[(xviii) ~~semi-volatile organic compounds, UCMR List 2, EPA method 526.1--$263;~~]

(xiii) [~~(xix)~~] trihalomethanes, EPA method 502.2--$84;

(xiv) [~~(xx)~~] trihalomethanes, EPA method 524.2--$84; and

(xv) [~~(xxi)~~] VOCs, EPA method 524.2--$183. [~~; and~~]

[(xxii) ~~VOCs, UCMR, EPA method 524.2--$223.~~]

(D) Radiochemicals:

[(i) ~~alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion--$165;~~]

[(ii) ~~carbon-14, Liquid Scintillation--$123;~~]

(i) [~~(iii)~~] gross alpha and beta, EPA method 900.0--$113;

(ii) [~~(iv)~~] gross alpha or beta, EPA method 900.0--$100;

(iii) [~~(v)~~] gamma emitting isotopes, EPA method 901.1--$94;

[(vi) ~~plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry--$90;~~]

(iv) [~~(vii)~~] radium-226, EPA method 903.1--$83;

(v) [~~(viii)~~] radium-228, EPA method 904.0--$118;

[(ix) ~~radon, EPA method 903.1--$83;~~]

(vi) [~~(x)~~] strontium-89 or 90, EPA method 905.0--$126;

(vii) [~~(xi)~~] thorium isotopes, DOE-RESL A-20 Alpha Spectrometry--$90;

[(xii) ~~total alpha emitting radium, EPA method 903.0--$90;~~]

(viii) [~~(xiii)~~] tritium, EPA method 906.0--$64;

(ix) [~~(xiv)~~] uranium isotopes, DOE-RESL A-20 Alpha Spectrometry--$95; and

(x) [~~(xv)~~] Composite/storage fee--$19.

(3) The following fees apply to the analysis of food and food products.

(A) Inorganic analyses:

[(i) ~~added substances, Association of Official Analytical Chemists (AOAC) calculation--$16;~~]

(i) [~~(ii)~~] added water, AOAC calculation--$16;

[(iii) ~~benzoate, AOAC method 960.38--$101;~~]

[(iv) ~~cereal, USDA CRL method--$80;~~]

(ii) [~~(v)~~] deterioration, canned products, AOAC chart--$30;

[(vi) ~~fat, dairy products, AOAC method 46.616--$44;~~]

(iii) [~~(vii)~~] fat, paly screen, AOAC method 46.616--$44;

(iv) [~~(viii)~~] fat, soxhlet extraction, USDA method Fat-1--$101;

[(ix) ~~filth, AOAC methods--$44;~~]

[(x) ~~filth, beverages, AOAC method 965.38--$44;~~]

[(xi) ~~filth, cereal foods, AOAC method 971.32--$44;~~]

(v) [~~(xii)~~] filth, AOAC method 941.16--$44;

[(xiii) ~~filth, spices, AOAC method 945.83--$44;~~]

[(xiv) ~~food coloring, AOAC method 988.13--$73;~~]

[(xv) ~~fumonisin in corn products by high performance liquid chromatography (HPLC)--$250;~~]

(vi) [~~(xvi)~~] insect identification, Food and Drug Administration (FDA) Technical Bulletin #2--$44;

[(xvii) ~~maximum internal temperature, USDA ICT 2 method--$101;~~]

(vii) [~~(xviii)~~] meat protein, AOAC calculation--$19;

(viii) [~~(xix)~~] moisture (total water), USDA M01 method--$21;

[(xx) ~~moisture-protein ratio, AOAC calculation--$40;~~]

[(xxi) ~~package exam for rodent contamination, AOAC method 973.63--$30;~~]

(ix) [(xxii)] pH of food products, AOAC method 981.12--$25;

(x) [(xxiii)] protein, total, USDA protein block digestion--$73;

[(xxiv) rodent pellet, identification, FDA Microscope Analytical Methods in Food and Drug Control--$44;]

(xi) [(xxv)] salt, USDA method SLT--$131;

(xii) [(xxvi)] soy protein concentrate, USDA SOY1 method--$80; and

[(xxvii) soya, USDA SOY1 method--$80;]

[(xxviii) sulfite, AOAC method 980.17--$83;]

(xiii) [(xxix)] water activity, AOAC method 978.18--$44. [; and]

[(B) Organic analysis, tetracycline in milk, FDA/AOAC methods--$125.]

(B) [(C)] Metals analyses. A sample preparation fee applies to all food samples analyzed by FLAA, GFAA, GHAA, ICP or ICP-MS techniques. The total analysis fee includes the sample preparation fee and the per-element fee. The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees.

(i) Sample preparation fee--total recoverable metals digestion, EPA methods 200.2, 200.3, or SW-846 method 3050B--$46.

(ii) Per-element fees:

(I) mercury, EPA methods 245.1, 245.5, and 245.6, and SW-846 methods 7470A and 7471A--$40;

(II) single metal, FLAA or ICP, EPA 200 series methods and EPA SW-846 methods 6010 or 7000 series--$24;

(III) single metal, GFAA or GHAA, EPA 200 series methods and EPA SW 846 methods 7000 series, and SM, 18th edition, 3114--$38; and

(IV) single metal, ICP-MS, EPA method 200.8, EPA SW-846 method 6020--$31.

(4) The following fees apply to the analysis of soil and solids:

[(A) pH, Soil, EPA method 9045B--$28.]

(A) [(B)] Metals analysis. A sample preparation fee applies to the analysis of all solid (soil, sediment, etc.) samples. The total cost of the analysis will be the sample preparation fee plus the per-element fee. The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees.

(i) Sample preparation fee--acid digestion of sediments, sludges, and soils, EPA SW-846 Method 3050B--$44.

(ii) Per-element fee:

(I) lead in paint by FLAA--$44;

(II) lead in pottery leachate by FLAA--$33;

(III) lead and cadmium in pottery leachate by FLAA--$59;

(IV) lead in soil by FLAA--$46;

(V) lead in solids by FLAA--$44;

(VI) mercury, sediment, EPA method 245.5 and EPA SW-846 method 7471A--$40;

(VII) non-routine single metal, EPA 200 series methods and EPA SW-846 methods: 6010B, 6020, and 7000's--$60;

(VIII) silver, EPA method 200.7, and EPA SW-846 methods 6010B, 7760A, and 7761--$60;

(IX) single metal, FLAA or ICP, EPA 200 series methods, 200.7, and EPA SW-846 6010B and 7000 series methods--$26;

(X) single metal, graphite furnace atomic absorption spectrometry (GFAA) or gas hydride atomic absorption spectrometry (GHAA), EPA 200 series methods and EPA SW-846 methods 7000 series, 7062, and 7742, and SM, 18th edition, 3114--$38; and

(XI) single metal, ICP-MS, EPA method 200.8 and EPA SW-846 method 6020--$31.

(B) [(C)] Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion--$154;

(ii) gross alpha and beta, EPA method 900.0--$101;

(iii) gross alpha or beta, EPA method 900.0--$81;

(iv) gamma emitting isotopes, EPA method 901.1--$140;

(v) plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry--$90;

(vi) radium-226, DOE-RESL A-20/EPA method 903.1--$133;

(vii) radium-228, DOE-RESL A-20/EPA method 904.0--$110;

(viii) strontium-89 or 90, EPA method 905.0--$147;

(ix) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry--$88;

(x) tritium, EPA method-Azeotopic Distillation--$99; and

(xi) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry--$86.

(5) The following fees apply to the analysis of tissue and vegetation samples. A tissue preparation (homogenization) fee applies to all seafood tissue samples analyzed for organic compounds and/or metals. The total analysis cost includes the tissue preparation fee, any analyte specific sample preparation fee, and the per-element or per-group test fee.

(A) (No change.)

(B) Metals analyses. A sample preparation fee applies to all tissue samples analyzed by ICP or ICP-MS. The total analysis cost includes [the sample preparation fee and] the per-element or per-group fee plus any required sample preparation fee:

(i) - (iii) (No change.)

(C) (No change.)

(D) Radiochemistry:

(i) - (vi) (No change.)

[(vii) radium-228, DOE-RESL A-20/EPA method 904.0--$98;]

(vii) [(viii)] strontium-89 or 90, EPA method 905.0--$149;

(viii) [(ix)] thorium isotopes, DOE-RESL A-20 Alpha Spectrometry--$88;

(ix) [(x)] tritium, EPA Method 906.0 Azeotopic Distillation--$99; and

(x) [(xi)] uranium isotopes, DOE-RESL A-20 Alpha Spectrometry--$85.

(6) The following fees apply to the analysis of water and wastewater.

(A) Inorganic parameters:

(i) odor, EPA method 140.1--$65; and

(ii) phenolics, total recoverable, EPA method 420.1--$60. [; and]

[(iii) UV 254, SM 19th edition, 5910--$69.]

(B) (No change.)

(C) Radiochemistry:

(i) (No change.)

[(ii) carbon-14, Liquid Scintillation--$123;]

(ii) [(iii)] gross alpha and beta, EPA method 900.0--$113;

(iii) [(iv)] gross alpha or beta, EPA method 900.0--$100;

(iv) [(v)] gamma emitting isotopes, EPA method 901.1--$94;

(v) [(vi)] plutonium, isotopes, DOE-RESL A-20 Alpha Spectrometry--$90;

(vi) [(vii)] radium-226, EPA method 903.1--$101;

(vii) [(viii)] radium-228, EPA method 904.0--$85;

[(ix) radon, EPA method 903.1--$83;]

(viii) [(x)] strontium-89 or 90, EPA method 905.0--$126;

(ix) [(xi)] thorium isotopes, DOE-RESL A-20 Alpha Spectrometry--$88;

[(xii) total alpha emitting radium, EPA method 903.0--$88;]

(x) [(xiii)] tritium, EPA method 906.0--$64; and

(xi) [(xiv)] uranium isotopes, DOE-RESL A-20 Alpha Spectrometry--$90.

(7) The following fees apply to the analysis of wipes/filters/cartridges.

(A) (No change.)

(B) Radiochemistry:

(i) - (vii) (No change.)

[(viii) radium-228, DOE-RESL A-20/EPA method 904.0--$98;]

(viii) [(ix)] strontium-89 or 90 EPA method 905.0--$148;

(ix) [(x)] thorium isotopes, DOE-RESL A-20 Alpha Spectroscopy--$88;

(x) [(xi)] tritium, Azeotopic Distillation--$64; and

(xi) [(xii)] uranium isotopes, DOE-RESL A-20 Alpha Spectroscopy--$85.

(8) Identification of feces and urine stains: [Other chemical testing:]

[(A) blood identification, Source Book Forensic Serology--$31;]

[(B) dust identification--$58;]

(A) [(C)] identification of feces stains, AOAC method 981.22--$159; and

(B) [(D)] identification of urine stains, [stain identification,] AOAC methods 963.28, and 959.14--$44.

(9) Additional charges.

(A) Analysis of trip and field blank samples will be billed at the same rate as the requested sample analysis.

(B) If the submitter requires specific samples within their batch to be analyzed and reported as laboratory fortified matrix (FM) or matrix spike (MS), and laboratory fortified matrix duplicate (LFMD) or matrix spike duplicate (MSD), a fee for two additional samples will be charged.

(C) A fee of $8.00 per sample will be charged for samples submitted but not analyzed at the submitters request, including samples on hold, and then voided.

(D) The preparation fee (or 20% of the analysis fee if there is no separate preparation fee) will be charged for any sample prepared but not analyzed at the clients request.

(E) A fee equal to 3% of the analysis fee will be charged for a summary of the quality control data routinely generated during the analysis. This summary may include data for method blanks, duplicate, matrix spike recovery, laboratory control samples, and surrogate recovery.

(F) Additional copies of reports and raw data packages will be provided at a cost of $0.10 per page for each request in excess of 50 pages. An additional fee of $15 will be charged for each hour in excess of one hour to prepare the request.

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 September 30, 2005.

TRD-200504445
Lisa Hernandez
Deputy General Counsel
Department of State Health Services
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 458-7236

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25 TAC §73.25

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of

the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is authorized under Health and Safety Code, §12.031 and §12.032, which allow the department to charge fees to a person who receives public health services from the department, §12.034, which requires the department to establish collection procedures, §12.035, which requires the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the department's public health service fee fund, and §12.0122, which allows the department to enter into a contract for laboratory services; 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 Chapter 1001, Health and Safety Code.

The proposed repeal affects the Health and Safety Code, Chapters 12 and 1001; and Government Code, Chapter 531.

§73.25. Environmental Laboratory Certification and Accreditation.

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 September 30, 2005.

TRD-200504446
Lisa Hernandez
Deputy General Counsel
Department of State Health Services
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 458-7236

CHAPTER 337. WATER HYGIENE
SUBCHAPTER A. DRINKING WATER STANDARDS GOVERNING DRINKING WATER QUALITY AND REPORTING REQUIREMENTS FOR PUBLIC WATER SUPPLY SYSTEMS

25 TAC §337.12, §337.18

(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.)

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §337.12 and §337.18, concerning drinking water standards governing drinking water quality and reporting requirements for public water supply systems.

BACKGROUND AND PURPOSE

The repeals are necessary to comply with §5.013 of the Texas Water Code that grants the Texas Natural Resource Conservation Commission, now titled the Texas Commission on Environmental Quality, jurisdiction for the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning. Repeal of these sections is necessary because the rulemaking authority for these sections was transferred to the Texas Commission on Environmental Quality in 1992. Fees for the laboratory analysis of drinking water for bacteriological quality and chemical content previously listed in §337.18 are now in 25 Texas Administrative Code Chapter 73, §73.54 and §73.55 respectively.

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). Section 337.12 and §337.18 have been reviewed and the department has determined that reasons for adopting the sections no longer exist because the rule making authority for Water Hygiene was transferred to the Texas Commission on Environmental Quality.

SECTION-BY-SECTION SUMMARY

The repeal of §337.12 and §337.18 is necessary because the Texas Commission on Environmental Quality now administers the Water Hygiene program, and the fees for the drinking water laboratory analysis are now located in 25 Texas Administrative Code Chapter 73.

FISCAL NOTE

Dr. Susan Neill, Director, Laboratory Services Section has determined that for each year of the first five-year period that the sections are no longer in effect, there will be no fiscal implications to state or local governments as a result of the repeal of these sections.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Neill has also determined that there are no anticipated economic costs to small businesses, micro-businesses or persons because the rules are no longer necessary, and business practices will not be altered in order to comply with the proposed repeal of the sections. There will be no impact on local employment.

PUBLIC BENEFIT

In addition, Dr. Neill has also determined that for each year of the first five years the repeal of the sections is in effect, the public benefit anticipated as a result of the repeal is to reflect that the Texas Commission on Environmental Quality is the agency now responsible for the administration of Water Hygiene.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeal 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, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be directed to Sherry S. Clay, Manager, Quality Control Unit, Laboratory Services Section, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3199, or by e-mail to sherry.clay@dshs.state.tx.us. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The proposed repeals are authorized under Health and Safety Code, §12.031 and §12.032, which allow the department to charge fees to a person who receives public health services from the department, §12.034, which requires the department to establish collection procedures, §12.035, which requires the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the department's public health service fee fund, and §12.0122, which allows the department to enter into a contract for laboratory services; 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 Chapter 1001, Health and Safety Code.

The proposed repeals affect the Health and Safety Code, Chapters 12 and 1001; and Government Code, Chapter 531.

§337.12. Approved Laboratory.

§337.18. Fees for Services to Drinking Water Systems.

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

Filed with the Office of the Secretary of State on September 30, 2005.

TRD-200504447
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 458-7236

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 337. DRY CLEANER ENVIRONMENTAL RESPONSE

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §§337.3, 337.11, 337.13 - 337.15, 337.20, 337.22, 337.30, 337.31, 337.61, and 337.62.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement House Bill (HB) 2376 and Senate Bill (SB) 444, 79th Legislature, 2005. Both of these bills revise statutes relating to the dry cleaner environmental response program created by the 78th Legislature, 2003, and codified in Texas Health and Safety Code (THSC), Chapter 374. HB 2376 amends THSC, §§374.001, 374.004, §374.051 - 374.054, 374.101 - 374.104, 374.151, 374.154, 374.202, 374.203, 374.251 - 374.253 and repeals §§374.052(c), 374.101(1), 374.105, 374.156, and 374.201. HB 2376 includes provisions regarding secondary containment requirements for chlorinated dry cleaning solvent; amended annual registration fees and assessment calculations; the involvement of the Texas Comptroller of Public Accounts to verify certain registration information; an extended deadline for the designation of nonparticipating dry cleaning facilities and drop stations; and solvent distributors retaining 1% of the fees collected if the distributor pays the fees on time to the commission.

SB 444 amends THSC, §374.104. SB 444 extends the deadline for the designation of nonparticipating dry cleaning facilities and drop stations and allows registration fee credits for the owners of certain dry cleaning facilities that do not participate in the Dry Cleaning Facility Release Fund. The bill also specifies that for changes mandated by this bill, the commission shall adopt rules by February 28, 2006.

SECTION BY SECTION DISCUSSION

The commission proposes amendments to Chapter 337, Dry Cleaner Environmental Response, to establish the procedures to administer and enforce HB 2376 and SB 444.

The commission proposes an amendment to §337.3, Definitions, which adds the language "a dry cleaning unit" to the definition of dry cleaning machine. The additional phrase is necessary to further clarify the meaning of the term, reduce confusion, and to match the usage in HB 2376, §5(c)(3) and (4). The language "as that subsection existed from September 1, 2003, until August 31, 2005" has been added to the definition of participating non-perchloroethylene user registration certificate. This certificate was issued under THSC, §374.103(b)(1), which was deleted from the statute by HB 2376.

The commission proposes an amendment to §337.11, Dry Cleaner Registration Certificates, which includes the procedures related to registration certificates for dry cleaning facilities and dry cleaning drop stations, including obtaining, renewing, and displaying a certificate, as well as the process for revocation or denial of a certificate. Dry cleaner registration certificates are necessary to receive delivery of dry cleaning solvents. This section clarifies that a registration must be administratively complete before a certificate will be issued and further defines an administratively complete registration. It further clarifies that upon determination that a submitted registration is administratively complete, the executive director may issue a registration certificate as long as there is no reason to deny the registration for other reasons. The redundant opening phrase, "Issuance of a registration certificate." has been stricken from §337.11(c). "Chapter 37 of this title (relating to Financial Assurance)" has been removed from the same subsection in accordance with HB 2376, §19, repealing THSC, §374.105. Commission review was added to enable the owner to appeal the executive director's determination to revoke or deny a certificate. The appeal must

be in writing and filed with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails the determination to revoke or deny a certificate. This section was added due to changes to THSC, §374.251, required by HB 2376.

The commission proposes an amendment to §337.13, Distributor Registration Certificate, which includes the procedures related to registration certificates for distributors, including obtaining and displaying a certificate, as well as the process for revocation or denial of a certificate. The certificate is necessary for the delivery of dry cleaning solvents and makes it easier for a dry cleaner to determine if a distributor is registered with the agency. This is important because, under these rules, dry cleaners are prohibited from purchasing solvent from a distributor that is not registered with the agency. A commission review was added to enable the distributor to appeal the executive director's determination to revoke or deny a certificate. The appeal must be in writing and filed with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails the determination to revoke or deny a certificate. This section was added due to changes to THSC, §374.251, required by HB 2376.

The commission proposes an amendment to §337.14, Registration Fees, which includes the procedures and requirements for owners of operating dry cleaning facilities and dry cleaning drop stations to pay the registration fees required by THSC, §374.102. Because the registration fee structure changes effective September 1, 2005, separate identification for registration fees payable for operations conducted prior to September 1, 2005, and fees to be assessed after September 1, 2005, has been added to the rule. Subsequent paragraphs have been renumbered accordingly.

The commission proposes an amendment to §337.15, Solvent Fees, which includes the procedures and requirements for payment and collection of the dry cleaning solvent fees required by THSC, §374.103. This section includes the entities exempt from paying the solvent fees, reporting requirements for distributors, specifications on payment of collected fees to the agency, and provisions governing late payments. A dry cleaning drop station is a retail commercial establishment, the primary business of which is to act as a collection point for the drop-off and pickup of garments or other fabrics that are sent to a dry cleaning facility for processing. Exemptions from solvent fees have been extended to include drop stations for which the owner has submitted the appropriate affidavit to the executive director and received a non-perchloroethylene user registration certificate. Exemptions from solvent fees have been clarified to specify an owner to whom the executive director has issued a participating non-perchloroethylene user registration certificate. A provision under THSC, §374.103(a)(1) allows the distributor of solvents to withhold 1% of the amount of the fee imposed by §337.15(a) for the distributor's administrative expenses if the distributor pays the remaining amount to the commission no later than the date prescribed by the commission. The distributor must submit a report specifying the total amount of fees collected by the distributor for the period, the amount due to the distributor under the provisions, if any, and the total amount to be remitted to the commission. The actual due dates for reports and fees have been itemized: the report and payment for the period of September 1 - November 30 must be received by the agency by December 20; the report and payment for the period of December 1 - February 28/29 must be received by the agency by March 20; the report and payment for the period of March 1 - May 31 must be received by the agency by June 20; and the report and payment for the period of June 1 - August 31 must be received by the agency by September 20. This rule also specifies that the fees collected by the distributor are held in a trust for the agency and not the property of the distributor and not to be used by the distributor until the date that the distributor remits the amount due to the commission. Distributors that fail to pay their quarterly solvent fees when due forfeit any right or claim to withhold a portion of collected fees for administrative expenses. Subsequent paragraphs have been renumbered accordingly.

The commission proposes an amendment to §337.20, Performance Standards, which includes the performance standards that apply to dry cleaning facilities and dry cleaning drop stations, including the dates by which owners must be in compliance. In §337.20(a), applicability is clarified for those facilities that have a nonparticipating non-perchloroethylene user certificate and removes the verbiage, "and dry cleaning drop stations" as standards are applicable only to equipment. Proposed §337.20(b), compliance deadlines, has been added to specify that required compliance extends to owners of all operating dry cleaning facilities unless otherwise specifically stated. It further states that owners of all new dry cleaning facilities shall construct and operate facilities in compliance with this section. Subsequent paragraphs have been renumbered accordingly. Section 337.20(e)(2) has been inserted to include the procedures and requirements for compliance deadlines and specifies the exemption. The exemption includes dry cleaning facilities in operation on or before January 1, 2004, that have gross annual receipts of $150,000 or less. These facilities have until January 1, 2015, to comply. Further stated, if before January 1, 2015, a dry cleaning facility begins to have gross annual receipts greater than $150,000, the dry cleaning facility must meet the requirements of compliance deadlines by August 1 of the year following the time the facility exceeded $150,000 in annual gross receipts. Subsequent paragraphs have been renumbered accordingly.

The commission proposes an amendment to §337.22, Variances and Alternative Procedures, which includes the procedures for obtaining a variance from the requirements of the dry cleaning rules in this subchapter, as well as recordkeeping requirements related to a variance that is granted. Having the option of requesting a variance to the performance standards provides flexibility in applicable situations while still addressing environmental concerns. The term "the owner of a dry cleaning facility" has been stricken and replaced with "a person" in §337.22(a) and the term "owner" has been stricken and replaced with "person requesting the variance" in §337.22(b) to allow flexibility in the approval of emerging technologies. Section 337.22(c) has been changed to clarify that any request to the executive director for approval of a variance must be in writing, signed and dated by the person requesting the variance, and accompanied by specified documentation. The substance of the subsection has not been impacted, but reorganized for clarity of reading.

The commission proposes an amendment to §337.30, Prioritization of Sites, which includes the provisions relating to the prioritization of dry cleaning sites that require corrective action. A site will only be eligible for prioritization if it has been ranked with the dry cleaning facility ranking system. Under THSC, §374.051(b)(3), criteria for prioritization is required to be in the rule. The term "facility" has been replaced with "site" for consistency and clarity in §337.30(a)(1) and (b)(1).

The commission proposes an amendment to §337.31, Ranking of Sites, which includes the procedures for the ranking of dry

cleaning facilities. The ranking system is a methodology designed to determine a numerical score for a facility based on various factors that may impact human health or the environment. This section includes the information required to be contained in the application for ranking package as well as who may apply for a site to be ranked under THSC, §374.154(b). The term "facility" has been replaced with "site" in §337.31(a) and subsection (a)(1) and the term "facilities" has been replaced with "sites" in §337.31(a)(2) for consistency and clarity.

The commission proposes to change the title of Subchapter G, Non-Perchloroethylene Users and Facilities, to Non-Perchloroethylene Users, Facilities, and Drop Stations in accordance with HB 2376 by adding drop stations.

The commission proposes an amendment to §337.61, Participating Non-Perchloroethylene User Registration Certificate, which states that to obtain this certificate the owner must meet requirements of THSC, §374.104 and swear in an affidavit approved by the executive director. After September 1, 2005, a participating non-perchloroethylene registration certificate will not be available or valid unless the owner has already obtained this certificate. For clarity, the paragraph stating requirements of the affidavit is proposed to be reformatted, removing §337.61(b) altogether. Section 337.61(1) specifies that the owner swears that perchloroethylene has never been used or that the owner allowed the use of perchloroethylene at any dry cleaning facility or drop station in the state. Section 337.61(2) specifies that perchloroethylene must never have been used at the location to which the nonparticipating non-perchloroethylene user registration certificate would apply. Section 337.61(3) specifies that the owner will not now or ever use perchloroethylene at the location to which the nonparticipating non-perchloroethylene user registration certificate would apply. Section 337.61(4) specifies that the owner was the owner of the dry cleaning facility or dry cleaning drop station on January 1, 2004, and was eligible to file the option not to participate on or before January 1, 2004, and inadvertently failed to file before that date. The commission proposes to change the name of the title to Nonparticipating Non-Perchloroethylene User Registration Certificate.

The commission proposes an amendment to §337.62, Nonparticipating Non-Perchloroethylene Facilities, which includes requirements that apply to such a facility, including disclosure requirements for any sale of the facility. This section clarifies the requirements set forth in THSC, §374.104 by adding "or drop station" after "facility" throughout the section and removes "the owner of the" in §337.62(a)(1) to "the dry cleaning facility or drop station is not eligible for any expenditures of money from the Dry Cleaning Facility Release Fund." The commission proposes to change the name of the title to Nonparticipating Non-Perchloroethylene Facilities and Drop Stations.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Derek Chapin, Analyst, Chief Financial Officer Division, determined that, for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the commission. No fiscal implications are anticipated for other units of state or local government. In addition, fiscal implications are anticipated for owners and operators of dry cleaning facilities, dry cleaning drop stations, distributors of dry cleaning solvent, and consumers who purchase the services of dry cleaning facilities.

The proposed amendments implement HB 2376 and SB 444. The bills amend the dry cleaning regulation and remediation program established by HB 1366, 78th Legislature (codified as THSC, Chapter 374).

HB 2376 amends and clarifies performance standards, modifies fee rates and registration and collection procedures, establishes a new deadline and process for filing a nonparticipation option, creates new penalties, and revises the allowable administrative percentage and use of funds.

SB 444 amends THSC, §374.104. SB 444 establishes a new deadline to file a nonparticipation option and provides for registration fee credits for owners who file a nonparticipation option before February 28, 2006, to the extent that a registration fee paid in 2004 or 2005 exceeded the amount due for a nonparticipating dry cleaning facility.

The amendments are proposed in order to regulate and remediate certain dry cleaning facilities; amend registration procedures; revise fee assessments and collections; and amend performance standards.

The proposed amendments apply to all dry cleaning facilities (except for certain types or categories of businesses such as hotels, motels, formal wear and costume rental businesses, and others), dry cleaning drop stations, and distributors of dry cleaning solvent. Currently, there are an estimated 2,154 dry cleaning facilities, 1,668 dry cleaning drop stations, and 23 distributors of dry cleaning solvents doing business in the state.

HB 2376 amends registration fee rates. The bill increases the gross receipts threshold between the low ($250) and high ($2,500) registration fees from $100,000 to $150,000, so that, for example, the registration fee for a participating facility with gross annual receipts of $125,000 decreases from $2,500 to $250 under the legislation. Registration fees for drop stations are no longer based on ownership status but instead on gross receipts, with drop stations earning gross annual receipts of more than $150,000 assessed $750 annually, and drop stations with less revenue assessed $250 annually. Eligible drop stations also can register as nonparticipating at a rate of $125 annually. Both HB 2376 and SB 444 extend the deadline to file a nonparticipation option to February 28, 2006, with SB 444 adding that credits be provided to nonparticipating facility owners to the extent that a registration fee due in 2004 or 2005 exceeded the amount due for a nonparticipating dry cleaning facility. The estimated effect of these statutory changes on the commission is to reduce registration fee revenue by an average of $1,166,000 in each year of the five-year period covered by the fiscal note.

HB 2376 also amends solvent fee rates by permitting distributors to withhold 1% of solvent fees collected if the remaining amount is remitted not later than the date prescribed by the commission. This statutory change, combined with a projected increase in nonparticipating facilities exempt from solvent fees, is estimated to reduce solvent fees remitted to the commission by an average of $77,000 in each year of the five-year period covered by the fiscal note.

To implement the provisions of HB 2376 and SB 444, the commission will undertake a rulemaking, revise its registration and billing database, and develop a process for verifying registration information with the comptroller. The commission does not anticipate any change to revenue collections as a direct result of the rulemaking.

PUBLIC BENEFITS AND COSTS

Mr. Chapin also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from the changes seen in the proposed rules will be in compliance with state law and the protection of the state's ground and surface water from potential and actual contamination from certain dry cleaning facilities.

No new or additional costs are anticipated for businesses or individuals as a result of the implementation of the proposed amendments. Costs for some businesses may decline due to the statutory change in registration fee rates; such businesses may or may not pass on any realized savings from reduced registration fees to their customers. Businesses may also benefit from reduced registration fees and fee credits due to the statutory extension of the deadline to file a nonparticipation option. Businesses with gross annual receipts of $150,000 or less may benefit from the statutory change allowing such businesses until 2015 to implement performance standards; previously, businesses with $200,000 or less in gross annual receipts were required to comply with the performance standards by 2007.

Solvent distributors will benefit from the statutory provision allowing withholding of 1% of solvent fee collections to offset administrative costs. The estimated savings to distributors ranges from $1.00 to $12,000 annually for the largest distributor.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. Approximately 60% of the facilities that registered previously with the commission reported gross receipts of less than $200,000. Moreover, 80% of drop stations are estimated to generate less than $150,000 in gross annual receipts. It is therefore estimated that most of the dry cleaning facilities and drop stations in the state are small or micro-businesses. There are an estimated 23 distributors of dry cleaning solvents in the state, but it is not known how many of them are small or micro-businesses.

Small businesses may realize benefits from the statutory changes made by HB 2376 and SB 444. Participating facilities with gross annual receipts greater than $100,000 but equal to or less than $150,000 will benefit from a reduction in annual registration fees from $2,500 to $250. Previously participating facilities with more than $150,000 in gross annual receipts that file a nonparticipation option by the new deadline will also reduce their registration fees from $2,500 to $250.

Drop stations that are owned by a facility and that have gross annual receipts of more than $150,000 will benefit from a reduction in annual registration fees from $1,000 to $750. Drop stations that are owned by a facility and that have gross annual receipts of $150,000 or less will benefit from a reduction in annual registration fees from $1,000 to $250. An unknown number of drop stations may see their registration fees increase from $250 to $750 if they are not owned by a facility and if they generate more than $150,000 in gross annual receipts. An unknown number of drop stations may file a nonparticipation option, resulting in a registration fee savings of $125 or $875 from 2004 - 2005 fee levels.

The estimated savings to distributors from the statutory changes ranges from $1.00 to $12,000 annually for the largest distributor.

The following is an analysis of the cost per employee for small or micro-businesses affected by the proposed amendments. Small and micro-businesses are defined as having fewer than 100 or 20 employees, respectively. Some owners of dry cleaning facilities could realize savings of $2,250, or $22.50 per employee for a small business and $112.50 per employee for a micro-business. Drop station owners may realize changes ranging from a savings of $750 to additional costs of $500. The potential savings equate to $7.50 per employee for a small business and $37.50 for a micro-business; the potential costs equate to $5.00 per employee for a small business and $25 per employee for a micro-business. For those distributors that are small or micro-businesses, the maximum estimated annual savings from the statutory changes equates to $120 per employee for a small business and $600 per employee for a micro-business.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the proposed rules is to protect the environment or reduce risks to human health from environmental exposure, the proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, even if the proposed rules did meet the definition of a major environmental rule, Texas Government Code, §2001.0225 only applies to a major environmental rule if the result of the rule is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These proposed rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225 even if they did meet the definition of a major environmental law. Specifically, the proposed rules are required by state law, are not proposed solely under the general powers of the agency, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

The commission invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that

is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The proposed rules implement HB 2376 and SB 444, which amend THSC, Chapter 374. THSC, Chapter 374 addresses the environmental regulation and remediation program for dry cleaning facilities and dry cleaning drop stations. Under the program, certain dry cleaners pay registration and solvent fees into a fund that is then used by the agency to investigate and clean up eligible contaminated dry cleaning sites. Additionally, the legislation and proposed rules contain performance standards and waste handling requirements to alleviate the possibility of future contamination from dry cleaning facilities. Such contamination is a real and substantial threat to public health and safety. The proposed rules significantly advance a health and safety purpose by providing the framework within which the agency processes registrations, collects the funds for corrective action, and uses those funds to address health and safety concerns at sites around the state. Furthermore, the proposed rules significantly advance a health and safety purpose by specifying performance standards and waste handling requirements to alleviate future health and safety issues resulting from dry cleaning facilities. The proposed rules are narrowly tailored to apply to only certain dry cleaning facilities, dry cleaning drop stations, and distributors, and do not impose a greater burden than is necessary to achieve the health and safety purpose as previously stated.

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to implement HB 2376 and SB 444 by setting forth: 1) procedures governing registration, certificates, and the collection of fees; 2) performance standards; 3) requirements for the removal of dry cleaning solvents and waste; 4) procedures relating to the prioritization and ranking of sites; and 5) provisions relating to non-perchloroethylene users and facilities.

Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), restrict, or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rules. The proposed rules implement HB 2376 and SB 444 by providing the framework within which the agency will regulate and remediate dry cleaning facilities and dry cleaning drop stations. There are no burdens imposed on private real property from these proposed rules and the benefits to society are the proposed rules' specific procedures and requirements for a program that addresses dry cleaning contamination and seeks to prevent future contamination.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to the rulemaking is governing emissions of air pollutants to protect and enhance air quality in the coastal area so as to protect coastal natural resource areas and promote the public health, safety, and welfare. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies. The amendments are required to comply with HB 2376 and SB 444 relating to the environmental regulation and remediation of dry cleaning facilities. The proposed rules amend annual registration fees assessment calculations; establish new compliance deadlines for performance standards for dry cleaning facilities; reference the necessity of comptroller verification that the owner is in good standing with the state and is reporting gross receipts accurately; clarify the designation of a nonparticipating status and establish new deadlines and fee credits for nonparticipating sites; expand on revocation or denial of a certificate; and clarify and establish procedures to administer and enforce the program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 8, 2005, at 10:00 a.m. at the Texas Commission on Environmental Quality in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer question before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Holly Vierk, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Holly Vierk, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-043-337-PR. Comments must be received by 5:00 p.m., November 14, 2005. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information or questions concerning this proposal, please contact Don Kennedy, Registration, Review and Reporting Division, at (512) 239-2154.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §337.3

STATUTORY AUTHORITY

The amendment is proposed under the authority granted to the commission by the 79th Legislature and THSC, Chapter 374. The amendment is also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under

the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and THSC; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its powers under the Solid Waste Disposal Act; THSC, §361.024, which authorizes the commission to adopt rules consistent with the Solid Waste Disposal Act and establish minimum standards for the management and control of solid waste; HB 2376, 79th Legislature; and SB 444, 79th Legislature.

The proposed amendment implements THSC, Chapter 374.

§337.3. Definitions.

Definitions set forth in Texas Health and Safety Code, Chapter 374 and §3.2 of this title (relating to Definitions) that are not specifically included in this section also apply. The following words and terms, when used in this chapter, have the following meanings.

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

(3) Dry cleaning machine--The equipment used for the purpose of cleaning garments or other fabrics using a process that involves any use of dry cleaning solvents; a dry cleaning unit .

(4) - (11) (No change.)

(12) Participating non-perchloroethylene user registration certificate--A registration certificate issued by the executive director to an owner designated as a nonuser of perchloroethylene in accordance with Texas Health and Safety Code, §374.103(b)(1) as that subsection existed from September 1, 2003, until August 31, 2005.

(13) - (15) (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 September 30, 2005.

TRD-200504396
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 239-0177

SUBCHAPTER B. REGISTRATION, CERTIFICATES, AND FEES

30 TAC §§337.11, 337.13 - 337.15

STATUTORY AUTHORITY

The amendments are proposed under the authority granted to the commission by the 79th Legislature and THSC, Chapter 374. The amendments are also proposed under TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and THSC; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its powers under the Solid Waste Disposal Act; THSC, §361.024, which authorizes the commission to adopt rules consistent with the Solid Waste Disposal Act and establish minimum standards for the management and control of solid waste; HB 2376, 79th Legislature; and SB 444, 79th Legislature.

The proposed amendments implement THSC, Chapter 374.

§337.11. Dry Cleaner Registration Certificates.

(a) Before the executive director evaluates a registration to determine if a registration certificate should be issued, each registration must be administratively complete. A registration is not administratively complete if: [~~Completion of the registration form. Upon the executive director's determination that a submitted registration form has been completed in accordance with this chapter and that all fees, penalties, and interest owed to the agency have been paid, a registration certificate will be issued for the dry cleaning facility or dry cleaning drop station, as applicable. This certificate is necessary to receive the delivery of dry cleaning solvents under §337.4(b) of this title (relating to General Prohibitions and Requirements).~~]

(1) the registration form has not been completed and submitted to the agency in accordance with this chapter;

(2) the registration form does not contain all requested information with clear, legible, and true responses;

(3) all fees, penalties, and interest owed to the agency have not been paid; or

(4) the comptroller reports to the executive director that the owner is not in good standing with the state or that the owner's application information does not agree with the comptroller's information. However, if the comptroller does not respond to the agency's request for verification within three business days in accordance with Texas Health and Safety Code, §374.102(f), the executive director shall not be prohibited from determining that the registration is administratively complete.

(b) Upon the executive director's determination that a submitted registration is administratively complete, a registration certificate will be issued for the dry cleaning facility or dry cleaning drop station, as applicable, as long as the executive director has no reason to deny the registration certificate under subsection (f) of this section. This certificate is necessary to receive the delivery of dry cleaning solvents under §337.4(b) of this title (relating to General Prohibitions and Requirements). [~~Incomplete or inaccurate registration form or nonpayment. The executive director will not issue a registration certificate if the registration form is determined by the executive director to be incomplete or inaccurate (including forms with illegible or unclear information) or if any fees, penalties, or interest is owed to the agency. In order for a registration form to be complete and accurate, the registration form must contain all requested information with clear, legible, and true responses.~~]

(c) [~~Issuance of a registration certificate.~~] The agency's issuance of a registration certificate for a dry cleaning facility or dry cleaning drop station does not constitute agency certification or affirmation of the compliance status of the location in question with this chapter, [~~Chapter 37 of this title (relating to Financial Assurance),~~] the Texas Water Code, or the Texas Health and Safety Code; and this issuance does not preclude the agency from investigating these locations and pursuing enforcement actions when apparent violations are discovered.

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

(f) Revocation or denial of a certificate.

(1) The executive director may revoke or deny issuance of a certificate if:

(A) (No change.)

(B) the owner of a dry cleaning facility or dry cleaning drop station is in violation of any of the requirements of this chapter [~~, Chapter 37 of this title,~~] or Texas Health and Safety Code, Chapter 374.

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

(4) The owner may appeal for commission review of the executive director's determination to revoke or deny a certificate. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. An original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the owner must file with the Office of the Chief Clerk an original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this section must:

(i) provide a copy of the owner's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this section is not a contested case for purposes of Texas Government Code, Chapter 2001.

§337.13. Distributor Registration Certificate.

(a) - (d) (No change.)

(e) Revocation or denial of certificate.

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

(4) The distributor may appeal for commission review of the executive director's determination to revoke or deny a certificate. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. An original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the distributor must file with the Office of the Chief Clerk an original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this section must:

(i) provide a copy of the distributor's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this section is not a contested case for purposes of Texas Government Code, Chapter 2001.

§337.14. Registration Fees.

(a) Except for registration fees payable for operations conducted before September 1, 2005, each [~~Each~~] owner of an operating dry cleaning facility or dry cleaning drop station shall pay the registration fees set forth in Texas Health and Safety Code, §374.102. The owner of the dry cleaning facility or dry cleaning drop station on or after September 1 of each state fiscal year is responsible for the registration fees owed for the state fiscal year beginning on September 1. However, if a person acquires a dry cleaning facility or dry cleaning drop station that does not have a current registration certificate, the facility or drop station would have to be registered and the fee paid before a current registration certificate would be issued.

(b) Registration fees payable for operation of a facility or drop station before September 1, 2005, will be assessed and payable at the rates in effect before September 1, 2005.

(c) [~~(b)~~] Payment in full of registration fees is due within 30 days of the agency invoice date. The fees must be paid by check, certified check, money order, or electronic funds transfer made payable to the "Texas Commission on Environmental Quality."

(d) [~~(c)~~] The registration certificate will not be issued until registration fees, penalties, and interest assessed are paid in full.

(e) [~~(d)~~] Owners that fail to pay registration fees when due shall pay penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

§337.15. Solvent Fees.

(a) (No change.)

(b) The following are exempt from the fees required in subsection (a) of this section:

(1) a nonparticipating facility or drop station as designated in accordance with Texas Health and Safety Code, §374.104, for which [~~whereby~~] the owner has submitted the appropriate affidavit to the executive director and received a nonparticipating non-perchloroethylene user registration certificate; and

(2) an owner to whom the executive director has issued [~~that has been designated as a nonuser of perchloroethylene in accordance with Texas Health and Safety Code, §374.103(b)(1), has submitted the appropriate affidavit with the executive director, and has received~~] a participating non-perchloroethylene user registration certificate.

(c) The person that distributes the dry cleaning solvent shall collect the fee when the dry cleaning solvent is sold and remit the fee to the agency as required by this section. Solvent is considered sold when it is paid for in full or when delivered or otherwise distributed to the dry cleaning facility, whichever occurs first. A distributor is required to remit solvent fees due to the agency for any solvent that is considered sold, regardless of whether or when the distributor collected

the fee from the dry cleaning facility to which the solvent was delivered or otherwise distributed.

(1) On or before the due dates, the distributor shall submit a report to the executive director, on a form approved by the executive director, and remit the amount of fees required to be collected for the associated reporting period less any amount the distributor is entitled to withhold under the provisions of Texas Health and Safety Code, §374.103(a)(1). The report must set forth each sale of dry cleaning solvent with the associated facility registration numbers, name, address, solvent types and amounts, and dates of delivery. The report also must set forth the total amount of fees collected by the distributor for the period, the amount withheld by the distributor under the provisions of Texas Health and Safety Code, §374.103(a)(1), if any, and the total amount to be remitted to the commission. The following are the due dates and associated reporting periods.

(A) The report and payment [~~due date~~] for the [~~reporting~~] period of September 1 - November 30 must be received by the agency by [~~is~~] December 20.

(B) The report and payment [~~due date~~] for the [~~reporting~~] period of December 1 - February 28/29 must be received by the agency by [~~is~~] March 20.

(C) The report and payment [~~due date~~] for the [~~reporting~~] period of March 1 - May 31 must be received by the agency by [~~is~~] June 20.

(D) The report and payment [~~due date~~] for the [~~reporting~~] period of June 1 - August 31 must be received by the agency by [~~is~~] September 20.

(2) - (4) (No change.)

(5) Solvent fees collected by the distributor are held in trust for the agency, are not the property of the distributor, and are not to be used by the distributor for any other purpose. Any amount due to the distributor under the provisions of Texas Health and Safety Code, §374.103(a)(1), does not become property of the distributor until the date on which the distributor remits the remaining amount to the commission.

(6) [~~(5)~~] At any time, the executive director may request in writing that the distributor remit the amount of fees required to be collected up to a date certain as determined by the executive director. The distributor shall remit such amount to the agency within ten days of receiving the executive director's request.

(7) [~~(6)~~] The distributor must pay the fees by check, certified check, money order, or electronic funds transfer made payable to the "Texas Commission on Environmental Quality."

(8) [~~(7)~~] Late payment and returned checks.

(A) Distributors that fail to pay quarterly solvent fees when due shall forfeit any right or claim to withhold a portion of fees collected for administrative expenses as provided in Texas Health and Safety Code, §374.103(a)(1), and shall pay penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

(B) In addition to penalties, interest, and other amounts that may apply, if the distributor does not remit any of the required amount by the due date or a distributor's check is returned for insufficient funds, the executive director may require the distributor to remit collected fees on a different basis and time frame than set forth in this subsection.

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

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SUBCHAPTER C. PERFORMANCE STANDARDS AND WASTE REMOVAL

30 TAC §337.20, §337.22

STATUTORY AUTHORITY

The amendments are proposed under the authority granted to the commission by the 79th Legislature and THSC, Chapter 374. The amendments are also proposed under TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and THSC; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its powers under the Solid Waste Disposal Act; THSC, §361.024, which authorizes the commission to adopt rules consistent with the Solid Waste Disposal Act and establish minimum standards for the management and control of solid waste; HB 2376, 79th Legislature; and SB 444, 79th Legislature.

The proposed amendments implement THSC, Chapter 374.

§337.20. Performance Standards.

(a) Applicability. Unless otherwise specifically stated, these performance standards apply to all dry cleaning facilities, including those that have a nonparticipating non-perchloroethylene user certificate [~~and dry cleaning drop stations~~].

(b) Compliance deadlines.

(1) Unless otherwise specifically stated in this section, owners of all operating dry cleaning facilities must comply with this section by the deadlines set forth in Texas Health and Safety Code, §374.052(a) and House Bill 1366 (Chapter 540, §3(b)), 78th Legislature, May 24, 2003.

(2) Owners of all new dry cleaning facilities shall construct and operate the facilities in compliance with this section.

(c) [~~(b)~~] Storage, treatment, and disposal of dry cleaning wastes. Any person at a dry cleaning facility that generates hazardous wastes shall comply with the provisions specified under Chapter 335, Subchapter C of this title (relating to Standards Applicable to Generators of Hazardous Waste).

(d) [~~(c)~~] Air emission standards.

(1) The owner of a dry cleaning facility shall comply with Chapter 106 of this title (relating to Permits by Rule) or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(2) The owner of a dry cleaning facility using perchloroethylene and any person using perchloroethylene at a dry cleaning facility shall comply with emission standards for hazardous air pollutants as specified in 40 Code of Federal Regulations Part 63, Subpart M, in effect September 22, 1993.

(3) Each owner of a dry cleaning facility that is a major source as defined in Chapter 122 of this title (relating to Federal Operating Permits Program) shall obtain an operating permit.

(e) [~~(d)~~] Dikes and other secondary containment structures.

(1) Applicability. This [~~Unless otherwise specifically stated, this~~] subsection applies to:

(A) all dry cleaning facilities using chlorinated dry cleaning solvents; and

(B) all other dry cleaning facilities that replace or install a dry cleaning machine on or after September 1, 2005 [~~, with the exception of any dry cleaning facility that primarily uses carbon dioxide~~].

(2) Compliance deadlines. The compliance deadlines set forth in subsection (b) of this section apply to all dry cleaning facilities with the exception of dry cleaning facilities in operation on or before January 1, 2004, that have gross annual receipts of $150,000 or less (as indicated on the most current registration form filed with the agency). These dry cleaning facilities have until January 1, 2015, to comply with this subsection. However, if before January 1, 2015, a qualifying dry cleaning facility begins to have gross annual receipts greater than $150,000, the dry cleaning facility must meet the requirements of this subsection by August 1 of the year following the time the facility exceeded $150,000 in annual gross receipts.

(3) [~~(2)~~] Installation.

(A) Each owner of a dry cleaning facility shall 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.

(B) Each secondary containment structure must be maintained in good condition and capable of containing any leak, spill, or release of dry cleaning solvents in accordance with this subsection.

(C) Floor drains must not be located within any secondary containment structure required by this subsection.

(4) [~~(3)~~] Construction materials.

(A) The materials used to construct each secondary containment structure must be impervious to, and compatible with, the dry cleaning solvents, dry cleaning wastes, and dry cleaning wastewater used or stored within the secondary containment structure.

(B) For any dry cleaning unit using chlorinated dry cleaning solvents and any storage area for chlorinated dry cleaning solvents, chlorinated dry cleaning wastes, or chlorinated dry cleaning wastewater, materials other than epoxy or steel may be used for the construction of the secondary containment structure only upon approval by the executive director. Approval for the use of a material other than epoxy or steel will be granted upon satisfactory demonstration to the executive director that the material is as compatible with, and impervious to, dry cleaning solvent as epoxy or steel.

(C) All sealant and all caulk used on each secondary containment structure must be impervious to and compatible with the dry cleaning solvent, dry cleaning waste, or dry cleaning wastewater used or stored within the secondary containment structure.

(5) [~~(4)~~] Storage capacity.

(A) Dry cleaning machine. Each secondary containment structure installed after September 1, 2005, must be capable of completely containing a minimum of 110% of the volume of liquids that can be held within the largest tank on a machine. The secondary containment area must be kept free of all materials or objects that would diminish its capacity to contain a leak, spill, or release.

(B) Storage area. Each secondary containment structure installed after September 1, 2005, must be capable of completely containing a minimum of 110% of the volume of liquids that can be held within the largest container in a storage area. The secondary containment area must be kept free of all materials or objects that would diminish its capacity to contain a leak, spill, or release.

(6) [~~(5)~~] Inspections. The owner of each dry cleaning facility shall visually inspect each installed secondary containment structure weekly to ensure that the structure is not damaged.

(A) The owner of each dry cleaning facility shall ensure that any damage is repaired within seven days after the discovery. The owner may request an extension of this time limit from the executive director. If there is a release or imminent threat of release of dry cleaning solvents, the owner shall ensure that any release is immediately contained and controlled and that the dry cleaning machine is temporarily removed from service until the damage is repaired within the seven-day time limit.

(B) The owner of each dry cleaning facility shall keep a log of these inspections which include, as a minimum, the following information. This information must be provided to the executive director upon request:

(i) the date and time of each inspection;

(ii) the name of the person conducting the inspection;

(iii) a brief notation of findings; and

(iv) the date and nature of each repair or other action taken.

(C) For dry cleaning facilities using chlorinated solvents, inspection logs required under this section may be added to the leak inspection and repair records required by 40 Code of Federal Regulations Part 63, Subpart M, for dry cleaning equipment containing chlorinated solvent.

(D) Each inspection and repair log must be kept at the dry cleaning facility for not less than five years after the log has been completed.

(f) [~~(e)~~] Delivery of solvents.

(1) Chlorinated dry cleaning solvents. All chlorinated dry cleaning solvents must be delivered to dry cleaning units and solvent storage containers by means of either of the following:

(A) a closed, direct-coupled delivery system; or

(B) an alternative method submitted to, and approved by, the executive director that provides protection of human health and safety and the environment that is equivalent to or greater than the protection provided by direct-coupled delivery systems.

(2) Non-chlorinated dry cleaning solvents, except for carbon dioxide solvents. All non-chlorinated dry cleaning solvents, except for carbon dioxide, must be delivered to dry cleaning units and solvent storage containers in a manner that will minimize releases to the environment.

§337.22. Variances and Alternative Procedures.

(a) Prior to proceeding in any manner that differs from the requirements of this subchapter, a person [~~the owner of a dry cleaning facility~~] shall secure written approval from the executive director in the form of a variance in accordance with this section.

(b) The executive director may review and approve requests for variances that meet the requirements in this section. The executive

director will approve such requests only if the person requesting the variance [~~owner~~] can demonstrate to the executive director that the proposed alternative procedure and/or equipment is no less protective of human health and safety and the environment than the requirement(s) for which the variance is sought.

(c) Any request to the executive director for approval of a variance must be made in writing, signed and dated by the person requesting the variance [~~dry cleaning facility owner~~], and accompanied by the following additional documentation:

(1) proposed date for implementation of the alternative procedure and/or equipment;

(2) sufficient documentation to describe or illustrate the alternative procedure and/or equipment, such as:

(A) plans, drawings, and detail sheets (drawn to scale);

(B) design and construction specifications; and

(C) equipment manufacturers' specifications, operating instructions, and warranty information;

(3) documentation and supporting data that demonstrate, to the satisfaction of the executive director, the reliability and appropriateness of the proposed procedure and/or equipment;

(4) complete explanation of the reasons why the proposed procedure and/or equipment are considered preferable to the requirement for which the variance is sought or why that requirement is considered impracticable for the specified facility;

(5) documentation that demonstrates, to the satisfaction of the executive director, that use of the proposed alternative procedure and/or equipment will be no less protective of human health and safety and the environment than adhering to the requirement(s) for which the variance is sought; and

(6) if the person requesting the variance is the owner or a representative of the owner of a dry cleaning facility, the request must also include:

(A) written concurrence by the location owner, if different from the dry cleaning facility owner; and

(B) complete project identification, including:

(i) location name, address, and location identification number (if known);

(ii) location owner's name, address, and telephone number; and

(iii) name, address, and telephone number of dry cleaning facility owner's/operator's authorized representative.

[~~(1) written concurrence by the location owner, if different from the dry cleaning facility owner;~~]

[~~(2) complete project identification, including:~~]

[~~(A) location name, address, and location identification number (if known);~~]

[~~(B) location owner's name, address, and telephone number;~~]

[~~(C) name, address, and telephone number of dry cleaning facility owner's/operator's authorized representative; and~~]

[~~(D) proposed date for implementation of the alternative procedure and/or equipment;~~]

[~~(3) sufficient documentation to describe or illustrate the alternative procedure and/or equipment, such as:~~]

[~~(A) plans, drawings, and detail sheets (drawn to scale);~~]

[~~(B) design and construction specifications; and~~]

[~~(C) equipment manufacturers' specifications, operating instructions, and warranty information;~~]

[~~(4) documentation and supporting data that demonstrate, to the satisfaction of the executive director, the reliability and appropriateness of the proposed procedure and/or equipment;~~]

[~~(5) complete explanation of the reasons why the proposed procedure and/or equipment are considered preferable to the requirement for which the variance is sought or why that requirement is considered impracticable for the specified facility; and~~]

[~~(6) documentation that demonstrates, to the satisfaction of the executive director, that use of the proposed alternative procedure and/or equipment will be no less protective of human health and safety and the environment than adhering to the requirement(s) for which the variance is sought.~~]

(d) - (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.

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SUBCHAPTER D. PRIORITIZATION AND RANKING

30 TAC §337.30, §337.31

STATUTORY AUTHORITY

The amendments are proposed under the authority granted to the commission by the 79th Legislature and THSC, Chapter 374. The amendments are also proposed under TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and THSC; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its powers under the Solid Waste Disposal Act; THSC, §361.024, which authorizes the commission to adopt rules consistent with the Solid Waste Disposal Act and establish minimum standards for the management and control of solid waste; HB 2376, 79th Legislature; and SB 444, 79th Legislature.

The proposed amendments implement THSC, Chapter 374.

§337.30. Prioritization of Sites.

(a) The executive director will prioritize sites for corrective action as follows.

(1) A site will only be eligible for prioritization if it has been ranked with the dry cleaning site [~~facility~~] ranking system.

(2) (No change.)

(b) The relative priority for corrective action at a site will be based on the following factors:

(1) the dry cleaning site [~~facility~~] ranking system;

(2) - (7) (No change.)

(c) (No change.)

§337.31. Ranking of Sites.

(a) Dry cleaning site [~~facility~~] ranking system.

(1) The dry cleaning site [~~facility~~] ranking system is a methodology designed to determine a numerical score for a facility based on the executive director's judgment regarding various factors that may impact human health or the environment.

(2) The executive director will rank dry cleaning sites [~~facilities~~] based on information provided in an application for ranking package. An application for ranking will be accepted from persons eligible to apply for a site to be ranked under Texas Health and Safety Code, §374.154(b), including former owners of dry cleaning facilities and owners of real property on which a dry cleaning facility was formerly located that meet the eligibility criteria.

(3) - (8) (No change.)

(b) (No change.)

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

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SUBCHAPTER G. NON-PERCHLOROETHYLENE USERS, FACILITIES, AND DROP STATIONS

30 TAC §337.61, §337.62

STATUTORY AUTHORITY

The amendments are proposed under the authority granted to the commission by the 79th Legislature and THSC, Chapter 374. The amendments are also proposed under TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and THSC; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its powers under the Solid Waste Disposal Act; THSC, §361.024, which authorizes the commission to adopt rules consistent with the Solid Waste Disposal Act and establish minimum standards for the management and control of solid waste; HB 2376, 79th Legislature; and SB 444, 79th Legislature.

The proposed amendments implement THSC, Chapter 374.

§337.61. Nonparticipating [~~Participating~~] Non-Perchloroethylene User Registration Certificate.

[~~(a)~~] To obtain a nonparticipating [~~participating~~] non-perchloroethylene user registration certificate, an owner of a dry cleaning facility or dry cleaning drop station must meet the requirements of Texas Health and Safety Code, §374.104 and swear in an affidavit approved by the executive director that:

(1) the owner has never used or allowed the use of the dry cleaning solvent perchloroethylene at any dry cleaning facility or drop station in the state; [~~.~~]

(2) the dry cleaning solvent perchloroethylene has never been used at the location to which the nonparticipating non-perchloroethylene user registration certificate would apply;

(3) the owner will not now or ever use or allow the use of perchloroethylene at the location to which the nonparticipating non-perchloroethylene user registration certificate would apply; and

(4) the owner was the owner of the dry cleaning facility or dry cleaning drop station on January 1, 2004, and was eligible to file the option not to participate on or before January 1, 2004, and inadvertently failed to file before that date.

[~~(b) A facility is only eligible for a non-perchloroethylene user registration certificate, if perchloroethylene has not been, is not, and will not be used at the facility that is being registered for the certificate.~~]

§337.62. Nonparticipating Non-Perchloroethylene Facilities and Drop Stations.

(a) In accordance with Texas Health and Safety Code, §374.104, after a dry cleaning facility or drop station is designated as nonparticipating:

(1) the [~~owner of the~~] dry cleaning facility or drop station is not eligible for any expenditures of money from the Dry Cleaning Facility Release Fund or other benefits of participation for that facility or drop station;

(2) that dry cleaning facility or drop station may not later become a participating facility or drop station, regardless of whether the owner of the facility, the owner of the drop station, or the owner of the real property is applying for [~~the facility's~~] participation in Dry Cleaning Facility Release Fund benefits; and

(3) (No change.)

(b) In any sales transaction of the nonparticipating non-perchloroethylene facility, drop station, or of the real property on which the facility or drop station is located, the owner of the facility, the owner of the drop station, or the owner of the real property [~~owner~~], as applicable, shall disclose the following to potential buyers prior to any sale:

(1) the nonparticipating status of the dry cleaning facility or drop station;

(2) the fact that the dry cleaning facility or drop station may not later become a participating facility or drop station; and

(3) the prohibition on the use of perchloroethylene at the dry cleaning facility or drop station.

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

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 23. VEHICLE INSPECTION

The Texas Department of Public Safety proposes amendments to Subchapters A, B, and D - G, §§23.1, 23.3, 23.8, 23.12 - 23.15, 23.21, 23.28, 23.51 - 23.53, 23.61, 23.73, 23.75, 23.76, 23.79, and 23.94. The department is also proposing adding new §23.18 and new §23.19 to Subchapter A; new §23.25 to Subchapter B; and new §23.81 to Subchapter F. New §23.25 is filed simultaneously with a proposal for repeal of current §23.25. The amendments and new sections relate to regulation of the Texas Vehicle Inspection Program by the department.

The primary reason for the proposed amendments and new rules is implementation of the automation of the motor vehicle inspection program requiring inspection stations to use TexasOnline to purchase inspection certificates and send records, reports, and other required information to the department as authorized by §548.258 of the Texas Transportation Code, as amended by §22 of H.B. 2048 and §11 of H.B. 2593, 79th Legislature (RS). Revising the rules for the department and inspection stations to use TexasOnline, the Texas Automated Vehicle Inspection System (TAVIS), necessitated an extensive review of all applicable rules resulting in additional amendments correcting typographic errors, procedural updates, and minor program changes.

The rules in Subchapter A, with proposed amendments and as proposed, contain style revisions and substantive changes to facilitate use of TexasOnline in vehicle inspection station licensing matters. Section 23.1 amends the application procedure, allows phase-in of TexasOnline procedures, and a corresponding automation fee authorized by Government Code, §2054.2591 as amended by §8 of H.B. 2048 and §6 of H.B. 2593, 79th Legislature (RS). Section 23.3 requires inspection stations to record all inspections using the TAVIS system. Section 23.8 removes a nonspecific repair tool requirement, updates inspection tool requirements, and adds requirement for the TAVIS device with associated telephone line requirement. Section 23.12 updates procedure for reinstatement of a license that expired during a period of suspension and aligns it with initial application procedures. Section 23.13 updates the procedure for reinstating an unexpired license after suspension and aligns it with initial application procedures. Section 23.14 revises license renewal procedures allowing phase-in, as available, of TexasOnline procedures and a corresponding automation fee. Section 23.15 corrects typographical errors, clarifies violations, and updates violations to include TAVIS, as follows: Category A (minor) violations - clarifies out-of-date certificate issuance, adds minor TAVIS security violation, and adds recording false vehicle information in TAVIS; Category B (intermediate) violations - adds using another inspector's TAVIS identification code and inspector not safeguarding own TAVIS identification code; Category C (serious) violations - revises permitting 'uncertified person' participating in inspections to 'currently denied, suspended, or revoked inspector' and adds violation for the disqualified inspector under same circumstance; Category D (eligibility) violations - clarifies understanding of this category and deferred adjudication as a conviction; Category E (emissions, other than C) - minor style change and minor textual change in subsection (j). New §23.18 provides TAVIS access and security requirements. New §23.19 provides explanation on issuance of TAVIS interface equipment to stations.

The rules in Subchapter B, with proposed amendments and as proposed, contain substantive changes to facilitate use of TexasOnline and operational clarifications to meet general vehicle inspection requirements. Section 23.21 amends requirements for recording information on certificate and requiring reporting inspection results using TAVIS system, as available. New §23.25 provides inspection station security and financial responsibilities concerning certificates and TAVIS equipment. Section 23.28 removes reference to inspection of miniature vehicles to prevent confusion concerning legality of recently popular mini-motorcycles (Pocket Bikes) that are not eligible for registration and/or operation on the public roadways.

The rules in Subchapter D with proposed amendments contain substantive changes to facilitate use of TexasOnline and minor textual clean up for vehicle inspection records and forms. Section 23.51 amends record requirements to include TAVIS. Section 23.52 removes outdated reference to the out-of-state vehicle identification number (VIN) verification form used for initial registration duplicated in another rule, §23.80 of this title (relating to Out-of-State Vehicle Identification Number Verification), and includes use of TAVIS. Section 23.53 includes TAVIS use for maintaining records of station activity.

The rule in Subchapter E with proposed amendment contains style revisions and substantive changes to facilitate use of TexasOnline for the certification of inspectors. Section 23.61 amends the inspector application procedure to allow phase-in of TexasOnline procedures and collection of a corresponding automation fee.

The rules in Subchapter F, with proposed amendments and as proposed, contain style revisions and substantive changes to facilitate use of TexasOnline and program updates in regulation of vehicle inspection station operation. Section 23.73 amends inspection fees for El Paso County based on rulemaking by the Texas Commission on Environmental Quality (TCEQ), removes authorization of inspection stations to offer and/or advertise inspection in combination with other services, and authorization for inspection stations to pass certificate automation fee to vehicle owners. Section 23.75 aligns procedure for change of licensing information with initial application procedures to include TAVIS. Section 23.76 revises going out of business procedures to include responsibility of returning TAVIS equipment. Section 23.79 amends minor textual change and department procedures for handling insufficient electronic funds transfers in TAVIS. New §23.81 provides the TAVIS procedures the department may require stations to use to requisition inspection certificates.

The rule in Subchapter G is proposed to amend the vehicle emissions inspection and maintenance program with a minor textual change to §23.94 by removing reference to On-Board Diagnostic (OBD) testing as an alternative vehicle emissions testing methodology, since OBD is the primary emissions test method for model years 1996 and newer vehicles.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be minor fiscal implications for state, local governments, and local economies. Each vehicle inspected at a station automated with a TAVIS device will be charged an additional automation fee of $2.00, including vehicles registered to governmental entities. The automation fee defrays the cost of automation equipment provided at no cost to the station through TexasOnline. Where stations perform emissions testing, the automation fee is $0.25 because the station's current emissions analyzer is used and no additional TAVIS equipment is needed, nor provided.

The Texas Department of Transportation (TxDOT) registration database reports 420,829 government vehicles registered as "exempt." TxDOT was unable to provide registration specifics beyond county of registration for these exempt vehicles, rendering separation of state fiscal impacts from local and municipal governments extremely difficult. In Travis County, there are 213,607 exempt vehicles registered. Although most of these are assigned to state agencies, some number may be operated elsewhere in the state. Vehicle emissions testing in Travis County started on September 1, 2005 and exempt vehicles operating in it require an automation fee of $0.25, while those normally operating in non-emissions testing counties require the $2.00 automation fee. In other counties with emissions testing, there are 83,549 exempt vehicles, estimated to be local governmental vehicles, accruing automation fees ($0.25) estimated to total in the amount of approximately $20,887. Finally there are 123,673 exempt vehicles in non-emission testing counties generating an estimated fiscal impact in automation fees ($2.00) of $247,364, primarily to local governmental entities. There is no anticipated additional cost in enforcing or administering the rules to state or local governments.

Mr. Ybarra also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be better service to the vehicle owners by improving the administration of the Texas Vehicle Inspection Program though the automation of inspection records and processes. There will be some minor economic cost to individuals, small businesses and micro-businesses operating vehicles because of the inspection automation fee; however, the fee will be no more than $2.00 per vehicle annually.

Comments on the proposed rules and amendments may be submitted and to insure consideration must reference "Proposed Vehicle Inspection Amendments for TexasOnline" in the subject line or in the beginning of the text, no later than 30 days from the date of this publication to E. Eugene Summerford, Legal Counsel, Vehicle Inspections and Emissions, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0543; by fax at (512) 424-2774 or by e-mail to earl.summerford@txdps.state.tx.us. All requests for a public hearing on the proposed rules and amendments, submitted under the Administrative Procedure Act, must be received by the department, as previously indicated, not more than 15 days after the notice of proposed changes in the sections have been published in the *Texas Register*.

SUBCHAPTER A. VEHICLE INSPECTION STATION LICENSING

37 TAC §§23.1, 23.3, 23.8, 23.12 - 23.15, 23.18, 23.19

The amendments and 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, §548.002 and §548.258 which authorize the department to adopt rules to administer and enforce the compulsory inspection of vehicles and requiring inspection stations to use TexasOnline to purchase inspection certificates, send records, reports, and other information to the department.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 and §548.258 are affected by this proposal.

§23.1. New Applications.

(a) An applicant for licensing as a vehicle inspection station must apply to the department using department provided forms. The director may determine not to consider any application unless all requested information has been supplied by the applicant. [~~Request for appointment.~~] Persons may request department forms for application [~~certificate of appointment~~] as a vehicle inspection station by notifying a department representative by telephone, letter, or through another vehicle inspection station.

(b) The director or designee shall develop all forms and related documents including, but not limited to, an application form, signature authorization form, submissions requirements for submitting credit reports or related release forms, and/or any other background information relating to the applicant required to determine the applicant's eligibility for a license and whether the granting of a license to the applicant will best serve the public. An applicant must disclose all criminal convictions for individuals to whom Transportation Code, §548.405(f) applies. [~~Investigation. Each request for certificate of appointment will be investigated by the Department of Public Safety, and the person making application will be informed at that time of the minimum certification requirements.~~]

(c) The applicant(s) shall complete, sign, date, and submit all forms and related information and documents required. By signing and submitting the application form, the applicant agrees to allow the department to investigate the criminal, credit, and tax background of the applicant and other matters as authorized by law. [~~Forms. Applicants for station certificate of appointment shall complete and submit the following forms:~~]

[~~(1) inspection station application and investigation report, Form VI-2;~~]

[~~(2) signature card, Form VI-13; and~~]

[~~(3) statutory certificate of appointment fee of $30.~~]

(d) The statutory fee for certification as an inspection station is $30 for a two year period.

(e) [~~(d)~~] Certification. The applicant must certify in writing that, if it is a corporation, its franchise taxes owed to the State of Texas under the Tax Code, Chapter 171, are current, or that the corporation is exempt from or not subject to the Texas franchise tax.

(f) [~~(e) Frequency of application.~~] Except as provided in §23.13 of this title (relating to Reissue of Inspection Station Certificate of Appointment after Suspension), no person may apply for a certificate of appointment as a vehicle inspection station within one year from the date of denial by the director of an application from the same person.

(g) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), the following provisions are effective.

(1) Applicants for inspection station certification must apply in a manner prescribed by the department using on-line forms, paper forms, or combination of both provided by the department, TexasOnline, and/or authorized TAVIS contractor(s).

(2) In addition to the statutory certification fee, applicants may be required to pay an additional automation subscription fee of $2.00.

(3) Applicants must enter into and maintain a business arrangement with the State and/or the TAVIS contractor(s) to obtain a telecommunication link between the Texas Automated Vehicle Inspection Database and the TAVIS station interface device. The business arrangement will include a security agreement between the station and the State and/or TAVIS contractor(s) detailing the station's responsibility for care, maintenance, and security of the TAVIS station interface device. The security agreement shall specify that replacement of the TAVIS station interface device for any reason other than ordinary and normal usage (fair wear and tear) must be at the station's expense. Placement of a TAVIS station interface device by the contractor may require a security deposit from the station applicant in an amount as authorized by the department.

§23.3. Specific Requirements for Public, Fleet, and Governmental Vehicle Inspection Stations.

(a) Space requirements. The inspection area shall include:

(1) an area of 12 feet by 24 feet of minimum space;

(2) an inspection area located entirely within or adjacent to the building; and

(3) a permissible center drain provided it does not interfere with the proper inspection of the vehicle.

(b) Specific requirements for fleet vehicle inspection stations.

(1) Fleet vehicle inspection stations shall not inspect the personal vehicles of officers, employees, or the general public even though personal vehicles are used part-time or full-time for business. Personal vehicles will be inspected in public vehicle inspection stations.

(2) Fleet vehicle inspection stations will not be approved when free access to the vehicle inspection station grounds is not granted to representatives of the department.

(3) Firms open to the public will not be issued a fleet vehicle inspection station certificate of appointment unless such firms are currently certified as a public vehicle inspection station and desire a fleet vehicle inspection station certificate of appointment for "new car make ready."

(4) A fleet vehicle inspection station shall meet all the requirements as prescribed for a public vehicle inspection station as detailed in this section.

(c) Specific requirements for public inspection stations. Public inspection stations shall inspect all vehicles presented for the purpose of inspection, if the station is certified to inspect that type vehicle.

(d) Specific requirements for governmental inspection stations.

(1) A governmental vehicle inspection station shall meet the requirements as prescribed for a public vehicle inspection station as detailed in this section.

(2) Governmental vehicle inspection stations shall not inspect the personal vehicles of officers, employees, or the general public, even though personal vehicles are used part-time or full-time for business.

(3) Governmental vehicle inspection stations will not be approved when free access to the vehicle inspection station grounds is not granted to representatives of the department.

(e) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), all inspection stations must record all inspections into the state vehicle inspection database using an approved device during each inspection.

§23.8. Equipment Requirements for All Classes of Vehicle Inspection Stations.

(a) Applicant shall be informed of the required equipment including such items as approved testing devices, tools, measuring devices, display board, brake machines, and marked brake test area.

(b) The minimum tools, equipment, and approved testing devices shall be kept and maintained in proper working condition at all times in the vehicle inspection station area.

(c) All testing equipment shall be approved by the department. All testing equipment shall be installed and used in accordance with the manufacturer's and department's recommendation. Equipment shall be arranged and located at or near the approved inspection area to obtain maximum efficiency.

(d) If equipment is used during the inspection procedure, the vehicle inspection station owner shall be responsible for its use, accuracy, and general maintenance. When equipment adjustments and calibrations are needed, the manufacturer's and department's specifications shall be followed. Defective equipment shall not be used until such deficiencies are corrected.

(e) Every certified inspector shall have a working knowledge of all testing devices used during inspections.

(f) Each vehicle inspection station is required to own and maintain, as a minimum, the equipment as detailed [~~listed~~] in paragraphs (1) - (9) of this subsection:

[~~(1) Tools for making tests, repairs, and adjustments ordinarily encountered on those types of vehicles to be inspected;~~]

(1) [~~(2)~~] a measured and marked brake test area which has been approved by the department, or an approved brake testing [~~inspecting~~] device;

(2) [~~(3)~~] a measuring device clearly indicating measurements of 12 inches, 15 inches, 20 inches, 24 inches, 54 inches, 60 inches, 72 inches and 80 inches to measure reflector height, clearance lamps, side marker lamps and turn signal lamps on all vehicles--vehicle inspection stations with only a motorcycle endorsement are not required to have an 80 inch measure;

(3) [~~(4)~~] a permanent [~~laundry~~] marking pen for completing the reverse side of the windshield inspection certificate;

(4) [~~(5)~~] a scraping device for removing the old inspection certificate;

(5) [~~(6)~~] a gauge for measuring tire tread depth;

(6) [~~(7)~~] a 1/4 inch round hole punch if motorcycle-trailer certificates are issued;

(7) [~~(8)~~] a measuring device for checking brake pedal reserve clearance [~~checker with one-inch and two-inch clearances~~] (except vehicle inspection stations with only a motorcycle endorsement);

(8) [(9)] a department approved device for measuring the light transmission of sunscreening devices. This paragraph does not apply to government stations or fleet stations which have provided the department annual written certification that the governmental entity or fleet station has no vehicles equipped with a sunscreening device. This requirement does not apply to vehicle inspection stations with only a motorcycle and/or trailer endorsement. The effective date for implementation of this paragraph is January 1, 1994; and

(9) [(10)] A [a] department approved device with required adapters for checking fuel cap pressure. This paragraph does not apply to government stations or fleet stations which have provided the department annual written certification that the government entity or fleet station has no vehicles meeting the criteria for checking gas cap pressure or that these vehicles will be inspected by a public inspection station capable of checking gas caps. This requirement does not apply to vehicle inspection stations with only a motorcycle and/or trailer endorsement and certain commercial inspection stations that only inspect vehicles powered by a fuel other than gasoline. [The effective date for implementation of this paragraph is January 1, 2000.]

(g) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), all classes of inspection stations may be required to have:

(1) an approved and operational TAVIS station interface device, and

(2) a telephone line for the TAVIS station interface device to be used during vehicle inspections either dedicated solely for use with the TAVIS device or shared with other devices in a manner as approved by the department.

§23.12. Expiration of Appointment during Suspension.

[(a)] After expiration of a period of suspension in which the certificate of appointment has expired, a vehicle inspection station owner desiring reinstatement must [may] request reinstatement in the same manner as an initial application as detailed in §23.1 of this title (relating to New Applications) [by notifying in writing the appropriate service commander].

[(b) An owner seeking reinstatement shall:]

[(1) submit a properly completed inspection station application, Form VI-2;]

[(2) submit a properly completed signature card, Form VI-13; and]

[(3) submit the statutory Certificate of Appointment fee of $30.]

§23.13. Reissue of Inspection Station Certificate of Appointment after Suspension.

[(a) General.] After expiration of a period of suspension, a vehicle inspection station owner desiring reinstatement must [may] request reinstatement in the same manner as an initial application as detailed in §23.1 of this title (relating to New Applications) [by notifying in writing the appropriate service commander].

[(b) Forms required. An owner seeking reinstatement shall submit a properly completed inspection station application, Form VI-2.]

§23.14. Vehicle Inspection Station Certificate of Appointment Renewal.

(a) Inspection station certificate holders seeking license renewal must apply to the department using department provided forms. The director may determine not to consider any renewal application unless all requested information has been supplied by the applicant. Persons may request department forms for renewal of certification as a vehicle inspection station by notifying a department representative by telephone, letter, or in person. [Forms required. To obtain renewal of the vehicle inspection station Certificate of Appointment the following shall be submitted to the department:]

[(1) the signature card, Form VI-13;]

[(2) the statutory certificate of appointment fee of $30; and]

[(3) inspection station application and investigation report, Form VI-2.]

(b) The director or designee shall develop all forms and related documents including, but not limited to, an application form, signature authorization form, release form to obtain a credit report, and/or any other background information relating to the applicant required to determine the applicant's eligibility for a license and whether the granting of a license to the applicant will best serve the public. An applicant must disclose all criminal convictions for those individuals to whom Transportation Code, §548.405(f) applies.

(c) The applicant(s) shall complete, sign, date, and submit all forms and related information and documents required. By signing and submitting the application form, the applicant agrees to allow the department to investigate the criminal, credit, and tax background of the applicant and other matters as authorized by law.

(d) [(b) Consistent name, number, and location.] Renewal certification may not be obtained unless the station Certificate of Appointment is renewed in exactly the same name, station number, and location as currently certified. If name, number, or location is changed, initial [a base] application must be made as detailed in [under] §23.1 of this title (relating to New Applications)[, §23.2 of this title (relating to General Space Requirements), §23.3 of this title (relating to Specific Requirements for Public, Fleet, and Governmental Vehicle Inspection Stations), §23.4 of this title (relating to Station Endorsements), §23.5 of this title (relating to Specific Requirements for Vehicle Inspection Stations with Trailer Endorsement), §23.6 of this title (relating to Specific Requirements for Vehicle Inspection Stations with Motorcycle Endorsements), §23.7 of this title (relating to Specific Requirements for Vehicle Inspection Stations with Commercial Endorsements), §23.8 of this title (relating to Equipment Requirements for All Classes of Vehicle Inspection Stations), §23.9 of this title (relating to Manpower), §23.10 of this title (relating to Inspection Station Display Area), and §23.11 of this title (relating to Vehicle Inspection Station Sign)].

(e) [(c) Distribution of forms.] Renewal forms will be forwarded to the department by mail or picked up by a department representative as instructed.

(f) [(d)] Deadline. Vehicle inspection stations which fail to file a complete application for renewal by October 1 of each renewal year must file a new application only.

(g) The statutory fee for renewal of certification as an inspection station is $30.

(h) [(e)] Certification. The applicant must certify in writing that, if it is a corporation, its franchise taxes owed to the state of Texas under the Tax Code, Chapter 171, are current, or that the corporation is exempt from or not subject to the Texas franchise law.

(i) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), the following provisions are effective.

(1) Renewal applications must be submitted in a manner prescribed by the department using on-line forms, paper forms, or combination of both provided by the department, TexasOnline, and/or authorized TAVIS contractor(s).

(2) In addition to the statutory certification renewal fee, applicants may be required to pay an additional automation fee of $2.00.

(3) Applicants must enter into and maintain a business arrangement with the TAVIS contractor(s) to obtain a telecommunication link between the Texas Automated Vehicle Inspection Database and the TAVIS station interface device. The business arrangement will include a security agreement between the station and TAVIS contractor(s) detailing the station's responsibility for care, maintenance, and security of the TAVIS station interface device. The security agreement shall specify that replacement of the TAVIS station interface device for any reason other than ordinary and normal usage (fair wear and tear) must be at the station's expense. Placement of a TAVIS station interface device by the contractor may require a security deposit from the station applicant in an amount as authorized by the department.

§23.15. Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings.

(a) - (d) (No change.)

(e) Violation categories are as follows:

(1) Category A.

(A) (No change.)

(B) Issuing an inspection certificate without [the] requiring the owner or operator to furnish proof of financial responsibility for the vehicle at the time of inspection.

(C) - (D) (No change.)

(E) Issuing out of date, wrong series or type of inspection certificate for vehicle inspected [certificates].

(F) (No change.)

(G) Failure to properly safeguard inspection certificates, department issued forms, and Texas Automated Vehicle Inspection System (TAVIS) Access unique identifier protocol, Emissions Analyzer Access/Identification Card, and/or any Personal Identification Number (PIN) [PIN] number.

(H) - (R) (No change.)

(S) Carelessly or negligently entering incorrect vehicle information into the Texas Automated Vehicle Inspection System (TAVIS) station interface device resulting in the reporting of erroneous information concerning the vehicle.

(2) Category B.

(A) - (N) (No change.)

(O) Issuing an inspection certificate by using the Emissions Analyzer Access/Identification Card, Texas Automated Vehicle Inspection System (TAVIS) Access unique identifier protocol, and/or the associated PIN number of another inspector.

(P) Giving, sharing, or lending an Emissions Analyzer Access/Identification Card, Texas Automated Vehicle Inspection System (TAVIS) Access unique identifier protocol, and/or divulging the associated PIN number to another person without the explicit consent of appropriate department personnel.

(3) Category C.

(A) - (G) (No change.)

(H) Permitting or allowing a [an uncertified] person whose certificate is currently denied, suspended, or revoked, to issue an inspection certificate or participate in a vehicle inspection.

(I) Conducting or participating in the inspection of a vehicle during a period of suspension or revocation.

(4) Category D is a non-punitive bar or restraint on further operation as an inspection station or inspector based on the temporary failure to possess or maintain an item or condition necessary for certification. The bar or curtailment from some or all inspection activities is immediate and immediately removed when the obstacle has been removed or remedied.

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

(C) Failure to enter into and maintain a business arrangement with the Texas Information Management System contractor to obtain a telecommunications link to the Texas Information Management System Vehicle Identification Database (VID) for each vehicle emissions [exhaust gas] analyzer, if in an affected county as defined in §23.93(b)(1) of this title.

(D) Conviction, as defined in Transportation Code, §548.405(b), under the laws of this state, another state, or the United States of any crime as detailed in subsection (f) of this section. A conviction will be cause for denial, suspension, or revocation, under this subsection, until after the court imposed punishment or supervision has elapsed. For the purposes of this section, a person is convicted of an offense when an adjudication of guilt or an order of deferred adjudication for the offense is entered against the person by a court of competent jurisdiction. [A dismissal and discharge in a deferred adjudication proceeding shall not be considered a conviction for the purpose of this section.]

(5) Category E.

(A) The following applies to inspectors and inspection stations in which emission testing is required as detailed by §23.93 of this title [applies]:

(i) - (xi) (No change.)

(B) (No change.)

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

(h) Certification of an inspection station where the current owner or operator is pending or currently serving a suspension or revocation is subject to additional restrictions that may result in denial, suspension, or revocation of certification.

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

(4) Establishing proof is by a notarized affidavit signed by the applicant. This affidavit must state that the previous certificate holder may not inspect vehicles; deal with inspection customers; handle any certificates, department forms, or certificate related materials; supervise; or to any extent manage any portion of the inspection station business. The affidavit must also contain the statement that the affiant understands and agrees that in the event the department discovers that the previous certificate holder is involved in the inspection business at that location, the certificate will be revoked immediately, under Transportation Code, §548.407(d).

(i) (No change.)

(j) The director, without a hearing, may suspend or revoke or refuse to issue any certificate if, within 20 days after the personal notice of the notification [notice] is sent or notice has been deposited in the United States mail, the person has not made a written request to the director for this administrative hearing.

(k) - (q) (No change.)

§23.18. Texas Automated Vehicle Inspection System (TAVIS) Access.

(a) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), all inspections shall be recorded into the TAVIS database using an approved method or device during the inspection. Access to the TAVIS system at certified inspection stations shall be controlled using procedures, processes, and protocols as established by the department.

(b) The data records maintained in the Texas Automated Vehicle Inspection System are government records. Fraudulent use of the TAVIS system or the entering of false information into the TAVIS database will subject the individual to criminal action under either Penal Code, §37.10, Transportation Code, §548.601, or both as well as administrative action by the department.

(c) Inspectors, and all other authorized users, shall be held accountable for the security and confidentiality of all assigned TAVIS access processes including, but not limited to, passwords, protocols, tokens, or access/identification cards. Inspectors, all other authorized users, and inspection station owner/operators shall be responsible for all unauthorized use of assigned unique identifier protocols.

(d) Before each official inspection begins, the inspector shall use a unique identifier protocol, as established by the department, which links the inspection record with the certified inspector performing the inspection in TAVIS.

(e) Inspectors may not give, share, lend, or divulge this unique identifier protocol, including but not limited to, passwords, personal identification numbers (PIN), tokens, or access/identification cards to another person without the explicit consent of appropriate department personnel. Failure to comply with this paragraph shall result in suspension or revocation of the inspector's certification as well as any appropriate criminal action or administrative disciplinary action. Inspectors are responsible for unauthorized access of the Texas Automated Vehicle Inspection System (TAVIS) resulting from their negligence or carelessness in maintaining the confidentiality of their unique identifier protocol.

(f) Certified inspectors must sign a statement acknowledging the department's policy for the use and protection of TAVIS access procedures. Each inspector shall, as a condition of certification, complete and sign, on a locally produced form, the following statement:
Figure: 37 TAC §23.18(f)

(g) The department may utilize the Texas Driver License, or Texas Identification Card, if the individual's driver license is from another state, as the TAVIS Access/ID for the Texas Automated Vehicle Inspection System and establish any necessary additional unique identifier protocols. If these documents are used, department rules applicable to their issue will prevail relating to their issuance.

§23.19. Additional Texas Automated Vehicle Inspection System (TAVIS) Station Interface Equipment.

(a) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), inspection stations not engaged in vehicle emissions testing, as detailed in §23.93 of this title (relating to Vehicle Emissions Inspection Requirements), will receive a single TAVIS station interface device as a result of entering into a business arrangement with the State and/or TAVIS contractor(s) and subject to any security deposit required by the State and/or TAVIS contractor(s), as authorized by the department.

(b) An inspection station operating multiple inspection lanes or bays, under the same roof or single structure, may share a single TAVIS device. In the event an inspection station desires separate TAVIS devices for each lane of a multi-lane station, the owner/operator must secure the additional devices at a cost and under terms set by the State and/or the TAVIS contractor(s) as authorized by the department.

(c) Notwithstanding subsections (a) and (b) of this section, multi-lane inspection stations shall not circumvent this section by seeking certification as multiple inspection stations with the same physical location since for purposes of this section these multiple inspection stations will be considered a single station.

(d) Notwithstanding subsection (c) of this section, a fleet station for "new car make ready" (2-year) inspections and a separate public station, as detailed in §23.3 of this title, with the same physical location shall not be considered a single station for purposes 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.

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SUBCHAPTER B. GENERAL INSPECTION REQUIREMENTS

37 TAC §§23.21, 23.25, 23.28

The amendments and 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, §548.002 and §548.258 which authorize the department to adopt rules to administer and enforce the compulsory inspection of vehicles and requiring inspection stations to use TexasOnline to purchase inspection certificates, send records, reports, and other information to the department.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 and §548.258 are affected by this proposal.

§23.21. Issuance of Inspection Certificates.

(a) Certificate issued to every vehicle inspected and approved.

(1) An inspection certificate shall be issued in numerical sequence for every vehicle inspected and approved. It is the responsibility of the certified inspector to personally place the proper number insert on the face of the certificate indicating the month and year of expiration and to affix the certificate in the proper place on the vehicle. Any other certificate, decal, or sticker, such as parking permit or property owner identification, shall be removed if it is in the lower left-hand corner of the windshield where the inspection certificate is to be affixed. The vehicle inspection station owner shall advise the vehicle owner or operator that the department designates this location for the inspection certificate, [and] that the vehicle owner should obtain a replacement permit or decal, and place [locate] it in [on] another location [place] on the vehicle.

(2) The reverse side of the inside windshield-type inspection certificate shall be completed legibly with a permanent marking pen, recording [laundry marking pen or typewriter giving] the information required [requested,] and shall be signed [with a laundry marking pen] by the certified inspector making the inspection.

(3) Facsimile signatures or initials are not acceptable.

(4) An inspection certificate shall be voided if it is illegible or torn, or if the wrong month or year insert is used. The certified inspector shall write void across the face of the certificate, write the certificate number voided on the inspection station report, and retain the voided inspection certificate until the refund of the other unused certificates is made.

(5) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), an inspection certificate shall not be issued unless the vehicle information and inspection results are entered into the system using the TAVIS station interface device, or if non-operational and after department approval, the alternative TAVIS Interactive Voice Portal.

(b) Expiration of inspection certificates.

(1) The certificate of inspection shall be valid for one year from the month it was affixed to the vehicle.

(2) The certificate of inspection shall not be valid after the end of the 12th month in which the vehicle was last inspected (24th month for two-year certificates).

(3) Enforcement on expired inspection certificates shall begin after the fifth day following the expiration of the period designated for the inspection or month and year designated on the certificate.

(c) Design and color change. The director, or authorized designate [~~with the approval of the commission~~], shall determine any [~~designate~~] new design and color change of the inspection certificates to be issued for all inspections.

(d) Windshield-type inspection certificates. The windshield-type inspection certificates, to be properly valid, shall contain a number insert indicating the month and year of expiration.

(e) Motorcycle-trailer inspection certificate. The motorcycle-trailer inspection certificate, to be properly valid, shall have the month (and/or year) of expiration punched out.

§23.25. Inspection Station Responsibilities for Safeguarding Certificates; Financial Responsibility for Inspection Certificates Received and Subsequently Damaged, Rendered Unusable or Received and Subsequently Stolen or Lost; and for State Authorized Vendor Property.

(a) Definitions. The following definitions apply relating to the Texas Automated Vehicle Inspection System (TAVIS) Certificate Inventory and Tracking Management Application.

(1) Disbursed--The status of inspection certificates that have been assigned to an inspection station's account and is pending confirmation of delivery to the inspection station's location.

(2) Confirmed--The status of an inspection certificate that has been physically received by the inspection station. Inspection stations issued a TAVIS inspection station interface device are required to immediately "confirm" receipt of inspection certificates using the TAVIS device and that status is recorded in the TAVIS system.

(3) Active--The status of an inspection certificate that has been confirmed as physically received at the inspection station and available for issue to a vehicle upon passing inspection. A book of inspection certificates is activated using the TAVIS station interface device located in the inspection station's location and that status is recorded in the TAVIS system. An inspection station is required to "activate" inspection certificates.

(4) Issued--The status of an inspection certificate attached to a vehicle after the vehicle passes the inspection and the results have been recorded into the TAVIS system.

(b) Safeguarding certificates.

(1) Vehicle inspection station owners and operators are responsible for all certificates disbursed to, confirmed at, and activated in their inspection station. Adequate facilities shall be provided by the inspection station for safeguarding all certificates. The certificates shall be kept under lock and key at all times in a metal box or a secure container with a locking device.

(2) Vehicle inspection stations may not transfer, furnish, give, loan, or sell certificates to any other vehicle inspection station. A vehicle inspection station's failure to have an adequate supply of certificates on hand at all times during the inspection year shall be cause for suspension or revocation of the vehicle inspection station's certificate of appointment.

(3) When an old certificate is removed from the vehicle, it shall be destroyed so that it cannot be reused. Certificates shall not be transferred to another windshield or reissued.

(c) Responsibility for inspection certificates.

(1) Except as otherwise expressly provided by this subsection, each inspection station shall bear the risk of loss for all inspection certificates disbursed to that station. Confirmed receipt of inspection certificates by an inspection station shall confirm delivery and final purchase of such inspection certificates. Each inspection station shall be liable to the department for the state mandated fees of such inspection certificates.

(2) Notwithstanding paragraph (1) of this subsection, an inspection station may return full and complete books of inspection certificates returned in original condition and receive an accounting indicating that the certificate books have been removed from the inspection station's active inventory.

(3) Notwithstanding paragraph (1) of this subsection, the director, or authorized designate, may charge the inspection station an administrative fee for each inspection certificate returned to the department which was not issued, if the book has been used to issue certificates, rendering the remaining book of certificates non-disbursable.

(4) Notwithstanding paragraph (1) of this subsection, the director, or authorized designate, may waive the administrative fee for certificates not issued that are damaged due to an Act of God provided the inspection station, within 24 hours of the discovery of the damage, has made a formal report of such damage to the department through the TAVIS station interface device or interactive voice portal and appropriate department representative.

(5) Notwithstanding paragraph (1) of this subsection, an inspection station may return, and receive an accounting for certificate(s) which because of an error of manufacture or printing is not suitable for issue, if reported to the department as defective.

(d) Reporting inspection certificates received and subsequently stolen or lost.

(1) An inspection station shall report each stolen or lost inspection certificate, within 24 hours of the discovery, to:

(A) appropriate local law enforcement authorities,

(B) the local department representative, and

(C) the department through the TAVIS station interface device or interactive voice portal within 24 hours of the discovery of the theft or loss.

(2) Where inspection certificates are lost or stolen, the inspection station shall not be reimbursed for the certificates.

(e) Responsibility for inspection program State and/or vendor property. Each inspection station shall be financially responsible to the department, or its agents, for all inspection program related property placed at the inspection station's location.

§23.28. Additional Information and Requirements.

(a) [~~Miniature vehicles.~~]

[~~(1) Miniature vehicles such as mini-bikes, go-carts, or toy class vehicles, shall pass the inspection requirements and obtain an inspection certificate before being operated on the streets and highways of this state.~~]

[~~(2)~~] Vehicles with not more than three wheels in contact with the ground shall be inspected as motor-driven cycles. [~~All other vehicles shall be inspected as passenger cars.~~]

[~~(3) Before an inspection certificate is issued to a miniature vehicle, it shall meet all inspection requirements for its class of vehicle and be equipped with lighting devices that meet standards by the Texas Department of Public Safety.~~]

(b) Reconstructed or rebuilt vehicles.

(1) Reconstructed or rebuilt vehicles using the public highways shall pass all vehicle inspection requirements.

(2) Cars used for competitive racing such as modified stock cars, dragsters, and hot rods, may be inspected. Rules and regulations for inspection of passenger cars shall apply to competitive racing cars.

(c) Multipurpose vehicles. A multipurpose passenger vehicle is a motor vehicle, with exception of a trailer, designed to carry 10 persons or less, constructed either on a truck chassis or with special features for occasional off-road operation. Lighting and reflector requirements for multipurpose passenger vehicles shall be the same as for similar type vehicles such as bus or van-type trucks. The type of registration plate is not a determinative factor in the number of lighting devices required for inspection purposes.

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

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SUBCHAPTER D. VEHICLE INSPECTION RECORDS

37 TAC §§23.51 - 23.53

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 and §548.258 which authorize the department to adopt rules to administer and enforce the compulsory inspection of vehicles and requiring inspection stations to use TexasOnline to purchase inspection certificates, send records, reports, and other information to the department.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 and §548.258 are affected by this proposal.

§23.51. Retention of Records.

(a) Records must be kept in a safe place within the vehicle inspection station.

(b) Records will be available to authorized officers of the department.

(c) Records shall be filed in a manner to insure ready availability.

(d) Duplicate copies of vehicle inspection station reports, rejection receipts, and requisitions shall be kept by the vehicle inspection station for at least one year from the date of completion.

(e) All reports, requisitions, and other correspondence relative to vehicle inspection shall be sent to the Texas Department of Public Safety, Vehicle Inspection Records Bureau in[~~,~~] Austin.

(f) Certificates, out of state identification certificates and number inserts shall be kept locked at all times to prevent theft.

(g) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), inspection records will be transmitted to the TAVIS database via the TAVIS interface device, or if non-operational, the alternative TAVIS Interactive Voice Portal.

(1) Records transmitted to the TAVIS database shall be retained in the system and constitute the record or log of the station's reportable activities. The inspection station is not required to maintain duplicate paper records of reportable inspections or transactions.

(2) Notwithstanding paragraph (1) of this subsection, any records that are not incorporated in the TAVIS system, but continue to be utilized will be retained in accordance with department instructions.

§23.52. Vehicle Inspection Forms.

(a) Rejection receipt, Form VI-7, shall be executed in duplicate by the certified inspector when a vehicle fails to conform to the standards of safety. The original shall be given to the driver of the rejected vehicle; duplicates shall be kept in the vehicle inspection station's records.

(1) The owner or operator of the vehicle shall pay the inspection fee for each complete inspection conducted on a vehicle.

(A) An inspection certificate shall be issued for the vehicle if it meets all inspection requirements.

(B) If the vehicle fails to meet inspection requirements, the owner or operator of the rejected vehicle may:

(i) have the necessary repairs made on the vehicle by the inspection station;

(ii) pay the required inspection fee, accept a rejection receipt showing all defects for which the vehicle was rejected, and have the vehicle repaired at any place he chooses;

(iii) after required adjustments have been made, return the vehicle to the vehicle inspection station that issued the rejection for one reinspection without charge, provided the vehicle is returned within 15 days of the date of the initial inspection.

(C) If a vehicle inspection station cannot reinspect a vehicle for which it has issued a rejection receipt, it will return the inspection fee to the owner or operator of the vehicle.

(2) A rejection receipt issued to a vehicle which does not have a valid current inspection certificate does not entitle such vehicle to legally operate on a public street or highway.

(b) Every vehicle inspection station shall have a signature card, Form VI-13, on file with the department.

(1) The owner, or person whose signature appears on the inspection station application, Form VI-2, shall endorse the signature card in the space provided at the bottom of the signature card. Signatures of other designated employees may be affixed to the signature card upon approval by the vehicle inspection station owner or operator.

(2) A requisition, Form VI-18, shall be signed by a person who is associated with the business requesting certificates or by the owner or employee with the proper signature as it appears on the signature card on file with the department.

(3) The vehicle inspection station owner or operator shall notify the department representative when an employee authorized to sign the requisition, Form VI-18, resigns or otherwise leaves the vehicle inspection station.

(c) Requisition for certificates, Form VI-18.

(1) The initial order for certificates is supplied by the department representative when the vehicle inspection station is placed into operation.

(2) Any subsequent order for certificates shall be submitted by the vehicle inspection station and directed to the Texas Department of Public Safety, Vehicle Inspection Section, Austin, or those local Texas Department of Public Safety offices which have certificates available.

(3) Requisition, Form VI-18, shall be accompanied by a cashier's check or money order made payable to the Texas Department of Public Safety.

(4) All information required on the requisition, VI-18, shall be completed. The signature on the requisition shall be a signature that has been authorized on the signature card, VI-13, on file with the department, or the signature of a person who is associated with the business requesting certificates.

(5) The original and one copy of the requisition, Form VI-18, shall be submitted by the vehicle inspection station.

(d) Vehicle inspection station reports, Forms VI-8 and VI- 8a, shall be executed in duplicate with the original showing all required information on inspections for the previous period. It shall be mailed to Vehicle Inspection Records Bureau in Austin. The duplicate shall be retained by the vehicle inspection station for one year.

(e) Warning notice, Form VI-20, will be issued to the owner or operator of a vehicle inspection station or to the certified inspector at a vehicle inspection station for a violation of the provisions of the Uniform Act or the Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors. The warning notice:

(1) will be filled out as directed by the department;

(2) no penalty will be assessed;

(3) will be entered into the vehicle inspection station's record at the department if it is an inspection station warning; and

(4) will be entered into the certified inspector's record at the department if it is a certified inspector warning.

(f) Receipt for Texas inspection certificate, Form VI-41, will be issued by the department representative investigating a motor vehicle traffic accident when it is apparent that the vehicle involved is damaged to the extent that repair would be necessary before passing inspection. Reinspection of the vehicle is required within 30 days after receipt is issued.

(g) Out-of-State Verification Forms. The department shall furnish serially numbered identification certificates, to all vehicle inspection stations for the purpose of verifying the vehicle identification number on vehicles coming into Texas from another state or country, as detailed in §23.80 of this title (relating to Out-of-State Vehicle Identification Number Verification).[~~Effective September 1, 2001 until August 30, 2008, two separate forms are used:~~]

[~~(1) Vehicle Identification Certificate, VI-30, shall be executed in triplicate by the certified inspector when the vehicle is presented for inspection for the purpose of registration in this state and the vehicle is subject to collection of the Texas Emissions Reduction Plan Fund Fee.~~]

[~~(A) The first copy of the identification certificate will be presented to the driver of the vehicle for use in registering and titling the vehicle. The original of the identification certificate will be forwarded to the department weekly with the Texas Emissions Reduction Plan Fund Fee collected, minus the statutorily authorized station administrative cost. The second copy of the inspection certificate will be retained in the certificate book by the inspection station.~~]

[~~(B) Form VI-30 will be obtained from the department by requisition using Form VI-18, signed by a person who is the owner or employee of the inspection station with the proper signature as it appears on the signature card on file with the department. These requisitions shall be submitted by the vehicle inspection station and directed to the Texas Department of Public Safety, Vehicle Inspection Records, Austin, or those local Texas Department of Public Safety offices, which have certificates available. Inspection stations will maintain a sufficiently reasonable number of VI-30 forms on-hand to adequately provide for out-of-state vehicles, however requisitions of VI-30 forms in bulk numbers are not allowed.~~]

[~~(C) The issuance of Form VI-30 by inspection stations will be recorded on the VI-8, VI-8a, and VI-8b.~~]

[~~(2) Vehicle Identification Certificate VI-30A, shall be executed in duplicate by the certified inspector when the vehicle is presented for inspection for the purpose of registration in this state and the owner of the vehicle is exempt from the Texas Emissions Reduction Plan Fund Fee.~~]

[~~(A) The original of the identification certificate will be presented to the driver of the vehicle for use in registering and titling the vehicle. The copy of the identification certificate will be retained by the inspection station.~~]

[~~(B) Form VI-30A will be obtained from the department by requisition using Form VI-18, signed by a person who is the owner or employee of the inspection station with the proper signature as it appears on the signature card on file with the department. These requisitions shall be submitted by the vehicle inspection station and directed to the Texas Department of Public Safety, Vehicle Inspection Records, Austin, or those local Texas Department of Public Safety offices, which have certificates available. Inspection stations, particularly those on or near military bases, will maintain a sufficiently reasonable number of VI-30A forms on- hand to adequately provide for out-of-state vehicles, however orders of bulk numbers of this form for exempted vehicle owners are not allowed.~~]

[~~(C) The issuance of Form VI-30A by inspection stations will be recorded on the VI-8, VI-8a, and VI-8b.~~]

[(3) Form VI-30 or Form VI-30A certificates shall be safeguarded in the same manner required to safeguard safety inspection certificates.]

(h) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), inspection records will be transmitted to the TAVIS database via the TAVIS interface device, or if non-operational, the alternative TAVIS Interactive Voice Portal.

(1) The TAVIS interface device provides electronic forms or screens and each must be completed with the required information.

(2) Any records that are not included in the TAVIS system, but continue to be utilized will be retained in accordance with department instructions.

§23.53. Inspection Station Report Form, VI-8.

(a) A record and report as prescribed by the department shall be made of every inspection and every certificate so issued. The department representative will periodically analyze vehicle inspection station records and reports for evaluation of activity.

(1) Errors related to the proper recording of costs, repairs, and adjustments shall be brought to the attention of the certified inspectors and vehicle inspection station owners.

(2) Missing inspection certificates will be investigated.

(3) The certified inspector performing the inspection will properly complete the inspection station report and sign for that inspection in the appropriate place.

(4) The number of inspections performed per day by a given certified inspector shall be evaluated as to the amount of time it takes to perform an actual inspection.

(b) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), the inspection activities of the station will be available to the department for audit and review.

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

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SUBCHAPTER E. CERTIFICATION OF INSPECTORS

37 TAC §23.61

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 and §548.258 which authorize the department to adopt rules to administer and enforce the compulsory inspection of vehicles and requiring inspection stations to use TexasOnline to purchase inspection certificates, send records, reports, and other information to the department.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 and §548.258 are affected by this proposal.

§23.61. Procedures for Certification.

(a) Duties and responsibilities of certified inspectors. Before a person may inspect vehicles under the Texas Vehicle Inspection Act, the person must be certified by the Texas Department of Public Safety.

(1) A certified inspector will be thoroughly instructed in the vehicle inspection program.

(2) A certified inspector shall conduct a thorough and efficient inspection of every vehicle presented for an official inspection, as authorized by the station's endorsement.

(3) Each certified inspector shall qualify, by training and examination approved by the department, for one or more of the following qualifications which indicate the type of inspection certificates the inspector is certified to issue and the types of inspections the inspector is qualified to perform. The qualifications are as follows:

(A) S. May inspect any vehicle requiring a safety only vehicle inspection windshield certificate, i.e., one-year, two-year, trailer, and motorcycle.

(B) C. May inspect any vehicle requiring a commercial inspection windshield certificate, i.e., commercial motor vehicle and commercial trailer.

(C) E. May inspect any vehicle requiring an emissions test windshield certificate, i.e., one-year safety/emissions, and one-year emissions only (unique emissions test-only inspection certificate).

(4) A certified inspector shall not use alcohol or drugs, nor be under the influence of either while on duty. Prescription drugs may be used when prescribed by a licensed physician, provided the inspector is not impaired while on duty.

(5) A certified inspector shall inspect a vehicle presented for inspection within a reasonable time.

(6) A certified inspector shall notify the department representative supervising the vehicle inspection station immediately if his driver's license is suspended or revoked.

(7) A certified inspector shall conduct each inspection, and affix each inspection certificate, in the approved inspection area of the vehicle inspection station location designated on the certificate of appointment. The road test may be conducted outside this area.

(8) The certified inspector shall consult the vehicle owner or operator prior to making a repair or adjustment.

(9) The certified inspector shall not delegate responsibility for a proper and thorough inspection to any other person, and shall have complete control of the vehicle to be tested during the entire test procedure.

(10) The certified inspector shall not require a vehicle owner whose vehicle has been rejected to have repairs made at a specific garage.

(11) The certified inspector shall maintain a clean and orderly appearance and be courteous in his contact with the public.

(b) Qualifications for certification as a certified inspector. To qualify as an inspector an applicant shall:

(1) be at least 18 years of age;

(2) hold a valid driver's license from state of residence during period of certification;

(3) submit to a criminal history and drivers license check by the department;

(4) not be subject to denial of an application nor suspension or revocation of a certificate for felony conviction or other reasons as detailed in [~~stated in~~] §23.15 [~~23.15(a)(13)~~] of this title (relating to Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings);

(5) not be under suspension in the Texas vehicle inspection program;

(6) make an application for inspector certification on a form prescribed by the department;

(7) attend a training session approved by the department;

(8) pass, with a grade of not less than 80, an examination on the law and rules and regulations of the department pertinent to the vehicle inspection program;

(9) successfully demonstrate ability to correctly operate the testing devices at the vehicle inspection station; and

(10) submit a statutory fee of $10 when the certification process is completed and the person is ready for issuance of an inspector's certificate.

(11) applicants shall be exempt from the inspector certification fee if employed at a governmental inspection station. Dual authorization for another class of inspection station would require an inspector certification fee.

(c) How instruction is furnished. Instruction is furnished by:

(1) inspector schools conducted by the department, or

(2) external inspector training schools certified by the department.

(d) Certification after attendance at department training school.

(1) Periodic certified inspector schools may be conducted by the department for persons currently employed by certified vehicle inspection stations.

(2) After each certified inspector school, examinations will be given individually or in groups by the department representative or an individual certified by the department. Examinations will not necessarily be given during the same hours the school is held.

(3) When training and examinations are successfully completed and fees are submitted, the applicant is provisionally certified pending final departmental approval.

(e) Certification after attendance at departmental approved external training school.

(1) The external training school shall issue a three-part certificate of completion (copy 1--department, copy 2--applicant, copy 3--school) for each eligible applicant to be turned in to the department representative upon making application to become a certified inspector.

(2) The certified instructor shall notify the applicant to submit the certificate of completion along with a completed application and application fee to the department for certification processing prior to performing any inspections.

(3) The applicant shall submit the certificate of completion, inspector application and applicable fees to the department within 90 days of completing the external training school.

(4) The application shall be submitted for processing through the designated department office in which the individual is making application to become a certified inspector.

(5) Once the department representative receives the certificate, the application and fee; the application and certificate shall be forwarded to the Manager of Vehicle Inspection Records, Austin, Texas.

(6) Vehicle Inspection Records shall process inspector applications and review for completeness. Applications will be checked for the following items:

(A) full name of applicant;

(B) applicant's complete home address (street, city, state, zip);

(C) applicant's driver license number;

(D) applicant's social security number;

(E) information on station employing the applicant, to include station certificate number, business phone number, address;

(F) signature of applicant; and

(G) signature of department representative.

(7) Any application missing any of the information above will be returned to the department representative processing the application for corrections.

(8) The Manager of Vehicle Inspection Records shall perform an inquiry to check for valid driver license and for any court imposed punishment. If the applicant is found eligible, a certificate will be generated. If the applicant is found to be ineligible, the application shall be returned to the applicant with a denial letter.

(9) Vehicle Inspection Records shall forward the applicant's inspector certificate to the department representative for issuance to inspector. This certificate is conditional upon compliance with department rules and regulations [~~issued by the department~~] and is subject to renewal.

(f) Where certification examination process may take place.

(1) The written examination may be conducted at the Department of Public Safety office, or any place approved by the Department of Public Safety.

(2) The demonstration of the ability to correctly operate the testing devices will ordinarily be conducted at the vehicle inspection station where the person is employed, but it may be conducted elsewhere. In every instance, the demonstration will be performed on the same type device as used at the place of employment.

(g) Failure to pass the examination.

(1) Each applicant will be given a minimum of two opportunities to pass an inspector's examination. Applicants will be notified of any failure, shown their mistakes, and given the correct answers to questions missed on the first examination. Applicants will be advised of where and when a subsequent retest may be administered.

(2) Applicants who fail their first examination will be given a different examination for the second examination.

(3) Applicants who fail their second examination given by the department must wait at least 30 days before taking a subsequent examination.

(h) Failure to pass the demonstration test.

(1) Persons failing the demonstration test will be notified of any mistakes, shown correct usage, and advised where and when a subsequent test may be taken.

(2) After two consecutive failures, additional tests will be conducted only after due evaluation of the circumstances involved.

(i) Applicant passing the written test and the demonstration test.

(1) An applicant passing the written and demonstration tests will be so notified.

(2) The individual, service manager or station owner will be notified of the applicant's successful completion of the required tests.

(3) Inspection procedure, record keeping, and security regulations will be reviewed by the department.

(j) Renewal testing. The department may require testing and/or training of certified inspectors prior to certification renewal.

(k) Expiration of certification of inspectors. An inspector's certification will expire:

(1) when provisional certification has been withdrawn by the department;

(2) when the certified inspector fails to attend a required renewal testing and/or training; or

(3) August 31 of each even-numbered year following the date of appointment. Thereafter, appointment as inspector shall be made for two-year periods.

(l) Certification after suspension.

(1) After expiration of a period of suspension, a person desiring reinstatement may request reinstatement by notifying in writing the appropriate regional supervisor and:

(A) make a written application for reinstatement;

(B) meet all qualifications for appointment;

(C) pass the complete written and demonstration test; and

(D) submit the inspector's certification fee if certification has expired during suspension.

(2) If the certified inspector passes all tests, the inspector certificate card, will be reissued.

(m) Reexamination[~~; revocation of certification~~]. The department representative may require the certified inspector to take all or part of the written and demonstration tests at any time or may require attendance at any training program. Failure to pass a required test may result in revocation of the inspector's certificate.

(n) Dual authorization. A certified inspector may be certified at more than one vehicle inspection station at the same time. Inspection station owners shall furnish information as may be required by the department pertaining to inspectors employed at stations within three working days of a change in the inspector's employment.

(o) Changes in employment.

(1) If a certified inspector changes their place of employment, the inspector shall prove their ability to correctly operate the testing equipment at such new vehicle inspection station, and may be required to take a complete written examination before the inspector will be allowed to inspect at the new location.

(2) The inspection station owner shall notify the department representative supervising the station within three working days of a change in employment of inspectors at that station.

(p) Certified inspector schools.

(1) Schools given by the department are conducted on a region-wide [~~regionwide~~] schedule according to need at any time during the year.

(2) The department may certify external inspector training schools to provide training to applicants to be certified as inspectors as provided in §23.62 of this title (relating to Certification of External Inspector Training Schools).

(q) Withdrawal of application. An application for a license as a certified inspector may be withdrawn by the applicant at any time. An application will be deemed withdrawn when 60 days elapses:

(1) from the first failure of the inspector's written examination; or

(2) from the successful completion of the written emissions examination when the applicant has not requested that a demonstration test on the testing equipment be given.

(r) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), the department may automate procedures for inspector certification, which may include, but is not limited to:

(1) application,

(2) training,

(3) examination,

(4) certification,

(5) enrollment into the TAVIS system, and

(6) renewal training, examination and certification.

(7) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), inspector initial applications and renewals shall be processed through TAVIS and may be required to pay an additional automation fee of $2.00 in addition to the statutory certification 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.

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SUBCHAPTER F. VEHICLE INSPECTION STATION OPERATION

37 TAC §§23.73, 23.75, 23.76, 23.79, 23.81

The amendments and new section 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 and §548.258 which authorize the department to adopt rules to administer and enforce the compulsory inspection of vehicles and requiring inspection stations to use TexasOnline to purchase inspection certificates, send records, reports, and other information to the department.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 and §548.258 are affected by this proposal.

§23.73. Inspection Fees.

(a) The maximum inspection fees charged for all vehicles are set by statute or administrative rule. All required inspection items shall be examined with the inspection fees in accordance with the following schedule:

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

(4) Emissions only inspection.

(A) El Paso County--$14.00. In the event, an approved Low Income Repair Assistance Program (LIRAP) is implemented--$16.00 [$17.00].

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

(5) Vehicles subject to safety and emissions inspection.

(A) El Paso County--$26.50. In the event an approved Low Income Repair Assistance Program (LIRAP) is implemented--$28.50 [$29.50].

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

(b) The inspection fee is chargeable at the time of the original inspection whether the vehicle is approved or disapproved. Every inspection shall be completed before a vehicle is approved or rejected.

(1) The inspection fee may not be included in combination with other services or products [not related to any item of inspection. Under no circumstance shall an inspection station require purchase or payment for these additional services or products as prerequisite in obtaining an inspection of a vehicle].

(2) The inspection fee may not be advertised in conjunction with other products or services [not related to any item of inspection. All advertisements of the inspection fee in conjunction or in combination with non-related services or products must clearly state that the purchase of the services or products are not required to obtain the required inspection at the fee specified in this section].

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

(c) Notwithstanding subsection (a) of this section and upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), an automation fee of $2.00 for each safety inspection certificate and $0.25 for each emissions inspection certificate shall be charged to the inspection station, in addition to any other state mandated prepaid fee. Inspection stations may recover these automation fees from customers presenting vehicles for inspection by adding the corresponding automation fee to the inspection fee amounts as detailed in this section.

§23.75. Change of Location, Name, or Ownership.

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

(c) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), owners of vehicle inspection stations contemplating a change of location, change of name, or change of ownership shall notify the department representative before such change is made. A vehicle inspection station owner implementing any significant change must effect change(s) in the same manner as an initial application as detailed in §23.1 of this title (relating to New Applications) along with any applicable fee.

§23.76. Going Out of Business.

If a vehicle inspection station intends to go out of business, the licensee shall notify the department representative and immediately return all forms, inspection certificates, [and] signs, any equipment furnished by the department and/or state authorized vendor(s), and any other official materials relating to the state inspection program [inspections]. Failure to comply with the requirement of this section may result in criminal prosecution, as well as necessary civil recovery action and may impede any [interfere with the] reappointment of the vehicle inspection station.

§23.79. Handling Insufficient Funds Checks.

(a) Vehicle inspection stations with two or more outstanding insufficient funds checks will be suspended and all inspection [(safety)] certificates surrendered until the checks have cleared. Once the inspection station has reopened, certificate purchases will only be allowed by cashier's check or money order for a minimum six-month time period. A second incident involving an insufficient funds check will again result in suspension of the inspection station until the check(s) has cleared. Once the inspection station has reopened, inspection certificate purchases will only be allowed by cashier's check or money order for a minimum of 18 month time period. A third incident involving an insufficient funds check(s) will result in suspension of the inspection station and the requirement that inspection certificate purchases be made only by cashier's check or money order for an indefinite time period.

(b) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), the failure of an inspection station to have sufficient funds available to cover an electronic funds transfer to the department's account shall be cause for summary temporary cessation of authorization to perform state inspections and record TAVIS transactions (TAVIS lock-out) until the matter has been rectified. Further, if a check or electronic transfer of funds to the department is dishonored, the department may take any and all actions authorized by law including, but not limited to, lock-out, suspension and/or revocation of certification of the station, surrender of all inspection certificates held by the station, and payment of service charges, administrative fees, attorney, and litigation fees.

§23.81. Inspection Station Acquisition of Certificates Using Texas Automated Vehicle Inspection System (TAVIS).

(a) Upon implementation of the Texas Automated Vehicle Inspection System (TAVIS), the department shall require inspection stations to acquire inspection certificates utilizing department approved procedures to facilitate automation of the state inspection system.

(b) The department procedures to provide inspection certificates may include but not be limited to ordering through the TAVIS station interface device located at the station, mail, telephone, other electronic access methods, and/or in person at designated department facilities.

(c) An automation fee of $2.00 for each safety inspection certificate and $0.25 for each emissions inspection certificate shall be charged to the inspection station, in addition to any other required fee.

(d) The Texas Uniform Statewide Accounting System (USAS) requires TAVIS e-pay transactions for certificates to be limited to those compatible with electronic funds transfers, electronic checks, and similar transaction means.

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

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SUBCHAPTER G. VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM

37 TAC §23.94

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 Transportation Code, §548.002 and §548.258 which authorize the department to adopt rules to administer and enforce the compulsory inspection of vehicles and requiring inspection stations to use TexasOnline to purchase inspection certificates, send records, reports, and other information to the department.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.002 and §548.258 are affected by this proposal.

§23.94. Alternate Vehicle Emission Testing.

(a) The Department of Public Safety with the approval of the Public Safety Commission may allow alternate vehicle emission testing[~~, including onboard diagnostic testing~~] if:

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

(b) (No change.)

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

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CHAPTER 23. VEHICLE INSPECTION
SUBCHAPTER A. VEHICLE INSPECTION STATION LICENSING

37 TAC §23.17

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

The Texas Department of Public Safety proposes the repeal of §23.17, concerning Vehicle Inspection Station Licensing. As a result of a rule review performed to implement the use of TexasOnline in vehicle inspection operation as provided under §22 of H.B. 2048 and §11 of H.B. 2593, 79th Legislature (RS) and codified as Texas Transportation Code, §548.258. The repeal of §23.17 concerning the Lease or Sale of Inspection Station During Suspension is no longer necessary as it is duplicative of portions of §23.15 of this title (relating to Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings).

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be more effective administration of the rules and regulations. There is no anticipated economic cost to individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted and must reference "Proposed Repeal of VI Rules" in the subject line or in the beginning of the text, no later than 30 days from the date of this publication to E. Eugene Summerford, Legal Counsel, Vehicle Inspections and Emissions, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0543; by fax at (512) 424-2774 or by e-mail to earl.summerford@txdps.state.tx.us.

The repeal 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 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.

§23.17. Lease or Sale of Inspection Station During Suspension.

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

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SUBCHAPTER B. GENERAL INSPECTION REQUIREMENTS

37 TAC §23.25

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

The Texas Department of Public Safety proposes the repeal of §23.25, concerning General Inspection Requirements. As a result of a rule review performed to implement the use of TexasOnline in vehicle inspection operation as provided under §22 of H.B. 2048 and §11 of H.B. 2593, 79th Legislature (RS) and codified as Texas Transportation Code, §548.258, the repeal of §23.25 concerning Safeguarding Certificates is necessary because substantial changes and renaming of the section are required. The repeal of §23.25 is filed simultaneously with the proposal of a new §23.25.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be more effective administration of the rules and regulations. There is no anticipated economic cost to individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted and must reference "Proposed Repeal of VI Rules" in the subject line or in the beginning of the text, no later than 30 days from the date of this publication to E. Eugene Summerford, Legal Counsel, Vehicle Inspections and Emissions, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0543; by fax at (512) 424-2774 or by e-mail to earl.summerford@txdps.state.tx.us.

The repeal 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 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.

§23.25. Safeguarding Certificates.

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 September 27, 2005.

TRD-200504293
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 424-2135

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED

SUBCHAPTER J. 1915(c) MEDICAID HOME AND COMMUNITY-BASED WAIVER SERVICES FOR AGED AND DISABLED ADULTS WHO MEET CRITERIA FOR ALTERNATIVES TO NURSING FACILITY CARE

40 TAC §48.6031

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §48.6031, concerning emergency response services (ERS) general contracting requirements, in Chapter 48, Community Care for Aged and Disabled.

Background and Purpose

DADS is proposing new rules that govern contracting to provide ERS elsewhere in this issue of the *Texas Register*. The new ERS Program rules in Chapter 52 will render the current ERS rule in Chapter 48 obsolete upon adoption. This amendment is proposed to ensure that the DADS rule base is consistent with regard to ERS.

Section-by-Section Summary

The proposed amendment to §48.6031 replaces the current ERS rule in Chapter 48 with a reference to the new ERS Program rules in Chapter 52.

Fiscal Note

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

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro- businesses or on businesses of any size as a result of enforcing or administering the amendment, because the amendment does not impose new requirements for businesses.

Cost to Persons and Effect on Local Economies

DADS does not anticipate that there will be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

Public Benefit

Barry Waller, Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that there will be one place for providers to find the rules governing the ERS Program.

Takings Impact Assessment

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

Public Comment

Questions about the content of this proposal may be directed to Rudy Gomez at (512) 438-3740 in DADS' Community Services Policy Development and Support Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-201, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§48.6031. Emergency Response Services Program [~~General Contracting Requirements~~].

Contracting requirements for the Emergency Response Services Program are located in Chapter 52 of this title (relating to Contracting to Provide Emergency Response Services). [~~To contract with the Texas Department of Human Services (DHS) to provide nursing facility waiver emergency response services under the Nursing Facility Waiver, a legal entity must:~~]

[~~(1) have a 24-hour, seven-day-a-week emergency response monitoring capability;~~]

[~~(2) be a public agency or a private nonprofit or profit corporation that is either chartered with or authorized by the secretary of state to transact business within the State of Texas; and~~]

[~~(3) be licensed by the Texas Board of Private Investigators and Private Security Agencies, unless exempt from its regulation. The provider agency must send a copy of its license and a copy of the annual renewal of its license to DHS.~~]

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 September 28, 2005.

TRD-200504344
Phoebe Knauer
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

CHAPTER 50. §1915(c) CONSOLIDATED WAIVER PROGRAM

40 TAC §50.24

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §50.24, concerning general contracting for Emergency Response Services (ERS), in Chapter 50, §1915(c) Consolidated Waiver Program.

Background and Purpose

DADS is proposing new rules that govern contracting to provide ERS elsewhere in this issue of the *Texas Register*. The new ERS rules in Chapter 52 will render the current ERS contracting requirements in §50.24(b) obsolete upon adoption. This amendment is proposed to ensure that the DADS rule base is consistent with regard to ERS.

Section-by-Section Summary

The proposed amendment replaces the current ERS contracting requirements in §50.24(b) with a reference to the new ERS rules in Chapter 52. The amendment also corrects agency names to reflect the consolidation of health and human services agencies in 2004 and updates the section make it consistent with other DADS rules.

Fiscal Note

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

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro- businesses or on businesses of any size as a result of enforcing or administering the amendment, because the amendment does not impose new requirements for businesses.

Cost to Persons and Effect on Local Economies

DADS does not anticipate that there will be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

Public Benefit

Barry Waller, Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that there will be one place for providers to find the rules governing ERS.

Takings Impact Assessment

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

Public Comment

Questions about the content of this proposal may be directed to Alfredo Cervantes at (512) 438- 3769 in DADS' Community Services Policy Development and Support Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-201, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

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

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§50.24. General Contracting.

(a) Home and community support services agencies (HCSSAs). To be qualified as a HCSSA provider to deliver Consolidated Waiver Program (CWP) services under contract with the Department of Aging and Disability Services (DADS) [Texas Department of Human Services (DHS)], a HCSSA must:

(1) have a separate contract with DADS [DHS] to provide CWP services in the designated service area in which services are to be delivered;

(2) have a HCSSA license with the licensed home health category of licensure and deliver CWP services, as required by licensure and by contract as indicated in §50.22 of this title (relating to Service Array for Home and Community Support Services Providers);[.]

(3) have the county in the DADS [DHS] contract for CWP services included in the identified service area on file at DADS [DHS] with the licensed home health category of licensure;

(4) (No change.)

(5) meet all requirements outlined in §48.6028 of this title (relating to Provisional Contracts--[-]Home and Community Support Service Agencies). The reference to Community Based Alternatives (CBA) contract in §48.6028(k)(2) and (3) means CWP [Consolidated Waiver Program (CWP)] contract for home and community support service agency providers that are contracted to deliver CWP services.

(b) Emergency Response Services (ERS). Contracting requirements for ERS are located in Chapter 52 of this title (relating to Contracting to Provide Emergency Response Services). [To contract with DHS to provide ERS under the CWP, a legal entity must:]

[(1) have a 24-hour, seven-day-a-week emergency response monitoring capability;]

[(2) be a public agency or a private not-for-profit or for-profit corporation that is either chartered with or authorized by the secretary of state to transact business within the State of Texas;]

[(3) be licensed by the Texas Commission on Private Security, unless exempt from its regulation. The provider agency must send a copy of its license and a copy of the annual renewal of its license to DHS; and]

[(4) have a separate contract with DHS to provide CWP services in the designated service area in which services are to be delivered.]

(c) Adult Foster Care (AFC). To contract with DADS [DHS] to provide AFC services under the CWP, the provider must:

(1) be enrolled by DADS [DHS] as a CWP adult foster care provider;

(2) (No change.)

(3) if serving four participants, be licensed by DADS [DHS] as a Type C Assisted Living Facility as defined in §92.4(3) of this title (relating to Types of Assisted Living Facilities) of the DADS [DHS] Licensing Standards for Assisted Living Facilities;

(4) agree to comply with all Adult Foster Care standards found in the Community Based Alternatives [(CBA)] Provider Manual, Section 4200, Adult Foster Care; and

(5) have a separate contract with DADS [DHS] to provide CWP services in the designated service area in which services are to be delivered.

(d) Assisted Living/Residential Care (AL/RC). To contract with DADS [DHS] to provide assisted living/residential care services under the CWP, the facility must be licensed as an assisted living facility by DADS [DHS], type "A" or "B" as defined in Chapter 92 of this title (relating to Licensing Standards for Assisted Living Facilities); and have a separate contract with DADS [DHS] to provide CWP services in the designated service area in which services are to be delivered.

(e) Home-delivered Meals (HDM). To contract with DADS [DHS] to provide home-delivered [home delivered] meals under the CWP, the provider must:

(1) meet state, local health, and DADS [DHS] requirements in the handling, transporting, serving and delivery of these meals;

(2) - (4) (No change.)

(5) have a separate contract with DADS [DHS] to provide CWP services in the designated service area in which services are to be delivered.

(f) Out-of-home respite. To contract with DADS [DHS] to provide out-of-home respite services under the CWP, providers must have a separate contract with DADS [DHS] to provide CWP services in the designated service area in which services are to be delivered and be one of the following:

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

(6) an assisted living facility in accordance with subsection (d) of this section [§50.24(d) of this title (relating to General Contracting)]; or

(7) an adult foster care facility meeting the requirements in subsection (c) of this section [§50.24(c) of this title (relating to General Contracting)].

(g) Family surrogate services. To contract with DADS [DHS] to provide family surrogate services (available only to CWP participants younger than 18 years of age), providers must meet all the requirements of the [Texas] Department of Family and Protective Services (DFPS) [and Regulatory Services (TDPRS)] minimum standards for Independent Foster Family Homes pursuant to 40 TAC §720.231-720.248 (concerning Standards for Foster Family Homes). Additional provider requirements are outlined in §50.26 of this title (relating to Care Options in Family Surrogate Services).

(h) Independent advocacy. To contract with DADS [DHS] to provide Independent Advocacy services, the provider:

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

(i) (No change.)

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

Filed with the Office of the Secretary of State on September 28, 2005.

TRD-200504345
Phoebe Knauer
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 438-3734

CHAPTER 52. EMERGENCY RESPONSE SERVICES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Chapter 52, Emergency Response Services, consisting of §§52.101, 52.201, 52.301, 52.401 - 52.403, 52.501, 52.503, and 52.601; and proposes new Chapter 52, Contracting to Provide Emergency Response Services, consisting of Subchapter A, §52.101 and §52.103, concerning purpose and definitions; Subchapter B, §52.201 and §52.203, concerning contracting requirements; Subchapter C, §52.301 and §52.303, concerning staff requirements and responders; Subchapter D, §§52.401, 52.403, 52.405, 52.407, 52.409, 52.411, 52.413, 52.415, 52.417, 52.419, and 52.421, concerning service delivery and equipment; and Subchapter E, §52.501 and §52.503, concerning claims payment and documentation.

Background and Purpose

The purpose of the new sections and repeal is to reorganize the rules in Chapter 52 and to rewrite them in plain English that will be easier for the public, including individuals and providers, to locate and understand. The new rules incorporate requirements for providers of the Emergency Response Services (ERS) in the Community Based Alternatives (CBA) Program, the Consolidated Waiver Program (CWP), and the Community Care for Aged and Disabled (CCAD) ERS Program.

Section-by-Section Summary

The new rules govern the contracting, provider staff, service delivery, equipment, and documentation requirements of ERS. The new rules also incorporate existing ERS policy into rule language, update licensing agency references, reduce a provider's documentation and notification requirements by allowing specified information to be kept in an individual's file and not requiring its submission to the DADS contract manager, update terminology in order to be consistent with other Community Care programs, and add a rule concerning an interdisciplinary team in order to help resolve service delivery issues.

Fiscal Note

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

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the new sections and repeal because the new sections clarify and streamline the program processes without adding requirements that will have an adverse economic effect on provider agencies.

Cost to Persons and Effect on Local Economies

DADS does not anticipate that there will be an economic cost to persons who are required to comply with the new sections and repeal. The new sections and repeal will not affect a local economy.

Public Benefit

Barry Waller, Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the new sections and repeal are in effect, the public benefit expected as a result of enforcing the new sections and repeal is the promulgation of rules that will clearly describe ERS provider responsibilities. The new rules also reduce the amount of documentation and notification that a provider must submit to the DADS case manager, freeing up staff time and resources.

Takings Impact Assessment

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

Public Comment

Questions about the content of this proposal may be directed to Maxcine Tomlinson at (512) 438-3169 in DADS' Community Services Policy Development and Support Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-201, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

SUBCHAPTER A. DEFINITIONS

40 TAC §52.101

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

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

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§52.101. Definitions of Program Terms.

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 September 28, 2005.

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Phoebe Knauer
General Counsel
Department of Aging and Disability Services
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SUBCHAPTER B. CONTRACTING FOR EMERGENCY RESPONSE SERVICES

40 TAC §52.201

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

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

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§52.201. General Contracting Requirements.

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

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Phoebe Knauer
General Counsel
Department of Aging and Disability Services
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SUBCHAPTER C. PROVIDER AGENCY STAFF REQUIREMENTS

40 TAC §52.301

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

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

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§52.301. Provider Staff Requirements.

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

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Phoebe Knauer
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

SUBCHAPTER D. SERVICE DELIVERY REQUIREMENTS

40 TAC §§52.401 - 52.403

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

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

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§52.401. Initiation of and Referral for Services.

§52.402. Service Delivery.

§52.403. Suspension and Termination of Services.

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 September 28, 2005.

TRD-200504349

Phoebe Knauer

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-3734

SUBCHAPTER E. CLAIMS

40 TAC §52.501, §52.503

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

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

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§52.501. Billing and Claims Payment.

§52.503. Documentation Errors.

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 September 28, 2005.

TRD-200504350

Phoebe Knauer

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: November 13, 2005

For further information, please call: (512) 438-3734

SUBCHAPTER F. REVIEWS AND AUDITS OF PROVIDER AGENCY RECORDS

40 TAC §52.601

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

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

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§52.601. Recordkeeping Requirements.

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 September 28, 2005.

TRD-200504351

Phoebe Knauer

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-3734

CHAPTER 52. CONTRACTING TO PROVIDE EMERGENCY RESPONSE SERVICES

SUBCHAPTER A. INTRODUCTION

40 TAC §52.101, §52.103

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

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

§52.101. Purpose.

This chapter establishes the requirements for a provider contracting to provide emergency response services (ERS) to individuals through the Department of Aging and Disability Services (DADS) Community Based Alternatives (CBA) Program, the Consolidated Waiver Program (CWP), and the Community Care for Aged and Disabled (CCAD) ERS Program.

§52.103. Definitions.

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

(1) Alarm call--A signal transmitted from the equipment to the provider's response center indicating that an individual needs immediate assistance.

(2) Call button--An electronic device that, when pressed, triggers an alarm call to the provider's response center to alert the provider that an individual needs immediate assistance. The device may be held in the hand, worn around the neck, hung on a garment, or kept within an individual's reach.

(3) Case manager--A DADS employee who is responsible for case management activities for an individual, including eligibility determination, enrollment, assessment and reassessment of the individual's need, service plan development, and intercession on the individual's behalf.

(4) CBA--Community Based Alternatives. A Medicaid waiver program that provides services to eligible adults who are aged or disabled or both as an alternative to institutional care in a nursing facility. CBA services are provided in accordance with the waiver provisions of §1915(c) of the Social Security Act (42 U.S.C. §1396n(c)).

(5) CCAD--Community Care for Aged and Disabled. A group of DADS programs that provide a variety of Title XX-funded community-based services.

(6) Contract--A written agreement between DADS and a provider to provide ERS to an individual in exchange for payment.

(7) Contract manager--A DADS employee who is responsible for the overall management of a contract with a provider.

(8) Coordinator--A provider employee who is responsible for the management and provision of ERS and who ensures that services are delivered as described in this chapter.

(9) CWP--Consolidated Waiver Program. A Medicaid waiver program that provides home and community-based services to people who are eligible for care in a nursing facility care or an intermediate care facility for persons with mental retardation or related conditions (ICF-MR/RC). CWP services are provided in accordance with the waiver provisions of §1915(c) of the Social Security Act (42 U.S.C. §1396n(c)).

(10) DADS--Department of Aging and Disability Services.

(11) Day--Any reference to a day means a calendar day, unless otherwise specified in the text. A calendar day includes weekends and holidays.

(12) ERS--Emergency response services. A CCAD program and a service provided through the CBA and CWP programs that provides electronic monitoring services for functionally impaired adults who live alone or who are functionally isolated in the community. In the CBA and CWP programs, ERS helps assure health and safety in the community.

(13) Equipment--The system used in an individual's home to provide electronic monitoring services.

(14) Imminent danger--An immediate, real threat to a person's safety.

(15) Individual--A person who has been determined eligible to receive ERS. A reference in this chapter to "individual" includes the individual's representative, unless the context indicates otherwise.

(16) Installer--A volunteer, a subcontractor, or an employee of a provider who connects, maintains, or repairs the equipment.

(17) Institution--A hospital, a nursing facility, a state mental retardation facility, a state mental health facility, or an ICF-MR/RC.

(18) Monitor--A volunteer, a subcontractor, or an employee of a provider who monitors ERS and ensures that an alarm call is responded to immediately.

(19) Negotiated referral--A request from a case manager to a provider to begin services on a particular date due to an individual's needs, or a service start date that is negotiated between the case manager and the provider.

(20) Provider--An entity that has a contract with DADS to provide ERS.

(21) Public service personnel--A staff member of a sheriff's department, police department, emergency medical service, or fire department.

(22) Reckless behavior--Acting with conscious indifference to the consequences.

(23) Representative--An individual's spouse, other responsible party, or legal representative.

(24) Responder--A person designated by an individual to respond to an emergency call activated by the individual. A responder may be a relative, a neighbor, or a volunteer.

(25) Response center--The site where a provider's ERS monitoring system is located.

(26) Routine referral--A request from a case manager to a provider to begin ERS for which the case manager determines that an individual's needs do not require a negotiated referral.

(27) Subcontractor--An organization or an individual who delivers a component of ERS for the provider for a fee and is not an employee or volunteer of the provider.

(28) Suspension--A temporary stoppage of ERS to an individual without loss of the individual's ERS eligibility.

(29) System check--A successful activation of the call button by an individual or a test of the equipment by the provider.

(30) Termination--A permanent stoppage of ERS to an individual by DADS.

(31) Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

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

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SUBCHAPTER B. CONTRACTING REQUIREMENTS

40 TAC §52.201, §52.203

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

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

§52.201. General Contracting Requirements.

(a) A provider must meet all provisions of this chapter and Chapter 49 of this title (relating to Contracting for Community Care Services).

(b) A provider must:

(1) be licensed:

(A) by the Public Security Bureau of the Texas Department of Public Safety as an alarm systems company; or

(B) by the Department of State Health Services as a personal emergency response system provider;

(2) have emergency monitoring capability 24 hours a day, seven days a week; and

(3) be equipped to provide verifiable data using technology capable of producing a printed record of:

(A) the type of alarm code (test, accidental, or emergency);

(B) the unit subscriber number;

(C) the date; and

(D) the time of the activated alarm in seconds.

(c) A provider must comply with §49.13 of this title (relating to General Contractual Requirements) and Chapter 69, Subchapter D of this title (relating to Subgrants and Subcontracts) if the provider chooses to subcontract any portion of ERS.

§52.203. Written Notification.

Any written notification to DADS from a provider required by this chapter must be sent by mail, fax, or hand-delivery, unless otherwise specified. E-mail is not an acceptable form of written notification.

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SUBCHAPTER C. STAFF REQUIREMENTS

40 TAC §52.301, §52.303

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

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

§52.301. Provider Staff Requirements.

(a) Coordinator. A coordinator must:

(1) understand the rules of this chapter and ERS procedures; and

(2) be able to communicate with:

(A) other provider staff;

(B) an individual;

(C) the case manager; and

(D) other people involved with ERS.

(b) Installer.

(1) An installer must:

(A) meet the requirements of an alarm systems installer as described in the Occupations Code, Chapter 1702;

(B) be able to communicate with an individual; and

(C) be able to show identification issued by the provider.

(2) A provider must ensure that an installer is competent in the following areas:

(A) installation procedures;

(B) proper use of the equipment; and

(C) Federal Communications Commission requirements on equipment installation.

(c) Monitor. A monitor must be able to:

(1) communicate with an individual and a responder;

(2) respond to an alarm call as described in §52.409 of this chapter (relating to Alarm Calls);

(3) monitor and document an alarm call from the time an alarm call is received to the time an individual receives assistance;

(4) conduct and document a system check as described in §52.407 of this chapter (relating to System Checks); and

(5) identify an individual's health history and functioning levels.

(d) Documentation. A provider must document that a provider staff member as described in subsections (a)-(c) of this section:

(1) is competent to perform his job duties before he begins his job; and

(2) meets the applicable requirements of this chapter.

§52.303. Responders.

(a) Responder responsibilities. A responder must:

(1) go to the individual's home if an alarm call is made to a provider; and

(2) take appropriate action, including contacting public service personnel, based on the situation.

(b) Securing responders. A provider must attempt to secure the names of at least two responders from an individual on or before the date the provider initiates services.

(1) If the provider is able to secure the name of only one responder from an individual, the provider must:

(A) designate public service personnel in place of the individual's second responder; and

(B) document the reason the provider could secure the name of only one responder.

(2) If a provider is unable to secure the names of any responders from an individual, the provider must:

(A) designate public service personnel in place of the individual's responders; and

(B) send written notification to the case manager of the inability to secure the names of any responders within 14 days after initiating services.

(c) Responder orientation. A provider must:

(1) orient a responder in person, by telephone, or in writing on the responder's responsibilities on or before the date the responder is first contacted by the provider and asked to respond to an alarm call;

(2) document the following information concerning the orientation:

(A) the name and telephone number of the responder;

(B) the name of the individual;

(C) the date the responder was secured;

(D) the date of orientation;

(E) the method of orientation; and

(F) the topics covered; and

(3) ensure that a responder receives written procedures on how to respond to an alarm call and document the date the procedures were provided to the responder. The provider may mail the written procedures to the responder.

(d) Replacing a responder.

(1) A provider must secure a replacement responder when an individual's responder is no longer able to participate.

(A) If an individual has two responders, a provider must secure a second responder within seven days after becoming aware that the individual will no longer have two responders.

(B) If an individual has one responder, a provider must secure a replacement responder within four days after becoming aware that the individual's sole responder is no longer able to participate.

(C) If a provider is unable to secure any replacement responders, the provider must:

(i) designate public service personnel in place of the replacement responders; and

(ii) provide the case manager with written notification within 14 days after the provider determines it cannot secure a replacement responder.

(2) A provider must document:

(A) the date the provider became aware that a responder was no longer able to participate; and

(B) the date the provider secured a replacement responder.

(e) Current responders. A provider must maintain a record of the names of current responders for each individual.

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

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SUBCHAPTER D. SERVICE DELIVERY

40 TAC §§52.401, 52.403, 52.405, 52.407, 52.409, 52.411, 52.413, 52.415, 52.417, 52.419, 52.421

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal

funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

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

§52.401. Referrals.

(a) A provider must accept all DADS referrals for ERS.

(b) DADS refers an individual to a provider either with a negotiated referral or a routine referral.

(1) A case manager makes a negotiated referral:

(A) by phone; and

(B) on DADS' Notification of Community Based Alternatives (CBA) Services, Authorization of Community Care Services, or Notification of Consolidated Waiver Program (CWP) Services form.

(2) A case manager makes a routine referral on DADS' Notification of Community Based Alternatives (CBA) Services, Authorization of Community Care Services, or Notification of Consolidated Waiver Program (CWP) Services form.

§52.403. Service Initiation.

(a) Service initiation requirements. To initiate services, a provider must:

(1) secure responders, as described in §52.303 of this chapter (relating to Responders);

(2) install the equipment as described in §52.405 of this chapter (relating to Equipment Installation);

(3) train an individual on the use of the equipment, including:

(A) demonstrating how the equipment works; and

(B) having the individual activate an alarm call;

(4) explain to the individual:

(A) that the individual must participate in a system check each month;

(B) that the individual must contact the provider if:

(i) his telephone number or address changes; or

(ii) one or more of his responders change; and

(C) that the individual must not willfully abuse or damage the equipment;

(5) inform the individual that a responder can forcibly enter an individual's home if necessary;

(6) obtain a signed release for forcible entry; and

(7) inform an individual of the procedures for filing a complaint against a provider.

(b) Service initiation due dates.

(1) If DADS refers an individual to a provider with a routine referral, the provider must initiate services within 14 days after the service effective date given on the appropriate form listed in §52.401(b)(2) of this chapter (relating to Referrals), or within 14 days after the date the provider receives the form, whichever is later.

(2) If DADS refers an individual to a provider with a negotiated referral, the provider must initiate services on the date orally negotiated with the case manager.

(3) If an individual is not available during the time frames described in paragraph (1) or (2) of this subsection, a provider must initiate services within 72 hours after becoming aware that an individual is available, or within 72 hours after the date the individual is available, whichever is later.

(c) Delay in service initiation. A provider must document any failure to initiate services by the applicable date in subsection (b) of this section.

(1) DADS does not hold the provider accountable if a service delay is:

(A) beyond the control of the provider; and

(B) not directly caused by the provider.

(2) Documentation must include:

(A) the reason for the delay;

(B) either the date the provider anticipates it will initiate services or specific reasons the provider cannot anticipate a service initiation date; and

(C) a description of the provider's ongoing efforts to initiate services.

(d) Documentation of service initiation. A provider must maintain documentation of service initiation in an individual's file.

§52.405. Equipment Installation.

(a) During an initial home visit, an installer must:

(1) install and make an initial test of the equipment;

(2) ensure that the equipment has an alternate power source in the event of a power failure;

(3) operate within the limits set forth by local telephone companies; and

(4) if necessary:

(A) purchase a telephone extension cord;

(B) connect and run a telephone extension cord not to exceed 50 feet between the wall jack and the equipment; and

(C) safely tack the telephone extension cord against the wall or floorboard to prevent a hazard to an individual.

(b) An installer is not required to:

(1) adapt the physical environment in an individual's home to make it compatible with the equipment;

(2) arrange or pay for relocation of the telephone; or

(3) purchase or install electrical extension cords. An installer must not use an electrical extension cord when installing equipment.

(c) A provider must document a failure to install the equipment, including:

(1) the reason for the delay, which must:

(A) be beyond the control of the provider; and

(B) not be caused directly by the provider;

(2) the date the provider anticipates it will install the equipment or the specific reason the provider cannot anticipate a date; and

(3) a description of the provider's ongoing efforts to install the equipment, if applicable.

§52.407. System Checks.

(a) Purpose. The purpose of a system check is to ensure:

(1) that an individual can successfully make an alarm call; and

(2) that the equipment is working properly.

(b) Conducting a system check.

(1) A provider must conduct a system check at least once during each calendar month.

(2) The system check must be conducted during normal working hours or as negotiated with the individual.

(3) A provider must document a completed system check. The documentation must include the date and time of the completed system check and confirm that the individual was contacted.

(c) Failure to complete a system check.

(1) When a system check failure occurs, a provider must attempt to complete the system check a total of three times during the calendar month. The attempts must occur on three different days.

(2) If a provider is unable to complete a successful system check after three attempts and does not have a documented reason why the system checks have not been completed, the provider must ask a responder to attempt to find out why the individual is unable to complete the system check.

(3) If a provider is unable to complete a system check during a calendar month, the provider must provide written notification to the case manager by the 15th day of the month after the system check was due. The written notification must include:

(A) the date and time of each attempted system check;

(B) the date and time of each attempt to contact a responder other than public service personnel; and

(C) the reason the individual was unable to participate, if known.

(d) If a provider is unable to complete a system check due to equipment failure, the provider must replace the equipment as described in §52.411(a)(2) of this chapter (relating to Equipment Maintenance).

§52.409. Alarm Calls.

(a) Response time. A provider must respond to an alarm call within 60 seconds of the alarm, 24 hours a day, seven days a week.

(b) Response to alarm calls. A provider must, in response to an alarm call:

(1) record the response time in seconds;

(2) attempt to contact the individual to verify that an emergency exists before contacting a responder; and

(3) immediately contact a responder if:

(A) the individual verifies there is an emergency; or

(B) the provider is unable to reach the individual.

(c) Documentation of alarm calls.

(1) A provider must document an alarm call at the time the alarm call is received and after it is resolved. The documentation must include:

(A) the name of the individual;

(B) the date and time the provider receives the alarm call, recorded in hours, minutes, and seconds;

(C) the time the monitor called the individual in response to the alarm call, recorded in hours, minutes, and seconds;

(D) the name of the contacted responder, if applicable;

(E) a brief description of the incident; and

(F) a statement of how the incident was resolved.

(2) A provider must provide written notification to the case manager by the next working day after an alarm call that results in a responder being dispatched to an individual's home.

§52.411. Equipment Maintenance.

(a) Equipment failure. A provider must:

(1) contact an individual by the end of the next working day after learning of an equipment failure; and

(2) replace the equipment:

(A) by the end of the next working day after learning of an equipment failure if the individual is available; or

(B) by the end of the third working day after learning of an equipment failure if the individual is not available within one working day.

(b) Low battery. A provider must visit an individual's home to check the equipment within five working days after the equipment has registered five or more "low battery" signals in a 72-hour period. The provider must replace a defective battery during the visit.

(c) Documentation. A provider must document and maintain a record of each equipment failure and low battery signal. The documentation must include:

(1) the date the provider became aware of the equipment failure or low battery signal;

(2) the equipment or subscriber number;

(3) a description of the problem; and

(4) the date the equipment is repaired or replaced.

§52.413. Interdisciplinary Team.

(a) Interdisciplinary team (IDT). An IDT is a designated group of people who meet when the need arises to discuss service delivery issues. An IDT meeting must include:

(1) the individual or the individual's representative or both;

(2) a provider representative; and

(3) a DADS representative, who is:

(A) a case manager (or designee);

(B) a contract manager (or designee); or

(C) a regional nurse (or designee).

(b) Convening an IDT meeting. A provider must convene an IDT meeting within three working days after the date the provider:

(1) suspends services to an individual for reasons explained in §52.419 of this chapter (relating to Suspension); or

(2) identifies an issue that prevents the provider from carrying out a requirement of this chapter.

(c) IDT meeting.

(1) A provider may conduct an IDT meeting by telephone conference call or in person.

(2) The IDT must:

(A) evaluate the service delivery issue;

(B) identify solutions to resolve the service delivery issue; and

(C) make recommendations to the provider.

(d) IDT meeting outcome. A provider must implement the recommendations of an IDT within two working days after the IDT meeting.

(e) Documentation of an IDT meeting. A provider must document an IDT meeting in the individual's file, including:

(1) the specific reason for calling the IDT meeting;

(2) the names of the participants in the IDT meeting;

(3) the provider's attempts to convene an IDT meeting with all the members if all members described in subsection (a) of this section are unable to participate in the meeting;

(4) the IDT's recommendations;

(5) the provider's action as a result of the IDT recommendations; and

(6) the reasons for a provider's actions.

(f) Failure to convene an IDT meeting with a DADS representative present. If a provider convenes an IDT meeting without a DADS representative present, the provider must send the documentation described in subsection (e) of this section to the designated DADS staff for the region in which the individual resides.

(1) The documentation must be sent within five working days after the date of the IDT meeting.

(2) After reviewing the IDT meeting documentation, the designated DADS staff may require the provider to take further action.

§52.415. Changes in an Individual's Surroundings.

A provider must provide written notification to the case manager within seven days after becoming aware of a change in an individual's surroundings. Examples of a change include:

(1) a change of address; and

(2) a change in household composition.

§52.417. Required Notification.

(a) Required notification. A provider must provide written notification to the case manager if:

(1) an individual complains of pain;

(2) an individual requests that services end;

(3) an individual is temporarily admitted to an institution;

(4) an individual abuses the service by activating:

(A) four false alarms within a six-month period that result in a response by the fire department, police, sheriff, or ambulance; or

(B) 20 false alarms of any kind within a six-month period;

(5) a provider makes three unsuccessful attempts for three consecutive months to contact an individual for a monthly system check;

(6) an individual or someone in an individual's home engages in illegal discrimination against a provider staff or DADS employee; or

(7) an individual or someone in an individual's home exhibits reckless behavior, which may result in imminent danger to the health and safety of the individual, provider staff, or another person. If this occurs, the provider must immediately notify:

(A) the Department of Family and Protective Services or other appropriate protective services agency;

(B) local law enforcement, if appropriate; and

(C) the case manager.

(b) Method and due date. A provider must notify the case manager orally or by fax no later than one working day after becoming aware of a circumstance detailed in subsection (a) of this section. If the provider's first notification is oral, the provider must send written notification to the case manager within five working days of the oral notification. Written notification must include:

(1) the date the provider became aware of a circumstance detailed in subsection (a) of this section; and

(2) the reason for the written notification.

(c) Allowed payment. A provider may continue to receive payment when the provider is unable to conduct a monthly system check for the reasons outlined in subsection (a) of this section for three consecutive months. In order to receive payment, the provider must:

(1) comply with the requirements of §52.407(b) of this chapter (relating to System Checks); and

(2) convene an IDT meeting, as described in §52.413 of this chapter (relating to Interdisciplinary Team) to address subsection (a)(5) and (6) of this section.

§52.419. Suspension.

(a) Required suspensions. A provider must suspend services to an individual if the individual:

(1) permanently leaves the state or moves to a county where the provider does not contract with DADS to provide ERS;

(2) permanently moves to a location where ERS cannot be provided, such as an assisted living facility;

(3) dies;

(4) is admitted to an institution; or

(5) is no longer mentally alert enough to operate the equipment properly.

(b) Notification. A provider must notify the case manager orally or by fax no later than one working day after suspending services. If a provider's notification is oral, the provider must send written notification to the case manager within five working days after the oral notification. Written notification must include:

(1) the date services were suspended; and

(2) the reason services were suspended.

(c) A provider must remove the equipment from an individual's home within 14 days after suspending services in order to receive payment for the month services were suspended.

§52.421. Termination.

(a) If DADS terminates ERS, a provider may be paid for the last month of service, regardless of how many days of service were provided that month, if:

(1) the provider has already conducted a system check that month before the termination of services;

(2) the provider conducted a system check on the day it picked up the equipment; or

(3) the provider could not complete a system check because:

(A) the individual's telephone was disconnected;

(B) the individual damaged the equipment;

(C) the equipment was picked up at a location other than the individual's home; or

(D) the individual changed his telephone number or address without allowing the provider to remove the equipment from the individual's home.

(b) The provider must:

(1) document the results of the final system check; or

(2) document the reason the provider was unable to complete a system check.

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SUBCHAPTER E. CLAIMS PAYMENT AND DOCUMENTATION

40 TAC §52.501, §52.503

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

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

§52.501. Record Keeping.

(a) General requirements. A provider must maintain records according to:

(1) Chapter 49 of this title (relating to Contracting for Community Care Services);

(2) Chapter 69 of this title (relating to Contract Administration); and

(3) the terms of the contract.

(b) Individual's file. A provider must maintain the following information for each individual:

(1) the individual's name, telephone number, address, and medical condition;

(2) the name and telephone number of each responder;

(3) a record of all completed and attempted system checks;

(4) a record of each alarm call;

(5) a copy of all required notices sent to the case manager;

(6) a signed release for forcible entry;

(7) acknowledgement that the equipment belongs to the provider;

(8) if applicable, documentation showing approval for the continuation of service delivery; and

(9) if applicable, documentation showing that service delivery is suspended.

(c) Financial records.

(1) A provider must maintain financial records in accordance with generally accepted accounting principles (GAAP) and DADS procedures:

(A) to support billing for payment; and

(B) to document payment by DADS. The documentation must include:

(i) the amount of payment;

(ii) the voucher number;

(iii) the warrant number;

(iv) the date of receipt; and

(v) sufficient direct deposit information to trace deposits through the provider's accounting system.

(2) A provider's financial records must include:

(A) deposit slips, bank statements, cancelled checks, program income and individual fee ledgers, donation ledgers, and receipts;

(B) purchase orders;

(C) invoices, statements, and delivery receipts;

(D) journals, ledgers, and other books of account and other supporting documentation;

(E) payroll and tax records;

(F) inventory records for supplies;

(G) service delivery documentation;

(H) Internal Revenue Service, Department of Labor, and other government records and forms;

(I) records of insurance coverage, claims, and payments (for example, medical, liability, fire and casualty, and workers' compensation);

(J) equipment inventory records;

(K) the provider's internal accounting procedures;

(L) chart of accounts, as defined by GAAP; and

(M) company policies and procedures.

(d) Subcontractor records. A provider must maintain invoices, contracts, and service delivery records for a subcontractor who contracts with the provider to provide ERS.

§52.503. Payment.

(a) Billing requirements. A provider must bill DADS for ERS provided as described in §49.41 of this title (relating to Billings and Claims Payment).

(b) Unit rate ceiling. A provider must agree to accept and DADS pays only the unit rate ceiling established by the Health and Human Services Commission.

(c) Documentation. The provider must maintain the documentation described in this chapter to be eligible for payment.

(d) Suspension. DADS does not reimburse a provider after equipment is removed from an individual's home.

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For further information, please call: (512) 438-3734

CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§97.1 - 97.3, concerning general provisions, §97.201, concerning applicability, §§97.213 - 97.220, concerning conditions of a license, §§97.241, 97.242, 97.245 - 97.247, 97.249, 97.250, 97.252, 97.253, and 97.257, concerning agency administration, §§97.281 - 97.283, 97.285, 97.287, 97.288, 97.290, 97.291, and 97.298 - 97.301, concerning provision and coordination of treatment and services, §97.321 and §97.322, concerning branch offices and alternate delivery sites, and §97.603, concerning court action; the repeal of §§97.11 - 97.16, concerning application and issuance of a license, §97.221, concerning changing ownership, §97.501 and §97.502 concerning surveys, and §§97.601, 97.602, and 97.604, concerning enforcement; and new §§97.11, 97.13, 97.15, 97.17, 97.19, 97.21, 97.23, 97.25, 97.27, 97.29, and 97.31, concerning criteria and eligibility, application procedures, and issuance of a license, §97.210, concerning agency operating hours, §§97.501, 97.503, 97.505, 97.507, 97.509, 97.521, 97.523, 97.525, and 97.527, concerning licensure surveys, and §§97.601, 97.602, and 97.604, concerning enforcement, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

Background and Purpose

The purpose of the amendments, new sections, and repeal is to reorganize the rules in Chapter 97 and to rewrite them in plain English that will be easier for the public and home and community support services agencies (agencies) to locate and understand. The amendments correct references to other rules, update statutory citations, and update agency names. References to the Texas Department of Human Services are being amended to the Department of Aging and Disability Services to reflect the name of the agency that has the authority to adopt rules for licensing and regulation of agencies. The repeal and new sections update provisions regarding criteria and eligibility for licensing, application, license issuance, surveys, and enforcement.

Section-by-Section Summary

The amendment to §97.2 adds, deletes, and amends definitions to clarify terminology used throughout the chapter.

New Subchapter B is reorganized to better explain criteria and eligibility for licensing, application procedures, and issuance of a license.

New §97.210 adds the requirement for an agency to adopt and enforce a written policy identifying the agency's operating hours and to post notice of contact information if the person in charge of the agency is away during agency operating hours. The amendment to §97.217 requires an agency to notify DADS of a voluntary suspension of operations and the resumption of operations. The repeal of §97.221 deletes duplicate information that is included in new §97.25 concerning application procedures and requirements for a change of ownership.

The amendment to §97.241 requires that the license holder maintain accurate documentation and comply with enforcement orders. The amendment to §97.246 requires an agency to conduct a criminal history check, an employee misconduct registry check, and a nurse aide registry check on each unlicensed person having face-to-face contact with clients who is employed by or volunteers for the agency. The amendment to §97.249 requires an agency to notify DADS and appropriate enforcement agencies immediately if there is cause to believe that a client has been abused, neglected, or exploited by an individual directly employed by the agency, a contractor, or a volunteer. The amendment to §97.250 defines the written policy an agency must adopt and enforce for a complaint investigation, including an investigation for abuse, neglect, and exploitation and requires the agency to submit a written report no later than 10 days after reporting the act. The amendment to §97.253 requires an agency to state whether it conducts drug testing. If the agency does conduct drug testing, the agency must describe the method and provide a copy of the policy to anyone who applies for services or requests a copy from the agency.

The amendment to §97.287 requires an agency's Quality Assessment and Performance Improvement Program to include components that measure the effectiveness and safety of all services provided by the agency. The amendment to §97.290 requires an agency to obtain and keep in the client's file a written agreement for backup services if the backup service provider is an individual other than an agency employee or contractor. The amendment to §97.300 clarifies the applicability of certain requirements relating to medication administration if the agency staff administers medications. The amendment to §97.301 explains the requirements for an agency if it is using a physician's stamped signature for a signed paper record.

New §97.505 states that DADS will not announce or give prior notice to an agency when conducting a survey, including an initial survey. New §97.521 requires an agency to admit at least one client and initiate services within six months of receiving an initial license. An agency must also submit a written request for an initial survey at least six months before the expiration date of the initial license.

New §97.602 includes updated administrative penalty charts in subsection (e)(1) and (2) to allow DADS to add certain violations in areas that jeopardize the health and safety of clients.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments, new sections, and repeal are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments, new sections, and repeal are in effect is an estimated increase in revenue due to the revision of the administrative penalty charts of §97.602. Exact revenue increases are indeterminable based on the graduated nature of the penalties and the potential for an agency to reduce assessed penalties if corrective measures and time frames are met.

Small Business and Micro-business Impact Analysis

DADS has determined that there may be an adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, new sections, and repeal. The proposed new §97.246 requires a criminal history check for a volunteer who has face-to-face contact with a client; therefore, the proposed rule may increase the number of persons an agency must check. The agencies that provide hospice services would face the greatest impact because they use a larger volunteer workforce. DADS estimates the cost for a criminal history check is $5 - $30 per volunteer. The range is based on variable fees charged by businesses that offer these services and economies of scale related to business size. The cost of compliance by small and micro-businesses is not significantly different to the cost of compliance by the largest businesses.

There may be an adverse economic effect on small businesses or micro-businesses as a result of the proposed amendment to §97.602 due to additional administrative penalties that may be imposed under this section against an agency that does not comply with the rules. For most violations the rule provides a range of amounts that may be assessed as an administrative penalty. Therefore, the size of a business may be taken into account in assessing an administrative penalty. In addition, due to the indeterminable nature of these penalties, as explained in the fiscal note, a cost comparison is not feasible.

Cost to Persons and Effect on Local Economies

DADS anticipates that there may be an economic cost to persons who are required to comply with the amendments, new sections, and repeal. If an agency employs a volunteer who has face-to-face contact with a client, the agency will incur costs associated with obtaining a criminal history check on the volunteer, as required by the proposed new §97.246. There will also be a cost to an agency that violates a rule and is assessed an administrative penalty.

The amendments, new sections, and repeal will not affect a local economy.

Public Benefit

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments, new sections, and repeal are in effect, the public benefit expected as a result of enforcing the amendments, new sections, and repeal is promulgation of rules that reflect current agency names and DADS procedures for licensing an agency. The rules will strengthen the licensure process and clarify licensure issues that have been identified by DADS and agencies. Having the rules in plain English will make the requirements easier for the public and agencies to understand.

Takings Impact Assessment

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

Public Comment

Questions about the content of this proposal may be directed to Rosalind Nelson-Gamblin at (512) 438-3158 in DADS' Regulatory Services Policy Development and Support Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-022, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§97.1 - 97.3

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.1. Purpose and Scope.

(a) Purpose.

(1) The purpose of this chapter is to implement the Health and Safety Code, Chapter 142, which provides the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services (DADS) [~~(DHS)~~] with the authority to adopt minimum standards that a person must meet in order to be licensed as a home and community support services agency (HCSSA) and also to qualify to provide certified home health services. The requirements serve as a basis for licensure and survey activities [~~for licensure~~].

(2) Except as provided by the Health and Safety Code, §142.003 (relating to Exemptions from Licensing Requirement), a person, including a health care facility licensed under the Health and Safety Code, may not engage in the business of providing home

health, hospice, or personal assistance services (PAS), or represent to the public that the person is a provider of home health, hospice, or PAS [personal assistance services] for pay without a HCSSA license authorizing the person to perform those services issued by DADS [DHS] for each place of business from which home health, hospice, or PAS is [personal assistance services are] directed. A certified HCSSA must have a license to provide certified home health services.

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

§97.2. Definitions.

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

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

(6) Affiliate--With respect to an applicant or license holder, [owner] which is:

(A) a corporation--means each officer, director, and stockholder with direct ownership of at least 5.0%, subsidiary, and parent company;

(B) (No change.)

(C) an individual--means:

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

(iii) each corporation in which the individual is an officer, director, or stockholder with a direct ownership or disclosable interest of at least 5.0%.

(D) - (E) (No change.)

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

(9) Applicant--The owner of an agency that [which] is applying for a license under the statute. This is the person in whose name the license will be issued.

(10) Assistance with self-administration of medication--Any needed ancillary aid provided to a client in the client's self-administered medication or treatment regimen, such as reminding a client to take a medication at the prescribed time, opening and closing a medication container, pouring a predetermined quantity of liquid to be ingested, returning a medication to the proper storage area, and assisting in reordering medications from a pharmacy. Such ancillary aid includes administration of any medication when the client has the cognitive ability to direct the administration of their medication and would self-administer if not for a functional limitation.

(11) (No change.)

(12) Audiologist--A person who is currently licensed under the Occupations Code, Chapter 401[Texas Civil Statutes, Article 4512j], as an audiologist.

(13) - (14) (No change.)

(15) Branch office--A facility or site in the service area of a parent agency from which home health or personal assistance services are delivered or where active client records are maintained. This does not include inactive records that [which] are stored at an unlicensed site.

(16) Care plan--

(A) a written plan prepared by the appropriate health care professional [personnel] for a client of the home and community support services agency; or

(B) for home dialysis designation, a written plan developed by the physician, registered nurse, dietitian, and qualified social worker to personalize the care for the client and enable long- and short-term goals to be met.

(17) - (19) (No change.)

(20) CHAP--Community Health Accreditation Program, Inc. An independent, nonprofit accrediting body that publicly certifies that an organization has voluntarily met certain standards for home and community-based health care.

(21) [(20)] Client--An individual receiving home health, hospice, or personal assistance services from a licensed home and community support services agency. This term includes each member of the primary client's family if the member is receiving ongoing services. This term does not include the spouse, significant other, or other family member living with the client who receives a one-time service (e.g., vaccine) if the spouse, significant other, or other family member receives the service in connection with the care of a client.

(22) [(21)] Clinical note--A dated and signed written notation by agency personnel of a contact with a client containing a description of signs and symptoms; treatment and medication given; the client's reaction; other health services provided; and any changes in physical and emotional condition.

(23) CMS--Centers for Medicare and Medicaid Services. The federal agency that administers the Medicare program and works in partnership with the states to administer Medicaid.

(24) [(22)] Complaint--An allegation against an agency regulated by DADS or against an employee of an agency regulated by DADS [the Texas Department of Human Services (DHS)] that involves a violation [violation(s)] of this chapter or the statute.

(25) [(23)] Controlling person--A person with the ability, acting alone or [in concert] with others, to directly or indirectly[,] influence, direct, or cause the direction of the management, expenditure of money, or policies of an agency or other person.

(A) A controlling person includes:

(i) a management company[, landlord,] or other business entity that operates or contracts with others for the operation of an agency;

(ii) a [any] person who is a controlling person of a management company or other business entity that operates an agency or that contracts with another person for the operation of an agency; and

(iii) any other individual who, because of a personal, familial, or other relationship with the owner, manager, [landlord, tenant,] or provider of an agency, is in a position of actual control or authority with respect to the agency, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the agency.

(B) A controlling person, as described by subparagraph (A)(iii) of this paragraph, does not include an employee, lender, secured creditor, [or landlord,] or other person who does not exercise formal or actual influence or control over the operation of an agency.

(26) [(24)] Counselor--An individual qualified under Medicare standards to provide counseling services, including bereavement, dietary, spiritual, and other counseling services to both the client and the family.

(27) [(25)] DADS [DHS]--[The Texas] Department of Aging and Disability [Human] Services.

(28) Day--Any reference to a day means a calendar day, unless otherwise specified in the text. A calendar day includes weekends and holidays.

(29) Deficiency--A finding of noncompliance with federal requirements resulting from a survey.

(30) Designated survey office--A DADS Home and Community Support Services Agencies Program office located in an agency's geographic region.

(31) [~~(26)~~] Dialysis treatment record--For home dialysis designation, a dated and signed written notation by the person providing dialysis treatment which contains a description of signs and symptoms, machine parameters and pressure settings, type of dialyzer and dialysate, actual pre- and post-treatment weight, medications administered as part of the treatment, and the client's response to treatment.

(32) [~~(27)~~] Dietitian--A person who is currently licensed under the laws of the State of Texas to use the title of licensed dietitian or provisional licensed dietitian, or who is a registered dietitian.

[~~(28) Director--The director of the Home and Community Support Services Agencies Program of the Texas Department of Human Services or his or her designee.~~]

(33) [~~(29)~~] End stage renal disease (ESRD)--For home dialysis designation, the stage of renal impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.

(34) [~~(30)~~] Freestanding hospice--An agency that provides hospice services to clients of the agency who are residing at the agency's physical location including inpatient and respite care.

(35) [~~(31)~~] Functional need--Needs of the individual that [~~which~~] require services without regard to diagnosis or label.

(36) [~~(32)~~] Health assessment--A determination of a client's physical and mental status through inventory of systems.

(37) [~~(33)~~] Home and community support services agency--A person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location.

(38) Home health aide--An individual working for an agency who meets at least one of the requirements for home health aides as defined in §97.701 of this chapter (relating to Home Health Aides).

(39) [~~(34)~~] Home health medication aide--A person permitted under the Health and Safety Code, Chapter 142, Subchapter B.

(40) [~~(35)~~] Home health service--The provision of one or more of the following health services required by an individual in a residence or independent living environment:

(A) nursing, including blood pressure monitoring and diabetes treatment;

(B) physical, occupational, speech, or respiratory therapy;

(C) medical social service;

(D) intravenous therapy;

(E) dialysis;

(F) service provided by unlicensed personnel under the delegation or supervision of a licensed health professional;

(G) the furnishing of medical equipment and supplies, excluding drugs and medicines; or

(H) nutritional counseling.

(41) [~~(36)~~] Hospice--A person licensed under this chapter to provide hospice services, including a person who owns or operates a residential unit or an inpatient unit.

(42) [~~(37)~~] Hospice services--Services, including services provided by unlicensed personnel under the delegation of a registered nurse or physical therapist, provided to a client or a client's family as part of a coordinated program consistent with the standards and rules adopted under this chapter. These services include palliative care for terminally ill clients and support services for clients and their families that:

(A) are available 24 hours a day, seven days a week, during the last stages of illness, during death, and during bereavement;

(B) are provided by a medically directed interdisciplinary team; and

(C) may be provided in a home, nursing facility, residential unit, or inpatient unit according to need. These services do not include inpatient care normally provided in a licensed hospital to a terminally ill person who has not elected to be a hospice client. For the purposes of this definition, the word "home" includes a person's "residence" as defined in this section.

(43) [~~(38)~~] Independent living environment--A client's [~~individual~~] residence, which may include a group home or foster home, or other settings where a client participates in activities, including school, work, or church.

(44) [~~(39)~~] Individual/family choice and control--Individuals and families who express preferences and make choices about how their support service needs are met.

(45) Individualized service plan--A written plan prepared by the appropriate health care personnel for a client of a home and community support services agency licensed to provide personal assistance services.

(46) [~~(40)~~] Inpatient unit--A facility that provides a continuum of medical or nursing care and other hospice services to clients admitted into the unit and that is in compliance with:

(A) the conditions of participation for inpatient units adopted under Social Security Act, Title XVIII (42 United States Code §1395 et seq.); and

(B) standards adopted under this chapter.

(47) IRoD--Informal review of deficiencies. An informal process that allows an agency to refute a deficiency or violation cited during a survey.

(48) JCAHO--Joint Commission on Accreditation of Healthcare Organizations. An independent, nonprofit organization for standard-setting and accrediting in-home care and other areas of health care.

(49) [~~(41)~~] Licensed vocational nurse--A person who is currently licensed under Occupations Code, Chapter 301 [~~302~~], as a licensed vocational nurse.

(50) [~~(42)~~] Manager--A person having a contractual relationship to provide management services to a home and community support services agency for the overall operation of a home and community support services agency including administration, staffing, or delivery of services. Examples of contracts for services that will not be

considered contracts for management services include contracts solely for maintenance, laundry, or food services.

(51) [(43)] Medication administration record--A record used to document the administration of a client's medications.

(52) [(44)] Medication list--A list [of a client's medications] that includes all prescription and over-the-counter medication that a client is currently taking, including the dosage, the frequency, and the method of administration [the physician orders relating to dosage and the frequency and method of administration. The medication list is used to identify possible ineffective drug therapy or adverse reactions, significant side effects, drug allergies, and contraindications].

(53) [(45)] Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(54) [(46)] Nursing facility--An institution licensed as a nursing home under the Health and Safety Code, Chapter 242.

(55) [(47)] Nutritional counseling--Advising and assisting individuals or families on appropriate nutritional intake by integrating information from the nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. Nutritional counseling may include[, but is not limited to,] the following:

(A) dialogue with the client to discuss current eating habits, exercise habits, food budget, and problems with food preparation;

(B) discussion of dietary needs to help the client understand why certain foods should be included or excluded from the client's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the client's physician or practitioner, to include instructions for implementation;

(D) providing the client with motivation to help the client [him or her] understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the client or the client's family members by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(56) [(48)] Occupational therapist--A person who is currently licensed under the Occupational Therapy Practice Act, Occupations Code, Chapter 454, as an occupational therapist.

(57) [(49)] Original active client record--A record composed first-hand for a client currently receiving services.

[(50) Owner--One of the following persons that will hold or does hold a license issued under the statute in the person's name or the person's assumed name:]

[(A) a corporation;]

[(B) a limited liability company;]

[(C) an individual;]

[(D) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;]

[(E) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or]

[(F) all co-owners under any other business arrangement.]

(58) [(51)] Palliative care--Intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness.

(59) [(52)] Parent agency--An [The] agency that develops and maintains administrative controls and provides supervision of branch offices and alternate delivery sites.

(60) [(53)] Parent company--A person, other than an individual, who has a direct 100% ownership interest in the owner of an agency.

(61) [(54)] Person--An individual, corporation, or association.

(62) [(55)] Personal assistance services--Routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services. The term includes:

(A) personal care;

(B) health-related services performed under circumstances that are defined as not constituting the practice of professional nursing by the Board of Nurse Examiners through a memorandum of understanding with DADS [DHS] in accordance with Health and Safety Code, §142.016; and

(C) health-related tasks provided by unlicensed personnel under the delegation of a registered nurse or that a registered nurse determines do not require delegation.

(63) [(56)] Personal care--The provision of one or more of the following services required by an individual in a residence or independent living environment:

(A) bathing;

(B) dressing;

(C) grooming;

(D) feeding;

(E) exercising;

(F) toileting;

(G) positioning;

(H) assisting with self-administered medications;

(I) routine hair and skin care; and

(J) transfer or ambulation.

(64) [(57)] Physical therapist--A person who is currently licensed under Occupations Code, Chapter 453, as a physical therapist.

(65) [(58)] Physician--A person who holds a doctor of medicine or doctor of osteopathy degree and is currently licensed and practicing medicine under the laws of the state of Texas, Oklahoma, New Mexico, Arkansas, or Louisiana.

(66) [(59)] Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Occupations Code, Chapter 204, as a physician assistant.

(67) [(60)] Physician-delegated task [tasks]--A task [Tasks] performed in accordance with the [Medical Practice Act,] Occupations Code, Chapter 157, including orders signed by a physician

that specify the delegated task [task(s)], the individual to whom the task [task(s)] is delegated, and the client's name.

(68) [(61)] Place of business--An office of a home and community support services agency that maintains client records or directs home health, hospice, or personal assistance services. This term includes a parent agency, a branch office, and an alternate delivery site. The term does not include an administrative support site.

(69) [(62)] Plan of care--The written orders of a practitioner for a client who requires skilled services.

(70) [(63)] Practitioner--A person who is currently licensed in a state in which the person practices as a physician, dentist, podiatrist, or a physician assistant, or a person who is a registered nurse registered with the Board of Nurse Examiners for the State of Texas as an advanced practice nurse.

(71) [(64)] Presurvey conference--A conference held with DADS [DHS] staff and the applicant or the applicant's [his or her] representatives to review licensure standards and survey documents, and to provide consultation before the [on-site licensure] survey.

(72) [(65)] Progress note--A dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time.

(73) [(66)] Psychoactive treatment--The provision of a skilled nursing visit to a client with a psychiatric diagnosis under the direction of a physician that includes one or more of the following:

(A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;

(B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of the plan of care.

(74) [(67)] Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Occupations Code, Chapter 301, as a registered nurse.

(75) [(68)] Registered nurse delegation--Delegation by a registered nurse in accordance with:

(A) 22 TAC, Chapter 224 (concerning Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments); and

(B) 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(76) [(69)] Residence--A place where a person resides, including [and includes] a home, a nursing facility, a convalescent home, or a residential unit.

(77) [(70)] Residential unit--A facility that provides living quarters and hospice services to clients admitted into the unit and that is in compliance with standards adopted under the Health and Safety Code, Chapter 142.

(78) [(71)] Respiratory therapist--A person who is currently licensed under Occupations Code, Chapter 604, as a respiratory care practitioner.

(79) [(72)] Respite services--Support options that are provided temporarily for the purpose of relief for a primary caregiver in providing care to individuals of all ages with disabilities or at risk of abuse or neglect.

(80) [(73)] Section--A reference to a specific rule in this chapter.

(81) [(74)] Service area--A [The] geographic area [area(s)] established by an agency in which all or some of the agency's services are available.

(82) [(75)] Skilled services--Services in accordance with a plan of care that require the skills of [a]:

(A) a registered nurse;

(B) a licensed vocational nurse;

(C) a physical therapist;

(D) an occupational therapist;

(E) a respiratory therapist;

(F) a speech-language pathologist;

(G) an audiologist;

(H) a social worker; or

(I) a dietitian.

(83) [(76)] Social worker--A person who is currently licensed as a social worker under Occupations Code, Chapter 505.

(84) [(77)] Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Occupations Code, Chapter 401.

(85) [(78)] Statute--The Health and Safety Code, Chapter 142.

(86) Substantial compliance--A finding in which an agency receives no recommendation for enforcement action after a survey.

(87) [(79)] Supervising nurse--The person responsible for supervising skilled services provided by an agency and who has the qualifications described in §97.244(b) of this chapter (relating to Staffing Qualifications and Conditions). This person may also be known as the director of nursing or similar title.

(88) [(80)] Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(89) [(81)] Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(90) [(82)] Survey--An on-site inspection or complaint investigation conducted by a DADS [DHS] representative to determine if an agency [a licensee] is in compliance with the statute and this chapter or in compliance with applicable federal requirements or both.

(91) [(83)] Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(92) [(84)] Unlicensed person--An individual who is not licensed as a health care professional. The term includes[, but is not limited to,] home health aides, medication aides permitted by DADS [DHS], and other individuals providing personal care or assistance in health services.

(93) Unsatisfied judgments--A failure to fully carry out the terms or meet the obligation of a court's final disposition on the matters before it in a suit regarding the operation of an agency.

(94) Violation--A finding of noncompliance with this chapter or the statute resulting from a survey.

(95) [~~(85)~~] Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

(96) Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

§97.3. License [~~Licensing~~] Fees.

(a) (No change.)

(b) If an applicant for an initial license based on a change of ownership makes late application for a license to DADS [~~the Texas Department of Human Services (DHS)~~] in accordance with §97.25 [~~§97.13(b)(2)(C)(iii)~~] of this chapter [~~title~~] (relating to Application Procedures and Requirements for Change of Ownership), the applicant must submit the appropriate initial license fee as set out in subsection (a) of this section plus a [~~an additional~~] late fee of $250.

(c) DADS does [~~DHS will~~] not consider an application as officially submitted until the applicant pays the license [~~licensing~~] fee. The fee must accompany the application packet [~~form~~].

(d) A fee [~~Fees~~] paid to DADS is [~~DHS are~~] not refundable, except as provided by §97.31 [~~§97.16~~] of this chapter [~~title~~] (relating to Time Frames [~~Periods~~] for Processing and Issuing a License).

(e) DADS accepts [~~Any remittance submitted to DHS in payment of a required fee must be in the form of~~] a certified check, money order, or personal check made out to the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services in payment for a required 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 September 29, 2005.

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Phoebe Knauer
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 438-3734

SUBCHAPTER B. APPLICATION AND ISSUANCE OF A LICENSE

40 TAC §§97.11 - 97.16

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

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The repeal implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.11. Application and Issuance of Initial License.

§97.12. Issuance and Renewal of License.

§97.13. Change of Ownership.

§97.14. Application and Issuance of a Branch Office License.

§97.15. Application and Issuance of an Alternate Delivery Site License.

§97.16. 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.

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SUBCHAPTER B. CRITERIA AND ELIGIBILITY, APPLICATION PROCEDURES, AND ISSUANCE OF A LICENSE

40 TAC §§97.11, 97.13, 97.15, 97.17, 97.19, 97.21, 97.23, 97.25, 97.27, 97.29, 97.31

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The new sections implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.11. Criteria and Eligibility for Licensing.

(a) An applicant for a license must not admit a client or initiate services until the applicant has completed the application process and has received an initial license.

(b) A first-time application for a license is an application for an initial license.

(c) An application for a license when there is a change of ownership is an application for an initial license.

(d) A separate license is required for each place of business as defined in §97.2 of this chapter (relating to Definitions).

(e) An agency's place of business must be located in and have an address in Texas. An agency located in another state must receive a license as a parent agency in Texas to operate as an agency in Texas.

(f) An applicant must be at least 18 years of age.

(g) DADS does not issue a license to an applicant if the applicant, a controlling person of the applicant, a person with a disclosable interest, an affiliate of the applicant, an administrator, or an alternate administrator:

(1) at the time of application:

(A) has a criminal history of a crime listed in Health and Safety Code, §250.006;

(B) has an unsatisfied final judgment in any state or other jurisdiction;

(C) is in default on a guaranteed student loan (Education Code, §57.491); or

(D) is delinquent on child support obligations (Family Code, Chapter 232);

(2) for two years preceding the date of application, has a history in any state or other jurisdiction of any of the following:

(A) a federal or state tax lien;

(B) an eviction involving any property or space used as an agency; or

(C) an unresolved final Medicare or Medicaid audit exception; or

(3) for twelve months preceding the date of application, has a history in any state or other jurisdiction of any of the following:

(A) denial, suspension, or revocation of an agency license or a license for a health care facility;

(B) surrendering a license before expiration or allowing a license to expire instead of the licensing authority proceeding with enforcement action;

(C) a Medicaid or Medicare sanction or penalty relating to the operation of an agency or a health care facility;

(D) operating an agency that has been decertified in any state under Medicare or Medicaid; or

(E) debarment, exclusion, or involuntary contract cancellation in any state from Medicare or Medicaid.

§97.13. Application Procedures for an Initial License.

(a) The following staff must complete a presurvey conference seminar before submitting an application for a license:

(1) the administrator and alternate administrator (all license categories); and

(2) the supervising nurse and alternate supervising nurse (licensed home health services with or without home dialysis designation, licensed and certified home health services with or without home dialysis designation, and hospice services license categories).

(b) When applying for a license, an applicant must not:

(1) provide incorrect or false information; or

(2) withhold information.

(c) Upon request, DADS furnishes a person with an application packet for a license.

(d) An applicant may request to be licensed in one or more of the following categories:

(1) licensed and certified home health services;

(2) licensed and certified home health services with home dialysis designation;

(3) licensed home health services;

(4) licensed home health services with home dialysis designation;

(5) hospice services; or

(6) personal assistance services.

(e) DADS does not require an agency to be licensed in more than one category if the category for which the agency is licensed covers the services the agency provides.

(f) An applicant must complete and furnish all documents and information that DADS requests in accordance with instructions provided with the application packet. All submitted documents must be notarized copies or originals.

(g) Upon receipt of an application packet and license fee, DADS reviews the material to determine whether it is complete and correct. A complete and correct application packet includes all documents and information that DADS requests as part of the application process. If DADS receives a partial fee, the application packet and monies are returned to the applicant.

(1) DADS processes the application packet in accordance with time frames established in §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(2) If an applicant decides not to continue the application process for an initial license after submitting the application packet and license fee, the applicant must submit to DADS a written request to withdraw the application. DADS does not refund the license fee.

(3) If an applicant receives a notice from DADS that some or all of the information required by this section is missing or incomplete, the applicant must submit the required information no later than 30 days after the date of the notice. If an applicant fails to submit the required information within 30 days after the notice date, DADS considers the application packet incomplete and denies the application. If DADS denies the application, DADS does not refund the license fee.

(h) An applicant who has requested the category of licensed and certified home health services on the initial license application must also make an application for certification by CMS as a Medicare-certified agency under the Social Security Act, Title XVIII.

(1) Pending approval by CMS, the applicant:

(A) receives an initial license reflecting the category of licensed home health services if the applicant meets the criteria for a license; and

(B) complies with the Medicare conditions of participation for home health agencies in 42 Code of Federal Regulations, Part 484, as if the applicant were dually certified.

(2) If CMS certifies an agency to participate in the Medicare program during the initial license period, DADS sends a notice to the agency that the category of licensed and certified home health services has been added to the license. If the agency wants to delete the licensed home health services category once the category of licensed and certified home health services has been added, the agency must submit a written request for deletion of that category.

(3) If CMS denies certification to an applicant or if the applicant withdraws the application for participation in the Medicare program, the agency may retain the category of licensed home health services.

§97.15. Issuance of an Initial License.

(a) DADS issues an initial license when DADS determines:

(1) the application packet and license fee are complete and correct; and

(2) the applicant meets the criteria for the license as described in §97.11 of the chapter (relating to Criteria and Eligibility for Licensing).

(b) An initial license is valid for one year from the date of issuance.

(c) DADS may revoke an initial license or deny the first renewal of a license if an agency fails to:

(1) meet the requirements for an initial survey as specified in Subchapter E of this chapter (relating to Licensure Surveys); or

(2) maintain continuing compliance with the minimum standards and the provisions of this chapter for the services authorized under the license.

(d) DADS may deny an initial license for any of the reasons specified in §97.21 of this chapter (relating to Denial of an Application or a License).

(e) A license states an agency's place of business from which services are to be provided and designates an agency's authorized category of services.

§97.17. Application Procedures for a Renewal License.

(a) A license is valid for one year. In order to continue providing services to clients, an agency must renew its license.

(b) For each license period, an agency must provide services to at least one client.

(c) DADS does not require an agency to admit a client under each category authorized under the license as a condition for renewal of the license.

(d) An agency must document the provision of services and keep documentation readily available for review by a DADS surveyor.

(e) DADS sends notice of expiration of a license to an agency at least 60 days before the expiration date of the license.

(1) If an agency has not received notice of expiration from DADS at least 45 days before the expiration date, the agency must notify DADS and submit a written request for a renewal application for a license.

(2) An agency must submit and DADS must receive a complete and correct renewal application at least 30 days before the expiration date of a license.

(3) All documents submitted with the renewal application must be notarized copies or originals.

(f) Upon receipt of a renewal application and the renewal license fee, DADS reviews the material to determine whether it is complete and correct. A complete and correct renewal application includes all documents and information that DADS requests as part of the application process. If DADS receives a partial fee, the renewal application and monies are returned.

(1) DADS processes the renewal application according to the time frames in §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(2) If an agency decides not to continue the application process for a renewal license after submitting the renewal application and the renewal license fee, the agency must submit to DADS a written request to withdraw the renewal application. DADS does not refund the renewal license fee.

(3) If an agency receives a notice from DADS that some or all of the information required by this section is missing or incomplete, the agency must submit the required information no later than 30 days after the date of the notice. If an agency fails to submit the required information within 30 days after the notice date, DADS considers the renewal application incomplete and denies the application. If DADS denies the renewal application, DADS does not refund the renewal license fee.

(g) If an agency fails to make a timely and sufficient renewal application at least 30 days before the expiration date of the license, the agency must cease operation on the date the license expires.

(1) If an agency makes a timely renewal application of a license in accordance with this section, and an action to revoke, suspend, or deny renewal of the license is pending, the agency may continue to operate, and the license is valid until the agency has had an opportunity for a formal hearing as described in §97.601 of this chapter (relating to Enforcement Actions). DADS issues a renewal license only if DADS determines the reason for the proposed action no longer exists.

(2) An agency whose license has been expired for 90 days or less may renew the license by paying DADS a renewal fee that is one and one-half times the normally required renewal fee established in §97.3 of this chapter (relating to License Fees). DADS notifies the agency in writing of a pending license expiration.

(3) An agency whose license has been expired for more than 90 days must apply for an initial license in accordance with §97.13 of this chapter (relating to Application Procedures for an Initial License).

(h) If a license holder fails to timely renew a license because the license holder is or was on active duty with the armed forces of the United States of America outside the state of Texas, the license holder may renew the license pursuant to this subsection.

(1) The license holder's spouse, or another individual having power of attorney from the license holder, may request renewal of the license. The renewal application must include a current address and telephone number for the individual requesting the renewal.

(2) An agency may request a renewal application before or after the expiration of the license.

(3) A copy of the official orders or other official military documentation showing that the license holder is or was on active military duty serving outside the state of Texas must be filed with DADS along with the renewal application.

(4) A copy of the power of attorney from the license holder must be filed with DADS along with the renewal form if the individual

having the power of attorney executes any of the documents required in this section.

(5) A license holder renewing under this subsection must pay the applicable renewal fee.

(6) A license holder is not authorized to operate the agency for which the license was obtained after the expiration of the license unless and until the license holder actually renews the license.

(7) This subsection applies to a license holder who is an individual or a partnership comprised of individuals, all of whom are or were on active duty with the armed forces of the United States of America serving outside the state of Texas.

§97.19. Issuance of a Renewal License.

(a) A license is valid for one year. The new licensure period begins the day after the previous license expires.

(b) For renewal of an initial license, an agency must:

(1) meet the requirements for an initial survey as specified in Subchapter E of this chapter (relating to Licensure Surveys);

(2) show compliance with the minimum standards and the provisions of this chapter for the services authorized under the license as confirmed by an initial survey; and

(3) apply for renewal of the license in accordance with §97.17 of this chapter (relating to Application Procedures for a Renewal License).

(c) For renewal of a license other than an initial license, an agency must:

(1) comply with this chapter; and

(2) apply for renewal of the license in accordance with §97.17 of this chapter.

(d) DADS does not renew a license if:

(1) the agency is licensed to provide licensed and certified home health services, and the agency voluntarily or involuntarily withdraws from or is terminated from participation in the Medicare program. However, if the agency demonstrates continued compliance with the requirements for licensed home health services, the license may be renewed with the category of licensed home health services;

(2) renewal is prohibited by the Education Code, §57.491, concerning defaults on guaranteed student loans;

(3) the license is suspended under the Family Code, Chapter 232, concerning license suspension of delinquent child support obligors;

(4) the agency fails to meet the requirements for renewal as specified in this section; or

(5) the agency fails to meet the eligibility criteria in §97.11 of this chapter (relating to Criteria and Eligibility for Licensing).

§97.21. Denial of an Application or a License.

(a) DADS may deny an application for an initial license or for renewal of a license if an applicant, an affiliate of the applicant, a manager of the applicant, or a person required to submit background and qualification information:

(1) fails to comply with the statute;

(2) fails to comply with this chapter;

(3) knowingly aids, abets, or permits another person to violate the statute or this chapter; or

(4) fails to meet the criteria for a license established in §97.11 of this chapter (relating to Criteria and Eligibility for Licensing).

(b) If DADS denies an application for an initial license or for renewal of a license, the applicant or agency may request a formal administrative hearing. A formal administrative hearing is held through a formal hearing process as described in §97.601 of this chapter (relating to Enforcement Actions).

§97.23. Change of Ownership.

(a) A license issued under this chapter may not be sold or assigned to another person.

(b) A change of ownership occurs when there is:

(1) a change of 50% or more in the ownership of the business organization or sole proprietorship that is licensed to operate the agency; or

(2) a change in the federal tax payer identification number.

(c) A change of ownership for a parent agency is a change of ownership for the parent agency's branch office or alternate delivery site and requires the submittal of an initial application and license fee for the branch office or alternate delivery site.

(d) A change of ownership does not apply if an agency is a business entity and is simply amending its official documents to revise its name.

(e) For agencies licensed to provide licensed and certified home health services and licensed and certified hospice services, applicable federal laws and regulations relating to change of ownership or control apply in addition to the requirements of this section.

§97.25. Application Procedures and Requirements for Change of Ownership.

(a) An application for an initial license resulting from a change of ownership must be requested at least 60 days before the effective date of the change of ownership.

(1) To avoid a gap in the license period, a prospective new owner must submit a complete and correct application packet for a license and the appropriate license fee to DADS at least 30 days before the anticipated date of sale or other transfer of ownership, and before expiration date of the license.

(2) An applicant must submit a complete and correct application packet to DADS in accordance with the instructions provided with the application packet.

(3) An applicant must meet the criteria for a license as described in §97.11 of the chapter (relating to Criteria and Eligibility for Licensing).

(4) If an applicant submits a timely and sufficient application packet and license fee and meets all criteria for a license, DADS issues the applicant a license effective on the date of the transfer of ownership. DADS considers an applicant to have filed a timely and sufficient application for a license if the applicant submits:

(A) a complete and correct application packet and license fee to DADS that is postmarked at least 30 days before the anticipated date of sale or other transfer of ownership, and before the expiration date of the license;

(B) an incomplete application packet and license fee to DADS with a letter explaining the circumstances that prevented its completion that is postmarked at least 30 days before the anticipated date of sale or other transfer of ownership, and before the expiration

date of the license; and DADS accepts the explanation. The applicant must submit the missing information to DADS within 30 days after the date of the letter;

(C) a complete and correct application packet and license fee to DADS that is postmarked less than 30 days before the anticipated date of sale or other transfer of ownership, and before the expiration date of the license; and the applicant pays a late fee as required by §97.3(b) of this chapter (relating to License Fees); or

(D) a complete and correct application packet and license fee to DADS that is received by the date of sale or other transfer of ownership, and before the expiration date of the license; and the applicant proves to DADS' satisfaction that the health and safety of the agency's clients required an emergency change of ownership.

(5) If an applicant files a timely application packet and license fee, but DADS determines that the application packet is incomplete and a letter explaining the circumstances that prevented its completion was not filed with the application, DADS considers the application timely filed but incomplete.

(A) DADS provides the applicant with written notification of the missing information required to complete the application and may assess a late fee as set out in §97.3(b) of this chapter for failure to comply with paragraph (1) of this subsection.

(B) An applicant must submit the required information and late fee, if assessed, no later than 30 days after the date of the notice. If an applicant fails to submit the required information within 30 days after the notice date, DADS considers the application incomplete and DADS denies the license. If DADS denies the license, DADS does not refund the license fee.

(6) The initial license issued to the new owner is valid for one year from the date of issuance.

(7) The previous owner's license is void on the effective date of the new owner's initial license. The previous owner's license must be surrendered to DADS within five working days after the effective date of the change of ownership.

(8) DADS may deny issuance of a license for any of the reasons specified in §97.21 of this chapter (relating to Denial of an Application or a License).

(b) For agencies licensed to provide licensed and certified home health services and licensed and certified hospice services, applicable federal laws and regulations relating to change of ownership or control apply in addition to the requirements of this section.

§97.27. Application and Issuance of a Branch Office License.

(a) An agency with a current license to provide home health or personal assistance services may qualify for a branch office license if the parent agency:

(1) is found to be in substantial compliance with the statute and this chapter; and

(2) has no enforcement action pending against the license.

(b) Upon request, DADS furnishes a parent agency with an application packet for a branch office license.

(c) An agency must submit to DADS a complete and correct application packet and the required license fee for a branch office license in accordance with the instructions provided with the application packet. A complete and correct application packet includes all documents and information that DADS requests as part of the application process.

(d) DADS reviews an application packet for a branch office license to determine whether it is complete and correct.

(1) DADS processes an application packet for a branch office license according to the time frames in §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(2) If an agency receives a notice from DADS that some or all of the information required by this section is missing or incomplete, the agency must submit the required information no later than 30 days after the date of the notice. If an agency fails to submit the required information within 30 days after the notice date, DADS considers the application for a branch office license incomplete and denies the application. If DADS denies the application, DADS does not refund the license fee.

(e) A designated survey office conducts a review of an agency's request to establish a branch office. The survey office makes a recommendation to approve or disapprove the branch office request.

(f) DADS approves or denies the application for a branch office license after considering the designated survey office's recommendation. If DADS denies the application, DADS sends the agency a written notice:

(1) informing the agency of its decision; and

(2) providing the agency with an opportunity to appeal its decision through a formal hearing process as described in §97.601 of this chapter (relating to Enforcement Actions).

(g) CMS approves or denies the branch location if an agency is licensed to provide licensed and certified home health services.

(h) A branch office license expires on the same expiration date as the parent agency's license, and the agency may renew it with the parent agency's license.

(i) DADS mails the branch office license to the parent agency. The branch office must post the license in a conspicuous place on the licensed branch office premises.

(j) A branch office must comply with §97.321 of this title (relating to Standards for Branch Offices) and the additional standards that relate to the agency's authorized categories under the license.

(k) DADS may conduct a survey of a branch office after issuance of the license to verify compliance with the statute and this chapter.

§97.29. Application and Issuance of an Alternate Delivery Site License.

(a) An agency with a current license to provide hospice services may qualify for an alternate delivery site license if the parent agency:

(1) is found to be in substantial compliance with the statute and this chapter;

(2) has no enforcement action pending against the license; and

(3) can provide adequate supervision and oversight of an alternate delivery site.

(b) Upon request, DADS furnishes a parent agency with an application packet for an alternate delivery site license.

(c) An agency must submit to DADS a complete and correct application packet and the required license fee for an alternate delivery site in accordance with instructions provided with the application

packet. A complete and correct application packet includes all documents and information that DADS requests as part of the application process.

(d) DADS reviews an application packet for an alternate delivery site to determine whether it is complete and correct.

(1) DADS processes an application packet for an alternate delivery site according to the time frames in §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(2) If an agency receives a notice from DADS that some or all of the information required by this section is missing or incomplete, the agency must submit the required information no later than 30 days after the date of the notice. If an agency fails to submit the required information within 30 days after the notice date, DADS considers the application for an alternate delivery site license incomplete and denies the application. If DADS denies the application, DADS does not refund the license fee.

(e) A designated survey office conducts a review of an agency's request to establish an alternate delivery site. The survey office makes a recommendation to approve or deny the alternate delivery site request.

(f) If an agency provides licensed-only hospice services, DADS approves or denies the application for an alternate delivery site after considering the designated survey office's recommendation. If DADS denies the application, DADS sends the agency a written notice:

(1) informing the agency of its decision; and

(2) providing the agency with an opportunity to appeal its decision through a formal hearing process as described in §97.601 of this chapter (relating to Enforcement Actions).

(g) If an agency provides licensed and certified hospice services, CMS approves or denies the application for an alternate delivery site. If CMS denies the application, CMS sends the agency a written notice:

(1) informing the agency of CMS' decision; and

(2) providing the agency with an opportunity to appeal CMS' decision through a formal process.

(h) An alternate delivery site license expires on the same expiration date as the parent agency's license, and the agency may renew it with the parent agency's license.

(i) DADS mails an alternate delivery site license to the parent agency. The alternate delivery site must post the license in a conspicuous place on the licensed alternate delivery site premises.

(j) An alternate delivery site must comply with §97.403 of this chapter (relating to Standards Specific to Agencies Licensed to Provide Hospice Services) and §97.322 of this chapter (relating to Standards for Alternate Delivery Sites).

(k) The designated survey office conducts a survey after issuance of the license to verify compliance with §97.403 and §97.322 of this chapter.

(l) The designated survey office may recommend that a licensed alternate delivery site seek a license as a parent agency, under but not exclusive of the following conditions:

(1) the alternate delivery site is the hospice's principal place of business as defined in §97.2 of this chapter (relating to Definitions); or

(2) the alternate delivery site is located outside the geographical area served by the parent agency.

§97.31. Time Frames for Processing and Issuing a License.

(a) General.

(1) The date of an application is the date the DADS' Home and Community Support Services Agencies (HCSSA) Licensing Unit receives the application.

(2) DADS considers an application for an initial license complete when DADS receives, reviews, and accepts the information described in §97.13 of this chapter (relating to Application Procedures for an Initial License).

(3) DADS considers an application for a renewal license complete when DADS receives, reviews, and accepts the information described in §97.17 of this chapter (relating to Application Procedures for a Renewal License). The agency may continue to operate in accordance with §97.17(g)(1) of this chapter.

(4) DADS considers an application for a change of ownership license complete when DADS receives, reviews, and accepts the information described in §97.23 of this chapter (relating to Change of Ownership).

(5) DADS considers an application for a branch office license complete when DADS receives, reviews, and accepts the information described in §97.27 of this chapter (relating to Application and Issuance of a Branch Office License).

(6) DADS considers an application for an alternate delivery site license complete when DADS receives, reviews, and accepts the information described in §97.29 of this chapter (relating to Application and Issuance of an Alternate Delivery Site License).

(b) Time frames. An application from an agency for an initial, renewal, change of ownership, branch office, or alternate delivery site license is processed in accordance with the following time frames:

(1) The first time frame begins on the date DADS' HCSSA Licensing Unit receives an application and ends on the date a license is issued. If DADS' HCSSA Licensing Unit receives an incomplete application, the first time frame ends on the date DADS' HCSSA Licensing Unit sends a written notice to the agency that the application is incomplete. The written notice describes the specific information that the applicant must submit to complete the application. The first time frame is no longer than 45 days.

(2) The second time frame begins on the date DADS' HCSSA Licensing Unit receives the last item necessary to complete the application and ends on the date the license is issued. The second time frame is no longer than 45 days.

(3) If an agency is subject to a proposed or pending enforcement action on its license on or within 30 days before the expiration date of the license, DADS may suspend issuance of a renewal license until a formal hearing as described in §97.601 of this chapter (relating to Enforcement Actions) is complete.

(c) Reimbursement of fees.

(1) If DADS does not process the application in the time frames stated in subsection (b) of this section, the applicant has the right to request that DADS reimburse the license fee. If DADS does not agree that the established time frames have been violated or finds that good cause existed for exceeding the established time frames, DADS denies the request.

(2) DADS considers that good cause for exceeding the established time frames exists if:

(A) the number of applications to be processed exceeds by 15% or more the number of applications processed in the same quarter for the preceding year;

(B) another public or private entity used in the application process caused the delay; or

(C) other conditions existed giving good cause for exceeding the established time frames.

(d) Appeal. If DADS denies the request for reimbursement of the license fee as authorized by subsection (c) of this section, the applicant may appeal the denial. In order to appeal, the applicant must send a written request for reimbursement of the license fee to the DADS commissioner. The request must include that the application was not processed within the established time frame. DADS' HCSSA Licensing Unit provides the DADS commissioner with a written report of the facts related to the processing of the application and good cause for exceeding the established time frame. The DADS commissioner makes the final decision and provides written notification of the decision to the applicant and DADS' HCSSA Licensing Unit.

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

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SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 1. GENERAL PROVISIONS

40 TAC §97.201

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.201. Applicability.

(a) This subchapter [~~Subchapter C, Minimum Standards for All Home and Community Support Services Agencies,~~] applies to a [~~all~~] home and community support services agency [~~agencies~~] providing licensed home health services or[~~,~~] licensed and certified home health services with and without home dialysis designation, hospice services, or personal assistance services.

(b) In addition to the minimum standards in this subchapter, an agency must also comply with applicable standards in Subchapter D of this chapter (relating to Additional Standards Specific to License Category and Specific to Special Services).

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

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DIVISION 2. CONDITIONS OF A LICENSE

40 TAC §§97.210, 97.213 - 97.220

The amendments and new section are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The amendments and new section implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.210. Agency Operating Hours.

(a) An agency must adopt and enforce a written policy identifying the agency's operating hours.

(b) For the purposes of this section, the person in charge means the administrator, the designated alternate administrator, the supervising nurse, or the alternate supervising nurse.

(c) If an agency is closed during the agency's operating hours, the person in charge must:

(1) post a notice in a visible location outside the agency that will provide information regarding how to contact the person in charge; and

(2) leave a message on an answering machine or similar electronic mechanism that will provide information regarding how to contact the person in charge.

§97.213. Agency Relocation.

(a) An agency [~~A license~~] must not transfer a license [~~be transferred~~] from one location to another without prior notification to DADS [~~the Texas Department of Human Services (DHS)~~]. If an agency is considering relocation, the agency must notify DADS [~~DHS~~] 30 [~~calendar~~] days before [~~prior to~~] the intended relocation. DADS provides [~~DHS will provide~~] written notification to the agency amending the [~~annual~~] license to reflect the new location.

(b) If [~~The relocation of either~~] a branch office or an alternate delivery site affiliates with [~~to~~] a different parent agency, [~~requires submission of a new application for~~] the branch office or alternate delivery site must submit an initial application for the branch office or alternate delivery site in accordance [~~, compliance~~] with §97.27 [~~§97.14~~] of this chapter [~~title~~] (relating to Application and Issuance of a Branch Office License) and §97.29 [~~§97.15~~] of this chapter [~~title~~] (relating to Application and Issuance of an Alternate Delivery Site License), as appropriate, and be approved for the initial license [~~approval of the application by DHS~~].

§97.214. Notification Procedures for a Change in Telephone Number and Agency Operating Hours [~~Telephone Number Change~~].

(a) An agency must notify DADS [~~the Texas Department of Human Services~~] within five [~~seven~~] days after [~~of~~] a change in the agency's telephone number.

(b) An agency must notify DADS within five days after a change in the agency's operating hours.

§97.215. Notification Procedures for an Agency Name Change.

(a) If an agency changes its [~~the agency's~~] name (legal entity or doing business as), but does not undergo a change of ownership as defined in §97.23(b) [~~§97.13(a)(2)~~] of this chapter [~~title~~] (relating to Change of Ownership), the agency must provide to DADS [~~the Texas Department of Human Services (DHS)~~]:

(1) written notification of the name change within five working [~~business~~] days before the effective date of change;

(2) a copy of a certificate of amendment from the Secretary of State's office or other governmental authority [~~authority(ies)~~], such as[~~,~~] an assumed name certificate, reflecting the name change within 30 days after receiving [~~of receipt of~~] the certificate; and

(3) (No change.)

(b) DADS provides an [~~On receipt and verification of the certificate of amendment and the current federal taxpayer identification number, DHS will provide the~~] agency with a notification of change in the agency's name after DADS receives and verifies the certificate of amendment and the current federal taxpayer identification number.

§97.216. Change in Agency Certification or Accreditation Status.

(a) An agency must provide written notification to DADS [~~the Texas Department of Human Services (DHS)~~] within five [~~calendar~~] days after [~~of~~] the agency's receipt of a notice of change in state or federal certification or accreditation status. The agency [~~licensee~~] must include a copy of the notice of change with its written notice to DADS [~~DHS~~].

(b) If an agency chooses to withdraw from the Medicare Program, or if CMS terminates or denies its certification, the license will be affected as follows:

(1) If an agency has no other license categories remaining on the license after losing its Medicare certification, its license is void and the agency must cease operation. If the agency wants to resume providing services, it must apply for an initial license.

(2) If an agency has another license category remaining on the current license and the agency wants to continue providing services under the remaining license category, DADS surveys the agency under the remaining license category.

(c) Termination or denial of certification by CMS does not result in an enforcement action by DADS.

§97.217. Agency Closure Procedures and Voluntary Suspension of Operations.

(a) Permanent closure. An agency must notify DADS [~~the Texas Department of Human Services (DHS)~~] in writing within five days before the permanent closure [~~calendar days prior to the cessation of operation~~] of the agency, branch office, or alternate delivery site.

(1) The agency must include in the written notice the reason for closing, the location of the client records (active and inactive), and the name and address of the client record custodian.

(2) If the agency closes with an active client roster, the agency must transfer a copy of the active client record with the client to the receiving agency in order to ensure [~~assure~~] continuity of care and services to the client.

(3) The agency must mail or return the initial license or renewal license to DADS [~~DHS~~] at the end of the day that services ceased [~~were terminated~~].

(4) If an agency continues [~~Continuing~~] to operate after the closure date specified in the notice, DADS may take enforcement action against the agency [~~result in enforcement action~~].

(b) Applicability. This subsection applies to an agency licensed to provide licensed home health services, personal assistance services, and licensed-only hospice services.

(1) Voluntary suspension of operations occurs when an agency voluntarily suspends its normal business operations for 10 or more consecutive days. A voluntary suspension of operations may not last longer than the licensure renewal period. If an agency voluntarily suspends operations, the agency must:

(A) discharge or arrange for backup services for active clients;

(B) provide written notification to the designated survey office at least five days before the voluntary suspension of operations or within two working days before the voluntary suspension of operations if an emergency occurs that is beyond the agency's control; and

(C) post a notice of voluntary suspension of operations on the entry door of the agency and leave a message on an answering machine or with an answering service that informs callers of the voluntary suspension of operations.

(2) An agency must notify the Home and Community Support Services Agencies Licensing Unit in writing at least seven days after resuming operations.

§97.218. Agency Organizational Changes.

(a) An agency must notify DADS [~~the Texas Department of Human Services (DHS)~~] in writing immediately of any change in its agency administrator, controlling person, or chief financial officer. [~~DHS will perform a criminal history check for a change in the administrator and the chief financial officer.~~]

(b) For a change in the administrator and the chief financial officer, an agency must complete and submit a criminal history check consent form to DADS' Home and Community Support Services Agencies Licensing Unit.

§97.219. Procedures for Adding or Deleting a Category to the License.

To add or delete a category to its [the] license, an [the] agency must provide written notification to DADS [the Texas Department of Human Services (DHS)] at least 30 days before [calendar days prior to] the addition or deletion of the category.

(1) Additions. DADS approves or denies [DHS will approve or disapprove] the addition of a category.

(A) At the discretion of DADS [DHS], an agency must attend a presurvey conference at the designated survey office before DADS approves [prior to DHS approving] the addition of a category.

(B) DADS either approves or denies [DHS will either approve or deny] the addition of a category within 30 days after receipt of the written notification. An agency must [may] not provide the services under the category the agency is adding [being added] until the agency receives written notice of approval [has been received] from DADS [DHS].

(C) If DADS denies the addition of a category, DADS informs [disapproved, DHS will inform] the agency of the reason for denial [disapproval].

(D) DADS may conduct a [At the discretion of DHS, an on-site] survey after [may be conducted following] the approval of a category.

(2) Deletions. DADS' [DHS's] receipt of an agency request to delete a category from the license does not preclude DADS [DHS] from taking enforcement action as appropriate in accordance with Subchapter F of this chapter (relating to Enforcement [Action]).

§97.220. Service Areas.

(a) Licensed service area.

(1) An agency must identify [provide services only within] its licensed service area.

(2) An agency must not provide services outside its licensed service area.

(b) (No change.)

(c) Expansion of service area. Except as provided under subsection (f) of this section, an [An] agency may expand its service area at any time during the licensure period.

(1) Unless exempted under paragraph (2) of this subsection, [to expand its service area,] an agency must submit to DADS [the Texas Department of Human Services (DHS)] a written request to expand its service area at least [notice] 30 days before [prior to] the expansion. The request must include [that includes]:

(A) - (C) (No change.)

(2) An agency is exempt [will be exempted] from the 30-day written request [notice] requirement under paragraph (1) of this subsection if DADS [DHS] determines an emergency situation exists that would impact client health and safety. An agency must notify DADS [DHS] immediately of a possible emergency. DADS determines [DHS will determine] if an exemption can be granted.

(d) Reduction of service area. An agency may reduce its service area at any time during the licensure period by sending DADS [DHS] written notification of the reduction, the revised boundaries of the agency's original service area, and the effective date of the reduction.

(e) (No change.)

(f) If DADS notifies an agency in writing of a proposed enforcement action, including denial of an application for license renewal, license suspension, immediate license suspension, or license revocation, the agency must not expand its service area until DADS notifies the agency in writing of the reversal or resolution of the enforcement action.

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

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DIVISION 2. CONDITIONS OF LICENSE

40 TAC §97.221

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

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The repeal implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.221. Changing Ownership.

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

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DIVISION 3. AGENCY ADMINISTRATION

40 TAC §§97.241, 97.242, 97.245 - 97.247, 97.249, 97.250, 97.252, 97.253, 97.257

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.241. Management [~~and Ownership~~].

(a) Agency policies. The license holder [~~licensee~~] is responsible for the conduct of the agency and [~~assumes full legal responsibility~~] for the adoption, implementation, enforcement [~~adopting, implementing, enforcing~~], and monitoring of adherence to the written policies required throughout this chapter. The license holder is also responsible [~~and that govern the home and community support services agency's total operation and~~] for ensuring that the [~~these~~] policies comply with the statute and the applicable provisions of this chapter and are administered to provide safe, professional, quality health care.

(b) Documentation. The license holder must ensure that all documents submitted to DADS or maintained by the agency pursuant to this chapter are accurate and do not misrepresent or conceal a material fact.

(c) Compliance with enforcement orders. The license holder must comply with an order of the DADS commissioner or other enforcement orders that may be imposed on the agency in accordance with the statute and this chapter.

§97.242. Organizational Structure and Lines of Authority.

(a) An agency must prepare and maintain a current [a] written description of [~~document that identifies~~] the agency's organizational structure. The document may be either in the form of a chart or a narrative.

(b) The description [~~written organizational structure~~] must include [~~clearly define, at a minimum~~]:

(1) all services [~~that are~~] provided by the agency;

(2) the governing body, the administrator, the supervising nurse, advisory committee, interdisciplinary team, and staff, as appropriate, based on services [~~that are~~] provided by the agency; and

(3) (No change.)

§97.245. Staffing Policies.

(a) An agency must adopt and enforce written staffing policies that govern all personnel used [~~staffed~~] by the agency, including employees, volunteers, and contractors.

(b) An agency's written staffing [~~The~~] policies must:

(1) include requirements for orientation to the policies, procedures, and objectives of the agency [~~; training; and demonstration of competency for tasks when competency cannot be determined through education, license, certification, or experience of all employees, volunteers (if used), and contractors (if used) to the policies, procedures, and objectives of the agency and participation by all personnel in employee training specific to their job. The agency must provide a continuing systematic program for the training of its employees. The staff, including volunteers (if used) and contractors (if used), must be properly oriented to tasks performed, and these individuals must be informed of changes in techniques, philosophies, goals, client's rights, and products, relating to the client's care~~];

(2) include requirements for participation by all personnel in job-specific training. Agency training program policies must:

(A) ensure personnel are properly oriented to tasks performed;

(B) ensure demonstration of competency for tasks when competency cannot be determined through education, license, certification, or experience;

(C) ensure a continuing systematic program for the training of all personnel; and

(D) ensure personnel are informed of changes in techniques, philosophies, goals, client's rights, and products relating to client's care;

(3) [~~(2)~~] address participation by all personnel in appropriate employee development programs;

(4) [~~(3)~~] include a written job description (statement of those functions and responsibilities which constitute job requirements) and job qualifications (specific education and training necessary to perform the job) for each position within the agency;

(5) [~~(4)~~] include procedures for processing criminal history checks and searches of the nurse aide registry and the employee misconduct registry for unlicensed personnel in accordance with §97.247 of this title (relating to Verification of Employability of Unlicensed Persons);

(6) [~~(5)~~] ensure annual evaluation of employee and volunteer performance;

(7) [~~(6)~~] address employee and volunteer disciplinary action [~~action(s)~~] and procedures;

(8) [~~(7)~~] if volunteers are used by the agency, address the use of volunteers. The policy must be in compliance with §97.248 of this title (relating to Volunteers);

(9) [~~(8)~~] address requirements for providing and supervising services to pediatric clients. Services provided to pediatric clients must be provided by staff who have been instructed and have demonstrated competence in the care of pediatric clients [~~specify the qualifications, experience, and training in pediatrics required for any registered nurse who provides or supervises direct care staff in the provision of services to pediatric clients~~]; and

(10) [~~(9)~~] include a requirement that all personnel who are direct care staff and who have direct contact with clients (employed by or under contract with the agency) sign a statement that they have read, understand, and will comply with all applicable agency policies.

§97.246. Personnel Records.

(a) A [~~An individual~~] personnel record must be maintained on each individual who is [~~person~~] employed by or [~~the agency, including~~] volunteers for the agency. All information must be kept current. A personnel record must include[~~, but not be limited to,~~] the following:

(1) job description and qualifications or [~~. In lieu of the job description and qualifications for employment, the personnel record may include~~] a statement signed by the employee or volunteer that he has read the job description and qualifications for the position accepted;

(2) (No change.)

(3) verification of license, permits, references [reference(s)], job experience, and educational requirements as appropriate; [and]

(4) performance evaluations and disciplinary actions; and[.]

(5) for an unlicensed person having face-to-face contact with clients who is employed by or volunteers for the agency:

(A) a criminal history report;

(B) an employee misconduct registry check; and

(C) a nurse aide registry check.

(b) Original personnel files may be kept in any location as determined by the agency. Original personnel files must be accessible and readily retrievable for inspection by DADS [the department] at the site of the survey.

§97.247. Verification of Employability of Unlicensed Persons.

(a) An [Each] agency must conduct the criminal history check authorized under [comply with the provisions of] the Health and Safety Code, Chapter 250 (relating to Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities). An agency must also conduct the verification of employability required under Health and Safety Code §253.008.

(b) To verify that an applicant is not listed with a finding concerning abuse, neglect, or mistreatment of a consumer of an agency or a facility licensed under the Health and Safety Code, Chapter 142, or misappropriation of a consumer's property, an agency must search the nurse aide registry and the employee misconduct registry by calling DADS' [DHS's] toll-free number, 1-800-452-3934.

(c) (No change.)

§97.249. Reportable Conduct.

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

(1) Abuse, exploitation, and neglect have the meanings assigned by Human Resources Code, §48.002.

(2) Cause to believe means that an individual knows or suspects.

(3) Employee means an individual directly employed by an agency, a contractor, or a volunteer.

(4) Reportable conduct has the meanings assigned by Human Resources Code, §48.401.

(b) An agency must adopt and enforce a written policy for [relating to] reporting alleged acts of abuse, neglect, and [or] exploitation of clients and reportable conduct by an employee [employee(s)] of the agency.

[(1) In this section, the terms "abuse," "exploitation," and "neglect" have the meanings assigned by §48.002, Human Resources Code.]

[(2) In this section, "reportable conduct" has the meanings assigned by Human Resources Code, §48.401.]

(c) [(3)] An agency that has cause to believe that a client [an employee] has been abused, exploited, or neglected by an employee, [a client of] the agency must report the information immediately to:

(1) [(A)] the [Texas] Department of Aging and Disability [Human] Services at 1-800-458-9858; and

(2) [(B)] the [Texas] Department of Family and Protective [and Regulatory] Services [(PRS)] at 1-800-252-5400, or other appropriate state agency as required by Human Resources Code, §48.051.

§97.250. Investigations [Complaint Investigation].

(a) Written policy. An agency must adopt and enforce a written policy relating to the agency's procedures for investigating complaints or reports of abuse, neglect, and exploitation. The policy must meet the requirements of this section. [Such procedures must require the agency to:]

(b) Abuse, neglect, and exploitation (ANE).

(1) An agency must initiate an investigation of known and alleged acts of ANE by agency employees, including volunteers and contractors, immediately upon witnessing the act or upon receipt of the allegation.

(2) An agency must send a written report of the investigation to DADS state office no later than the tenth day after reporting the act to DADS and the Department of Family and Protective Services.

(3) An agency must complete the written report using the Provider Investigation form and include the following information:

(A) incident date;

(B) the alleged victim;

(C) the alleged perpetrator;

(D) any witnesses;

(E) the allegation;

(F) any injury or adverse affect;

(G) any assessments made;

(H) any treatment required;

(I) the investigation summary; and

(J) any action taken.

(c) Other investigations.

(1) An agency must investigate complaints made by a client, a client's family or guardian, or a client's health care provider, in accordance with this subsection, regarding:

(A) treatment or care that was furnished by the agency;

(B) treatment or care that the agency failed to furnish; or

(C) a lack of respect for the client's property by anyone furnishing services on behalf of the agency.

(2) An agency must:

[(1) investigate complaints made by a client or the client's family or guardian or the client's health care provider regarding treatment or care that is (or fails to be) furnished or regarding the lack of respect for the client's property by anyone furnishing services on behalf of the agency;]

(A) [(2)] document the receipt of the complaint and initiate a complaint investigation within 10 [calendar] days after [of] the agency's receipt of the complaint;

(B) [(3)] document all components of the investigation; and

(C) [(4)] complete the investigation and documentation within 30 [calendar] days after the agency receives the complaint, unless the agency has and documents reasonable cause for a delay.

(d) [(b)] Retaliation.

(1) An agency may not retaliate against a person for filing a complaint, presenting a grievance, or providing, in good faith, information relating to home health, hospice, or personal assistance services provided by the agency.

(2) [(c)] An agency is not prohibited from terminating an employee for a reason other than retaliation.

§97.252. Financial Solvency and Business Records.
An agency must have the financial ability to carry out its functions.

(1) An agency must not intentionally or knowingly pay employees or contracted staff with checks from accounts with insufficient funds.

(2) (No change.)

(3) An [The] agency must make available to DADS [the Texas Department of Human Services (DHS)] upon request business records relating to its ability to carry out its functions. If there is a question relating to the accuracy of the records or the agency's financial ability to carry out its functions, DADS [DHS] or its designee may conduct a more extensive review of the records. [Any financial review by DHS will be conducted by an individual who has the financial qualifications to review such records.]

(4) (No change.)

§97.253. Disclosure of Drug Testing Policy.
(a) An agency must have a written policy describing whether it will conduct [that conducts] drug testing of its employees who have direct contact with clients [must adopt and enforce a written policy governing drug testing of its employees].

(b) If an agency conducts drug testing, the written policy must describe the method by which drug testing is conducted.

(c) If an agency does not practice drug testing of its employees, the written policy must state that the agency does not conduct drug testing of its employees.

(d) An agency must provide a copy of the policy to anyone applying for services from the agency and any person who requests it.

[(b) An agency must provide a written statement describing the agency's policy for the drug testing of employees who have direct contact with clients to the following persons:]

[(1) each person applying for services from the agency; and]

[(2) any person requesting the information.]

§97.257. Medicare Certification Optional.
(a) An agency that applies [which makes application] for the category of licensed and certified home health services [category of service] must comply with the regulations in the Medicare Conditions of Participation for Home Health Agencies, 42 Code of Federal Regulations (CFR), Part 484, pending approval of certification granted by CMS [the Centers for Medicare & Medicaid Services (CMS)]. An agency providing hospice services and applying for participation in the Medicare program must comply with the Medicare Conditions of Participation for Hospice Services, 42 CFR, Part 418.

(b) Upon DADS' [the Texas Department of Human Services' (DHS's)] receipt of written approval from CMS, DADS [DHS] will amend the licensing status of the agency to include the licensed and certified home health services category. The agency must then comply with §97.402 of this chapter [title] (relating to Standards Specific to Licensed and Certified Home Health Services).

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

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DIVISION 4. PROVISION AND COORDINATION OF TREATMENT AND SERVICES

40 TAC §§97.281 - 97.283, 97.285, 97.287, 97.288, 97.290, 97.291, 97.298 - 97.301

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.281. Client Care Policies.
An [The] agency must adopt and enforce a written policy that specifies the agency's client care practices. The written policy must include the following elements if covered under the scope of services provided by the agency [policies, which may include]:

(1) - (16) (No change.)

§97.282. Client Conduct and Responsibility and Client Rights.
(a) An agency must adopt and enforce a written policy governing client conduct and responsibility and client rights in accordance with this section. The written policy must include a grievance mechanism under which a client can participate without fear of reprisal.

(b) An agency must protect and promote the client's rights.

(c) An agency must comply with the provisions of the Human Resources Code, Chapter 102, concerning the rights of the elderly.

(d) At the time of admission, an agency must provide each person who receives home health, hospice, or personal assistance services with a written statement that informs the client that a complaint against the agency may be directed to the Department of Aging and Disability Services, DADS' Consumer Rights and Services Division, P.O. Box 149030, Austin, Texas 78714-9030, toll free 1-800-458-9858.

The statement also may inform the client that a complaint against the agency may be directed to the administrator of the agency. The statement about complaints directed to the administrator also must include the time frame in which the agency will review and resolve the complaint.

(e) [(1)] In advance of furnishing care to the client or during the initial evaluation visit before the initiation of treatment, an [the] agency must provide each client or their legal representative with a written notice of all policies governing client conduct and responsibility and client rights.

(f) A client has the following rights:

(1) [(2)] A [The] client has the right to be informed in advance about the care to be furnished, the plan of care, expected outcomes, barriers to treatment, and any changes in the care to be furnished. The agency must ensure that written informed consent that specifies the type of care and services that may be provided by the agency has been obtained for every client, either from the client or their legal representative. The client or the legal representative must sign or mark the consent form.

(2) [(3)] A [The] client has the right to participate in the planning of the care or treatment and in planning changes in the care or treatment.

(A) An [The] agency must advise or consult with the client or legal representative in advance of any change in the plan of care.

(B) A [The] client has the right to refuse care and services.

(C) A [The] client has the right to be informed, before care is initiated, of the extent to which payment may be expected from the client, third-party payers, and any other source of funding known to the agency.

[(4) The agency must protect and promote a client's rights.]

(3) [(5)] A client has the right to have assistance in understanding and exercising his [or her] rights. The agency must maintain documentation showing that it has complied with the requirements of this paragraph and that the client demonstrates understanding of his [their] rights.

(4) [(6)] A [The] client has the right to exercise his [or her] rights as a client of the agency.

(5) A client has the right to have his person and property treated with consideration, respect, and full recognition of his individuality and personal needs.

(6) A client has the right to confidential treatment of his personal and medical records.

(7) A client has the right to voice grievances regarding treatment or care that is or fails to be furnished, or regarding the lack of respect for property by anyone who is furnishing services on behalf of the agency and must not be subjected to discrimination or reprisal for doing so.

(g) [(7)] In the case of a client adjudged incompetent, the rights of the client are exercised by the person appointed by law to act on the client's behalf.

(h) [(8)] In the case of a client who has not been adjudged incompetent, any legal representative may exercise the client's rights to the extent permitted by law.

[(9) The client has the right to have his or her person and property treated with consideration, respect, and full recognition of his or her individuality and personal needs.]

[(10) The client has the right to confidential treatment of his or her personal and medical records.]

[(11) The client has the right to voice grievances regarding treatment or care that is or fails to be furnished, or regarding the lack of respect for property by anyone who is furnishing services on behalf of the agency and must not be subjected to discrimination or reprisal for doing so.]

[(A) The written policy must include a grievance mechanism under which a client can participate without fear of reprisal.]

[(B) At the time of admission, an agency must provide each person who receives home health, hospice, or personal assistance services with a written statement that informs the client that a complaint against the agency may be directed to the director, Texas Department of Human Services (DHS), P.O. Box 149030, Austin, Texas 78714-9030, toll free 1-800-458-9858. The statement also may inform each client that a complaint against the agency may be directed to the administrator of the agency. Information about complaints directed to the administrator also must include the timeframe for the agency's review and resolution].

[(12) An agency must comply with the provisions of the Human Resources Code, Chapter 102, concerning the rights of the elderly.]

§97.283. Advance Directives.

(a) (No change.)

(b) DADS assesses [The Texas Department of Human Services (DHS) will assess] an administrative penalty of $500 against an agency that violates [subsection (a) of] this section, relating to requirements for the provision of a written statement relating to advance directives. DADS provides [DHS will provide] notice of administrative penalty and opportunity for a hearing in accordance with §97.602 of this chapter [title] (relating to Administrative Penalties).

§97.285. Infection Control.

An agency must adopt and enforce written policies addressing infection control, including the prevention of the spread of infectious and communicable disease. The policies must:

(1) ensure compliance by the agency, its employees, and its contractors with:

(A) the Communicable Disease Prevention and Control Act, Health and Safety Code, Chapter 81;

(B) [(2)] the [ensure compliance with] Occupational Safety and Health Administration (OSHA), 29 CFR Part 1910.1030 and Appendix A relating to Bloodborne Pathogens [and Appendix A to 1910.1030]; and

(C) the Health and Safety Code, Chapter 85, Subchapter I, concerning the prevention of the transmission of human immunodeficiency virus and hepatitis B virus; and

(2) [(3)] require documentation of infections that the client acquires [are acquired] while [the client is] receiving services from the agency.

(A) If an agency is licensed to provide only personal assistance services, documentation must include the date that the infection was disclosed to the agency employee, the client's name, and treatment.

(B) If an agency is licensed to provide services other than personal assistance services, documentation [Documentation] must include [at a minimum] the date that the infection was detected, the client's name, primary diagnosis, signs and symptoms [signs/symptoms], type of infection, pathogens identified, and treatment. [; and]

[(4) ensure compliance of the agency and its employees and contractors with the Health and Safety Code, Chapter 85, Subchapter I, concerning the prevention of the transmission of human immunodeficiency virus and hepatitis B virus.]

§97.287. Quality Assessment and Performance Improvement.

(a) Quality Assessment and Performance Improvement (QAPI) Program.

(1) An agency must maintain a [an] QAPI Program that is [will be] implemented by a [an] QAPI Committee. The QAPI Program must be ongoing, focused on client outcomes that are measurable, and have a written plan of implementation. The QAPI Committee must review and update or revise the plan of implementation [This plan must be reviewed and updated or revised] at least once within a calendar year, or more often if needed[, by the QAPI Committee]. The QAPI Program must include:

(A) a system that [of] measures [that captures] significant outcomes for [that are essential to] optimal care. The QAPI Committee must use the measures [and are used] in the care planning and coordination of services and events. The measures must include [at a minimum and as appropriate] the following as appropriate for the scope of services provided by the agency:

(i) (No change.)

(ii) a review of:

(I) (No change.)

(II) complaints and incidents [issues] of unprofessional conduct by licensed staff and misconduct by unlicensed staff;

(III) infection control activities; [and]

(IV) medication administration and errors; and

(V) effectiveness and safety of all services provided, including:

(-a-) the competency of the agency's clinical staff;

(-b-) the promptness of service delivery; and

(-c-) the appropriateness of the agency's responses to client complaints and incidents;

(iii) a determination that services have been performed as outlined in the individualized service plan, care plan, or plan of care; and

(iv) (No change.)

(B) an annual evaluation of the total operation, including services provided under contract or arrangement.

(i) An [The findings are to be used by the] agency must use the evaluation to correct identified problems and, if necessary, to revise policies[, if necessary].

(ii) An agency must document corrective action to ensure that improvements are sustained over time.

(2) An agency must immediately correct identified problems that directly or potentially threaten the client care and safety.

(3) [(2)] QAPI documents must be kept confidential and be made available to DADS [the Texas Department of Human Services (DHS)] staff upon request.

(b) QAPI Committee membership. At a minimum, the QAPI Committee must consist of [at least]:

(1) (No change.)

(2) the supervising nurse or therapist [nurse/therapist], or the supervisor of an agency licensed to provide personal assistance services [(PAS) if delegating health related tasks]; and

(3) an individual representing the scope of services provided by the agency [representation from skilled and unskilled disciplines providing services].

(c) (No change.)

§97.288. Coordination of Services.

(a) An agency must adopt and enforce a written policy requiring [to require that] all service providers involved in the care of a client, including physicians, contracted health care professionals, and other agencies, to effectively coordinate the client's care [or another agency, are engaged in an effective interchange, reporting, and coordination of care regarding the client].

(b) (No change.)

§97.290. Backup Services and After Hours Care.

(a) Backup services. An agency must adopt and enforce a written policy to ensure that backup services are available when an agency employee or contractor is not available [able] to deliver the services.

(1) Backup services may be provided by an [This may include] agency employee, a contractor [staff, contractors], or the client's designee who is willing and able to provide the necessary services [family members or friends].

(2) If the client's designee has agreed to provide backup services required by this section, the agency must have the designee sign a written agreement to be the backup service provider. The agency must keep the agreement in the client's file.

(3) An agency must not coerce a client to accept backup services.

(b) After hours care. An agency must adopt and enforce a written policy to ensure that clients are educated in how to access care from the agency or another health care provider after regular business hours.

§97.291. Agency Dissolution.

An agency must adopt and enforce a written policy that describes the agency's written contingency plan.

(1) (No change.)

(2) The plan must:

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

(C) comply with §97.217(2) of this chapter [title] (relating to Agency Closure Procedures and Voluntary Suspension of Operations).

§97.298. Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel and Tasks Not Requiring Delegation.

(a) (No change.)

(b) Requirements for RN delegation for personal assistance service clients are located in §97.404 [§97.404(c)(2)] of this chapter

(relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services).

§97.299. [Vocational] Nursing Education, Licensure and Practice.
If providing nursing services, an [An] agency must adopt and enforce a written policy to ensure compliance with the rules of the Board of [Vocational] Nurse Examiners adopted at 22 TAC Chapters 211 - 226 (relating to Nursing Continuing Education, Licensure, and Practice in the State of Texas) [231 - 240 (relating to Vocational Nursing Education, Licensure and Practice in the State of Texas)].

§97.300. Medication Administration.

(a) An agency must adopt and enforce a written policy for maintaining a current medication list.

(b) This subsection does not apply to clients served only under the personal assistance services license category, unless the agency staff administers medications.

(1) If an agency administers medication to its clients, the [An] agency must adopt and enforce a written policy for maintaining a current [medication list and] medication administration record.

(2) A [The] client's practitioner must order administration of medication[, unless it can be considered assistance with medications as that term is defined in §97.2(10). A current medication list and medication administration records may be incorporated into one document. Notation must be made in the medication administration record or clinical notes of medications not given and the reason].

(3) An agency may incorporate a current medication list and medication administration record into one document.

(A) An agency must use the medication list to identify possible ineffective drug therapy or adverse reactions, significant side effects, drug allergies, and contraindications.

(B) An agency must document in the medication administration record or clinical notes any medication that is not administered and the reason it was not administered.

(4) An individual delivering care must report any [Any] adverse reaction [must be reported] to a supervisor and document this [documented] in the client's [client] record on the day of occurrence. If the adverse reaction occurs after regular business hours, the individual delivering care must report the adverse reaction [must be reported] as soon as it is disclosed [to the individual delivering care].

§97.301. Client Records.

(a) In accordance with accepted principles of practice, an agency must establish and maintain a client record system to ensure [assure] that the care and services provided to each client are completely and accurately documented, readily accessible and systematically organized to facilitate the compilation and retrieval of information.

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

(6) A [The] clinical record must be an original, a microfilmed copy, an optical disc imaging system, or a certified copy.

(A) An original record is a [includes manually] signed paper record [records] or an electronically signed computer record [records]. A signed paper record may include a physician's stamped signature if the agency meets the following requirements:

(i) An agency must have on file at the agency a current written authorization letter from the physician whose signature the stamp represents, stating that he is the only person authorized to have the stamp and use it.

(ii) The authorization letter must be dated before a stamped record from the physician was accepted by the agency.

(iii) An agency must obtain a new authorization letter from the physician annually. A physician authorization letter is void one year from the date of the letter.

(iv) The authorization letter must be manually signed by the physician and include a copy of the stamped signature that the physician will use.

(B) Computerized records must meet all requirements of paper records, including protection from unofficial use and retention for the period specified in subsection (b) of this section [paragraph].

(C) An agency must ensure [Systems must assure] that entries regarding the delivery of care or services are not altered without evidence and explanation of such alteration.

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

(9) Each client record must include the following elements as applicable to the scope of services provided by the agency [(as applicable)]:

(A) - (C) (No change.)

(D) clinical and progress notes. Such notes must be written the day service is rendered and incorporated into the client record within 14 working [business] days;

(E) - (P) (No change.)

(b) (No change.)

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

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DIVISION 5. BRANCH OFFICES AND ALTERNATE DELIVERY SITES

40 TAC §97.321, §97.322

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.321. Standards for Branch Offices.

[(a) A parent agency is eligible to apply for a branch office license:]

[(1) if the agency has successfully completed an initial on-site survey; or for an agency with a first renewal or subsequent renewal license, if the agency continues to demonstrate substantial compliance with the statute and this chapter; and]

[(2) if enforcement action against the agency license is not proposed under Subchapter F of this chapter (relating to Enforcement).]

(a) [(b)] A branch office operates as a part of the parent agency and must comply with [all] the same [appropriate] regulations as the parent agency [must meet]. The parent agency [office] is responsible for ensuring that [the compliance of] its branches comply with licensing standards.

(b) [(c)] A branch office providing licensed and certified home health services must comply with the standards for certified agencies in §97.402 of this chapter [title] (relating to Standards Specific to Licensed and Certified Home Health Services).

(c) [(d)] The service area of a branch office must be located within the parent agency's service area.

(1) A branch office must not provide services outside [only within] its licensed [established] service area.

(2) A [The] branch office must maintain adequate staff to provide services and to supervise the provision of services within the service area.

(3) A branch office may expand its service area at any time during the licensure period.

(A) Unless exempted under subparagraph (B) of the paragraph, [to expand its service area,] a branch office must submit to DADS [the Texas Department of Human Services (DHS)] a written request to expand its service area at least [notice] 30 days before [prior to] the expansion. The request must include [that includes]:

(i) revised boundaries of the branch office's original service area;

(ii) the effective date of the expansion; and

(iii) an updated list of management and supervisory personnel (including names), if changes are made.

(B) An agency is exempt [will be exempted] from the 30-day written request [notice] requirement under subparagraph (A) of this paragraph if DADS [DHS] determines an emergency exists that would [adversely] impact client health and safety. An agency must notify DADS [DHS] immediately of a possible emergency. DADS determines [DHS will determine] if an exemption can [will] be granted.

(4) A branch office may reduce its service area at any time during the licensure period by sending DADS [DHS] written notification of the reduction, revised boundaries of the branch office's original service area, and the effective date of the reduction.

(d) [(e)] A parent agency and a branch office providing home health or personal assistance services must meet the following requirements:[.]

(1) The [On-site supervision of the branch office must be conducted at least monthly by the] parent agency administrator or alternate administrator [, administrator's designee], or supervising nurse or alternate supervising nurse must conduct an on-site supervisory visit to the branch office at least monthly. The parent agency may visit the branch office more frequently [designee. More frequent supervision may be required] considering the size of the service area and the scope of services provided by the parent agency. The supervisory visits must be documented and include the date of the visit, the content of the consultation, the individuals in attendance, and the recommendations of the staff.

(2) The original active clinical record must be kept at the branch office.

(3) The parent agency must approve all branch office policies and procedures. This [Such] approval must be documented and filed in the parent and branch offices.

(e) [(f)] DADS issues or renews [DHS will issue or renew] a branch office license for applicants who meet the requirements of this section.

(1) Issuance or renewal of a branch office license is contingent upon compliance with the statute and this chapter by the parent agency and branch office.

(2) DADS [DHS] may take enforcement action against a parent agency license for a branch office's failure to comply with the statute or this chapter[. Enforcement action will be] in accordance with Subchapter F of this chapter (relating to Enforcement).

(3) Revocation, suspension, denial, or surrender of a parent agency license will result in the same revocation, suspension, denial, or surrender of a branch office license for all branch office licenses of the parent agency.

(f) [(g)] A branch office may offer fewer health services or categories than the parent office but may not offer health services or categories that are not also offered by the parent agency.

§97.322. Standards for Alternate Delivery Sites.

[(a) A hospice is eligible to apply for an alternate delivery site license:]

[(1) if the agency has successfully completed an initial on-site survey; or for a hospice agency with a first renewal or subsequent renewal license, if the agency continues to demonstrate substantial compliance with the statute and this chapter; and]

[(2) if enforcement action against the agency is not proposed under Subchapter F of this chapter (relating to Enforcement).]

(a) [(b)] An alternate delivery site [providing hospice services] must comply with §97.403 of this chapter [title] (relating to Standards Specific to Agencies Licensed to Provide Hospice Services).

(b) [(c)] An alternate delivery site must independently meet §97.403(c), (f)(1), and (i) of this chapter [title (relating to Standards Specific to Agencies Licensed to Provide Hospice Services)], and §97.301 of this chapter [title] (relating to Client Records).

(c) [(d)] An alternate delivery site must be established within the parent agency's [hospice's] service area.

(1) An [The] alternate delivery site must not provide services outside [only within] its licensed [established] service area.

(2) An [The] alternate delivery site must maintain adequate staff to provide services and to supervise the provision of services within the service area.

(3) An alternate delivery site may expand its service area at any time during the licensure period.

(A) Unless exempted under subparagraph (B) of this paragraph, [to expand its service area,] an alternate delivery site must submit to DADS [the Texas Department of Human Services (DHS)] a written request to expand its service area at least [notice] 30 days before [prior to] the expansion. The request must include [that includes]:

(i) revised boundaries of the alternate delivery site's original service area;

(ii) the effective date of the expansion; and

(iii) an updated list of management and supervisory personnel (including names), if changes are made.

(B) An agency is exempt [will be exempted] from the 30-day written request [notice] requirement under subparagraph (A) of this paragraph if DADS [DHS] determines that an emergency exists that would impact client health and safety. An agency must notify DADS [DHS] immediately of a possible emergency. DADS determines [DHS will determine] if an exemption can be granted.

(4) An alternate delivery site may reduce its service area at any time during the licensure period by sending DADS [DHS] written notification of the reduction, revised boundaries of the alternate delivery site's original service area, and the effective date of the reduction.

(d) [(e)] A parent agency [hospice] and an alternate delivery site [providing hospice services] must meet the following requirements:[.]

(1) [On-site supervision of the alternate delivery site must be conducted by the parent agency once a month at a minimum. More frequent supervision may be required considering the size of the service area provided by the parent agency.] The parent agency administrator or alternate administrator [, administrator's designee], or supervising nurse or alternate supervising nurse [designee] must conduct an on-site supervisory visit [visits] to the alternate delivery site at least monthly. The parent agency may visit the alternate delivery site more frequently considering the size of the service area provided by the parent agency. The supervisory visits must be documented and include the date of the visit, the content of the consultation, the individuals in attendance, and the recommendations of the staff.

(2) The original active clinical record must be kept at the alternate delivery site [office].

(3) The parent agency must approve all alternate delivery site policies and procedures. This [Such] approval must be documented and filed in the parent and alternate delivery sites.

(e) [(f)] DADS issues or renews [DHS will issue to or renew] an alternate delivery site license for applicants who meet the requirements of this section.

(1) Issuance or renewal of an alternate delivery site [office] license is contingent upon compliance with the statute and this chapter by the parent agency and alternate delivery site.

(2) DADS [DHS] may take enforcement action against a parent agency license for an alternate delivery site's failure to comply with the statute or this chapter[. Enforcement action will be] in accordance with Subchapter F of this chapter (relating to Enforcement).

(3) Revocation, suspension, denial or surrender of a parent agency license will result in the same revocation, suspension, denial or surrender of all alternate delivery site licenses of the parent agency.

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

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SUBCHAPTER E. SURVEYS

40 TAC §97.501, §97.502

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

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The repeal implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.501. Survey Procedures.

§97.502. Complaint Investigation.

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

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SUBCHAPTER E. LICENSURE SURVEYS
DIVISION 1. GENERAL

40 TAC §§97.501, 97.503, 97.505, 97.507, 97.509

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies,

including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The new sections implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.501. Survey Frequency.

(a) At a minimum, DADS:

(1) conducts an initial survey after an agency has notified DADS of its readiness. See §97.521 of this chapter (relating to Requirements for an Initial Survey);

(2) conducts a survey of the agency within 18 months after conducting an initial survey and conducts subsequent surveys at least every 36 months thereafter;

(3) conducts a survey to investigate a complaint regarding the provision of home health, hospice, or personal assistance services that is alleged to have violated this chapter or the statute; and

(4) conducts a survey to investigate a complaint regarding the provision of home health or hospice services that is alleged to have violated federal requirements.

(b) DADS may conduct a survey for the renewal of a license or the issuance of a branch office or alternate delivery site license.

§97.503. Exemption From a Survey.

Except for the investigation of complaints, an agency is exempt from additional surveys by DADS if the agency maintains accreditation status for the applicable services from JCAHO or CHAP.

§97.505. Notice of a Survey.

DADS does not announce or give prior notice to an agency of a survey.

§97.507. Agency Cooperation with a Survey.

(a) By applying for or holding a license, an agency consents to entry and survey by a DADS representative to verify compliance with the statute or this chapter.

(b) If an agency does not cooperate with a survey, DADS may take enforcement action to deny, revoke, or suspend a license.

§97.509. Survey of a Branch Office, Alternate Delivery Site, and Services Provided.

(a) If an agency is applying for or renewing a branch office or alternate delivery site license, a survey covers all locations.

(b) If an agency is applying for a license to provide more than one category of service, a survey covers all provided services of the agency.

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

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DIVISION 2. THE SURVEY PROCESS

40 TAC §§97.521, 97.523, 97.525, 97.527

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The new sections implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.521. Requirements for an Initial Survey.

(a) An agency must admit at least one client and initiate services within six months of receiving an initial license.

(b) An agency is not required to admit a client under each category authorized under a license to be surveyed by DADS.

(c) An agency must submit a written request for an initial survey to the designated survey office at least six months before the expiration date of the initial license, unless an agency is exempt as described in subsection (f) of this section. The written request must include:

(1) the date of admission of the first client; and

(2) the name of the client.

(d) An agency must have the following information available and ready for review by a surveyor upon the surveyor's arrival:

(1) a list of clients who are receiving services or who have received services from the agency for each category of service licensed. The list must comply with the requirements of §97.293 of this chapter (relating to Client List and Services);

(2) the client records for each client admitted during the licensing period before the initial survey;

(3) all agency policies as required by this chapter; and

(4) all personnel records of agency employees.

(e) If an agency fails to meet the requirements of this section, DADS may propose to revoke or suspend an initial license.

(f) An initial survey is not required if an agency receives notice of accreditation from CHAP or JCAHO after the issuance of the initial license.

§97.523. Personnel Requirements for a Survey.

(a) For an initial survey, the administrator or alternate administrator must be present at the entrance conference, available in person

or by telephone during the survey, and present in person at the exit conference.

(b) For a survey other than an initial survey, the administrator or alternate administrator must be available in person or by telephone during the entrance conference and the survey, and must be present in person at the exit conference.

(c) The supervisor must be available in person or by telephone, if necessary, to provide information unique to the duties and functions of the position during the survey. For all licensed categories except personal assistance services, the supervising nurse or alternate supervising nurse may substitute for the supervisor to be available under this subsection.

(d) If a required individual is unavailable during the survey process and is not at the agency when the surveyor arrives, the surveyor makes reasonable attempts to contact the individual.

(e) If a surveyor arrives during regular business hours and the agency is closed, an administrator, alternate administrator, or a designated agency representative must provide the surveyor entry to the agency within two hours after the surveyor's arrival at the agency. The administrator must designate in writing the agency representatives who may grant entry to a surveyor. The agency must comply with notice requirements described in §97.210 of this chapter (relating to Agency Operating Hours).

(f) If the surveyor is unable to contact a required individual or the agency fails to comply with subsection (e) of this section, the surveyor may recommend enforcement action against the agency.

(g) If compliance with this section would cause an interruption in client care being provided by the administrator, the alternate administrator, the supervising nurse, or the alternate supervising nurse, the administrator must contact its backup service provider to ensure continued client care.

§97.525. Survey Procedures.

(a) Before beginning a survey, a surveyor holds an entrance conference with the required agency personnel to explain the purpose of the survey and the survey process and provides the personnel an opportunity to ask questions.

(1) A surveyor:

(A) conducts at least three home visits to determine an agency's compliance with licensing requirements;

(B) reviews any agency records that the surveyor believes are necessary to determine an agency's compliance with licensing requirements; and

(C) evaluates an agency's compliance with each standard.

(2) If a surveyor requests an agency record that is stored at a location other than the survey site, an agency must provide the original record to the surveyor within eight working hours. Failure to comply may result in enforcement action as described in §97.507 of this chapter (relating to Agency Cooperation with a Survey.)

(b) An agency accredited by CHAP or JCAHO must have the documentation of accreditation available at the time of a survey.

(c) An agency must provide the surveyor access to all agency records maintained by or on behalf of an agency.

(d) DADS keeps agency records confidential, except as allowed by Health and Safety Code, §142.009(d).

(e) A surveyor may remove original agency records from an agency only with the consent of the agency as provided in Health and Safety Code, §142.009(e).

(f) An agency must provide copies of agency records upon request by the surveyor.

§97.527. Post-Survey Procedures.

(a) After a survey is completed, the surveyor holds an exit conference with the administrator or alternate administrator to inform the agency of the preliminary findings.

(b) An agency may make an audio recording of the exit conference only if the agency:

(1) records two tapes simultaneously;

(2) allows the surveyor to review the tapes; and

(3) gives the surveyor the tape of the surveyor's choice before leaving the agency.

(c) An agency may make a video recording of the exit conference only if the surveyor agrees to allow it and if the agency:

(1) records two tapes simultaneously;

(2) allows the surveyor to review the tapes; and

(3) gives the surveyor the tape of the surveyor's choice before leaving the agency.

(d) An agency may submit additional written documentation and facts after the exit conference only if the agency describes the additional documentation and facts to the surveyor during the exit conference.

(1) The agency must submit the additional written documentation and facts to the designated survey office within two working days after the end of the exit conference.

(2) If an agency properly submits additional written documentation, the surveyor may add the documentation to the record of the survey.

(e) If DADS identifies additional violations or deficiencies after the exit conference, DADS holds an additional face-to-face exit conference with the agency regarding the additional violations or deficiencies.

(f) DADS provides official written notification of the survey findings to the agency within 10 working days after the exit conference. For the purpose of this section, the "official written notification of the survey findings" means the "preliminary findings of the survey" referenced in Health and Safety Code, §142.009(g).

(g) The official written notification of the survey findings includes a statement of violations and instructions for submitting an acceptable plan of correction, and provides an opportunity for an informal review of deficiencies (IRoD).

(1) If the official written notification of the survey findings declares that an agency is in violation of the statute or this chapter, an agency must follow DADS' instructions included with the statement of violations for submitting an acceptable plan of correction.

(2) An acceptable plan of correction includes the corrective measures and time frame with which the agency must comply to ensure correction of a violation. An agency must correct a violation in accordance with the following time frames:

(A) A Severity Level B violation that results in serious harm to or death of a client or constitutes a serious threat to the health

or safety of a client must be addressed upon receipt of the official written notice of the violations and corrected within two days.

(B) A Severity Level B violation that substantially limits the agency's capacity to provide care must be corrected within seven days after receipt of the official written notice of the violations.

(C) A Severity Level A violation that has or had minor or no health or safety significance must be corrected within 20 days after receipt of the official written notice of the violations.

(D) A violation that is not designated as Severity Level A or Severity Level B must be corrected within 60 days after the date the violation was cited.

(3) An agency must submit an acceptable plan of correction for each violation or deficiency no later than 10 days after its receipt of the official written notification of the survey findings. Failure to meet this requirement may result in an administrative penalty.

(4) If DADS finds the plan of correction unacceptable, DADS gives the agency written notice and provides the agency one additional opportunity to submit an acceptable plan of correction.

(A) An agency must submit a revised plan of correction no later than 15 days after the agency's receipt of DADS' written notice of an unacceptable plan of correction.

(B) If an agency fails to submit an acceptable plan of correction, DADS may recommend enforcement action.

(h) An acceptable plan of correction does not preclude DADS from taking enforcement action against an agency.

(i) If an agency fails to correct each violation or deficiency by the date on the plan of correction, DADS may take enforcement action against the agency. The agency may request a formal hearing as described in §97.601 of this chapter (relating to Enforcement Actions).

(j) An agency must submit a plan of correction in response to an official written notification of survey findings that declares a violation or deficiency even if the agency disagrees with the survey findings.

(k) If an agency disagrees with the survey findings, the agency may request an IRoD and submit additional written information to refute a violation or deficiency to demonstrate compliance in an informal setting.

(1) An IRoD is available for:

(A) a violation or deficiency cited during a visit;

(B) a violation or deficiency that remains uncorrected from a previous visit and is re-cited with no change in findings, as long as the agency has not already had an IRoD for the violation or deficiency from the original visit; and

(C) a violation or deficiency that remains uncorrected from a previous visit and is re-cited with new findings.

(2) To request an IRoD, an agency must submit the form for requesting the IRoD (included in the official written notification of the survey findings), a rebuttal letter, and supporting documentation to DADS.

(A) The original request form must be postmarked within 10 days after the date of receipt of the official written notification of the survey findings and be received at the DADS address listed on the form within 10 days after the date of the postmark.

(B) A copy of the completed request for IRoD form and supporting documentation must also be sent to the designated survey office.

(3) An agency waives its right to an IRoD if the agency fails to submit the required information within the required time frame. The agency may not submit additional information after the 10 days allowed, unless DADS' review staff request additional information for clarification.

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 September 29, 2005.

TRD-200504392
Phoebe Knauer
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

SUBCHAPTER F. ENFORCEMENT

40 TAC §§97.601, 97.602, 97.604

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

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The repeal implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.601. License Denial, Suspension or Revocation.

§97.602. Administrative Penalties.

§97.604. Surrender or Expiration of 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.

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Phoebe Knauer
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Department of Aging and Disability Services
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40 TAC §§97.601 - 97.604

The amendment and new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides DADS with the authority to adopt rules for licensing and regulation of home and community support services agencies.

The amendment and new sections implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.601. Enforcement Actions.

(a) Enforcement actions. DADS may take the following enforcement actions against an agency:

(1) license suspension;

(2) immediate license suspension;

(3) license revocation;

(4) immediate license revocation;

(5) administrative penalties; and

(6) denial of license application.

(b) Denial of license application. DADS may deny a license application for the reasons set out in §97.21 of this chapter (relating to Denial of an Application or a License).

(c) Suspension or revocation.

(1) DADS may suspend or revoke an agency's license if the license holder, the controlling person, the affiliate, the administrator, or the alternate administrator:

(A) fails to comply with this chapter;

(B) fails to comply with the statute;

(C) engages in conduct that violates Occupations Code, Chapter 102 (relating to Solicitation of Patients); or

(D) is convicted of a crime listed in Health and Safety Code, §250.006 (relating to Convictions Barring Employment).

(2) DADS may suspend or revoke an agency's license to provide licensed and certified home health services if the agency fails to maintain its certification qualifying the agency as a certified agency, as referenced in Health and Safety Code, §142.011(c).

(d) Administrative penalties.

(1) DADS may assess an administrative penalty against an agency in accordance with §97.602 of this chapter (relating to Administrative Penalties).

(2) DADS may consider the assessment of past administrative penalties when considering another enforcement action against an agency.

(e) Immediate licensure suspension or revocation. DADS may immediately suspend or revoke an agency's license when the health and safety of a client is threatened.

(1) If DADS issues an order for immediate suspension or revocation of the agency's license, DADS provides immediate notice to the controlling person, administrator, or alternate administrator of the agency by certified mail with return receipt requested or by hand-delivery. The notice includes:

(A) the action taken;

(B) legal grounds for the action;

(C) the procedure governing appeal of the action; and

(D) the effective date of the order.

(2) An order for immediate suspension or revocation goes into effect immediately.

(3) An agency is entitled to a formal administrative hearing not later than seven days after the effective date of the order for immediate suspension or revocation.

(4) The formal administrative hearing is conducted in accordance with the Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC, Chapter 357, Subchapter I.

(f) Opportunity to show compliance.

(1) Before revocation or suspension of an agency's license or denial of an application for the renewal of an agency's license, DADS gives the license holder:

(A) a notice by personal service or by registered or certified mail of the facts or conduct alleged to warrant the proposed action, with a copy sent to the agency; and

(B) an opportunity to show compliance with all requirements of law for the retention of the license by sending DADS' Regulatory Services office a written request. The request must:

(i) be postmarked within 10 days of the date of DADS' notice and be received in DADS' Regulatory Services office within 10 days of the date of the postmark; and

(ii) contain specific documentation refuting DADS' allegations.

(2) DADS limits its review to the documentation submitted by the license holder and information DADS used as the basis for its proposed action. An agency may not attend DADS' meeting to review the opportunity to show compliance. DADS gives a license holder a written affirmation or reversal of the proposed action.

(3) After an opportunity to show compliance, DADS sends a license holder a written notice that:

(A) informs the license holder of DADS' decision; and

(B) provides the agency with an opportunity to appeal DADS' decision through a formal hearing process.

(g) Notice of denial of application for license or renewal of a license, suspension or revocation of license. DADS sends an applicant

or license holder notice by certified mail of DADS' denial of an application for an initial license or renewal of a license, suspension of a license or revocation of a license.

(h) Formal appeal. An applicant or license holder has the right to make a formal appeal after receipt of DADS' notification of denial of an application for an initial license or renewal of a license and suspension or revocation of a license.

(1) An agency must request a formal administrative hearing within 20 days of receipt of DADS' notice of denial of an application for an initial license or renewal of a license, suspension of a license or revocation of a license. To make a formal appeal, the applicant or agency must comply with the formal hearing procedures in 1 TAC, Chapter 357, Subchapter I.

(2) DADS presumes receipt of DADS' notice to occur on the tenth day after the notice is mailed to the last known address unless another date is reflected on the return receipt.

(3) If an agency does not meet the deadline for requesting a formal hearing, the agency has lost its opportunity for a formal hearing, and DADS takes the proposed action.

(4) If an agency fails to appear at a scheduled hearing, DADS takes the proposed action.

(5) A formal administrative hearing is conducted in accordance with Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC, Chapter 357, Subchapter I.

(6) Except for the denial of an application for an initial license, if an agency appeals, the license remains valid until all appeals are final, unless the license expires without a timely application for renewal submitted to DADS.

(7) If an agency appeals, the enforcement action will take effect when all appeals are final and the proposed enforcement action is upheld. If the agency wins the appeal, the proposed action does not happen.

(8) If DADS suspends a license, the suspension remains in effect until DADS determines that the reason for suspension no longer exists. A suspension may last no longer than the term of the license.

(A) DADS conducts a survey of the agency before making a determination to recommend cancellation of a suspension.

(B) If suspension overlaps a renewal date, the suspended license holder must comply with the renewal procedures in this chapter; however, DADS does not renew the license until it determines the reason for suspension no longer exists.

(9) If DADS revokes or does not renew a license and one year has passed following the effective date of revocation or denial of licensure renewal, a person may reapply for a license by complying with the requirements and procedures in this chapter in effect at the time of reapplication. DADS does not issue a license if the reason for revocation or nonrenewal continues to exist.

(i) Agency dissolution. Upon suspension, revocation, or nonrenewal of a license, the license holder must:

(1) return the original license to DADS; and

(2) follow its contingency plan in accordance with §97.291 of this title (relating to Agency Dissolution).

§97.602. Administrative Penalties.

(a) Assessing penalties. DADS may assess an administrative penalty against a licensed agency if the agency:

(1) violates the statute, Chapter 102 of the Occupations Code, or a provision of this chapter for which a penalty may be assessed;

(2) violates Health and Safety Code, §166.004; or

(3) fails to correct a violation in accordance with an approved plan of correction.

(b) Criteria for assessing penalties. DADS uses a schedule of appropriate and graduated penalties established in this subchapter to determine which violations warrant an administrative penalty.

(1) The schedule of appropriate and graduated penalties for each violation is based on the following criteria:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation, and the hazard of the violation to the health or safety of clients;

(B) the history of previous violations by a person or a controlling person with respect to that person;

(C) whether the affected agency identified the violation as part of its internal quality assurance process and made a good faith, substantial effort to correct the violation in a timely manner;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other matters that justice may require.

(2) The schedule of appropriate and graduated penalties established in this section includes Severity Level A violations and Severity Level B violations.

(A) A Severity Level A violation is a minor violation.

(B) A Severity Level B violation is a violation that:

(i) results in serious harm to or death of a client;

(ii) constitutes a serious threat to the health or safety of a client; or

(iii) substantially limits the agency's capacity to provide care.

(c) Penalty range. An administrative penalty may not be less than $100 or more than $1,000 for each violation.

(1) For a Severity Level A violation, the penalty range is $100 - $250.

(2) For a Severity Level B violation that:

(A) results in serious harm to or death of a client, the penalty is $1,000;

(B) constitutes a serious threat to the health or safety of a client, the penalty range is $500 - $1,000; or

(C) substantially limits the agency's capacity to provide care, the penalty range is $500 - $750.

(d) Penalty calculation and assessment.

(1) Each day that a violation occurs before the date of the exit conference is considered one violation.

(2) Each day that a violation occurs after the date of the exit conference constitutes a separate violation.

(3) A violation may be one or more Severity Level A violations, one or more Severity Level B violations, or a combination of

Severity Level A and B violations. If the same survey finding constitutes both a Level A violation and a Level B violation, DADS only assesses the administrative penalty for the Level B violation.

(4) DADS may assess the greater amount of an administrative penalty if an agency violates more than one rule with the same act or failure to act.

(5) DADS may assess an administrative penalty even if an agency corrects the violation within the required time frame if the agency failed to correct the violation from the prior survey, provided the prior survey occurred no more than three years before the subsequent survey.

(6) If an agency fails to correct a violation and the uncorrected violation was cited more than three years before the repeated citation of the same violation, DADS does not assess an administrative penalty.

(e) Schedule of appropriate and graduated penalties.

(1) Severity Level A violations. DADS may assess a separate Level A administrative penalty for a violation of any of the rules listed in the following table.
Figure: 40 TAC §97.602(e)(1)

(2) Severity Level B violations. DADS may assess a separate Level B administrative penalty for a violation of any of the rules listed in the following table.
Figure: 40 TAC §97.602(e)(2)

(f) Opportunity to correct. DADS gives an agency an opportunity to correct a violation in accordance with the time frames established in §97.527(g)(2) of this chapter (relating to Post-Survey Procedures).

(g) Proposal of administrative penalties.

(1) If DADS assesses an administrative penalty, DADS provides a written notice of violation letter to an agency. The notice includes:

(A) a brief summary of the violation;

(B) the amount of the proposed penalty; and

(C) a statement of the agency's right to a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(2) An agency may accept DADS' determination not later than 20 days after the date on which the agency receives the notice of violation letter, including the proposed penalty, or may make a written request for a formal administrative hearing on the determination.

(A) If an agency notified of a violation accepts DADS' determination, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(B) If an agency notified of a violation does not accept DADS' determination, the agency must submit to DADS a written request for a formal administrative hearing on the determination and must not pay the proposed penalty. Remittance of the penalty to DADS is deemed acceptance by the agency of DADS' determination, is final, and waives the agency's right to a formal administrative hearing.

(C) If an agency notified of a violation fails to respond to the notice of violation letter within the required time frame, the DADS commissioner or the DADS commissioner's designee issues an order approving the determination and ordering that the agency pay the proposed penalty.

(D) If an agency requests a formal administrative hearing, the hearing is held in accordance with the statute, §§142.0172 - 142.0173, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I .

(h) Other enforcement actions. DADS may propose other enforcement actions in addition to assessing an administrative penalty.

§97.603. Court Action.

(a) If a person operates an agency without a license issued under this chapter [~~the Act~~], the person is liable for a civil penalty of not less than $1,000 or more than $2,500 for each day of violation.

(b) If a person violates the licensing requirements of the statute, DADS [~~the Texas Department of Human Services~~] may petition the district court to restrain the person from continuing the violation.

§97.604. Surrender or Expiration of a License.

(a) After a survey in which a surveyor cited deficiencies, an agency may surrender its license or allow its license to expire to avoid enforcement action by DADS.

(b) If an agency surrenders its license before the expiration date, the agency must return its original license and provide the following information to DADS:

(1) the effective date of closure;

(2) the location of client records;

(3) the name and address of the client record custodian;

(4) a statement signed and dated by the license holder agreeing to the surrender of the license; and

(5) the disposition of active clients at the time of closure.

(c) If an agency surrenders its license or allows its license to expire, DADS denies an application for license by the agency, its license holder, and its affiliate for one year after the date of the surrender or expiration.

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 September 29, 2005.

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Phoebe Knauer
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 6. STATE INFRASTRUCTURE BANK

The Texas Department of Transportation (department) proposes amendments to §§6.1 - 6.3, and new §6.5, concerning general provisions, amendments to §6.12, concerning eligible projects, and §6.42, concerning performance of work.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

House Bill 2134, 79th Texas Legislature, Regular Session, 2005, amended Transportation Code, Chapter 222, Subchapter D, relating to the State Infrastructure Bank (SIB). Those amendments clarify in state law that SIB accounts and loans may be funded with state dollars as well as federal dollars, as allowed under federal law. Those amendments further clarify that the Texas Transportation Commission (commission) will administer the SIB program in accordance with applicable state and federal law. The proposed revisions to Chapter 6, implement the statutory amendments.

Section 6.1, Purpose, is amended to clarify that SIB loans may be used for eligible transportation facilities on or off the state highway system.

Section 6.2, Definitions, is amended to add new §6.2(14) to define Transportation Code, Chapter 222, Subchapter D, §222.071 et.seq., relating to a State Infrastructure Bank, as the State Act; to renumber §6.2(14) and (15) as §6.2(15) and (16), respectively; to clarify that new §6.2(15) includes capital expenditures for commuter rail; and to update new §6.2(16) to current terminology.

Section 6.3, General Policies, is amended to clarify that state funds may be deposited into the SIB by order of the commission.

New §6.5, Separate Subaccounts, is added to Subchapter A to clarify that the commission may create subaccounts in the SIB that are capitalized solely with state funds, and that such subaccounts by their nature are not subject to the federal law relating to state infrastructure banks.

Section 6.12, Eligible Projects, is amended to add the statutory requirement that financial assistance from the SIB is limited to eligible projects that are consistent with the transportation plan developed by the metropolitan planning organization.

Section 6.42, Performance of Work, is amended to clarify that the commission will administer the SIB program in accordance with applicable state and federal law.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new section 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 and new section. There are no anticipated economic costs for persons required to comply with the amendments and new section as proposed.

Mr. Bass, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments or new section.

PUBLIC BENEFIT

Mr. Bass has also determined that for each year of the first five years the amendments and new section are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new section will be the creation of a state funded SIB program for eligible transportation projects that can be applied to on-system and off-system highway projects and transit projects. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new section may be submitted to James Bass, Chief Financial Officer, Finance Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2005.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §§6.1 - 6.3, 6.5

STATUTORY AUTHORITY:

The amendments and new section 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, §222.077, which requires the commission to adopt rules governing the SIB.

CROSS REFERENCE TO STATUTE: Transportation Code, §§222.072, 222.073, 222.074, 222.076, and 222.077.

§6.1. Purpose.

(a) Transportation Code, Chapter 222, Subchapter D, establishes a state infrastructure bank as an account within the state highway fund, to be administered by the Texas Transportation Commission. The commission shall use money deposited in the bank to:

(1) encourage public and private investment in transportation facilities both within and outside of the state highway system, including facilities that contribute to the multimodal and intermodal transportation capabilities of the state; and

(2) (No change.)

(b) (No change.)

§6.2. Definitions.

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

(1) - (13) (No change.)

(14) State Act--Transportation Code, Chapter 222, Subchapter D, §222.071 et.seq., relating to a State Infrastructure Bank.

(15) [~~(14)~~] Transit project--Capital expenditures[~~, excluding expenditures for commuter rail,~~] eligible for funding under Title 49, United States Code, §5307, §5309, and §5311.

(16) [~~(15)~~] Unified Transportation Program, Construct [~~Priority 1~~] and Develop [~~Priority 2~~] designations--That group of transportation programs for which the commission has authorized the department to prepare or complete plans, specifications, and estimates, or acquire right-of-way, or adjust utilities, or be let to contract.

§6.3. General Policies.

(a) - (f) (No change.)

(g) The Federal Highway Administration, the Federal Transit Administration, and the Comptroller General of the United States, each if applicable, and the Texas State Auditor's Office, and the department, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the applicant which are pertinent to any agreement, in order to make audits, examinations, excerpts, and transcripts.

(h) Federal funds received by the state under the federal act, matching state funds in an amount required by that act, proceeds from

bonds issued under the state act, secondary funds, other state funds deposited into the bank by order of the commission, and other money received by the state that is eligible for deposit in the bank, may be deposited into the bank.

§6.5. Separate Subaccounts.

(a) The bank shall consist of at least two separate subaccounts, a highway subaccount and a transit subaccount.

(b) In addition to the subaccounts under subsection (a) of this section, the commission may create one or more subaccounts that are capitalized with state funds only. Subaccounts capitalized with state funds only are not subject to the federal act.

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

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

SUBCHAPTER B. ELIGIBILITY

43 TAC §6.12

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, §222.077, which requires the commission to adopt rules governing the SIB.

CROSS REFERENCE TO STATUTE: Transportation Code, §§222.072, 222.073, 222.074, 222.076, and 222.077.

§6.12. Eligible Projects.

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

(c) Financial assistance to a public or private entity shall be limited, as applicable, to an eligible project that is consistent with the transportation plan developed by the metropolitan planning organization.

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

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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SUBCHAPTER E. FINANCIAL ASSISTANCE AGREEMENTS

43 TAC §6.42

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, §222.077, which requires the commission to adopt rules governing the SIB.

CROSS REFERENCE TO STATUTE: Transportation Code, §§222.072, 222.073, 222.074, 222.076, and 222.077.

§6.42. Performance of Work.

(a) Work performed by the department. The department may, in its discretion and consistent with state law, provide all or part of the work connected with the project in the department's normal course of business. For work performed by the department, the following provisions will apply.

(1) The department will account for all costs of the project in the normal course of business in accordance with applicable law [~~as it does for all federal-aid eligible projects~~].

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

(4) The applicant shall provide the department, and if applicable, the Federal Highway Administration, and the Federal Transit Administration, or their authorized representatives as applicable, with right of entry or access to all properties or locations necessary to perform activities required to execute the work, inspect the work or aid otherwise in the prompt pursuit of the work.

(b) Work performed by applicant. The department may, in its discretion and consistent with state law, provide that the applicant conduct all or part of the work connected with the project. For work performed by the applicant, the following provisions apply.

(1) The applicant shall comply with applicable requirements of the federal act, Title 23, United States Code, Title 49, United States Code, other applicable state and federal law, and all terms and conditions of any agreements. Where approval or concurrence of the Federal Highway Administration, the Federal Transit Administration, or other federal agency is required, the applicant shall seek such action through the department. The applicant shall reimburse the department for any loss of federal funds to the department resulting from the applicant's failure to comply.

(2) - (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.

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

CHAPTER 7. RAIL FACILITIES

The Texas Department of Transportation (department) proposes: new Subchapter A, General Provisions, new §7.1, concerning Definitions; Subchapter B, Contracts, new §7.10, Definitions, new §7.12, Construction and Maintenance Contracts, and new §7.13 Leasing of Rail Facilities; new Subchapter C, Abandoned Rail, new §7.20, Definitions, new §7.21, Abandonment of Rail Line by Rural Rail Transportation District, and new §7.22, Acquisition of Abandoned Rail Facilities.

EXPLANATION OF PROPOSED NEW SECTIONS

House Bill 3588, 78th Legislature, Regular Session, 2003, and House Bill 2702, 79th Legislature, Regular Session, 2005, broadened the department's responsibilities concerning rail facilities. The enactment of these bills requires the adoption of new rules concerning rail facilities. Due to the growing department responsibilities in this area and the growing number of administrative rules the department will be required to promulgate, the department is creating a new Chapter in Title 43 of the Texas Administrative Code entitled Rail Facilities.

Existing rules concerning rail in Chapter 15, Transportation Planning and Programming, are being simultaneously repealed. This rulemaking moves those rules, without substantive change, to the new Chapter 7, Rail Facilities.

New §7.1, Definitions, in new Subchapter A, General Provisions, defines for purposes of the new Chapter 7, Texas Department of Transportation and the Texas Transportation Commission.

New §7.10, in Subchapter B, Contracts, defines terms used in the subchapter. These definitions are moved from §15.141 and §15.151.

New §7.12, Construction and Maintenance Contracts, in Subchapter B, Contracts, is moved from current §15.154.

New §7.13, Leasing of Rail Facilities, in Subchapter B, Contracts, is moved from current §15.155.

New §7.20, Definitions, in new Subchapter C, Abandoned Rail, defines terms used in the new subchapter. These definitions are moved from §15.141 and §15.151.

New §7.21, Abandonment of Rail Line by Rural Rail Transportation District, is moved from §§15.140, 15.142, 15.143, 15.144, and 15.145.

New §7.22, Acquisition of Abandoned Rail Facilities, is moved from §15.152 and §15.153.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Jim Randall, P.E., Director, Transportation Planning and Programming Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT

Mr. Randall 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 new sections will be the consolidation of department rules concerning rail facilities under one chapter of Title 43 of the Texas Administration Code. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new sections may be submitted to Jim Randall, P.E., Director, Transportation Planning and Programming 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 November 14, 2005.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §7.1

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Texas Civil Statutes, Article 6550c, §5(r), which requires the commission to adopt rules governing the commission's approval of the abandonment of a rural rail transportation district's rail line with respect to which state funds have been loaned or granted, and Transportation Code, §91.003, which authorizes the commission to adopt rule necessary to implement Transportation Code, Chapter 91, concerning Texas Department of Transportation rail facilities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Texas Civil Statutes, Article 6550c, §5(r).

§7.1. Definitions.

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

(1) Commission--The Texas Transportation Commission.

(2) Department--The Texas Department of Transportation.

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 September 30, 2005.

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Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

SUBCHAPTER B. CONTRACTS

43 TAC §§7.10, 7.12, 7.13

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Texas Civil Statutes, Article 6550c, §5(r), which requires the commission to adopt rules governing the commission's approval of the abandonment of a rural rail transportation district's rail line with

respect to which state funds have been loaned or granted, and Transportation Code, §91.003, which authorizes the commission to adopt rule necessary to implement Transportation Code, Chapter 91, concerning Texas Department of Transportation rail facilities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Texas Civil Statutes, Article 6550c, §5(r).

§7.10. Definitions.

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

(1) Abandoned rail facilities--Rail facilities for which:

(A) a notice of intent to abandon or discontinue service has been filed with the Surface Transportation Board under 49 C.F.R. §1152.20;

(B) an application for abandonment or discontinuance of service has been filed with the Surface Transportation Board under 49 C.F.R. Part 1152; or

(C) abandonment or discontinuance of service has been authorized by the Surface Transportation Board.

(2) Commission--The Texas Transportation Commission.

(3) Department--The Texas Department of Transportation.

(4) Director--The director of the department's Transportation Planning and Programming Division.

(5) District--A rural rail transportation district created under Texas Civil Statutes, Article 6550c.

(6) Executive Director--The executive director of the department or the executive director's designee not below the level of division director.

(7) Federal application--An application for abandonment of a rail line filed with the Surface Transportation Board under 49 C.F.R. Part 1152, Subpart C.

(8) Notice--The notice of intent to file an abandonment application described in 49 C.F.R. §1152.20.

(9) Public entity--A governmental entity, including a political subdivision of this state, that is authorized by law to operate rail facilities.

(10) Rail facility--Real or personal property, or any interest in that property, that is determined to be necessary or convenient for the provision of a freight or passenger rail facility or system, including commuter rail, intercity rail, and high-speed rail.

(11) Service performed on the rail line--The number of trains operated on the line and their frequency, and the total tonnage and carloads on the line.

(12) State funds--Funds provided by this state or an agency of this state for the purpose of acquiring or operating a rail line.

§7.12. Construction and Maintenance Contracts.

(a) Transportation Code, §91.051, provides that except for a contract entered into under §§91.052, 91.054 or 91.102, a contract made by the department for the construction, maintenance, or operation of a rail facility must be let by a competitive bidding procedure in which the contract is awarded to the lowest responsible bidder who complies with the department's requirements.

(b) The department shall comply with the policies and procedures prescribed in Chapter 9, Subchapter B of this title (relating to Highway Improvement Contracts) in the qualification of bidders, issuance of proposals and receipt of bids, and award and execution of a contract for the construction or maintenance of a rail facility.

(c) The name and address of the individual to whom bids shall be submitted will be provided when a project is advertised. That individual will be responsible for opening and reading bids in accordance with the policies and procedures in §9.15 of this title (relating to Acceptance, Rejection, and Reading of Proposals).

(d) Bidder responsibility requirements shall be provided by the department with the proposal form issued for a project.

(e) A construction or maintenance contract may provide for partial payments and retainage in the amounts provided in the contract.

(f) Architectural, engineering, or surveying services that are needed for the construction or maintenance of a rail facility shall be acquired in accordance with the requirements of Government Code, Chapter 2254, and Chapter 9, Subchapter C of this title (relating to Contracting for Architectural, Engineering, and Surveying Services), except that the administrative qualification requirements of §9.42 of this title (relating to Administrative Qualification) shall not apply if the department does not have a precertification category for the work to be performed.

§7.13. Leasing of Rail Facilities.

(a) Transportation Code, §91.102, authorizes the department to lease all or part of a rail facility or system to a rail operator and to contract with a rail operator for the use or operation of all or part of a rail facility or system. Transportation Code, §91.052, authorizes the department to enter into an agreement with a public entity, including a political subdivision of this state, to permit the entity, independently or jointly with the department, to acquire, construct, maintain, or operate a rail facility or system.

(b) The department may lease a rail facility acquired or constructed by the department to a public entity. The public entity shall comply with all applicable laws when contracting for the operation of the rail facility. The lease agreement shall provide for the department's monitoring of the rail operator's service and performance.

(c) The department will use a competitive process to obtain private rail operators for rail facilities acquired or constructed by the department. The department will publish a notice in the *Texas Register* and in a newspaper of general circulation in the area in which the rail facility is located, requesting proposals to lease and operate a department rail facility.

(d) In evaluating proposals submitted in response to a request under subsection (c) of this section, the department will consider the:

(1) qualifications and capability of the proposer to operate the rail facility;

(2) proposer's experience in constructing and maintaining rail facilities;

(3) financial capability of the proposer to operate and maintain the rail facility;

(4) relative effectiveness of the proposer's management team and staff;

(5) extent to which the proposal minimizes the department's financial obligations in acquiring or maintaining the rail facility;

(6) proposer's plan for maintaining and improving equipment, trackwork, and right of way, including the planned schedule for carrying out the maintenance and improvements and planned funding sources; and

(7) proposer's planned operating rules and procedures for servicing markets served by the rail facility, including plans and proposed schedules for improving service and adding additional markets.

(e) The department will rank all proposals submitted in response to a request under subsection (c) of this section using the criteria set out in the request for proposals. The criteria will, at a minimum, include the factors listed in subsection (d) of this section. The department will negotiate a lease agreement with the highest ranked proposer.

(f) If an agreement satisfactory to the department cannot be negotiated with the proposer, the department will formally end negotiations with that proposer. The department may reject all proposals or proceed to the next highest ranked proposal and attempt to negotiate an agreement with that proposer.

(g) The executive director will submit to the commission a summary of the final terms of a lease agreement successfully negotiated with a public or private entity under this section. The commission may authorize the executive director to execute the agreement if it finds that the agreement is in the best interest of the state and furthers state, regional, and local transportation plans, programs, policies, and goals.

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

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Richard D. Monroe
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SUBCHAPTER C. ABANDONED RAIL

43 TAC §§7.20 - 7.22

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Texas Civil Statutes, Article 6550c, §5(r), which requires the commission to adopt rules governing the commission's approval of the abandonment of a rural rail transportation district's rail line with respect to which state funds have been loaned or granted, and Transportation Code, §91.003, which authorizes the commission to adopt rule necessary to implement Transportation Code, Chapter 91, concerning Texas Department of Transportation rail facilities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Texas Civil Statutes, Article 6550c, §5(r).

§7.20. Definitions.

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

(1) Abandoned rail facilities--Rail facilities for which:

(A) a notice of intent to abandon or discontinue service has been filed with the Surface Transportation Board under 49 C.F.R. §1152.20;

(B) an application for abandonment or discontinuance of service has been filed with the Surface Transportation Board under 49 C.F.R. Part 1152; or

(C) abandonment or discontinuance of service has been authorized by the Surface Transportation Board.

(2) Commission--The Texas Transportation Commission.

(3) Department--The Texas Department of Transportation.

(4) Director--The director of the department's Transportation Planning and Programming Division.

(5) District--A rural rail transportation district created under Texas Civil Statutes, Article 6550c.

(6) Federal application--An application for abandonment of a rail line filed with the Surface Transportation Board under 49 C.F.R. Part 1152, Subpart C.

(7) Notice--The notice of intent to file an abandonment application described in 49 C.F.R. §1152.20.

(8) Rail facility--Real or personal property, or any interest in that property, that is determined to be necessary or convenient for the provision of a freight or passenger rail facility or system, including commuter rail, intercity rail, and high-speed rail.

(9) Service performed on the rail line--The number of trains operated on the line and their frequency, and the total tonnage and carloads on the line.

(10) State funds--Funds provided by this state or an agency of this state for the purpose of acquiring or operating a rail line.

§7.21. Abandonment of Rail Line by Rural Rail Transportation District.

(a) Purpose. Texas Civil Statutes, Article 6550c, §5(r) provides that a rural rail transportation district created under that article may not abandon a rail line of the district with respect to which state funds have been loaned or granted unless the abandonment is approved by the Texas Transportation Commission as being consistent with the policies of that article. This section prescribes the policies and procedures by which a rural rail transportation district may apply for and obtain approval to abandon a rail line of the district.

(b) Application.

(1) To request approval of the abandonment of a segment of rail line with respect to which state funds have been loaned or granted, a district shall submit an application to the director.

(2) An application shall be submitted no later than 45 days after the filing of a notice under 49 C.F.R. §1152.20 and shall include a copy of:

(A) documentation under which the district obtained state funds for the rail line;

(B) the notice relating to the rail line;

(C) the federal application relating to the rail line; and

(D) documentation evidencing compliance with the requirements of 49 C.F.R. §1152.20.

(c) Public Hearing.

(1) If the department finds that the application meets the requirements of subsection (b) of this section, it will notify the district of its findings and will conduct one or more public hearings to receive public comment on the proposed abandonment.

(2) The department will hold at least one hearing within at least one of the counties of the district.

(3) The department will file a notice of each hearing with the Secretary of the State for publication in the *Texas Register*.

(4) The district shall advertise each hearing in accordance with an outreach plan developed in consultation with the department.

(d) Approval. In approving a request to abandon a segment of rail line, the commission will consider:

(1) service performed on the line in the two years preceding the date of the notice;

(2) comments or other evidence of support of or opposition to the proposed abandonment received from interested parties;

(3) alternate sources of transportation services available, including alternate sources of rail transportation service;

(4) impact of the proposed abandonment on the operation of the state transportation system;

(5) impact of the proposed abandonment on communities served by the rail line; and

(6) viability of the rail line for continued rail transportation service.

(e) Limitation. Abandonment of a rail line is subject to Surface Transportation Board permission pursuant to federal law.

§7.22. Acquisition of Abandoned Rail Facilities.

(a) Purpose. Transportation Code, Chapter 91, authorizes the department to acquire abandoned rail facilities. In establishing criteria for the department's acquisition of abandoned rail facilities, the commission is required to consider the local and regional economic benefit realized from the disbursement of funds in comparison to the amount of the disbursement. This section prescribes policies and procedures for the department's acquisition of abandoned rail facilities.

(b) Public involvement.

(1) On receipt of a notice of intent to abandon or discontinue service, the department shall coordinate with the governing body of any municipality, county, or district in which all or a segment of the rail facility is located to determine whether:

(A) the department should acquire the rail facility to which the notice relates; or

(B) any other actions should be taken to provide for continued rail transportation service.

(2) The department shall request that a municipality, county, or district in which all or a segment of the rail facility is located provide documentation concerning the local and regional economic impact of an abandonment or discontinuance of service.

(3) If the department determines that there is a need to preserve the rail facility for continued rail service, or to preserve the corridor for another public-use condition under 49 C.F.R. §1152.28, it will notify the municipalities, counties, or districts in which all or a segment of the rail facility is located, and will conduct one or more public hearings to receive public comment on the proposed acquisition.

(4) In making a determination under subsection (c) of this section, the department will consider:

(A) information contained in the notice of intent to abandon or discontinue service and any application for abandonment or discontinuance of service filed with the Surface Transportation Board with respect to that rail facility under 49 C.F.R. Part 1152, including the extent of any service performed on the rail line; and

(B) information provided by a municipality, county, or district concerning the economic impact of an abandonment or discontinuance of service.

(5) The department will hold at least one public hearing within at least one of the counties in which the rail facility is located and will file a notice of each hearing with the Secretary of the State for publication in the *Texas Register*.

(c) Criteria. In approving the acquisition of an abandoned rail facility, the commission will consider:

(1) service performed on the rail line in the two years preceding the date of the notice of intent to abandon or discontinue service;

(2) comments or other evidence in support of or opposition to the proposed abandonment or discontinuance of service received from interested parties;

(3) alternate sources of transportation services available, including alternate sources of rail transportation service;

(4) impact of the proposed abandonment or discontinuance of service on the operation of the state transportation system;

(5) local and regional economic impact of the abandonment or discontinuance of service;

(6) viability of the rail line for continued rail transportation service; and

(7) the extent to which the monetary value of the economic benefits attributable to the acquisition exceed the amount of funds disbursed by the department to acquire the rail facility.

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 September 30, 2005.

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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SUBCHAPTER D. RAIL SAFETY

43 TAC §§7.30 - 7.42

The Texas Department of Transportation (department) proposes Title 43, Chapter 7, new Subchapter D, §§7.30 - 7.42, concerning rail safety.

EXPLANATION OF PROPOSED SECTIONS

House Bill 2702, 79th Legislature, Regular Session, 2005, transferred all powers and duties of the Railroad Commission that relate primarily to railroads and the regulation of railroads, to the department effective October 1, 2005. Under the new law the department is authorized to perform any act and issue any rules and orders as permitted by the Federal Railroad Safety Act of 1970 (49 U.S.C. 20101 et seq.). The department proposes the adoption of rules concerning railroad safety in order to implement the law. In a separate proposal, the department is proposing the repeal of the Railroad Commission's rules on rail safety. The proposed rules generally follow the rules of the Railroad Commission, but identify the department as the regulatory entity. The proposed rules also contain changes to organization and wording that are meant to make the rules easier to read. For example, the department has added headings to subsections of some rules. Other changes, as compared to the rules of the Railroad Commission, are described later in this preamble. When this preamble refers to the rules of the Railroad Commission it means that agency's rail safety rules that the department is proposing for repeal in a simultaneous rule proposal.

The department does not propose rules similar to all of the Railroad Commission's rules. There is no proposed rule similar to: §5.101 (concerning statement of philosophy), §5.105 (concerning statement of goals), §5.110 (concerning statement of objectives or policies), and §5.115 (concerning criteria for screening and ranking alternatives to abandonment). The Railroad Commission rules, while in a subchapter concerning rail safety, related to rail planning. If federal funds become available, the department believes it could qualify for federal assistance for local rail service under 49 C.F.R. part 266 by showing it has the required state rail plan. The department does not believe these rules are necessary for that purpose. Finally, the department proposes no similar rule entitled "severability clause" because it is not needed.

New §7.30, Definitions, defines for purposes of the subchapter, division director, FRA, and railroad. The definition of railroad is the same as in the Federal Railroad Safety Act.

New §7.31, Safety Requirements, specifies the applicable railroad safety requirements. Section 7.31(a) specifies that any person, association, private corporation, public corporation, or any other entity, that is the owner or operator of a railroad is responsible for compliance with the rules in the subchapter. Section 7.31(b) sets forth the applicable laws, and federal regulations adopted by reference. The list of adopted regulations is the same as those in the rules of the Railroad Commission, plus six additional federal areas have been added to update the list.

New §7.32, Filing Requirements, concerns the filing of contact information for a railroad's principal operating officer and railroad dispatcher. This will provide the department with basic information about how to contact a railroad in an emergency. The remainder of the requirements are the same as those in the rules of the Railroad Commission, with the exception that the information shall be filed only when the department requests it. Inspectors desire the most up to date information when they prepare to conduct an inspection, and railroads routinely provide the information upon request to them.

New §7.33, Reports of Accidents/Incidents, concerns the requirement to report accidents and incidents. The rule adopts by reference 49 C.F.R. §225.9, so that when a railroad gives a telephonic report to the National Response Center the railroad shall also give a telephonic report to the department in the same manner and following the requirements. The rule also includes the accidents/incidents that must be reported under the rules of the Railroad Commission. Concerning written reports, the requirements are the same as in the rules of the Railroad Commission, with the exception that the information shall be filed only when the department requests it. Inspectors desire the most up to date information and railroads routinely provide the information upon request to them.

New §7.34, Hazardous Materials--Telephonic Reports of Incidents, concerns the requirements to report accidents and incidents concerning hazardous materials. The rule adopts by reference 49 C.F.R. §171.15, so that when a railroad gives a telephonic report to the National Response Center the railroad shall also give a telephonic report to the department in the same manner and following the same requirements. Adopting the federal rule will ensure the department is aware of the incidents that are significant. Inspectors found that the rules of the Railroad Commission, which required a report when an incident "involved" a hazardous material, would lead to railroads reporting incidents that had only a tangential relation to hazardous materials issues.

New §7.35, Hazardous Materials--Written Reports, concerns the reporting of certain hazardous materials information to the department regarding the transportation of hazardous materials. The requirements are the same as those in the rules of the Railroad Commission, with the exception that the proposed rules do not contain requirements to report car classification and peak density season. Those requirements are not in Texas Civil Statutes, Article 6419c, and are not needed. Also, the department deleted a subsection concerning obsolete effective dates. New §7.35(g) contains a reference to the department's procedure for processing a request for variance. The proposed rule substitutes a new, more specific, standard by which to judge a request for variance. Under the proposed rule a request for variance may be granted, provided the department will continue to receive information concerning the transportation of hazardous materials needed by local emergency planning agencies and needed to efficiently allocate the department's inspection resources. This standard will ensure the objective of the rule will be obtained even if a variance is granted.

New §7.36, Clearances of Structures Over and Alongside Railway Tracks, specifies the minimum required clearances between the track and various specified objects. With the exception of grammatical changes, the requirements are the same as those in the rules of the Railroad Commission.

New §7.37, Visual Obstruction at Public Grade Crossing, specifies requirements to maintain a clear line-of-site adequate to protect vehicle occupants when crossing an unprotected grade crossing. The new rule contains an exemption for permanent buildings that existed at the time of the effective date of the rule. To make the "effective date" remain unchanged, the department has added the date June 26, 1986, which was the effective date of the Railroad Commission's original version of the rule (11 TexReg 2741). Similar to the rules of the Railroad Commission, the proposed rule allows for the granting of a variance. The proposed rule adds a reference to the department's procedure for processing a request for variance, which is discussed below. The proposed rule also substitutes a new, more specific, standard by which to judge a request for variance. The standard, that a request for variance may be granted provided there remains a clear line-of-site adequate to provide for the safe passage of vehicles,

ensures the objective of the rule will be obtained even if a variance is granted.

New §7.38, Wayside Detector Map, List, or Chart, concerns the reporting of certain wayside detector information to the department. The requirements are the same as those in the rules of the Railroad Commission, with the exception that the information shall be filed only when the department requests it. Inspectors desire the most up to date information when they prepare to conduct an inspection, and railroads routinely provide the information upon request to them.

New §7.39, Right to Inspect Railroad Property, concerns the right of department personnel to enter the property of a railroad. It is essential for department personnel to be able to enter the property of a railroad for purposes of investigations, surveillance, and inspection of records, in order to carry out the department's powers and duties related to railroad safety. The requirements are the same as those in the rules of the Railroad Commission.

New §7.40, Enforcement of Safety Requirements, concerns the enforcement of violations of Subchapter D, whether in a federal enforcement action or in a state enforcement action. The requirements are the same as those in the rules of the Railroad Commission.

New §7.41, Rail Safety Program Fee, concerns the department's calculation and collection of the fees authorized under Texas Civil Statutes, Article 6448a, to administer the department's rail safety program. The requirements are the same as those in the rules of the Railroad Commission. However, the proposed rule does not include the deposit of fees to the general revenue fund, because it is not needed. In new §7.41(i), the department proposes a new procedure by which a railroad may request an administrative review (described in new §7.42) of the department staff's calculation of the annual fee.

New §7.42, Administrative Review. The department proposes new §7.42 to allow a railroad, in specified circumstances, to apply for administrative review of a decision under Subchapter D. Proposed §7.35 (concerning Hazardous Materials--Written Reports), and §7.37 (concerning Visual Obstructions at Public Grade Crossings), state that a railroad may apply for a variance from the requirements of those rules according to the procedure in this section. The Railroad Commission also allowed for the granting of variances to the requirements of its rules. The department proposes to add another instance in the rules when a railroad may request administrative review. Proposed §7.41 (concerning Rail Safety Program Fee) authorizes administrative review of the department's calculation of the annual fee. The department proposes to adopt a procedure to process the requests. The executive director, or his designee not below division director, shall make the decision on an application. Section 7.42(c) specifies the administrative review is not a contested case hearing (under the Administrative Procedure Act, Government Code, Chapter 2001) and not subject to appeal because no statute grants such rights.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections. There are no anticipated economic costs for persons required to comply with the new sections as proposed.

The proposed rules will implement the legislature's transfer of the railroad safety program from the Railroad Commission to the department. The law: (1) transfers to the department the employees of the Railroad Commission that work primarily on railroad safety; and (2) gives the department the authority to collect rail safety program fees but does not change the method of calculating the amount of fees. The proposed rules will continue the state's railroad safety program in its current form.

James L. Randall, P.E., Director, Transportation Planning and Programming, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT

Mr. Randall has also determined that for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be the consolidation of the state's oversight of railroads into one state agency. The department already has authority to make statewide transportation plans, including rail plans, and to own and operate rail facilities. The state will benefit from the consolidation of this expertise, including rail safety, into one agency. The economic cost to railroads regulated under the proposed rules will not be significant. The proposed rules primarily adopt by reference federal railroad safety standards that a railroad must already comply with. The proposed rules also implement the transfer of the state's railroad safety program from one state agency to another, which should not in itself have an economic impact on railroads. There will be no adverse economic effect on small businesses.

TAKINGS IMPACT ASSESSMENT

The department has prepared an analysis of the applicability of the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007, and concluded the rulemaking is within an exception to the applicability of the act.

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 October 21, 2005, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:00 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 Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed new sections may be submitted to James L. Randall, P.E., Director, Transportation Planning and Programming, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2005.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Texas Civil Statutes, Articles 6445 and 6448a, which provide the department with the authority to adopt regulations and rules to perform its duties under those articles.

CROSS REFERENCE TO STATUTE

Texas Civil Statutes, Articles 6419c, 6445, 6446, 6448a, 6448b, 6464, 6492a, 6506, 6507, and 6519.

§7.30. Definitions.

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

(1) Division director--the director of the department's Transportation Planning and Programming Division.

(2) FRA--The Federal Railroad Administration.

(3) Railroad--any form of nonhighway ground transportation that runs on rails or electromagnetic guideways.

(A) Railroad includes:

(i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area; and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads;

(B) Railroad does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

§7.31. Safety Requirements.

(a) Applicability. A person, association, private corporation, public corporation, or any other entity that owns or operates a railroad shall comply with the requirements of this subchapter.

(b) Governing statutes. Railroads operating within the state of Texas shall comply with the safety requirements contained in or adopted under the following statutes:

(1) 49 United States Code, Subtitle III, §§5101, et seq.;

(2) 49 United States Code, Subtitle V, §§20101, et seq.;

(3) Texas Civil Statutes, Article 6448a; and

(4) Texas Civil Statutes, Article 6492a.

(c) Federal regulations adopted by reference. The following federal railroad safety requirements, as they exist on the effective date of this rule, are adopted by the department as the minimum railroad safety requirements, and all railroads operating within the state of Texas shall comply with them:

(1) transportation workplace drug testing programs, codified at 49 Code of Federal Regulations, Part 40;

(2) hazardous materials regulations, codified at 49 Code of Federal Regulations, Parts 171-179;

(3) track safety standards, codified at 49 Code of Federal Regulations, Part 213;

(4) bridge-worker safety standards, codified at 49 Code of Federal Regulations, Part 214;

(5) freight car safety standards, codified at 49 Code of Federal Regulations, Part 215;

(6) special notice and emergency order procedures, codified at 49 Code of Federal Regulations, Part 216;

(7) federal operating practice regulations, codified at 49 Code of Federal Regulations, Parts 217, 218, 220, 221, 225, and 228;

(8) control of alcohol and drug use, codified at 49 Code of Federal Regulations, Part 219;

(9) locomotive horns at public highway-rail crossings regulations, codified at 49 Code of Federal Regulations, Part 222;

(10) safety glazing standards, codified at 49 Code of Federal Regulations, Part 223;

(11) reflectorization of rail freight rolling stock regulations, codified at 49 Code of Federal Regulations, Part 224;

(12) locomotive safety standards, codified at 49 Code of Federal Regulations, Part 229;

(13) steam locomotive inspection and maintenance standards regulations, codified at 49 Code of Federal Regulations, Part 230;

(14) safety appliance standards, codified at 49 Code of Federal Regulations, Part 231;

(15) power brake standards, codified at 49 Code of Federal Regulations, Part 232;

(16) rules, standards, and instructions for railroad signal systems, codified at 49 Code of Federal Regulations, Part 236;

(17) passenger equipment safety standards regulations, codified at 49 Code of Federal Regulations, Part 238;

(18) passenger train emergency preparedness regulations, codified at 49 Code of Federal Regulations, Part 239; and

(19) qualifications and certification of locomotive engineers, codified at 49 Code of Federal Regulations, Part 240.

§7.32. Filing Requirements.

(a) A railroad shall file with the department:

(1) the name, address, and telephone number of the principal operating officer in Texas;

(2) a primary and secondary telephone number, which are manned 24 hours per day, for the railroad dispatcher responsible for train operations in Texas;

(b) When the department makes a written request, a railroad shall file with the department:

(1) its code of operating rules, timetables, and timetable special instructions as follows:

(A) the operating rules, timetables, and timetable special instructions; and

(B) each amendment to the railroad's code of operating rules, each new timetable, and each new timetable special instruction;

(2) a copy of monthly reports of excess service filed with the FRA under 49 C.F.R. §228.19;

(3) a copy of its program for periodic conduct of operational tests and inspections filed with the FRA under 49 C.F.R. §217.9; and

(4) a copy of its program for periodic instruction of its employees filed with the FRA under 49 C.F.R. §217.11.

(c) Filings required by subsection (b)(1)-(4) of this section may include only information pertaining to railroad operations conducted in the state of Texas.

(d) Filings required by this section shall be submitted to: Multimodal Section, Transportation Planning and Programming Division, Texas Department of Transportation, P.O. Box 149217, Austin, Texas 78714-9217.

§7.33. Reports of Accidents/Incidents.

(a) Telephonic reports of certain accidents/incidents.

(1) A railroad shall give immediate telephonic notice to the department of accidents/incidents and other events by calling the department's Transportation Planning and Programming Division at (800) 440-0376. Except as provided in paragraph (2) of this subsection, a railroad shall give reports to the department in the same manner and following the same requirements as the railroad shall give reports to the National Response Center under 49 C.F.R. §225.9.

(2) In addition to giving the department telephonic notice of the accidents/incidents and other events described in 49 C.F.R. §225.9, a railroad shall give telephonic notice of accidents/incidents which:

(A) result in the death of one or more persons;

(B) result in the injury of two or more persons;

(C) involve a fire or explosion; or

(D) involve a passenger train.

(b) Written reports. When the department makes a written request, a railroad shall furnish the department with a copy of an accident/incident report filed with the FRA under 49 C.F.R. Part 225, within 30 days after expiration of the month during which the accident/incident occurred. Only copies of reports that concern accidents/incidents occurring in the state of Texas shall be filed with the department.

§7.34. Hazardous Materials--Telephonic Reports of Incidents.

A railroad shall give immediate telephonic notice to the department of hazardous materials incidents by calling the department's Transportation Planning and Programming Division at (800) 440-0376. Except as provided in the succeeding sentence, a railroad shall give reports to the department in the same manner and following the same requirements as the railroad shall give reports to the National Response Center under 49 C.F.R. §171.15. A railroad shall give telephonic notice of only those accidents/incidents which involve the operation of railroad on-track equipment (standing or moving).

§7.35. Hazardous Materials--Written Reports.

(a) Policy. It is the policy of the department to provide information regarding the type and quantity of hazardous materials transported within the state to local emergency planning agencies in areas containing reported railroad operations. It is also department policy to collect such information in order for the department to more efficiently allocate hazardous materials inspection resources. To accomplish these policies, each railroad that transports a hazardous material through the state is required to adhere to certain reporting requirements relating to the transportation of hazardous materials.

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

(1) Emergency management program--An emergency management program established under Government Code, Chapter 418, Subchapter E.

(2) Hazardous material--Any substance transported by a railroad which is included within the requirements of the railcar placarding regulations adopted by the United States Department of Transportation and published in the Code of Federal Regulations, Title 49.

(3) Railroad line segment--A length of railroad line over which hazardous materials are transported between two or more municipalities within the state that are also identified as stations on a current railroad timetable. A line segment will terminate at the nearest municipality where the frequency of cars-per-year transporting hazardous materials changes from one category, as defined in subsection (d)(2) of this section, to another.

(4) Reporting year--Calendar year (January 1-December 31) preceding the year the report is to be submitted.

(c) Reporting requirements. A railroad that transports hazardous materials in or through the state is required to file the following information with the department.

(1) When the department makes a written request, a copy of the report of each hazardous materials incident occurring within the state of Texas that the railroad company files with the Unites States Department of Transportation under 49 C.F.R. §171.16;

(2) a map delineating the geographical limits of the railroad operating divisions or districts and the principal operating officer for the railroad in each operating division or district in the state;

(3) a primary and secondary telephone number, which are manned 24 hours per day, for the railroad dispatcher responsible for train operations in each operating division or district in the state;

(4) the name and address of the railroad employee in charge of managing hazardous materials transportation for the railroad; and

(5) a list of each type of hazardous material (sorted by hazard class and quantity) transported over each railroad line segment owned, leased, or operated by the railroad in the state during the reporting year.

(d) Type of hazardous material.

(1) The type of hazardous material transported shall be identified by hazard class as defined by 49 Code of Federal Regulations, Part 173, or 40 Code of Federal Regulations, Part 261.

(2) The quantity of hazardous materials transported shall be classified into the following five categories depending on the number of shipments of hazardous materials transported in a year:

(A) more than 10,000 cars-per-year;

(B) 5,001 to 10,000 cars-per-year;

(C) 1,001 to 5,000 cars-per-year;

(D) 501 to 1,000 cars-per-year;

(E) 51 to 500 cars-per-year;

(F) one to 50 cars-per-year.

(3) Texas counties traversed by each railroad line segment shall be identified.

(4) The applicable railroad operating division or district shall be identified for each railroad line segment. A railroad line segment shall not traverse more than one railroad operating division or district.

(e) Reporting dates. Reports required by subsection (c)(2)-(5) of this section shall be filed with the department not later than April 1 of each year.

(f) Forms. Reporting shall be made on a form or a copy as prescribed by the department.

(g) Variance. A railroad may request that the department grant a variance from the requirements of this section. The department shall process the application in accordance with §7.42 of this subchapter (relating to Administrative Review). The department may approve the variance only if the department will continue to receive information concerning the transportation of hazardous materials needed by local emergency planning agencies and needed to efficiently allocate the department's inspection resources. Any exception granted by the department shall be valid for a period not to exceed two years.

§7.36. Clearances of Structures Over and Alongside Railway Tracks.

(a) Mail cranes, turn tables, cattle guards, icing racks and coal chutes. Mail cranes, turn tables, cattle guards, icing racks, and coal chutes are exempt from provisions of the Texas Clearance Law, Texas Civil Statutes, Article 6559(a)-(f).

(b) Water cranes and oil cranes. Present standards for water cranes and oil cranes may be maintained, provided there is a minimum clearance of seven feet from the center line of the track.

(c) Through truss and girder bridges.

(1) The minimum horizontal clearance in bridges shall be seven feet six inches from the center line of the track, over a distance between a point four feet above the top of the rail and a point 17 feet above the top of the rail.

(2) Upper diagonal bracing in bridges shall not encroach within a line extending from a point seven feet six inches from the center line of the track at a height of 17 feet above the top of the rail to a point three feet from the center line of the track, at a height of 22 feet above the top of the rail.

(3) Lower diagonal bracing in bridges and walkway railings on bridges shall not encroach within a line extending from a point seven feet six inches outside of the center line of the track at a height of four feet above the top of the rail to a point five feet nine inches outside of the center line of the track at the top of the rail elevation.

(d) Switch stands interlocking plants.

(1) A switch stand or dwarf signal shall have a minimum horizontal clearance of five feet six inches from the center of the track, for the area two feet six inches or less above the top of the rail.

(2) Interlocking apparatus not exceeding six inches above the top of the rail shall have a minimum horizontal clearance of four feet from the center of the track.

(e) Passenger train sheds and platform. Passenger train sheds where only passenger equipment is handled are exempt from the requirements of this section. The minimum horizontal clearance between the center line of the track and the passenger station platform, one foot or less in height above the top of the rail, shall be four feet six inches.

(f) Round house and shop building doors. The provisions of the Texas Clearance Law, Texas Civil Statutes, Article 6559(a)-(f), shall not apply to engine houses or buildings into which locomotives or cars are moved for terminal inspection, attention, or repairs.

(g) Stock yards and loading chutes. Minimum horizontal clearance for stock yards and loading chutes shall be six feet six inches, except where such structures are constructed on main line tracks.

§7.37. Visual Obstructions at Public Grade Crossings.

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

(1) Unprotected public grade crossing--A crossing or intersection of railroad track by a publicly maintained road or highway at which there are no electronic devices (such as flashers or gates) to provide an active warning to a motorist of the approach of a train to the crossing.

(2) Vegetation--Grass, bushes, shrubbery, and trees having a trunk diameter of six inches or less.

(b) Standing equipment. No railroad shall cause or allow trains, railway cars, or equipment to stand less than 250 feet from the centerline of any unprotected public grade crossing unless a closer distance cannot be avoided.

(c) Vegetation. At unprotected public grade crossings, each railroad shall control vegetation on its right-of-way (except for the roadbed and areas immediately adjacent to the roadbed) for a distance of 250 feet each way from the centerline of the crossings, so that vegetation does not block the vehicular highway traffic's view of approaching trains. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road. Where the right-of-way is fenced, this subsection shall be deemed complied with if vegetation is controlled up to two feet from the fence.

(d) Permanent structures. At unprotected public grade crossings, each railroad shall keep its right-of-way clear of unnecessary permanent obstructions, such as billboards and signs that are not authorized by the railroad and that are not required for the safe operation of the railroad, for a distance of 250 feet each way from the crossing so that the obstructions do not block the vehicular highway traffic's view of approaching trains. Billboards and signs that are legally permitted by the state or a political subdivision are not unnecessary permanent obstructions, so long as they do not block the vehicular highway traffic's view of approaching trains. Permanent buildings, such as warehouses and equipment facilities, which existed prior to June 26, 1986, are exempt from the requirements of this subsection. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road.

(e) Variance. A railroad may apply for a variance from the requirements of subsections (c) and (d) of this section on a form to be prescribed by the department. The department shall process the application in accordance with §7.42 of this subchapter (relating to Administrative Review). The department may approve an application, provided there remains a clear line-of-site adequate to provide for the safe passage of vehicles.

§7.38. Wayside Detector Map, List, or Chart.

(a) When the department requests in writing, a railroad shall file a map, list, or chart with the department indicating the current locations within the state of Texas of the following wayside detectors:

(1) hot box indicators;

(2) dragging equipment detectors;

(3) high water indicators;

(4) shifted load detectors; and

(5) other wayside detectors.

(b) Filings required by this section shall be submitted to: Multimodal Section, Transportation Planning and Programming Division, Texas Department of Transportation, P.O. Box 149217, Austin, Texas 78714-9217.

§7.39. Right To Inspect Railroad Property.

Authorized personnel of the department shall have the right to enter onto the property of any railroad operating within the state of Texas, for the purpose of conducting inspections, investigations, and surveillance of railroad tracks, facilities, equipment, records, and operations in order to determine the railroad's compliance with relevant safety requirements. Any inspection, investigation, or surveillance shall be conducted at a reasonable time and in a reasonable manner.

§7.40. Enforcement of Safety Requirements.

(a) Federal enforcement action. The division director may refer violations of railroad safety requirements adopted under §7.31 of this subchapter (relating to Railroad Safety Requirements) to the FRA with a recommendation that the FRA seek either imposition of civil penalties or an injunction against further railroad safety violations, or both.

(b) State enforcement action. The department may, through the attorney general of Texas, bring an action in any court of competent jurisdiction and proper venue, seeking either imposition of a civil penalty or an injunction, or both, against violation of a railroad safety regulation or order issued under the provisions of Texas Civil Statutes, Article 6448a. The department may also, through the attorney general of Texas, bring an action in the United States district court for the judicial district in which the violation occurred or in which the defendant has its principal executive office, seeking either imposition of a civil penalty or an injunction, or both, for a violation of a railroad safety requirement adopted under the provisions of §7.31 of this subchapter, if the division director has requested such action and the FRA has failed to take timely action on a request. FRA action on a request that it seek to impose a civil penalty is timely if, within 60 days after receipt of the request, FRA has either assessed a civil penalty or determined, in writing, that no violation has occurred. FRA action on a request that it seek an injunction against further violation of a rail safety requirement is timely if, within 15 days after receipt of the request, the FRA has referred the matter to the United States attorney general for institution of litigation, has undertaken other enforcement action, or has determined, in writing, that no violation has occurred.

§7.41. Rail Safety Program Fee.

(a) Annual fee. Each railroad operating within the state shall pay an annual fee as provided by this section.

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

(1) Gross ton miles:

(A) the combined weight of all rail cars and their contents, exclusive of locomotives, multiplied by the number of miles traveled in the state within a calendar year; or

(B) if a railroad has reported its calendar year gross ton miles on a Form R-1 filed with the United States Surface Transportation Board (USSTB), that portion of the reported gross ton miles that are for operations within the state.

(2) Interchanged--transferred from one railroad to another.

(c) Annual report of gross ton miles. Each railroad operating within the state that is required to report its gross ton miles to the USSTB, shall report to the department, no later than July 1 of each calendar year, the railroad's gross ton miles for the preceding calendar year. The report shall be in writing, signed by a duly authorized officer of the railroad, and verified.

(d) Annual report of rail cars interchanged. Each railroad operating within the state that is not required to report its gross ton miles to the USSTB, shall report to the department, no later than July 1 of each calendar year, the railroad's total number of rail cars interchanged for the preceding calendar year. The report shall be in writing, signed by a duly authorized officer of the railroad, and verified.

(e) Calculation of fee. The department shall determine the annual fee for each railroad operating in the state as follows:

(1) for each railroad that is required to report its gross ton miles to the department:

(A) each railroad's gross ton miles will be divided by the total gross ton miles of all railroads required to report gross ton miles to the department; and

(B) the result will be multiplied by 95% of the amount estimated by the department to be necessary to recover the costs of administering the department's rail safety program for the next state fiscal year;

(2) for each railroad that is required to report its total rail cars interchanged to the department:

(A) each railroad's total number of rail cars interchanged will be divided by the total number of rail cars interchanged by all railroads required to report rail car interchanges to the department; and

(B) the result will be multiplied by 5% of the amount estimated by the department to be necessary to recover the costs of administering the department's rail safety program for the next state fiscal year.

(f) Notice of fee due. The department shall, no later than September 1 of each calendar year, notify each railroad operating in the state of the amount of that railroad's fee that is due and payable.

(g) Payment of fee. Each railroad operating in the state shall, no later than November 1 of each calendar year, pay its assessed fee to the department. The payment shall be made payable to the state of Texas and shall be considered by the department to be timely made if it is received by the department on or before November 1 of the same calendar year in which notice has been given under subsection (f) of this section, or is sent to the department by first-class United States mail in an envelope properly addressed, stamped, and postmarked on or before November 1 of the same calendar year in which notice has been given under subsection (f) of this section, and received by the department not more than 10 days later. A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(h) Determination of gross ton miles, total rail cars interchanged. The following requirements apply to railroad reports.

(1) If a railroad does not timely report its gross ton miles as required by subsection (c) of this section, the department may make a good-faith estimate of the railroad's gross ton miles and assess the railroad's fee based on that estimate. Failure by a railroad to timely report its gross ton miles constitutes a waiver by the railroad to object to both the department's estimate and the fee based on the estimate.

(2) If a railroad does not timely report its total rail cars interchanged as required by subsection (d) of this section, the department may make a good-faith estimate of the railroad's total cars interchanged and assess the railroad's fee based on that estimate. Failure by a railroad to timely report its total cars interchanged constitutes a waiver by the railroad to object to both the department's estimate and the fee based on the estimate.

(3) If the department has a rational basis for questioning the gross ton miles or the total rail cars interchanged reported by a railroad, the department may, by letter, fax, or electronic mail, request the railroad provide documentation or other evidence demonstrating how the railroad determined its reported gross ton miles or its reported total rail cars interchanged. The request shall state the department's rational basis for questioning the reported gross ton miles or the reported total rail cars interchanged and shall inform the railroad that it may deliver such documentation or evidence to the department by hand delivery, mail, fax, electronic mail, or private carrier.

(4) If the department determines that a railroad has not provided sufficient documentation or other evidence within 14 calendar days of the request, the department may, in the case of a railroad required to report its gross ton miles, proceed under paragraph (1) of this subsection as if the railroad did not timely report its gross ton miles or, in the case of a railroad required to report its total rail cars interchanged, proceed under paragraph (2) of this subsection as if the railroad did not timely report its total rail cars interchanged. The department shall inform a railroad whether it accepts the railroad's documentation or evidence or whether it is proceeding under paragraph (1) or (2) of this subsection.

(i) Administrative review. A railroad may apply for administrative review of the department's determination under subsection (h)(3) and (4) of this section in accordance with §7.42 of this subchapter (relating to Administrative Review).

§7.42. Administrative Review.

(a) Applicability. This section applies only when another section makes a specific reference to this section.

(b) Application.

(1) A railroad shall submit an application for administrative review to the following address: Director, Transportation Planning and Programming Division, Texas Department of Transportation, P.O. Box 149217, Austin, Texas 78714-9217.

(2) The application shall explain the relief requested, all relevant facts, and the legal basis for the relief sought.

(3) If the application seeks review of a department decision given to the railroad in writing, the railroad shall submit an application for review no later than 30 days after receipt of the written decision.

(c) Decision. The executive director, or his designee not below division director, shall decide whether to grant, grant in part, or deny the application. If an applicant does not provide information sufficient to evaluate the application, the application shall be denied. The applicant is not entitled to a contested case hearing, and there is no right to appeal the 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 September 30, 2005.

TRD-200504432
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

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CHAPTER 8. MOTOR VEHICLE DISTRIBUTION

The Texas Department of Transportation (department) proposes new Chapter 8, Motor Vehicle Distribution, Subchapter A, General Provisions, §§8.1 - 8.6; Subchapter B, Adjudicative Practice and Procedure, §§8.21 - 8.58; Subchapter C, Licenses, Generally, §§8.81 - 8.86, Subchapter D, Franchised Dealers, Manufacturers, Distributors, Converters, and Representatives, §§8.101 - 8.114; Subchapter E, General Distinguishing Numbers, §§8.131 - 8.148, Subchapter F, Lessors and Lease Facilitators, §§8.171 - 8.181; Subchapter G, Warranty Performance Obligations, §§8.201 - 8.210; and Subchapter H, Advertising, §§8.241 - 8.271.

EXPLANATION OF PROPOSED NEW SECTIONS

House Bill 2702, 79th Legislature, Regular Session, 2005, dissolved the Motor Vehicle Board (board) and transferred its rulemaking responsibilities to the Texas Transportation Commission (commission). Therefore it is necessary to propose the repeal of Title 16, Part 6, and simultaneously propose new sections under Title 43 to reflect the new delegation of duties and to transfer the rules to the appropriate title. Overall changes from Title 16, Part 6, correct statutory cites and grammar, and reflect the new delegation of duties to the director.

In addition, House Bill 988 and House Bill 2495, 79th Legislature, Regular Session, 2005 require revisions to current rules regarding the vehicle registration and title applications process. House Bill 988 amends Transportation Code, §501.0234, to state that the dealer has a reasonable time to apply for the vehicle title upon the sale of a vehicle. House Bill 2495 allows a dealer to sell a vehicle at auction prior to taking assignment of title. The rules are revised to address these changes.

Further, the proposed rules include changes to the temporary tag and dealer plate design format. This revision is proposed to increase the security of the tag and require dealers to maintain accessible records. Rules are also proposed to allow manufacturers and distributors to sell used vehicles to dealers at wholesale auctions without requiring a general distinguishing number. The proposed rules delete the requirement that corporations provide verification of the payment of franchise taxes prior to obtaining a license.

Subchapter A, General Provisions.

Existing Title 16, Part 6, Chapter 101, Subchapter A, §§101.2 - 101.4 and §101.28, containing general provisions describing the scope of the chapter is transferred to Title 43, Chapter 8,

Subchapter A, with the following additions. New §8.1, Objective, sets out the purpose and parameters for regulating motor vehicle distribution. New §8.3, Duties and Powers of Director, describes the powers and duties of the director of the Motor Vehicle Division (division).

Subchapter B, Adjudicative Practice and Procedure.

Existing Title 16, Part 6, Chapter 101, Subchapter C, relating to management of contested cases before the division, is transferred to Title 43, Chapter 8, Subchapter B. There are no significant amendments to this subchapter.

Subchapter C, Licenses, Generally.

Existing Title 16, Part 6, §§103.10, 103.11, 103.15, 103.16 and 111.19, relating to all licensees, are transferred to Title 43, Chapter 8, Subchapter C, with the following addition. New §8.81, Objective, states that the purpose of Subchapter C is to implement the intent of the legislature as declared in Occupations Code, Chapter 2301, and Transportation Code, Chapter 503.

Subchapter D, Franchised Dealers, Manufacturers, Distributors and Converters.

The portions of Title 16, Part 6, Chapter 103, relating to licensing franchised dealers, manufacturers, distributors, and converters, protest requirements and motor home shows is transferred to Title 43, Chapter 8, Subchapter D, with the following addition. New §8.101, Objective, states that the purpose of Subchapter D is to implement Occupations Code, Chapter 2301.

New §8.114, Sales of Vehicles by Manufacturer/Distributor at Wholesale Auction, will allow manufacturers, distributors, and their wholly-owned subsidiaries to sell used vehicles that are assigned to them, to dealers through wholesale auctions. Additionally, the new rule provides for the cancellation of all retail and wholesale general distinguishing numbers held by manufacturers and distributors when the rule becomes effective, except where otherwise allowed under Occupations Code, Chapter 2301 (the Code).

Occupations Code, §2301.476(c) was adopted by the Texas Legislature during its 76th session, and codified during the 77th legislative session. By its terms, it prohibits manufacturers and distributors from owning an interest in a motor vehicle dealership, operating or controlling a dealership, or acting in the capacity of a dealer, thereby prohibiting these licensees from holding general distinguishing numbers.

It is the business of manufacturers and distributors to put vehicles into the stream of commerce by selling them to dealers. This activity, by means of wholesale transactions to dealers, is not considered to be acting in the capacity of a dealer. Wholesale auctions have required any person who buys or sells vehicles at wholesale auction to have a general distinguishing number. The practice of allowing manufacturers to dispose of vehicles acquired from lease returns and other such programs at wholesale auction is a necessary and important way for dealers to acquire a supply of this category of vehicle in an efficient and cost-effective manner that provides potential benefits to the public. Off-lease vehicles are often a source of certified used vehicles that can be purchased by consumers at a reasonable price with extended warranties.

Proposed new §8.114 permits manufacturers and distributors to sell used vehicles at a licensed wholesale motor vehicle auction without a general distinguishing number provided that such vehicles are properly assigned into the appropriate entity's name, whether it is the manufacturer, distributor, or wholly-owned subsidiary. Since it is unlawful and upon adoption of §8.114, unnecessary in most cases for manufacturers and distributors to possess general distinguishing numbers, the proposed new rule also provides for the cancellation of those general distinguishing numbers. It should be noted, however, that the Code does allow manufacturers and distributors to own interests in dealerships, or entities that hold general distinguishing numbers, under certain limited circumstances enumerated in Occupations Code, §2301.476.

Subchapter E, General Distinguishing Numbers.

Existing Title 16, Part 6, Chapter 111, relating to general distinguishing number (GDN) licenses is transferred to Title 43, Chapter 8, Subchapter E, with the following additions and changes.

Section 8.133(e), General Distinguishing Number, is changed from the original §111.3(e), by deleting the requirement that corporations must provide verification that corporate franchise taxes have been paid to obtain a license, to comport with the repeal of Article 2.45 of the Texas Business Corporation Act.

Section 8.138, Temporary Cardboard Tags, §8.139, Metal Dealer License Plates and Temporary Cardboard Tags, and §8.146, Converters License Plates and Temporary Cardboard Tags, is revised from the original Title 16, Part 6, §§111.8, 111.9 and 111.17. Transportation Code, §503.062 and §503.0625 provide motor vehicle dealers and converters with a means to transport and test drive vehicles with expired or otherwise invalid registration by allowing them to use cardboard dealer and converter tags. Transportation Code, §503.063 authorizes dealers to place temporary buyer's tags on unregistered vehicles to allow a purchaser to drive the vehicle until registration is completed. A dealer may issue a supplemental temporary buyer's tag only if the dealer is unable to obtain documents necessary to transfer title from a lienholder. The department is responsible for prescribing the specifications, form and color of temporary tags, but may not issue or contract to issue the tags.

The current design of temporary buyer's tags was adopted effective December 31, 1997, in conjunction with amendments required as a result of legislation that provided for issuance of a supplemental buyer's tag (House Bill 1137, 75th Legislature, Regular Session, 1997). Currently, the prominent feature of the buyer's and supplemental buyer's tags is the expiration date of the tag. The prominent feature of dealer and converter tags is the license number. The tags also contain the department's "Flying T" copyrighted logo or mark, which may only be imprinted by licensed printers. This design was adopted in an effort to stop counterfeiting and help law enforcement easily ascertain whether temporary buyer's tags were legitimate.

The department has observed no decrease in counterfeiting or misuse of temporary buyer's tags. The current design may actually put law enforcement at greater risk inasmuch as peace officers could assume that a tag is genuine because it bears the TxDOT mark, when it is possibly counterfeit. The revisions proposed may improve public safety and aid law enforcement by reducing the number of false and forged temporary tags. Changing the form means that any temporary tag using the old form is presumably invalid. Currently, such invalid or false tags can be used to transport stolen vehicles and conceal unregistered vehicles being used for contraband trafficking.

The proposed revisions are intended to make certain changes to the overall design and use of all temporary tags. The prominent feature will be the phrase "UNREGISTERED VEHICLE" instead

of the license number or expiration date. The material of the tag will be 24 Point Poly Coated C2S Board, which is more resistant to weathering and will allow peace officers to more easily read legitimate tags at a distance. Tags will no longer contain the department "Flying T" logo and printers will no longer be required to execute licensing agreements with the department to print temporary tags.

All temporary tags must contain a unique sequential number printed on the front of the tag. Dealers and converters who issue tags will be required to maintain a record of each tag issued. The record must include the assigned sequential number, the date the tag was issued, the vehicle identification number, and the name of the buyer or the person in control of the vehicle. In addition, the record for dealer and converter temporary tags must contain the purpose for issuing the tag. Buyer's tag records must also contain the make of the vehicle. If a temporary tag or metal dealer plate can no longer be accounted for, it must be noted in the dealer's or converter's log and reported as missing to the department. Dealers already maintain information relating to sales of used vehicles under Occupations Code, Chapter 2305, (Records of Certain Vehicle Repairs, Sales, And Purchases) and §8.144 of proposed Subchapter E. The log requirement will merely involve noting information about the issuance of the temporary tag in addition to what is currently required. Law enforcement and department personnel frequently find temporary tags in the possession of persons who did not buy a vehicle from a dealer. The log will provide information to law enforcement and the department on whether the dealer issued the unauthorized tag, and will protect dealers against allegations of wrongdoing if the dealer can show the log has been completed correctly.

New §8.138(d) states that the log shall be available for review by department personnel during normal working hours. In addition, temporary tags that cannot be accounted for shall be marked as void in the dealer's log to enable law enforcement and department personnel to identify which tags may be unlawfully in circulation and subject to misuse.

Other proposed revisions eliminate unique charitable organization tags, and allow use of dealer tags instead. Tags placed in the rear window of a vehicle must be visible from a distance of 15 feet. When tags are placed in license plate holders, printed matter may not be obscured. Other overall revisions conform the font and style of each tag to one another, conform language to that contained in Transportation Code, §§503.062, 503.0625, and 503.063, and correct grammar.

New §8.144, Record of Sales and Inventory, is modified from the original Title 16, Part 6, §111.15. House Bill 988, 79th Legislature, Regular Session, 2005, amended Transportation Code §501.0234, to allow the purchaser of a vehicle to choose the county in which a dealer should apply for title and registration. It also states that a dealer has a reasonable time to comply and is not in violation during the time in which the dealer is making a good faith effort to comply. The rule formerly required dealers to provide purchasers with the receipt for title application within 20 working days of the date of purchase. In recognition of the difficulties dealers may encounter when applying for title in distant parts of the state, §8.144(c) requires dealers to apply for certificate of title and registration within 20 working days, rather than provide the receipt. Dealers are still required to provide the purchaser with the application receipt, and must maintain a copy of the receipt in the sales file. A copy of the receipt in the sales file may be used as evidence of a good faith effort to comply with the filing requirement.

Section 8.144(e) is revised from the Title 16 Part 6 rules to require dealers who sell vehicles that will be transferred out of state, to either provide the purchaser with properly assigned evidence of ownership or file application for certificate of title within 20 working days. The addition of the time limit will help purchasers title and register vehicles in their new location in a timely fashion, and allow them to receive the license plates that are necessary to operate their vehicles on public roadways.

House Bill 2495, 79th Legislature, Regular Session, 2005, added Transportation Code, §503.039, which allows public auctions who hold GDNs to take title from the consignor of a vehicle after the sale, but prior to transferring it to the buyer. In addition, auctions must apply for transfer of title on behalf of the purchaser within 20 working days of the sale of the vehicle. New §8.144(f) clarifies the records that public motor vehicle auctions must keep regarding vehicles consigned for sale and the manner and sequence in which title assignments must be made.

Subchapter F, Lessors and Lease Facilitators.

Existing Title 16, Part 6, Chapter 109, relating to licensing lessors and lease facilitators, is transferred to Title 43, Chapter 8, Subchapter F. There are no significant revisions to this subchapter.

Subchapter G, Warranty Performance Obligations.

Existing Title 16, Part 6, Chapter 107, relating to the Lemon Law, is transferred to Title 43, Chapter 8, Subchapter G, with the following changes. Provisions allowing parties to choose whether to file motions for rehearing with the board or the director are revised to reflect the new delegation of duties.

Subchapter H, Advertising.

Existing Title 16, Part 6, Chapter 105, relating to advertising regulation, is transferred to Title 43, Chapter 8, Subchapter H. There are no significant revisions to this subchapter.

FISCAL NOTE

James Bass, Chief Financial Officer, Finance Division, has determined that for each of the first five years the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT

Mr. Bray 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 new sections will be implementation of House Bill 2702 and a clearer understanding by the public and motor vehicle distribution industry of the location of rules relating to the Motor Vehicle Division of the department. There will be no adverse economic effect on small businesses.

The specific benefit of new §8.114 will be continued access by dealers, and ultimately consumers, to used vehicles, potentially as manufacturer certified used vehicles. It is also anticipated

that there will be some small savings to manufacturers who will no longer have to pay for general distinguishing number licenses.

The public benefit of revisions from Title 16, Part 6, in §8.133(e), deleting the requirement that corporations provide verification that corporate franchise taxes have been paid to obtain a license, will be a clearer understanding by licensees of the requirements for a license, and agreement of the rules with the Texas Business Corporation Act.

The public benefits of §§8.138, 8.139, and 8.146 will be improved safety for law enforcement officers and a reduction in the number of fraudulent or forged temporary tags in circulation. The department surmises that counterfeiters will be reluctant to label a vehicle as unregistered, which should reduce the number of forged temporary tags. In addition, the new tag design does not suggest any control or authentication by the department, thereby putting law enforcement officers on notice that they should be cautious when approaching any vehicle bearing a temporary tag.

The public benefit of revisions from Title 16, Part 6, in §8.144(c), requiring dealers to apply for title within 20 working days of the date of sale rather than provide the buyer with the application receipt in that time period, is to mitigate the difficulties dealers may encounter when applying for title in distant parts of the state.

The public benefits of revisions from Title 16, Part 6, in §8.144(e), requiring dealers who sell vehicles that will be transferred out of state to transfers ownership within 20 working days, is to help purchasers title and register vehicles in their new location in a timely fashion, and allow them to receive the license plates that are necessary to operate their vehicles on public roadways.

The public benefit of §8.144(f) is to clarify the statute and describe exactly how public motor vehicle auctions are allowed to take title from the consignor of a vehicle after the sale, but prior to transferring it to the buyer.

PUBLIC HEARING

The department will hold public hearings on the proposed new rules. A separate notice lists the date, times, and locations of the hearings.

SUBMITTAL OF COMMENTS

Written comments on the proposed new sections may be submitted to Brett Bray, Director, Motor Vehicle Division, P. O. Box 2293, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 13, 2005.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §§8.1 - 8.6

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.1. Scope and Purpose.

Occupations Code, Chapter 2301, and Transportation Code, Chapter 503, require the Motor Vehicle Division of the Texas Department of Transportation to license and regulate motor vehicle dealers, manufacturers, distributors, converters, representatives, lessors and lease facilitators, in order to ensure a sound system of distributing and selling motor vehicles, provide for compliance with manufacturer's warranties, prevent fraud, unfair practices, discrimination, impositions, and other abuses of the people of this state in connection with the distribution and sale of motor vehicles. The sections under this chapter prescribe the policies and procedures for regulating motor vehicle dealers, manufacturers, distributors, converters, representatives, lessors and lease facilitators, by regulating licensing, warranty performance obligations, advertising, enforcement, and providing for adjudicative proceedings.

§8.2. Definitions; Conformity with Statutory Requirements.

(a) The definitions contained in Occupations Code, Chapter 2301, and Transportation Code, Chapter 503 are hereby adopted by reference. All matters of practice and procedure set forth in the codes shall govern and these rules shall be construed to conform with the codes in every relevant particular, it being the intent of these rules only to supplement the codes and to provide procedures to be followed in instances not specifically governed by the codes. In the event of a conflict, the definition or procedure referenced in Occupations Code, Chapter 2301 shall control.

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

(1) Chapter 503--Transportation Code, Chapter 503.

(2) Code--Occupations Code, Chapter 2301.

(3) Codes--Occupations Code, Chapter 2301, and Transportation Code, Chapter 503.

(4) Commission--The Texas Transportation Commission.

(5) Department--The Texas Department of Transportation.

(6) Director--The director of the Motor Vehicle Division of the Texas Department of Transportation.

(7) Division--The Motor Vehicle Division of the Texas Department of Transportation.

(8) Executive director--The executive director of the Texas Department of Transportation.

(9) Governmental agency--All other state and local governmental agencies and all agencies of the United States government, whether executive, legislative, or judicial.

(10) License purveyor--Any person who for a fee, commission, or other valuable consideration, other than a certified public accountant or a duly licensed attorney at law, assists an applicant in the preparation of a license application or represents an applicant during the review of the license application.

(11) Party in interest--A party against whom a binding determination cannot be had in a proceeding before the director without having been afforded notice and opportunity for hearing.

§8.3. Duties and Powers of Director.

In accordance with the codes, the director shall:

(1) enforce and administer the codes;

(2) establish the qualifications of license holders;

(3) ensure that the distribution, sale, and lease of motor vehicles is conducted as required by the codes and this chapter;

(4) provide for compliance with warranties;

(5) prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles.

§8.4. Formal Opinions.

(a) General. Any person may request a formal opinion from the director on any matter within the jurisdiction of Occupations Code, Chapter 2301, or Transportation Code, Chapter 503. It is the policy of the director to consider requests for formal opinions and, where practicable, to inform the requesting party of the director's views; provided, however, that a request will be considered inappropriate for a formal opinion where the request involves a matter which is under investigation or is the subject of a current proceeding by the division or another governmental agency, or where the request is such that an informed opinion thereon can be given only after extensive investigation, research, or collateral inquiry.

(b) Procedure. Requests for formal opinions are to be submitted to the director in writing and shall include full and complete information on the matter with respect to which the formal opinion is requested. The request must affirmatively state that the matter involved is not the subject of an investigation or other proceeding by the division or any other governmental agency. The submission of additional information may be required by the director.

(c) Formal opinions rendered without prejudice. Any formal opinion so given is without prejudice to the right of the director to reconsider the matter and, where the public interest requires, to modify or revoke the formal opinion. Notice of such modification or revocation will be given to the party who originally requested the opinion so that the requestor may modify or discontinue any action which may have been taken pursuant to the director's formal opinion. The division will not proceed against such party with respect to any action taken in good faith reliance upon the director's formal opinion where all relevant facts were fully, completely, and accurately presented to the director and where such action was promptly discontinued or appropriately modified upon notification of the director's modification or revocation of the formal opinion.

(d) Publication. Texts or digests of formal opinions of general interest will be made available to any person upon written request to the director, subject to statutory and other restrictions against disclosure.

§8.5. Informal Opinions.

Any other advice, opinion, or information received from the director or the staff of the division in response to an inquiry is not a formal opinion of the director and shall be considered an informal opinion. No informal opinion, whether written or oral, by the director, or any employee will be binding upon the director in any subsequent proceeding involving the same or similar issue.

§8.6. Exempted Actions.

General statements of policy, informal opinions, or formal opinions are not construed to be rulemaking proceedings under Government Code, Chapter 2001.

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 September 29, 2005.

TRD-200504373

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

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SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §§8.21 - 8.58

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.21. Objective.

This subchapter governs practice and procedure before the division and the director. The objective of these rules is to insure fair, just, and impartial adjudication of the rights of parties in all matters within the jurisdiction of Occupations Code, Chapter 2301, and Transportation Code, Chapter 503, hereinafter referred to as the "codes" and to insure fair, just, and effective administration of said codes in accordance with the intent of the legislature as declared in Occupations Code, §2301.001 and §2301.152. This subchapter shall apply only as reasonably practicable to cases brought under Occupations Code, Subchapter M, §§2301.601 - 2301.613 (the Lemon Law) or §2301.204 (warranty performance).

§8.22. Prohibited Disclosures and Communications.

No party in interest, his attorney, or authorized representative in any proceeding shall submit, directly or indirectly, any ex parte communication concerning the merits of such proceeding to the director, or any employee of the division. Violations of this section shall be promptly reported in writing, and if in the opinion of the director such communication is prohibited and was made in willful violation of this section, or the dictates of fairness require that the communication be made public, a copy thereof (or a summary thereof if the same was oral) shall be filed with the records of such proceeding and a copy forwarded to all parties of record.

§8.23. Appearances.

(a) General. Any party to a proceeding before the director may appear to represent, prosecute, or defend his rights or interests, either in person, by an attorney, or by any other authorized representative. Any individual may appear for himself; and any member of a partnership which is a party to a proceeding or any bona fide officer of a corporation or association may appear for the partnership, corporation, or association. An authorized full time employee may enter an appearance for his employer.

(b) Agreements of representation. The director may require agreements between a party in interest and an attorney or other authorized representative concerning any pending proceeding to be in

writing, signed by the party in interest, and filed as a part of the record of the proceeding.

(c) Leading counsel. The attorney or other authorized representative of a party in interest shall be considered that party's leading counsel in any proceeding and, if present, shall have control in the management of the cause pending before the director.

(d) Intervention. Any public official or other person having an interest in a proceeding may, upon request to the director or hearing officer, be permitted to intervene and present any relevant and proper evidence, data, or argument bearing upon the issues involved in the particular proceeding. Any person desiring to intervene in a proceeding may be required to disclose his interest in the proceeding before permission to appear will be granted.

(e) Limitation on appearances. The director may limit or exclude entirely an attempt by persons to appear in a proceeding when such appearance would be irrelevant or would unduly broaden the scope of the proceeding.

§8.24. Petitions.

Petitions for relief under the codes or complaints filed alleging violations of the codes other than those specifically provided for in these rules shall be in writing, shall state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon, and the relief sought, and shall cite by appropriate reference the article of the Code or other law relied upon for relief and, where applicable, the proceeding to which the petition refers.

§8.25. Affidavits.

Whenever it may be necessary or proper for any party to make an affidavit, it may be made either by such party or by his authorized agent; provided, however, that the affidavit of any such agent must show the relationship of the agent to the party and state in what capacity he is authorized to make the affidavit. All affidavits shall affirmatively show that the affiant has personal knowledge of the matters sworn to.

§8.26. Form of Petitions, Pleadings, and the Like.

The original copy of every petition, pleading, motion, brief, or other instrument permitted or required to be filed with the director in a contested case proceeding shall be signed by the party in interest, his attorney, or his authorized representative. All pleadings filed in any proceeding shall be printed or typed on 8-1/2 inch by 11 inch bond paper in no smaller than 11 point type with margins of at least one inch at the top, bottom, and each side. Pages shall be numbered in the 1 inch margin at the bottom of each page. All typewriting except block quotations and footnotes shall be double spaced.

§8.27. Complaints.

All complaints alleging violations of the codes shall be in writing addressed to the director and signed by the complainant. Complaint forms will be supplied and assistance may be afforded by the director for the purpose of filing complaints. A complaint shall contain the name and address of the complainant, the name and address of the party against whom the complaint is made, and a brief statement of the facts forming the basis of the complaint. If requested by the director, complaints shall be under oath, and before initiating an investigation or other proceeding to determine the merits of the complaint, the director may require from the complainant such additional information as may be necessary to evaluate the merits of the complaint.

§8.28. Hearing Docket.

The division will maintain a hearing docket containing a record of all formal proceedings instituted. The hearing docket shall be a public file and shall be open for inspection at all reasonable times. Filing of hearing notices in the hearing docket will be deemed notice to the public. A docket number assigned by the division to any formal proceeding will be carried forward throughout the proceeding.

§8.29. Computing Time.

In computing any period of time prescribed or allowed by these rules, by order of the director, or by any applicable statute, the date of the act or event after which the designated period of time begins to run is not to be included; but the last day of the period so computed is to be included unless it be a Saturday, Sunday, or legal holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

§8.30. Filing of Documents.

(a) Every application, petition, notice, motion, brief, or other document required or permitted to be filed at the office of the division in Austin, may be filed by delivering an original of such document to said office, either: in person, by agent, by courier receipted delivery, by mail to the address of said office, or by telephonic document transfer to the current telecopier number at said office.

(b) Except as provided in subsection (e) of this section, delivery by mail shall be complete upon deposit of the document, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service.

(c) Except as provided in subsection (e) of this section, with respect to a document which, to be timely filed under these rules, must be filed on or before a specified date, delivery by mail shall be complete only if such deposit is made on or before said date and the document is received in hand by the division at its office in Austin not later than the fifth business day after the date of such deposit. Delivery by telephonic document transfer after 5 p.m. local time of said office shall be deemed delivered on the following day. Where the filing of a document is made by mail but the document is not received by the division within five business days after the date of deposit of the document in the mail, nothing herein shall preclude the delivery of the document to the division's office by other means of delivery, such as delivery in person or by telephonic document transfer, within the said five day period, provided that the party filing the document furnishes the division with proof of deposit of the document in the mail prior to the filing date, as provided herein.

(d) Such document may be delivered by a party to a matter, an attorney of record, or by any other person competent to testify. A certificate by an attorney of record or the affidavit of any person competent to testify, showing timely delivery of a document in a manner described in this section shall be prima facie evidence of the fact of timely delivery, although nothing herein shall preclude the division or any party from offering proof that the subject document was not timely delivered.

(e) Notwithstanding the foregoing, where by statute, rule, or order of the director or hearing officer, a document, to be timely filed, must be received in the division's office by a specified time, then the requirements of such statute, rule, or order shall govern the filing of that document, and any such document received at the division's office after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed not timely filed.

§8.31. Cease and Desist Orders.

(a) Whenever it appears to the director that any person is violating any provision of the codes or any regulation promulgated thereunder, the director may, directly or through its representative, enter an interlocutory order requiring such person to cease and desist.

(1) No interlocutory cease and desist order shall be granted without notice to the person against whom the order is requested unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the situations enumerated in Occupations Code, §2301.802(b)(1) - (5) will occur before notice can be served and a hearing had thereon;

(2) Every interlocutory cease and desist order granted without notice shall include the date and hour of issuance; shall state which of the situations enumerated in Occupations Code, §2301.802(b)(1) - (5) is found to necessitate the issuance of the order without notice; and shall set a date certain for a hearing as provided in these rules relating to adjudicative proceedings to determine the validity of the order and to allow the person against whom the order is issued to show good cause why the order should not remain in effect during the pendency of the proceeding;

(3) The person against whom the interlocutory cease and desist order has been issued without notice may request that the hearing to determine the validity of the order be held earlier than the date set by the order;

(4) Every cease and desist order granted with or without notice shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained;

(5) No cease and desist order, whether interlocutory or permanent, shall be granted unless the person requesting the order shall present his petition or complaint to the director or the director's designated representative verified by affidavit and containing a plain and intelligible statement of the grounds for such relief.

(b) The director's interlocutory decision shall be sufficient for a complaining party to seek judicial review of the matter as set out in Occupations Code, §2301.802(c) - (e). Upon appeal of an order issued pursuant to this subsection to the district court, as provided in the Code, the order may be stayed by the director upon a showing of good cause by a party of interest.

§8.32. Enlargement of Time.

(a) When by these rules or by a notice given thereunder or by order of the director or the hearing officer having jurisdiction, as the case may be, an act is required or allowed to be done at or within a specified time, except as provided in subsection (b) of this section, the director or the hearing officer for cause shown may, at any time in the director's or the hearing officer's discretion:

(1) with or without motion or notice, order the period enlarged if application therefore is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act.

(b) Notwithstanding anything contained in subsection (a) of this section, neither the director nor a hearing officer may enlarge the time for filing a document where by statute or rule, the document, to be timely filed, must be received in the division's office by a specified time, and the requirements of such statute or rule shall govern the filing of that document and any such document received at the division's office after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed not timely filed.

§8.33. Expenses of Witness or Deponent.

A witness or deponent in a contested case who is not a party and who is subpoenaed or otherwise compelled to attend a hearing or proceeding to give testimony or a deposition or to produce books, records, papers, or other objects that may be necessary and proper for the purposes of a proceeding under the codes is entitled to receive expenses pursuant to provisions of the Government Code, Chapter 2001. Such witness or deponent is entitled to receive reimbursement for mileage at the current state employee rate for each mile, for going to and returning from the place of the hearing or deposition, if the place is more than 25 miles from the person's place of residence and the person uses a personally owned or leased motor vehicle for the travel.

§8.34. Institution of Adjudicative Proceedings.

Adjudicative proceedings may be instituted by the director or division on its own motion at any time with reference to any matter, function, or duty having to do with enforcement of the codes. Actions instituted by the division may be heard at any time subsequent to the giving of proper notice as required by the codes. In addition to those adjudicative proceedings instituted by the division on its own motion, the division shall institute adjudicative proceedings upon issuance of an order to cease and desist by serving notice of hearing upon the party against whom the cease and desist order has been issued.

§8.35. Notice of Hearing in Adjudicative Proceedings.

(a) In any adjudicative proceeding before the director, the notice of hearing shall state:

(1) the name of the party or parties in interest;

(2) the time and place of the hearing;

(3) the docket number assigned to the hearing;

(4) any special rules deemed appropriate for such hearing; and

(5) a clear and concise factual statement sufficient to identify with reasonable definiteness the matters at issue. This can be satisfied by attaching and incorporating by reference the complaint or amended complaint.

(b) Notice of hearing shall be served upon the parties in interest either in person or by certified mail, return receipt requested, addressed to the parties in interest or their agents for service of process.

(c) Notice of hearing shall be presumed to have been received by a person if notice of the hearing was mailed by certified mail, return receipt requested, to the last known address of any person known to have legal rights, duties, or privileges that could be determined at the hearing.

(d) Notice of hearing may be amended at the hearing or at any time prior thereto.

§8.36. Reply.

Within 20 days after service of notice of hearing, or within 10 days after service of amended notice of hearing, a responding party may file a reply thereto in which the matters at issue are specifically admitted, denied or otherwise explained.

(1) Form and filing of replies. All replies shall include a reference to the docket number of the hearing and shall be sworn to by the responding party or his attorney of record. The original of the reply shall be filed with the division, and one copy shall be served upon other parties to the proceeding, if any.

(2) Amendment. A responding party may amend his reply at any time prior to the hearing, and in any case where the notice of hearing has been amended at the hearing, a responding party shall be given an opportunity to amend his reply.

(3) Extension of time. Upon the motion of a responding party, with good cause shown, the director may extend the time within which the reply may be filed.

(4) Default. All allegations not so answered shall be deemed admitted by any party who does not appear at the hearing on the merits.

§8.37. Hearings to be Public.

Hearings in adjudicative proceedings shall be open to the public.

§8.38. Recording and Transcriptions of Hearing Cost.

(a) Except as provided in Subchapter G of this chapter (relating to Warranty Performance Obligations), hearings in contested cases will be transcribed by a court reporter or recorded electronically at the discretion of the hearing officer. Any request regarding recording or transcription must be made to the hearing officer at least two days prior to the hearing.

(b) In those contested cases in which the hearing is transcribed by a court reporter, the costs of transcribing the hearing and for the preparation of an original transcript of the record for the director shall be assessed equally among all parties to the proceeding, unless ordered otherwise by the director.

(c) Copies of tape recordings of a hearing will be provided to any party upon written request and upon payment for the cost of the tapes.

(d) In the event a final decision of the director is appealed to the court and the director is required to transmit to the court the original or a certified copy of the record, or any part thereof, the appealing party shall, unless waived by the director, pay the costs of preparation of the record that is required to be transmitted to the court.

§8.39. Joint Record.

No adjudicative proceedings embracing two or more complaints or petitions shall be heard on a joint record without the consent of all parties in interest unless the hearing officer shall find, prior to the consolidation of the proceedings, that justice and efficiency are better served by the consolidation.

§8.40. Waiver of Hearing.

Subsequent to the issuance of a notice of hearing as provided in §8.35 of this chapter (relating to Notice of Hearing in Adjudicative Proceedings), a responding party may waive such hearing and consent to the entry of an agreed order by the director. Agreed orders proposed by the parties remain subject to director approval.

§8.41. Postponement of Hearing.

After a case has been called on the date assigned for hearing in a proceeding, pursuant to notice, postponement of the case will be granted only in exceptional circumstances. All motions for postponement of a hearing shall be filed sufficiently in advance of the date of hearing to permit notice to all parties if postponement should be granted.

§8.42. Presiding Officials.

The director may preside or may designate any other person to preside over any hearing held in any adjudicative proceeding. The term "hearing officer" as used herein includes the director when he or she presides over a hearing.

(1) Powers and duties. Hearing officers shall have the duty to conduct fair and impartial hearings, and the power to take all necessary action to avoid delay in the disposition of proceedings and to maintain order. Hearing officers shall have all powers necessary to these ends, including the authority to administer oaths; to examine witnesses; to rule upon the admissibility of evidence; to rule upon motions; and to regulate the course of the hearing and the conduct of the parties and counsel.

(2) Disqualification. When a hearing officer deems himself or herself disqualified to preside in a particular hearing, he or she shall withdraw therefrom by notice on the record and shall notify the director of the withdrawal. Whenever any party shall deem the hearing officer to be disqualified to preside in a particular hearing, the party may file with the director a motion to disqualify and remove the hearing officer which motion shall be supported by affidavits setting forth the alleged grounds for disqualification. A copy of the motion shall be served by the director on the hearing officer who shall have 10 days within which to reply. If the hearing officer contests the alleged grounds for disqualification, the director shall promptly determine the validity of the grounds alleged, such decision being determinative of the issue.

(3) Substitution of hearing officer. If the hearing officer is disqualified, dies, becomes disabled, or withdraws during any proceeding, the director may appoint another hearing officer who may perform any function remaining to be performed without the necessity of repeating any proceedings theretofore had in the case.

§8.43. Conduct of Hearing.

Each party in interest shall have the right in an adjudicative hearing to due notice, cross examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing. Procedures in such hearings, except where otherwise provided by these rules or in the notice of hearing, shall be insofar as reasonably practicable in accordance with the Texas Rules of Civil Procedure applicable in district and county courts in civil actions heard before the court without a jury.

§8.44. Conduct and Decorum.

Every party, witness, attorney, or other representative shall comport himself in all proceedings with proper dignity, courtesy, and respect for the director, the hearing officer, and all other parties. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the Texas Disciplinary Rules of Professional Conduct and Texas Lawyer's Creed. No party to a pending case, and no representative or witness of such a party, shall discuss the merits of such case with the hearing officer outside of the presence of all other parties, or their representatives. Upon violation of this section, any party, witness, attorney, or other representative may be excluded from any hearing for such period and upon such conditions as are just; or may be subject to such other just, reasonable, and lawful disciplinary action as the hearing officer or director may prescribe.

§8.45. Evidence.

(a) General. The Texas Rules of Evidence shall be applied in all adjudicative hearings to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily adduced while preserving the rights of the parties to the proceeding.

(b) Admissibility. All relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious or cumulative evidence shall be excluded. Immaterial or irrelevant parts of an otherwise admissible document shall be segregated and excluded so far as practicable.

(c) Official records. An official document or record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by the officer's deputy, and accompanied by a certificate to such effect. This section does not prevent and is not intended to prevent proof of any official record, the absence thereof or official notice thereof by any method authorized by any applicable statute or any rules of evidence in district and county courts.

(d) Entries in the regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event,

will be admissible as evidence thereof if it appears that it was made in the regular course of business. This section does not prevent and is not intended to prevent proof of any business writing or record by any method authorized by any applicable statute or any rules of evidence in district and county courts.

(e) Documents in division files. Documents or information in the licensing files of the division may be officially noticed and may be admitted and considered by the hearing officer, as described in Government Code, Chapter 2001.

(f) Abstracts of documents. When documents are numerous, the hearing officer may refuse to receive in evidence more than a limited number of said documents which are typical and representative, but may require the abstraction of the relevant information from the documents and the presentation of the abstract in the form of an exhibit; provided, however, that before admitting such abstract the hearing officer shall afford all parties in interest the right to examine the documents from which the abstract was made.

(g) Exhibits. Exhibits shall be limited to facts with respect to the relevant and material issues involved in a particular proceeding. Exhibits of documentary character shall be of such size as not to unduly encumber the record of the proceeding. Where practicable, the sheets of each exhibit shall not be more than 8 1/2 inches by 11 inches in size and shall be numbered, and there shall be a brief statement on the first sheet of the exhibit of what the exhibit purports to show. The original and one copy of each exhibit offered shall be tendered to the reporter or hearing officer for identification, and a copy shall be furnished to each party in interest. In the event an exhibit has been identified, objected to, and excluded, the hearing officer shall determine whether or not the party offering the exhibit withdraws the offer, and if so, return the exhibit. If the excluded exhibit is not withdrawn, it shall be given an exhibit number for identification and be included in the record only for the purpose of preserving the exception together with the hearing officer's ruling.

§8.46. Stipulation of Evidence.

Evidence may be stipulated by agreement of all parties in interest.

§8.47. Objections and Exceptions.

Formal exception to the ruling of the hearing officer is not necessary. It is sufficient that the party in interest at the time the ruling is made, or sought, make known to the hearing officer the action desired.

§8.48. Motions.

Every motion relating to a pending proceeding shall, unless made during a hearing, be written, and shall set forth the relief sought and the specific reasons and grounds therefor. If based upon matters which do not appear of record, it shall be supported by affidavit. Any motion not made during a hearing shall be filed with the hearing officer.

§8.49. Briefs.

Briefs may be filed in any pending adjudicative proceeding at such time as may be specified by the hearing officer.

§8.50. Service of Pleading, Petitions, Briefs, and the Like.

A copy of every pleading, petition, brief, or other document filed in any adjudicative proceeding, after appearances shall have been entered of record therein, shall be served upon all other parties in interest or their leading counsel and upon the director by sending a copy thereof properly addressed to each such party by first class United States mail, postage prepaid, by actual delivery, or by telephonic document transfer. A certificate of such fact shall accompany the original of each such instrument filed with the division.

§8.51. Submission.

Adjudicative proceedings will be deemed submitted to the hearing officer as soon as the hearing and record are completed and briefs, if any, are filed. At the discretion of the hearing officer, parties or their attorneys, in lieu of oral closing arguments or closing statements at the conclusion of an adjudicative proceeding, shall file a written summation or brief containing the statements, arguments and conclusions, together with references to supporting authorities, which might normally be presented orally at the conclusion of such hearing. A schedule for submission of written closing summations or briefs will be established by the hearing officer at the conclusion of the hearing on the merits.

§8.52. Findings and Recommendations of Hearing Officer.

As soon as practicable after the submission of the proceeding, the hearing officer shall prepare certify and file with the director a copy of the hearing officer's findings of fact, conclusions of law and a recommended decision and order. A copy of said report shall be served by the hearing officer upon all parties or their leading counsel.

§8.53. Filing of Exceptions.

Any party in interest may, within 20 days after the date of service of the hearing officer's report and recommended decision and order, file exceptions to such report and recommended decision and order. Requests for extension of time within which to file exceptions shall be filed with the hearing officer and a copy of such request shall be served on all other parties in interest. The hearing officer shall promptly notify the parties of his or her action upon the request and shall allow additional time only in extraordinary circumstances where the interest of justice so requires.

§8.54. Form of Exceptions.

Exceptions to findings of fact, conclusions or to any other matters of law in any report and recommended decision and order of a hearing officer shall be specific and shall be stated and numbered separately. When exception is taken to a statement of fact, specific reference must be made to the evidence relied upon to support the specification of error and a statement in the form claimed to be correct must be suggested. When exception is taken to a particular finding or conclusion, whether of fact, law, or a mixed question of fact and law, the evidence, if any, and the law relied upon to support the specification of error must be suggested.

§8.55. Replies to Exceptions.

Replies to exceptions may be filed within 10 days after the date of filing such exceptions. It is within the hearing officer's discretion, upon notice to all parties in interest, to extend the time for filing such reply. No further written responses or replies are allowed.

§8.56. Final Decision.

In all contested cases except those brought under Occupations Code, §§2301.601 - 2301.613 and §2301.204, after a matter has been heard and submitted to the director for decision, and the director has considered all exceptions and replies thereto, if any, and has issued the order in connection therewith, such order shall be deemed final and binding on all parties thereto and all administrative remedies are deemed to be exhausted as of the effective date stated therein, unless a motion for rehearing be filed as provided by law.

§8.57. Submission of Amicus Briefs.

Any interested party wishing to file an amicus brief for consideration by the director regarding a contested case should file its brief no later than the deadline for exceptions. A party may file one written response to the brief filed by the amicus curiae no later than the deadline for replies to exceptions. Any amicus brief, or response to that brief, not filed within such time will not be considered by the director, unless good cause may be shown why this deadline should be waived or extended.

§8.58. Format for Documents Filed with the Director Subsequent to the Issuance of a Proposal for Decision.

(a) The total number of typewritten pages of a party's exceptions to proposals for decision and motions for rehearing must not exceed the total number of pages of the examiner's proposal for decision, and the total number of typewritten pages of a party's replies to exceptions and replies to motions for rehearing must not exceed three-fourths of the total number of pages of the examiner's proposal for decision, exclusive of pages containing the cover, index, table of authority, and attachments. The total number of pages of amicus briefs must not exceed three-fourths of the total number of pages of the examiner's proposal for decision, exclusive of pages containing the cover, index, table of authority, and attachments. In no event, such as when the examiner's proposal for decision is less than 15 pages, will this rule be construed to limit the length of a party's exception to a proposal for decision, motion for rehearing, or response thereto, to less than 10 pages.

(b) Exceptions, motions for rehearing, replies to exceptions, replies to motions for rehearing, and amicus briefs shall be printed or typed on 8 1/2 inch by 11 inch bond paper in no smaller than 11 point type with margins of at least one inch at the top, bottom, and each side. Pages shall be numbered in the 1 inch margin at the bottom of each page. All typewriting except block quotations and footnotes shall be double spaced.

(c) Where applicable, when the exceptions, motions for rehearing, replies to exceptions, and replies to motions for rehearing refer to facts or testimony from the evidentiary record, these statements must be followed by a reference to the specific exhibit or page number in the transcript where the fact or testimony is found.

(d) Each party or interested person shall file an original and three copies of its exceptions, motions for rehearing, replies to exceptions, replies to motions for rehearing, and amicus briefs.

(e) Other than document length, the requirements in subsections (a) - (d) of this section are not to be strictly construed in cases brought under Occupations Code, §§2301.601 - 2301.613 (the Lemon Law) and §2301.204 (warranty performance) or where a party appears *pro se*.

(f) The hearing officer or director has the sole right to examine and determine whether documents meet the requirements of this section. If a document fails to meet the requirements of this section, the examiner or director has the discretion to accept the document as written, consider only those pages which meet the requirements of this section, or direct the party to make whatever modifications necessary to substantially conform the document to the requirements of this section. No motion or request to strike a document for failure to meet the requirements of subsections (a) - (d) of this section will be considered by the examiner or director.

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

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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SUBCHAPTER C. LICENSES, GENERALLY

43 TAC §§8.81 - 8.86

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.81. Objective.

The objective of this subchapter is to implement the intent of the legislature as declared in Occupations Code, Chapter 2301, and Transportation Code, Chapter 503, by prescribing rules to regulate businesses requiring licenses under those chapters.

§8.82. Administration of Licensing Fees.

(a) When a license is voluntarily or involuntarily cancelled by the director no refund of fees will be made.

(b) The division shall charge a processing fee of $50 for each duplicate license issued to any licensee.

(1) A request for a duplicate license must be made on a form prescribed by the director and state the reason a duplicate license is needed.

(2) A licensee may request one duplicate license at no charge if the licensee did not receive the original license and makes the request within 45 days of the time the license was mailed to the licensee.

(c) Prior to the issuance of a license, an applicant may withdraw its application and, upon written request, receive a refund of the application fees.

(d) Should an applicant fail to submit a complete new or amendment application not later than 180 days after the initial submission, the department may retain any monies paid by the applicant as earned fees. The 180-day time period may be tolled by the director or the director's designee for good cause.

(e) Should a licensee fail to submit a complete renewal application not later than 90 days after the expiration of its prior license, the department may retain any monies paid by the licensee as earned fees.

§8.83. Renewal of Licenses.

(a) A licensee must file a complete renewal application prior to the expiration of its existing license.

(b) If the licensee has not submitted to the division a renewal application with all required information and applicable fees within 90 days after license expiration, including late fees as provided by Occupations Code, §2301.264(b), the licensee must apply for a new license.

§8.84. Brokering, New Motor Vehicles.

(a) Under Occupations Code, §§2301.002, 2301.006, 2301.251 and 2301.252, the definition of "arranges or offers to

arrange a transaction" is construed as soliciting or referring buyers for new motor vehicles for a fee, commission, or other valuable consideration. Advertising would not be included in this definition as long as the person's business primarily includes the business of broadcasting, printing, publishing, or advertising for others in their own names.

(b) A buyer referral service, program, plan, club, or any other entity that accepts fees for arranging a transaction involving the sale of a new motor vehicle is a broker. The payment of a fee to such an entity is aiding and abetting brokering. However, any referral service, program, plan, club or other entity that forwards referrals to dealerships may lawfully operate in a manner that includes all of the following conditions:

(1) There are no exclusive market areas offered to dealers by the program. All dealers are allowed to participate on equal terms.

(2) Participation by dealers in the program is not restricted by conditions such as limiting the number of franchise lines or discrimination by size of dealership or location. Total number of participants in the program may be restricted if the program is offered to all dealers at the same time with no regard to the franchise line.

(3) All participants pay the same fee for participation in the program that shall be a weekly, monthly, or annual fee, regardless of the size, location or line-make of the dealership.

(4) A person is not to be charged a fee on a per referral fee basis or any other basis that could be considered a transaction-related fee.

(5) The program does not set or suggest to the dealer any price of vehicles or trade-ins.

(6) The program does not advertise or promote its plan in a manner that implies that the buyer, as a customer of that program, receives a special discounted price that cannot be obtained unless the customer is referred through that program.

(c) The provisions of subsections (a) and (b) of this section do not apply to any person or entity which is exempt from the broker definition in Occupations Code, §2301.002(3).

(d) All programs must comply with Subchapter H of this chapter (relating to Advertising).

§8.85. Brokering, Used Motor Vehicles.

(a) Transportation Code, §503.021, prohibits persons from engaging in the business as a dealer, directly or indirectly, including by consignment without a general distinguishing number. "Directly or Indirectly" includes the practice of arranging or offering to arrange a transaction involving the sale of a used motor vehicle for a fee, commission or other valuable consideration.

(b) A buyer referral service, program, plan, club, or any other entity that accepts fees for arranging a transaction involving the sale of a used motor vehicle is required to meet the requirements for and obtain a general distinguishing number unless the referral service, program, plan, or club is operated in the following manner:

(1) There are no exclusive market areas offered to dealers by the program. All dealers are allowed to participate on equal terms.

(2) Participation by dealers in the program is not restricted by conditions such as limiting the number of franchise lines or discrimination by size of dealership or location. Total number of participants in the program may be restricted if the program is offered to all dealers at the same time with no regard to the franchise line.

(3) All participants pay the same fee for participation in the program that shall be a weekly, monthly, or annual fee, regardless of the size, location, or line-make of the dealership.

(4) A person is not to be charged a fee on a per referral fee basis or any other basis that could be considered a transaction-related fee.

(5) The program does not set or suggest to the dealer any price of vehicles or trade-ins.

(6) The program does not advertise or promote its plan in a manner that implies that the buyer, as a customer of that program, receives a special discounted price that cannot be obtained unless the customer is referred through that program.

(c) All programs must comply with Subchapter H of this chapter (relating to Advertising).

§8.86. Processing of License Applications, Amendments, or Renewals.

(a) Any application for a license, amendment of a license, or renewal of a license issued by the division must conform to the procedures set out in paragraphs (1) and (2) of this subsection.

(1) Applications for licenses, amendments of licenses, and renewals of licenses will be accepted for processing only if filed by the applicant, licensee, or that person's designated attorney or certified public accountant; and

(2) Application, amendment, or renewal fees paid by check, credit or debit card, or electronic transfer, must be drawn from an account held by the applicant, licensee, or from a trust account of the applicant's designated attorney or certified public accountant.

(b) Information concerning the status of an application, application deficiencies, or new license numbers will not be provided telephonically to license purveyors.

(c) Attorneys and certified public accountants that file applications on behalf of applicants may be required to provide proof of authority to act on behalf of an applicant.

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

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Richard D. Monroe
General Counsel
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SUBCHAPTER D. FRANCHISED DEALERS, MANUFACTURERS, DISTRIBUTORS, CONVERTERS AND REPRESENTATIVES

43 TAC §§8.101 - 8.114

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the

conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.101. Objective.

The objective of these rules is to implement the intent of the legislature as declared in Occupations Code, Chapter 2301, by prescribing rules to regulate businesses requiring licenses under the Code.

§8.102. Representatives.

(a) To effectuate Occupations Code, §2301.002(29), the definition of the term "representative" is construed to be sufficiently broad to include regional, zone, or district executive personnel whose area of responsibility includes Texas, and whose duties include contacting motor vehicle dealers or dealership personnel, and every other person employed by a motor vehicle manufacturer, distributor or converter, directly or indirectly, to call upon or contact motor vehicle dealers or dealership employees concerning new motor vehicle sales, advertising, service, parts, business management, used motor vehicle sales, and for any other purpose.

(b) The statutory definition is construed to not include office or clerical personnel, production personnel, etc., whose duties do not include contacting motor vehicle dealers or dealership employees.

(c) A "person" who meets the definition of representative can also be other than a natural person such as a corporation. Employees of an entity licensed as a representative that perform representative functions in the scope of their employment for the licensed representative are required to obtain a representative's license in their individual capacity, except for the president/chief executive officer of the corporation. A licensed representative may identify and perform representative functions for more than one manufacturer, distributor, or converter.

§8.103. Service-Only Facility.

(a) A service-only facility is a location occupied and operated by a franchised dealer that is a completely separate, non-contiguous site, from the franchised dealer's new vehicle sales and service or sales only location, where the franchised dealer will only perform warranty and non-warranty repair services. Except as allowed in subsection (d) of this section, warranty repair services may only be performed at either a licensed dealership or a licensed service-only facility.

(b) A franchised dealer must obtain a license to operate a service-only facility. The dealer may not obtain a service-only facility license to service a particular line of new motor vehicles, unless the dealer is franchised and licensed to sell that line.

(c) A service-only facility is considered a dealership under Occupations Code, §2301.002(8), and is therefore subject to protest under Occupations Code, §2301.652.

(d) Upon the manufacturer's or distributor's prior written approval, which cannot be unreasonably withheld, only a franchised dealer of the manufacturer or distributor may contract with another person as a sub-contractor to perform warranty repair services the dealer is authorized to perform under a franchise agreement with a manufacturer or distributor. Payment shall be made by the franchised dealer to the sub-contractor and not by the manufacturer or distributor to the sub-contractor.

(e) A person with whom a franchised dealer contracts, as described in subsection (d) of this section, to perform warranty repair services is not eligible to obtain a service-only facility license and may not advertise to the public the performance of warranty repair services in any manner.

§8.104. Amended License.

(a) To effectuate Occupations Code, §2301.356, every licensed dealer who proposes to conduct business under a franchise which is additional to or which differs from the franchise or franchises on which the license is then based shall file an application to amend the license on the form prescribed by the director, attaching a copy of the franchise agreement. The amended application will be considered as if it were an original application to operate under the additional franchise as to all matters except those reflected by the license as issued.

(b) Every licensed dealer who proposes to sell and/or assign to another an interest equivalent to 10% or more in one or more franchises on which the license is then based or an equivalent interest in the business of the dealership, whether the same is a corporation, partnership, sole proprietorship, or otherwise, shall file an application to amend the license providing the requested information as to the proposed assignee. If the interest involved exceeds 50%, the amended license may be issued in the name of such assignee.

(c) In the event of a change in management reflected by a change of the general manager or other person who is in charge of a licensee's business activities, whether a managing partner, officer, or director of a corporation, or otherwise, the director shall be advised by means of an application for an amended license.

(d) If a licensed new motor vehicle dealer changes or converts from one type of business entity to another without changing ownership of the dealership, the submission of a franchise agreement in the name of the new entity is not required in conjunction with an application. The franchise agreement on file with the division prior to the change or conversion of the dealer's business entity applies to the successor entity until the parties agree to replace the franchise agreement.

(e) If a dealer adopts a plan of conversion under a state or federal law that allows one legal entity to be converted into another legal entity, only an application to amend the license is necessary to be filed with the division. The franchise agreement on file with the division continues to apply to the converted entity. If the entity change is accomplished by any means other than conversion, a new application is required, subject to subsection (d) of this section.

§8.105. Notification of License Application; Protest Requirements.

(a) Upon receipt of an application for a new motor vehicle dealer's license, including an application filed with the division by reason of the relocation of an existing dealership, the division shall not give notice of the filing of an application for the relocation of an existing dealership if the proposed relocation site is not farther than one mile from the site from which the dealership is being relocated, or if the dealership of the dealer licensee holding franchises for the sale of the same line-make of new motor vehicles is not closer to the proposed location than it is to the location from which the dealership is being relocated. However, the director shall give notice of the filing of such application to all other dealer licensees holding franchises for the sale of the same line-make of new motor vehicles who are located in the same county in which the proposed dealership site is located or in an area within 15 miles of the proposed dealership site. If the same line-make is not represented in the county or applicable 15-mile area, no notice shall be given. Any such dealer licensee holding a franchise for the sale of the same line-make of a new motor vehicle as proposed for sale in the subject application may file with the director a notice

of protest in opposition to the application and the granting of a license pursuant thereto, which notice shall be given in the following manner.

(1) The notice of protest shall be in writing and shall be signed by an authorized officer or other official authorized to sign on behalf of the licensee filing the notice.

(2) The notice of protest shall state the basis upon which the protest is made under Occupations Code, §2301.652(a), and shall state the reasons or grounds for the protest.

(3) The notice of protest shall state that the protest is not made for purposes of delay or for any other purpose except for justifiable cause under Occupations Code, §2301.652(a).

(b) The provisions of this section shall not be applicable to any application filed with the division for a dealer license as a result of the purchase or transfer of an existing entity holding a current franchise license which does not involve any physical relocation of the purchased or transferred line-makes.

§8.106. Time for Filing Protest.

Notices of protest must be received in the division offices in Austin not later than 5:00 p.m. on the date 15 days from the date of mailing of the director's notification to the licensees of the filing of the application. Any notice of protest received after such date shall be deemed not timely filed and shall not be considered by the director. A notice of protest may be filed by telegram, mailgram, telephonic document transfer, or other similar means of communication, provided that a notice of protest in conformance with §8.105 of this chapter (relating to Notification of License Application; Protest Requirements) is filed with the division not later than 5:00 p.m. on the date five days following the filing of the notice by telegram, mailgram, or telephonic document transfer, and is accompanied by the statutory protest filing fee. Failure to file a formal notice of protest within the specified time period shall result in the disallowance of the protest.

§8.107. Hearing.

Upon receipt of a notice of protest, timely filed in accordance with the provisions of §8.106 of this chapter (relating to Time for Filing Protest), the director shall promptly set a public hearing for the taking of evidence and for the consideration of the matters set forth in Occupations Code, §2301.652(a).

§8.108. Addition or Relocation of Line Make.

An application for the amendment of an existing new motor vehicle dealer's license by the addition of another line-make at the existing dealership or for the relocation of a line-make to the existing dealership shall be deemed to be an "application to establish a dealership" insofar as the line-make to be added is concerned, and shall be subject to the provisions of §§8.105 - 8.107 of this chapter (relating to Notification of License Application; Protest Requirements; Time for Filing Protest; and Hearing).

§8.109. Replacement Dealership.

An application for a new motor vehicle dealer's license for a dealership intended as a replacement for a previously existing dealership shall be deemed to be an application for "replacement dealership" required to be established pursuant to Occupations Code, §2301.453, and shall not be subject to protest under the provisions of §8.105 of this chapter (relating to Notification of License Application; Protest Requirements), provided that:

(1) the application states that the applicant is intended as a replacement dealership and identifies the prior dealership to be replaced;

(2) the franchisor of the line-make vehicle to be sold shall have given notice to the division and to its other dealers in the area within 60 days following the closing of the prior dealership, that it intends to replace the prior dealership;

(3) the application is filed with the division not later than one year following the closing of the prior dealership; and

(4) the location of the applicant's proposed dealership is not greater than one mile from the location of the prior dealership.

§8.110. Franchise Verification.

(a) Upon application for a new motor vehicle dealer license, or application for amendment of existing new motor vehicle dealer license to add a line-make, in addition to other attachments required to be submitted with the application, the applicant must submit a photocopy of those pages of the franchise agreement(s) which reflect the parties to the agreement(s) and the authorized signatures of the parties to the agreement(s) for each line of motor vehicle listed in the application. A "Verification of Franchise" form prescribed by the division and completed by the manufacturer/distributor may be submitted with the application in lieu of the information described in this subsection to meet this requirement temporarily, for purposes of application processing. The applicant must submit the required photocopies of the franchise agreement(s), as described in this subsection, immediately upon receipt.

(b) Upon application to relocate a new motor vehicle dealership, in addition to other attachments required to be submitted with the application, the applicant must submit a "Verification of Relocation Approval" prescribed by the division and completed by the manufacturer/distributor that identifies the licensee and the new location.

§8.111. Notice of Termination or Noncontinuance of Franchise and Time for Filing Protest.

A notice of termination or noncontinuance of a dealer's franchise shall be given by a manufacturer or distributor in accordance with the requirements of Occupations Code, §2301.453, not less than 60 days prior to the effective date thereof. A notice of protest of the franchise termination or noncontinuance by a dealer pursuant to Occupations Code, §2301.453, shall be in writing and shall be filed in the division's office in Austin, prior to the effective date of franchise termination or noncontinuance as stated in the notice from the manufacturer or distributor.

§8.112. Motor Home Show Limitations and Restrictions.

(a) A dealer licensed by the division who is authorized to sell new motor homes may attend and sell at any motor home show that has been approved by the division.

(b) The scope of this rule is expressly limited to new motor home shows and exhibitions. It does not apply to other types of motor vehicle distribution activities, static displays or any other provision of Occupations Code, Chapter 2301 other than §2301.355 and §2301.358. Other motor vehicle shows, exhibitions, or static displays will be reviewed by division staff on a case by case basis.

(c) Approval must be sought by the show coordinator/promoter no less than 30 days and no more than 90 days prior to the proposed show date. All applications for motor home shows must be submitted on the forms and in the manner prescribed by the division, and must be accompanied by all other required attachments. If the coordinator/promoter is not a licensee or an association or organization of licensees, the application must be accompanied by a $25,000 surety bond to assure compliance with Occupations Code, Chapter 2301 and rules, as well as other regulations pertaining to the sale of new motor vehicles.

(d) There must be at least three dealers participating in the show, representing at least three different line-makes at the show, for the show to qualify for approval. Each participating new motor vehicle

dealer must have a current, valid, Texas new motor vehicle dealer's license to sell the particular line of motor home to be shown.

(e) The duration of any motor home show shall not exceed six days. If a show extends over a Saturday and a Sunday, sales will be suspended by all motor vehicle dealers on the same day to achieve uniform compliance with the Blue Law.

(f) No motor home show shall occur in a county within 90 days of a previous motor home show within that county. Upon a showing of good cause, the division may authorize additional motor home shows in any county. Any motor home dealer may attend a motor home show so long as no like line dealership is located within 70 miles of the show site, unless a written waiver is obtained from the like line dealer or dealers located within 70 miles of the show site. Any like line dealer within 70 miles of the show site has a superior and exclusive right to represent that line at the proposed show. If there are two or more like line dealers located within 70 miles of the show site, each has equal right to participate in the proposed show.

§8.113. Manufacturer Ownership of Franchised Dealer; Good Cause Extension; Dealer Development.

(a) An application for a new motor vehicle dealer's license in which a manufacturer or distributor, as those terms are defined in Occupations Code, Chapter 2301, owns any interest in or has control of the dealership entity must be submitted to the division no later than 30 days before the opening of the dealership, close of the buy-sell agreement, or the expiration of the current license, whichever is the case.

(b) If a manufacturer or distributor applies for a new motor vehicle dealer's license in which the manufacturer or distributor holds an ownership interest in or has control of the dealership entity under the terms of Occupations Code, §2301.476(d), the license application must contain a sworn statement from the manufacturer or distributor that the dealership was purchased from a franchised dealer and is for sale at a reasonable price and under reasonable terms and conditions, and that the manufacturer or distributor intends to sell the dealership to a person not controlled or owned by the manufacturer or distributor within 12 months of acquiring the dealership, except as provided in subsection (h) of this section.

(c) A request for an extension of the initial 12 month period for manufacturer or distributor ownership or control of a new motor vehicle dealership in accordance with Occupations Code, §2301.476(d) must be submitted in accordance with subsection (a) of this section, along with a complete application to renew the new motor vehicle dealer's license. The request must contain a detailed explanation, including appropriate documentary support, to show the manufacturer's or distributor's good cause for failure to sell the dealership within the initial 12 month period. The director of the Motor Vehicle Division, or his designee, will evaluate the request and determine whether the license should be renewed for a period not to exceed 12 months or deny the renewal application. If the renewal application is denied, the manufacturer or distributor will be afforded an opportunity to request a hearing on the denial and, if requested, a hearing will be initiated in accordance with Occupations Code, §§2301.701 - 2301.713.

(d) Requests for extensions after the first extension is granted, as provided in Occupations Code, §2301.476(e), must be submitted at least 120 days before the expiration of the current license. Upon receipt of a subsequent request, the director will initiate a hearing in accordance with Occupations Code, §§2301.701 - 2301.713, at which the manufacturer or distributor will be required to show good cause for the failure to sell the dealership. The manufacturer or distributor has the burden of proof and the burden of going forward on the sole issue of good cause for the failure to sell the dealership.

(e) The division will give notice of the hearing described in subsection (d) of this section to all other dealer licensees holding franchises for the sale and service or service only of the same line-make of new motor vehicles who are located in the same county in which the dealership owned or controlled by the manufacturer or distributor is located or in an area within 15 miles of the dealership owned or controlled by the manufacturer or distributor. Such dealers, if any, will be allowed to intervene and protest the granting of the subsequent extension. Notices of intervention by dealers afforded a right to protest under Occupations Code, §2301.476(e), must be filed with the Docket Clerk within 15 days of the date of mailing of the notice of hearing, with a copy provided to the manufacturer or distributor. Failure to file a formal notice of intervention within the specified time period will result in the disallowance of the intervention.

(f) A hearing under subsections (d) and (e) of this section will be conducted as expeditiously as possible, but not later than 120 days after receipt of the subsequent request for extension from the manufacturer or distributor. A hearings officer will prepare a written decision and proposed order as soon as possible, but not later than 60 calendar days after the hearing is closed. The new motor vehicle dealer's license that is the subject of the hearing will continue in effect until a final decision is rendered on the request for a subsequent extension.

(g) The procedure described in subsections (d) - (f) of this section will be followed for all extensions requested by the manufacturer or distributor after the initial extension.

(h) An application for a new motor vehicle dealer's license in which a manufacturer or distributor owns any interest in the dealership entity under the terms of Occupations Code, §2301.476(g), must contain sufficient documentation to show the following:

(1) that the dealer development candidate is part of a group of persons who have historically been underrepresented in the manufacturer's or distributor's dealer body or is an otherwise qualified person who lacks the resources to purchase a dealership outright;

(2) that the manufacturer or distributor is in a bona fide relationship with the dealer development candidate;

(3) that the dealer development candidate has made a significant investment in the dealership, subject to loss;

(4) that the dealer development candidate has an ownership interest in the dealership; and

(5) that the dealer development candidate operates the dealership under a plan to acquire full ownership of the dealership within a reasonable time and under reasonable terms and conditions.

§8.114. Sale of Vehicles by Manufacturer/Distributor at Wholesale Auction.

A manufacturer or distributor who is licensed under Occupations Code, Chapter 2301, or a wholly-owned subsidiary of a manufacturer or distributor, may sell vehicles it owns to dealers through a licensed Texas wholesale motor vehicle auction. General distinguishing numbers currently issued to licensed manufacturers, distributors, or their wholly-owned subsidiaries shall be cancelled on the date this rule becomes effective, except where otherwise allowed under the 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 September 29, 2005.

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Texas Department of Transportation
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SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

43 TAC §§8.131 - 8.148

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.131. Objective.

The objective of this subchapter is to implement the intent of the legislature as declared in Transportation Code, Chapter 503, and Occupations Code, Chapter 2301, by prescribing rules to regulate businesses requiring general distinguishing numbers.

§8.132. Definitions.

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

(1) Agent of foreign motor vehicle dealer--a resident of a foreign country who is formally authorized by a foreign motor vehicle dealer to purchase motor vehicles for import and resale by the foreign motor vehicle dealer at the foreign motor vehicle dealer's authorized business in the foreign country.

(2) Barrier--A material object or set of objects that separates or demarcates.

(3) Charitable organization--An organization that is established and exists for the purpose of relieving poverty, the advancement of education, religion, or science, the promotion of health, governmental, or municipal purposes, or other purposes beneficial to the community without financial gain.

(4) Consignment sale--The sale of a vehicle by a person other than the owner, under the terms of a written authorization from the owner.

(5) Dealer--Any person who is regularly and actively engaged in the business of buying, selling, or exchanging new or used motor vehicles, motorcycles, motor homes, house trailers, or trailers or semitrailers as defined in Transportation Code, §501.001 et seq., or Transportation Code, §502.001 et seq., at either wholesale or retail, either directly, indirectly, or by consignment.

(6) Foreign motor vehicle dealer--A person holding a valid license to sell motor vehicles at retail or wholesale issued by a jurisdiction outside of the territorial limits of the United States. For purposes of this section, all states, protectorates, and trust territories administered by the federal government of the United States are considered part of the United States and excluded from the definition of foreign motor vehicle dealer.

(7) License--A dealer's general distinguishing number assigned by the division for the location from which the person engages in business.

(8) Mexican motor vehicle dealer--A resident of the Republic of Mexico holding a current and valid license to sell motor vehicles issued by the Secretaria de Economia of the Republic of Mexico.

(9) Person--Any individual, firm, partnership, corporation, or other legal entity.

(10) Sale--With regard to a specific vehicle, the transfer of possession of that vehicle to a purchaser for consideration.

(11) Temporary cardboard tag--A buyer tag, supplemental buyer tag, or dealer tag.

(12) Wholesale dealer--A licensed dealer who only sells or exchanges vehicles with other licensed dealers.

§8.133. General Distinguishing Number.

(a) No person may engage in business as a dealer unless that person has a currently valid general distinguishing number assigned by the division for each location from which the person engages in business. If a dealer consigns more than five vehicles in a calendar year for sale from a location other than the location for which the dealer holds a general distinguishing number, the dealer must also hold a general distinguishing number for the consignment location.

(b) The provisions of subsection (a) of this section do not apply to:

(1) a person who sells or offers for sale fewer than five vehicles of the same type as herein described in a calendar year and such vehicles are owned by him and registered and titled in his name;

(2) a person who sells or offers to sell a vehicle acquired for personal or business use if the person does not sell or offer to sell to a retail buyer and the transaction is not held for the purpose of avoiding the provisions of Transportation Code, §503.001 et seq., and this subchapter;

(3) an agency of the United States, this state, or local government;

(4) a financial institution or other secured party selling a vehicle in which it holds a security interest, in the manner provided by law for the forced sale of that vehicle;

(5) a receiver, trustee, administrator, executor, guardian, or other person appointed by or acting pursuant to the order of a court;

(6) an insurance company selling a vehicle acquired from the owner as the result of paying an insurance claim;

(7) a person selling an antique passenger car or truck that is at least 25 years old or a collector selling a special interest motor vehicle as defined in Transportation Code, §683.077, if the special interest vehicle is at least 12 years old;

(8) a licensed auctioneer who, as a bid caller, sells or offers to sell property to the highest bidder at a bona fide auction if neither legal nor equitable title passes to the auctioneer and if the auction is not held for the purpose of avoiding another provision of Transportation Code, §503.001 et seq., and this subchapter; and provided that if an auction is conducted of vehicles owned, legally or equitably, by a person who holds a general distinguishing number, the auction may be

conducted only at a location for which a general distinguishing number has been issued to that person or at a location approved by the division as provided in §8.35 of this chapter (relating to More Than One Location); and

(9) a person who is a domiciliary of another state and who holds a valid dealer license and bond, if applicable, issued by an agency of that state, when the person buys a vehicle from, sells a vehicle to, or exchanges vehicles with a person who:

(A) holds a current valid general distinguishing number issued by the division, if the transaction is not intended to avoid the terms of Transportation Code, §503.001 et seq.; or

(B) is a domiciliary of another state if the person holds a valid dealer license and bond, if applicable, issued by that state, and if the transaction is not intended to avoid the terms of Transportation Code, §503.001 et seq.

(c) Application for a general distinguishing number shall be on a form prescribed by the director properly completed by the applicant showing all information requested thereon and shall be submitted to the director accompanied by the following:

(1) a $25,000 surety bond as provided in §8.37 of this chapter (relating to Security Requirements);

(2) a one-year lease as cited in §8.140 of this chapter (relating to Established and Permanent Place of Business), or deed for the dealer's location in the name of the applicant;

(3) the fee for the general distinguishing number as prescribed by law for each type of license requested;

(4) the fee as prescribed by law for each dealer metal plate requested and the license plate reflectorization fee as prescribed by law;

(5) photographs clearly showing:

(A) the interior of the dealer's office;

(B) the exterior of the dealer's office;

(C) the dealer's sign;

(D) the vehicle display area; and

(6) verification of all assumed name(s), if applicable, in the form of assumed name certificate(s) on file with the Secretary of State or county clerk.

(7) a photocopy of the current driver's license or Department of Public Safety identification of the owner, president or managing partner of the dealership.

(d) A person who applies for a general distinguishing number and will operate as a dealer under a name other than the name of that person shall use the name under which that person is authorized to do business, as filed with the secretary of state or county clerk, and the assumed name of such legal entity shall be recorded on the application using the letters "DBA."

(e) If the general distinguishing number is issued to a corporation, the dealer's name, as it appears on file with the Secretary of State, shall be recorded on the application.

(f) A licensed wholesale dealer who elects to buy, sell to, or exchange vehicles with persons other than licensed dealers, must satisfy the display space requirements of §8.40 of this chapter (relating to Established and Permanent Place of Business) and exchange the wholesale dealer license for a general distinguishing number which is appropriate for the type of vehicles the dealer wishes to buy, sell, or exchange.

(g) An application for a general distinguishing number may be denied if an applicant for such license has committed any act that could result in license cancellation or revocation under Transportation Code, §503.001 et seq.

(h) Each license will be issued for a period of one year from the date of issuance of the license. The entire yearly license fee will be due at that time.

(1) The security requirement stated in Transportation Code, §503.033, must be effective, at a minimum, for the period for which the general distinguishing number will be valid.

(2) All dealer metal plates issued to a licensed dealer shall expire on the same date as the expiration of the dealer's general distinguishing number.

§8.134. House Trailer; Travel Trailer; Towable Recreational Vehicle.

The terms "house trailer" or "travel trailer," for the purpose of the sections under this subchapter, shall mean a vehicle without automotive power designed for human habitation and for carrying persons and property upon its own structure and for being drawn by a motor vehicle. Towable recreational vehicles as defined in Occupations Code, §2301.002, are included in the terms "house trailer" or "travel trailer."

§8.135. More than One Location.

(a) A dealer holding a general distinguishing number for a particular type of vehicle may operate from more than one location within the limits of a city, provided each such location is operated by the same legal entity and meets the requirements of §8.40 of this chapter (relating to Established and Permanent Place of Business).

(b) Additional locations which are not located within the limits of the same city of the initial dealership are required to obtain a separate license and security unless the location is exempt from the security requirement by statute.

(c) Dealerships that are relocated from a point outside the limits of a city, or relocated to a point not within the limits of the same city of the initial location are required to obtain a new license and provide new security reflecting the new address unless the location is exempt from the security requirement by statute.

(d) A dealer shall notify the division in writing within 10 days of the opening, closing, or relocation of any dealership location. Each new location must meet requirements of §8.40 of this chapter (relating to Established and Permanent Place of Business).

§8.136. Off-site Sales.

Unless otherwise authorized by statute, a dealer is not permitted under Transportation Code, §503.001 et seq. to sell or offer for sale vehicles from a location other than an established and permanent place of business which has been approved by the division and for which a general distinguishing number has been issued to that dealer.

§8.137. Security Requirements.

(a) Unless allowed to operate under Transportation Code, §503.033(c), a motor vehicle dealer or motorcycle dealer who does not hold a franchised dealer's license issued by the division shall maintain a $25,000 bond conditioned on the dealer's payment of all valid bank drafts drawn by the dealer for the purchase of motor vehicles and the dealer's transfer of good title to each motor vehicle the dealer offers for sale. The bond must be valid for the same period of time as the dealer's license and is subject to the following:

(1) The bond shall be on a form which is prescribed by the director and approved by the attorney general and issued by a company duly authorized to do business in the state of Texas.

(2) The name of all owners shall be shown on the bond along with the name in which the dealer's license is issued.

(3) A bond executed by an agent who represents a bonding company or surety must be supported by an original power of attorney from the bonding company or surety.

(b) Recovery against the bond may be made by any person who obtains a court judgment assessing damages and/or attorneys fees for an act or omission on which the bond is conditioned. If the person seeking to obtain such a court judgment is a dealer, that dealer shall notify the division of the claim immediately upon filing suit on the bond.

(c) Payment of any judgment by the bonding company shall be immediately reported to the division in writing.

(d) Recovery against an alternative surety source, as described in Transportation Code, §503.033(c), may be made by any person who obtains a court judgment assessing damages and/or attorneys fees for an act or omission concerning the payment of all valid bank drafts, including checks, drawn by the dealer for the purchase of motor vehicles and transfer of good title to each motor vehicle that the dealer sells. If the person seeking to obtain court judgment is a dealer, that dealer shall notify the division of the claim immediately upon filing suit.

(e) The provisions of subsection (a) of this section do not apply to:

(1) a franchised motor vehicle dealer who is licensed by the division;

(2) a franchised motorcycle dealer who is licensed by the division;

(3) a house trailer or travel trailer dealer; or

(4) a trailer/semitrailer dealer.

§8.138. Temporary Cardboard Tags.

(a) Motor vehicle, travel trailer, trailer/semitrailer, and converter tags shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 7-inch centers and vertically punched on 4 1/2-inch centers and the letters in the words "UNREGISTERED VEHICLE" shall not be less than 3/4 inch high. Motorcycle tags shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 5 3/4-inch centers and vertically punched on 2 3/4-inch centers and the letters in the words "UNREGISTERED VEHICLE" shall not be less than 1/2 inch high. All printed matter on a temporary cardboard tag must be visible and may not be covered or obstructed by a plate holder. Homemade cardboard tags or cardboard tags which have buyer's tag information printed on one side and dealer's tag information printed on the other side are not acceptable.

(b) The following appendices indicate the design and the instructions for printing and use of each of the respective temporary tags:

(1) Appendix A-1 - Dealer (design); Appendix A-2 - Dealer (instructions);
Figure 1: 43 TAC §8.138(b)(1)
Figure 2: 43 TAC §8.138(b)(1)

(2) Appendix B-1 - Buyer - Initial (design); Appendix B-2 - Buyer - Initial (instructions);
Figure 1: 43 TAC §8.138(b)(2)
Figure 2: 43 TAC §8.138(b)(2)

(3) Appendix B-3 - Buyer - Supplemental (design); Appendix B-4 - Buyer -Supplemental (instructions);
Figure 1: 43 TAC §8.138(b)(3)
Figure 2: 43 TAC §8.138(b)(3)

(4) Appendix C-1 - Converter (design); Appendix C-2 - Converter (instructions).
Figure 1: 43 TAC §8.138(b)(4)
Figure 2: 43 TAC §8.138(b)(4)

(c) A dealer shall maintain a log recording the information on all tags printed for that dealer and as to each vehicle such record shall contain those items for each appropriate tag as set out in Appendices A-1, B-1, and B-3 of subsection (b) of this section. The log shall become a part of the required records required to be maintained by the dealer and available for inspection.

(d) The dealer's record as referenced in subsection (c) of this section, shall be available at the dealer's location during normal working hours for review by a representative of the department. Temporary tags which cannot be accounted for shall no longer be valid for use and shall be voided in the dealer's log.

§8.139. Metal Dealer License Plates and Temporary Cardboard Tags.

(a) Metal dealer license plates shall be attached to the rear license plate holder of vehicles on which such plates are permitted to be displayed pursuant to Transportation Code, §503.061. Although not a requirement, a copy of the receipt for metal dealer's plate issued by the division should be carried in the vehicle so that it can be presented to law enforcement personnel upon request. If the vehicle on which a metal dealer plate is to be attached displays Texas multi-year plates that have not been validated for the current registration period, such multi-year plates shall be removed and safeguarded. The multi-year plates should be placed back onto the vehicle when it is sold or if the metal dealer plate is removed from the vehicle.

(b) All temporary cardboard tags shall be displayed either in the rear window or on the rear license plate holder of unregistered vehicles. When displayed in the rear license plate holder, all printed matter must be visible and may not be covered or obstructed by any plate holder. When displayed in the rear window, the tag shall be attached in such a manner that it is clearly visible and legible when viewed at 15 feet from the rear of the vehicle. If the vehicle on which a temporary cardboard tag is to be attached displays Texas multi-year license plates that have not been validated for the current registration period, the temporary cardboard tag may be displayed in the rear window as prescribed in this subsection or placed over the rear license plate. The multi-year plates should not be removed from the vehicle.

(c) Metal dealer license plates and dealer's temporary cardboard tags may not be displayed on laden commercial vehicles being operated or moved upon the public streets or highways or on the dealer's service or work vehicles. This prohibition does not apply to buyer tags or supplemental buyer tags, or to vehicles loaned to charitable organizations or schools.

(1) Examples of vehicles considered as service or work vehicles are:

(A) vehicles used for towing or transporting other vehicles;

(B) vehicles, including light trucks used in connection with the operation of the dealer's shops or parts department;

(C) courtesy cars on which courtesy car signs are displayed;

(D) rental and lease vehicles; and

(E) any boat trailer owned by a dealer or manufacturer which is used to transport more than one boat.

(2) A light truck is not considered to be a laden commercial vehicle:

(A) when mounted with a camper unit; or

(B) when towing a trailer for recreational purposes.

(3) As used in this subsection, light truck shall have the same meaning as defined in Transportation Code, §541.201.

(d) Each unregistered vehicle being transported utilizing the full mount method, the saddle mount method, the tow bar method, or any combination thereof in accordance with Transportation Code, §503.068(d), shall have a dealer's temporary cardboard tag or a buyer's temporary cardboard tag, whichever is applicable, affixed to that vehicle. If the vehicle being transported is of a type which is prohibited from operating upon the public streets and highway (i.e., off-highway vehicle or self-propelled machine) and, thus, cannot qualify for registration, a cardboard tag shall be displayed thereon; and such tag shall be marked in bold letters with the notation "For Off Highway Use Only."

(e) Metal dealer license plates and temporary cardboard tags may be displayed only on the type of vehicle for which the general distinguishing number is issued and for which a dealer is licensed to sell. Non-franchised dealers may not display metal plates on new motor vehicles.

(f) A buyer's temporary cardboard tag or supplemental tag may not be displayed on any vehicle being operated upon the public streets and highways for which a sale has not been consummated.

(g) When an unregistered vehicle is sold to another dealer, the selling dealer shall remove a dealer's temporary cardboard tag. In such instances, the selling dealer may attach a buyer's temporary cardboard tag to the vehicle; or the purchasing dealer may display a dealer's temporary cardboard tag or metal dealer plate on the vehicle. In the event a vehicle is consigned from one dealer to another, the vehicle shall display the temporary cardboard tag of the dealer to which such vehicle was consigned.

(h) A dealer may have printed temporary dealer tags, initial temporary buyer's tags, and supplemental temporary buyer's tags according to the specifications of Appendices A-1 through B-4 of §8.138 of this chapter (relating to Temporary Cardboard Tags).

(i) A dealer shall maintain a record of all dealer metal plates issued to that dealer and as to each vehicle such record shall consist of:

(1) the assigned metal plate number;

(2) the make;

(3) the vehicle identification number; and

(4) the name of the person in control.

(j) The dealer's record as referenced in subsection (i) of this section, shall be available at the dealer's location during normal working hours for review by a representative of the department. Dealer metal plates which cannot be accounted for shall no longer be valid for use and shall be voided in the dealer's record and reported as missing to the division.

(k) At the expiration of an initial buyer's temporary tag, a supplemental temporary buyer's tag may be issued as provided for in Transportation Code, §503.063.

(l) A person who holds a wholesale motor vehicle auction general distinguishing number may display its dealer's temporary cardboard tags on any vehicles which are transported to or from the licensed auction location by a bona fide employee or agent of the auction.

(m) A wholesale motor vehicle auction licensee may only issue a buyer's temporary cardboard tag in connection with a sale of a motor vehicle owned by a government agency that is made pursuant Transportation Code, §503.037(d).

(n) The number of metal dealer plates a dealer may order for business use shall be allocated based on the type of license applied for and the number of vehicles sold during the previous year. New license applicants shall be allotted a predetermined number of metal dealer plates during the first license term.

(1) New license applicants may receive metal dealer plates during the first term of licensure in accordance with the following schedule:

(A) Franchised motor vehicle dealer - 5

(B) Franchised motorcycle dealer - 5

(C) Independent motor vehicle dealer - 2

(D) Independent motorcycle dealer - 2

(E) Franchised or independent travel trailer dealer - 2

(F) Utility trailer or semi-trailer dealer - 2

(G) Wholesale dealer - 1.

(2) A newly licensed dealership is not subject to the initial allotment limits described in paragraph (1) of this subsection, and may rely on the previous license status to obtain dealer plates, if it is:

(A) a franchised dealership that has been subject to a buy-sell agreement, regardless of a change in the entity or ownership, or

(B) any dealer that relocates, if it has been licensed for a period of one year or more.

(3) Upon renewal, the maximum number of dealer plates issued to a motor vehicle dealer per license term shall be as follows:

(A) Franchised motor vehicle dealer - 30

(B) Franchised motorcycle dealer - 10

(C) Independent motor vehicle dealer - 3

(D) Independent motorcycle dealer - 3

(E) Franchised or independent travel trailer dealer - 3

(F) Utility trailer or semi-trailer dealer - 3

(G) Wholesale dealer - 1.

(4) To obtain more than the maximum number of plates set out in paragraph (3) of this subsection, a dealer must submit proof of sales to qualify for additional plates.

(A) Additional plates above the amounts set out in paragraph (3) of this subsection shall be as follows:

(i) Wholesale dealers - 1

(ii) Dealers selling less than 50 vehicles - 1

(iii) Dealers selling 50 to 99 vehicles - 2

(iv) Dealers selling 100 to 200 vehicles - 5

(v) Dealers selling 201 or more vehicles may obtain any number of dealer plates at the dealer's discretion.

(B) Proof of sales shall consist of a copy of the most recently filed Vehicle Inventory Tax Declaration or monthly statements duly filed with the proper taxing authority in the county of the dealership's location. Said copies should be stamped received by the tax authority. Any franchised dealer's renewal license application that indicates sales of 201 or more units shall be considered proof of sales of 201 or more and no additional proof is needed.

(5) The director or director's designee may waive the dealer plate issuance restrictions if the waiver both serves the purposes of this subchapter and is essential to the continuation of the business. To determine the number of dealer plates the dealer needs, the director or the director's designee may base the decision on the dealer's past sales, inventory, and any other pertinent factors as the director may determine.

(A) All requests for waivers shall be in writing and specifically state why the additional plates are necessary to the continuation of the applicant's business;

(B) All requests for waivers must be accompanied by proof of the dealer's sales for the previous year. Such proof shall consist of a copy of the most recently filed Vehicle Inventory Tax Declaration or monthly statements duly filed with the proper taxing authority in the county of the dealership's location. Said copies should be stamped received by the tax authority.

(C) Wholesale dealers may not apply for waiver of dealer plate issuance restrictions.

(D) Once a waiver is granted authorizing a certain number of plates, the authorization under that waiver is good for three (3) years.

§8.140. Established and Permanent Place of Business.
All dealers must meet the following requirements at each location where vehicles are sold or offered for sale.

(1) Office requirements.

(A) A dealer's office facility must be open to the public during normal working hours. Normal working hours are defined as at least four (4) days per week for a continuous period of time not less than four hours per day between the hours of 8:00 A.M. and 8:00 P.M. The dealer's business hours for each day of the week must be posted at the main entrance of the dealer's office, and the owner or a bona fide employee of the dealer must be at the dealer's location during the posted business hours for the purpose of buying, selling, exchanging, or leasing vehicles. In the event the owner or a bona fide employee is not available to conduct business during the dealer's posted business hours, a separate sign must be posted indicating the date and time such owner or a bona fide employee will resume dealer operations. In addition, such dealership must notify the division in writing of any subsequent change in the dealer's standard business hours.

(B) With the exception of dealers holding only a wholesale license, no more than four retail dealers may be located in a business or residential structure. A structure is a stand-alone building, has its own exterior walls on all sides, and has been assigned a separate mailing address by the United States Postal Service. The structure must be of sufficient size to accommodate the usual office furniture and equipment, such as a desk, file cabinet, chairs, etc. As a minimum, the office must be equipped with a desk and chairs from which the dealer transacts his business and be equipped with a separate working telephone instrument, number, and listing in the dealer's name with a fixed, land-based telephone company, answered from 8:00 a.m. to 5:00 p.m. weekdays by a bona fide employee, or an answering service or machine. If a dealer's office is located in a residential structure, the office must be completely separated from and have no direct access into the residential quarters and be in compliance with all applicable local zoning ordinances and deed restrictions. Such an office shall not be used as a part of the living quarters and must be readily accessible to the public without having to pass into or through any part of the living quarters.

(C) Portable-type office structures may qualify, provided they meet the minimum requirements as set forth herein.

(D) If a dealer conducts business in conjunction with another business owned by the same person, the same telephone instrument may be used for both businesses. However, if the name of the dealer differs from that of the other business, a separate telephone listing and a separate sign for the dealer is required.

(E) A dealer may conduct business in conjunction with another business not owned by the same person, however, the same telephone number may not be used by both businesses; the dealer shall have a separate sign, a separate desk, a separate working telephone instrument, and a separate telephone number and listing in the name of the dealer. The dealer must either own the property or have a separate lease agreement from the owner meeting the requirements of paragraph (4) of this subsection.

(F) Unless otherwise authorized by the Transportation Code, wholesale motor vehicle dealerships established after September 1, 1999, may not occupy the same structure as retail dealers. More than one, but no more than eight dealers who hold only a wholesale license may occupy the same business structure and conduct their respective dealer operations under different names, as long as no retail dealers are located in the same structure; provided, however, each wholesale dealer must, in addition to having a qualifying dealer's sign conspicuously displayed on the premises, have:

(i) a separate desk from which that dealer transacts business;

(ii) a separate working telephone instrument, number, and listing in the dealer's name with a fixed, land-based telephone company; and

(iii) a separate lease agreement meeting the requirements of paragraph (4) of this subsection.

(G) Dealers who hold only a wholesale license will not be required to be present during normal working hours if they keep on file with the division, notice of a designated period of time in which the dealer and the dealer's records will be available for inspection by the division at the dealer's licensed location. The period of time will be no less than two consecutive hours, between the hours of 8:00 a.m. and 5:00 p.m., on any one day of the week, except Saturday or Sunday.

(2) Sign requirements.

(A) A dealer shall display a conspicuous sign with letters at least six inches in height showing the name under which the dealer conducts business. Variance of the six-inch lettering size requirement may be considered upon a showing by the applicant dealer of local zoning requirements limiting lettering size to less than six inches.

(B) Such sign must be readable from the address listed on the application for the dealer license.

(3) Display space requirements.

(A) A dealer other than a wholesale dealer shall have an off-street display area sufficient to display at least five vehicles of the type for which the general distinguishing number was issued.

(B) The display area may not be on a public easement, right-of-way, or driveway, unless the governing body having jurisdiction of the easement, right-of-way, or driveway expressly consents to such use; provided, however, that if the easement, right-of-way, or driveway is a part of the state highway system, such use may only be authorized by a lease agreement entered under Transportation Code, §202.052. Such area shall be located at the dealer's address or contiguous with the dealer's address. The display area must be owned or leased for the exclusive use by the dealer for a continuous term of not less than one year. If the display area is in conjunction with other parking facilities, such area shall be separated by use of barriers under the control of the dealer so as to prevent its use for any purpose other than a display area. Subject to approval by the division, the display area may be located within a building. If multiple retail dealers occupy contiguous locations or are located in the same structure, each dealer must group its vehicles on display in the same area, marking the area and/or vehicles to identify the selling dealer.

(4) Lease requirements. If the premises from which a dealer conducts business is not owned by the licensed dealer, such dealer shall maintain a lease continuous for a period of one year, and such lease agreement shall be on a properly executed form containing, but not limited to, the following information:

(A) the names of the lessor and lessee;

(B) the legal description of the property or street address; and

(C) the period of time for which the lease is valid.

(5) A dealer shall at all times display the dealer license issued by the division in a manner that makes the license easily readable by the public, in a conspicuous place at each place of business for which it is issued. For dealers whose license applies to more than one location, a copy of the original license may be displayed in the supplemental location.

§8.141. Sanctions.

(a) Revocation/Denial. The director may deny, revoke or suspend a dealer's license (general distinguishing number) or assess civil penalties if that dealer:

(1) fails to maintain a good and sufficient bond in the amount of $25,000 or to be currently licensed as a franchised dealer by the division;

(2) fails to maintain an established and permanent place of business conforming to the regulations pertaining to office, sign, and display space requirements;

(3) refuses to permit or fails to comply with a request by a representative of the division to examine the sales records required to be kept under §8.144 of this chapter (relating to Record of Sales and Inventory) and ownership papers for vehicles owned by that dealer or under that dealer's control, and evidence of ownership or lease rights on the property upon which the dealer's business is located:

(A) during posted working hours, as required in §8.140(1)(A) of this chapter, at the dealer's licensed location, or

(B) through a certified letter request signed by the director or the director's designee;

(4) holds a wholesale dealer license and, without notifying the division and meeting the vehicle display space requirements of §8.140 of this chapter (relating to Established and Permanent Place of Business), is found to be selling or offering to sell a vehicle to someone other than a licensed dealer, unless authorized by statute;

(5) holds a travel trailer dealer license or a trailer/semi-trailer dealer license and is found to be selling a motor vehicle or a motorcycle;

(6) fails to notify the division of a change of physical or mailing address and/or telephone number within 10 days after such change;

(7) fails to notify the division of a dealer's name change or ownership within 10 days after such change;

(8) except as provided by law, issues more than one buyer's temporary cardboard tag for the purpose of extending the purchaser's operating privileges for more than 21 days;

(9) fails to remove out-of-state license plates from a vehicle which is displayed for sale;

(10) misuses a metal dealer license plate or a temporary cardboard tag;

(11) fails to display dealer license plates or cardboard tags in a manner conforming to the regulations pertaining to the display of such plates and cardboard tags on unregistered vehicles;

(12) fails to satisfy the notification requirements of §8.144 of this chapter (relating to Record of Sales and Inventory;

(13) holds open titles or fails to take assignment of all certificates of title, manufacturer's certificates, or other basic evidence of ownership for vehicles acquired by the dealer or fails to assign the certificate of title, manufacturer's certificate, or other basic evidence of ownership for vehicles sold. (All certificates of title, manufacturer's certificates, or other basic evidence of ownership for vehicles owned by a dealer must be properly executed showing transfer of ownership into the name of the dealer.);

(14) fails to remain regularly and actively engaged in the business of buying, selling, or exchanging vehicles of the type for which the general distinguishing number is issued;

(15) violates any of the provisions the codes, or any rule or regulation of the department, including advertising rules set out in Subchapter H of this chapter (relating to Advertising);

(16) has not assigned at least five vehicles in the prior 12 months, provided the dealer has been licensed more than 12 months;

(17) files a false or forged title or tax document, including sales tax statement or application for a certified copy of a title;

(18) uses or allows use of that dealer's license or location for the purpose of avoiding the provisions of the dealer law or other laws;

(19) makes a material misrepresentation in any application or other information filed with the division;

(20) fails to remit payment for civil penalties assessed by the director;

(21) sells new motor vehicles without a franchised dealer's license issued by the division;

(22) utilizes a temporary cardboard tag that fails to meet specifications as cited in §8.138 of this chapter (relating to Temporary Cardboard Tags); or

(23) violates any state or federal law or regulation relating to the sale of a motor vehicle.

(b) Civil penalties. The director may assess a civil penalty of not less than $50 nor more than $1,000 against a person who violates any provision of subsection (a) of this section, and in determining the amount of any such penalty may consider the relevant circumstances, including but not limited to the factors enumerated in Occupations Code, §2301.801(b).

(c) Pre-sanction citation. In lieu of imposing sanctions under subsection (a) or (b) of this section, the director may issue a pre-sanction citation to a person notifying that person of the nature of the violation, and specifying the date by which corrective action is to be completed and full compliance is to be met; provided, however, that the director may not utilize this procedure in more than three subsequent violations of the same or similar nature by that person in the same calendar year.

§8.142. GDN Sanction and Qualification Hearing.

(a) The director or division may initiate and conduct a formal administrative hearing pursuant to Occupations Code, §§2301.701 - 2301.713, and Transportation Code, §503.009, and Subchapter B of this chapter (relating to Practice and Procedure), concerning contested cases before the director, to determine any of the following matters:

(1) whether a licensee has violated any provision of this subchapter or Transportation Code, §503.001 et seq.;

(2) the amount of the civil penalty to be assessed, if any, from not less than $50 up to $1,000 for each alleged violation of the provisions of this subchapter or Transportation Code, §503.001 et seq.;

(3) whether the licensee's general distinguishing number should be canceled or suspended; and

(4) whether an application for a new general distinguishing number or the renewal of a general distinguishing number should be denied.

(b) For purposes of assessing civil penalties under this section, each act in violation of any provision of this subchapter or Transportation Code, §503.001 et seq. is a separate violation, and each day of a continuing violation is a separate violation.

(c) Notice of any hearing initiated under subsection (a) of this section may be waived by any person.

§8.143. Manufacturers License Plates.

(a) Manufacturers that distribute, manufacture, or assemble new vehicles may apply for and secure manufacturers license plates for display on unregistered vehicles.

(b) Manufacturers license plates must be used exclusively for the purpose of testing such vehicles or loaning a vehicle to a consumer in accordance with Occupations Code, §§2301.601 - 2301.613.

§8.144. Record of Sales and Inventory.

(a) Purchase and sales records. A dealer must keep a complete record of all vehicle purchases and sales for a minimum period of 24 months. Records reflecting purchases and sales for at least the preceding 13 months must be available for inspection by a representative of the division at the dealer's location. Records for prior time periods may be kept off-site at a location within the same county. Upon receipt of a certified letter from the director or the director's designee, a dealer must produce copies of specified records by mailing those copies to the address listed in the request within 15 days.

(b) Content of records. As used in this subsection, a complete record of vehicle purchases and sales shall include the:

(1) date of purchase;

(2) date of sale;

(3) vehicle identification number;

(4) name and address of person selling to the dealer;

(5) name and address of person purchasing from the dealer;

(6) name and address of selling dealer if vehicle is offered for sale by consignment; and

(7) except in a purchase or sale by a wholesale dealer, copy of the Tax Collector's Receipt for Title Application/Registration/Motor Vehicle Tax, Form 31;

(8) copies of any and all documents, forms, and agreements applicable to a particular sale, including, but not limited to title applications, work-up sheets, Manufacturer's Certificates of Origin, titles or photocopies of the front and back of titles, factory invoices, sales contracts, retail installment agreements, buyer's orders, bills of sale, waivers, or other agreements between the seller and purchaser; and

(9) dealer's monthly Motor Vehicle Seller Financed Sales Returns, if any.

(c) Title assignments. All certificates of title, manufacturer's certificates, or other evidence of ownership for vehicles offered for sale or which have been acquired by a dealer must be properly assigned into the dealer's name. A dealer must apply in the name of the purchaser of a motor vehicle for the registration of the motor vehicle with the appropriate county tax assessor-collector as selected by the purchaser. To be in compliance with Transportation Code, §501.0234(f), and considered filed within a reasonable time, a registration filed in Texas must be filed within 20 working days of the date of sale. The dealer shall provide to the purchaser the receipt for the application and maintain a copy of the receipt for application in the sales file.

(d) Notification to the department. Notification of vehicle sales, as required by Transportation Code, §503.005 et seq., shall be an application for certificate of title in the name of the retail purchaser filed with the appropriate county tax assessor-collector. When a sales transaction involves a vehicle to be transferred out of state, the dealer may, within 20 working days, either file the application for certificate of title for the purchaser or deliver the properly assigned evidence of ownership to the purchaser. In such instance, a photocopy of the completed sales tax exemption form for out-of-state sales approved by the Comptroller's Office shall be maintained on file at the dealer's business location.

(e) Consignment sales. A dealer offering a vehicle for sale by consignment shall have a written consignment agreement for the vehicle or a power of attorney covering the vehicle and shall maintain a record of each such vehicle by vehicle identification number and owner of each such vehicle handled on consignment for a minimum of 13 months.

(f) Public Motor Vehicle Auctions.

(1) A general distinguishing number holder who acts as a public motor vehicle auction must comply with the requirements relating to consignment sales as set out in subsection (e) of this section.

(2) A public motor vehicle auction is not required to take assignment of title of vehicles it offers for sale, but must take assignment of title of a vehicle from a consignor prior to making application for title on behalf of the buyer.

(3) A public motor vehicle auction must make application for title on behalf of the purchaser within 20 working days of the sale of the motor vehicle.

§8.145. Change of Dealer's Status.

(a) Dealer name change. A dealer's name change shall require a new bond or a rider to the existing bond reflecting the new dealer name. The dealer may retain the same general distinguishing number.

(b) Change of ownership. A dealer shall notify the division in writing within 10 days if there is any change of ownership. Upon notification of a change of the majority ownership interest, the division shall cancel the existing dealer's license and the new owner must qualify for a new general distinguishing number.

(c) Death of sole proprietor licensee. If a dealership is operated as a sole proprietorship and the sole proprietor dies, the surviving spouse of the deceased dealer, or other individual deemed qualified by the director, shall submit to the division a bond rider adding his or her name to the bond for the remainder of the bond and license term. That person may continue dealership operations under the current dealer license until its expiration. In the event the qualifying individual is a surviving spouse, he or she may change the ownership of the dealership upon renewal of the license without applying for a new general distinguishing number by submitting additional information regarding ownership, business background, and financial responsibility as required for a new application.

§8.146. Metal Converter's License Plates and Temporary Cardboard Tags.

(a) Metal converter's license plates shall be attached to the rear license plate holder of vehicles on which such plates are to be displayed pursuant to Transportation Code, §503.0618.

(b) Converter's temporary cardboard tags may be displayed either in the rear window or on the rear license plate holder of unregistered vehicles. When displayed in the rear license plate holder, all printed matter must be visible and may not be covered or obstructed by any plate holder. When displayed in the rear window, the tag shall be attached in such a manner that it is clearly visible and legible when viewed at 15 feet from the rear of the vehicle.

(c) Converter's temporary cardboard tags may only be used on unregistered vehicles by the converter or the converter's employees to:

(1) demonstrate or cause to be demonstrated the vehicle to a prospective buyer who is a franchised motor vehicle dealer or an employee of a franchised motor vehicle dealer;

(2) convey or cause the vehicle to be conveyed:

(A) from one of the converter's places of business in this state to another of the converter's places of business in this state;

(B) from the converter's place of business to a place the vehicle is to be assembled, repaired, reconditioned, modified, or serviced;

(C) from the state line or a location in this state where the vehicle is unloaded to the converter's place of business;

(D) from the converter's place of business to a place of business of a franchised motor vehicle dealer; or

(E) to road test the vehicle.

(d) Prospective buyers who are employees of a franchised dealer may operate a vehicle displaying converter's temporary cardboard tags during a demonstration.

(e) A vehicle being conveyed while displaying a converter's temporary cardboard tag is exempt from the inspection requirements of Transportation Code, Chapter 548.

(f) Converter's temporary cardboard tags may not be used as authorization to operate a vehicle for the converter's or a converter's employee's personal use.

(g) Each unregistered vehicle being transported by a licensed converter utilizing the full mount method, the saddle mount method, the tow bar method, or any combination thereof, shall have a converter's temporary cardboard tag affixed to that vehicle. If the vehicle being transported is of a type which is prohibited from operating upon the public streets and highway (i.e., off-highway vehicle or self-propelled machine) and, thus, cannot qualify for registration, a cardboard tag shall be displayed thereon; and such tag shall be marked in bold letters with the notation "For Off Highway Use Only."

(h) Metal converter's license plates and temporary cardboard tags may be displayed only on the type of vehicle that the converter is engaged in the business of assembling or modifying.

(i) When an unregistered new motor vehicle is sold to a converter, the selling dealer shall remove a dealer's temporary cardboard tag. In such instances, the selling dealer may attach a buyer's temporary cardboard tag to the vehicle; or the purchasing converter may display a converter's temporary cardboard tag or metal converter plate on the vehicle.

(j) A converter may have printed converter's temporary cardboard tags according to the specifications of Appendix C-1 of §8.138 of this chapter (relating to Temporary Cardboard Tags).

(k) A converter shall maintain a record of all converter metal plates issued to that converter and as to each vehicle such record shall consist of:

(1) the assigned metal plate number;

(2) the make;

(3) the vehicle identification number; and

(4) the name of the person in control.

(l) Converter metal plates which cannot be accounted for shall no longer be valid for use and shall be voided in the dealer's log and reported as missing to the department.

(m) A converter shall maintain a log recording the information on all temporary tags printed for that converter and as to each vehicle such record shall contain those items as set out in Appendix C-2 of §8.138 of this chapter. The log shall become a part of the required records required to be maintained by the converter.

(n) The converter's record, as referenced in subsections (l) and (m) of this section, shall be available at the converter's location during normal working hours for review by a representative of the department. Temporary tags and metal plates which cannot be accounted for shall no longer be valid for use and shall be voided.

§8.147. Proof of Valid License Required of Foreign Motor Vehicle Dealers.

(a) All holders of general distinguishing numbers must verify that a foreign motor vehicle dealer holds a valid license from the foreign dealer's country of origin before permitting the foreign motor vehicle dealer to purchase vehicles.

(b) All auctions or dealers who sell a vehicle to a foreign motor vehicle dealer shall stamp in black ink on the back of the title in all unused dealer reassignment spaces the words "For Export Only" and their general distinguishing number. The stamp shall also be placed on the front of the title in a manner that does not obscure any names, dates, or mileage statements. The stamp must be at least two inches wide, and all words must be clearly legible.

(c) Where the purchaser is a Mexican motor vehicle dealer or the agent of a Mexican motor vehicle dealer the following documents must be obtained prior to the sale and maintained in the sales file for each vehicle:

(1) A copy of the Republic of Mexico license issued by the Secretaria de Economia to the Mexican Motor Vehicle Dealer;

(2) A copy of identification documents issued by the Republic of Mexico indicating that the person claiming to be a Mexican dealer is, in fact, a resident of Mexico. Such documents include but are not limited to Mexican driver's licenses, voter registration documents, or official identification cards, if the card contains a picture of the person and lists a physical address;

(3) A completed Texas Motor Vehicle Sales Tax Exemption Certificate For Vehicles Taken Out of State for each vehicle sold to a Mexican dealer, indicating that the vehicle has been purchased for export to the Republic of Mexico; and

(4) A copy of the front and back of the title to the vehicle, showing the "For Export Only" stamp and the general distinguishing number of the auction or dealer;

(5) In the case of agents of Mexican motor vehicle dealers, the file must contain copies of the listed documents for the dealer and documentation supporting the person's claim to be acting as an agent for an Mexican motor vehicle dealer.

§8.148. Dealer Agents.

(a) In regard to the duties and obligations of a dealer, a dealer is responsible for the acts and omissions of any agent, representative, or employee if that dealer has given authority to any person for that agent, representative, or employee to act on the behalf of the dealer. This section is not to be construed in any manner to allow retail sales by any dealer agent or representative. The term "employee" used in this section includes only those persons paid by the licensee and reported on the federal form W-2, Wage and Tax Statement.

(b) A dealer must provide written authorization to any person buying or selling motor vehicles for resale or operating a licensed auction for the sale of motor vehicles for resale with whom an agent, representative, or employee will be conducting business or acting on the dealer's behalf.

(1) Once a dealer has given written authorization for an agent, representative, or employee to buy and sell motor vehicles for resale for that dealer, the dealer shall be liable for any acts or omissions regarding duties and obligations of dealers caused by that agent, representative, or employee unless and until either the earlier of written notification of revocation of the agent's, representative's or employee's authority or revocation of the dealer's license.

(2) Written authorization shall be a letter on the dealership letterhead of the dealer authorizing buying or selling, or on a form approved by the director or his designee, and stating that the dealer is liable for any acts or omissions regarding duties and obligations of dealers, caused by that agent, representative, or employee including any financial considerations to be paid for the vehicle unless and until the recipient is notified in writing of the revocation of the authority. The letter or form shall be signed by the dealer principal or person in charge of daily activities of the dealership.

(3) The written authorization shall include the employee, agent or representative's name; current mailing address; phone number; the business name, address, and license number of the dealer with whom the employee or agent is associated. The written authorization is a record that must be kept as all other records set out in §8.144 of this chapter (relating to Record of Sales and Inventory) and shall be made available to the director or division's representative upon request.

(c) Any licensee, including wholesale auctions who act on behalf of others, who buys and sells vehicles on a wholesale basis, including by sealed bid, is required to verify the authority of any person claiming to be either an employee, agent or representative who represents they are buying or selling motor vehicles on behalf of a licensed dealer.

(d) Titles to vehicles bought by an employee, agent or representative of a dealer shall be reassigned to the dealer by the seller or auction and shall not be delivered to the agent or representative but delivered only to the dealer, the dealer's employee, or the dealer's financial institution. Notwithstanding the prohibitions in this section, an authorized agent, representative or employee may sign any required odometer statements.

(e) Only checks or drafts drawn on the purchasing dealer's account, or cashiers checks in the name of the dealer, or wire transfers from the dealer's bank account shall be accepted for motor vehicles purchased in a wholesale transaction.

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

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General Counsel
Texas Department of Transportation
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SUBCHAPTER F. LESSORS AND LEASE FACILITATORS

43 TAC §§8.171 - 8.181

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.171. Objective.

The objective of this subchapter is to implement the intent of the legislature as declared in Occupations Code, Chapter 2301, and in particular, §§2301.251, 2301.253, 2301.254, 2301.261, 2301.262, 2301.357, and 2301.551-2301.556, by prescribing rules to regulate the business of leasing motor vehicles in this state.

§8.172. Definitions.

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

(1) Motor vehicle lease--A transfer of the right to possession and use of a motor vehicle for a term in excess of 180 days, in return for consideration.

(2) Motor vehicle lease facilitator--A person, other than a franchised dealer or a bona fide employee of a dealer, or a vehicle lessor or a bona fide employee of a vehicle lessor, who:

(A) holds himself out to any person as a "motor vehicle leasing company" or "motor vehicle leasing agent" or uses a similar title, for the purpose of soliciting or procuring a person to enter into a contract or agreement to become the lessee of a vehicle that is not, and will not be, titled in the name of and registered to the lease facilitator; or

(B) otherwise solicits a person to enter into a contract or agreement to become a lessee of a vehicle that is not, and will not be, titled in the name of and registered to the lease facilitator, or who is otherwise engaged in the business of securing lessees or prospective lessees of motor vehicles that are not, and will not be, titled in the name of and registered to the facilitator.

(3) Motor vehicle lessor--A person who, pursuant to the terms of a lease, transfers to another person the right to possession and use of a motor vehicle titled in the name of the lessor.

§8.173. License.

(a) No person may engage in business as a lessor or a lease facilitator unless that person has a currently valid license assigned by the division, or is otherwise exempt by law from obtaining such a license.

(b) Any person who facilitates leases on behalf of a lease facilitator must:

(1) be on the lease facilitator's payroll and receive compensation in which Social Security, Federal Unemployment Tax, and all other appropriate taxes are withheld from the representative's paycheck and said taxes are paid to the proper taxing authority; and

(2) have work details such as when, where, and how the final results are achieved, directed and controlled by the lease facilitator.

§8.174. Application for a License.

(a) Application for a lessor's or lease facilitator's license shall be on a form prescribed by the director, properly completed by the applicant, and shall be submitted with supporting documentation showing all information requested.

(b) The supporting documentation for a lessor's license shall include:

(1) a letter of appointment for each lease facilitator or acceptable substitute as designated by the division;

(2) a verification that each owner and officer of the applicant required to be listed on the application has not been convicted of any felony;

(3) the fee for the license as prescribed by law for each type of license required;

(4) photographs clearly depicting the overall appearance of the interior and exterior of the applicant's office;

(5) verification of all assumed name(s), if applicable, in the form of assumed name certificate(s) on file with the appropriate recording entity, such as the Secretary of State or the county clerk;

(6) verification of the business entity, such as a copy of the Certificate of Incorporation on file with the Secretary of State, or the partnership agreement;

(7) a sample copy of the agreement between the lessor and a lessee; and

(8) business background information for each principal or officer of the entity required to be listed on the application.

(c) The supporting documentation for a lease facilitator's license shall include:

(1) a letter of appointment from each lessor or acceptable substitute as designated by the division;

(2) a verification that each owner and officer of the applicant required to be listed on the application has not been convicted of any felony;

(3) the fee for the license as prescribed by law for each type of license required;

(4) photographs clearly depicting the overall appearance of the interior and exterior of the applicant's office;

(5) verification of all assumed name(s), if applicable, in the form of assumed name certificate(s) on file with the appropriate recording entity, such as the Secretary of State or the county clerk;

(6) verification of the business entity, such as a copy of the Certificate of Incorporation on file with the Secretary of State, or the partnership agreement;

(7) a sample copy of the agreement between the lease facilitator and a lessee;

(8) a list of all lessors, including names and addresses, with whom any lease facilitator executes leases. This list must be updated in writing upon renewal of a license, and within ten days of the addition of any lessor to this list; and

(9) business background information for each principal or officer of the entity required to be listed on the application.

§8.175. Sanctions.

(a) Revocation/Denial. The director may revoke, deny or suspend a lessor or lease facilitator's license, or assess civil penalties, if that lessor or lease facilitator:

(1) fails to maintain an established and permanent place of business conforming to §8.177 of this chapter (relating to Lessors and Lease Facilitator Licensing, Established and Permanent Place of Business);

(2) refuses to permit or fails to comply with a request by a representative of the division to examine the current and previous year's leasing records required to be kept under §8.178 of this chapter (relating to Records of Leasing) and ownership papers for vehicles owned, leased, or under that lessor or lease facilitator's control, and evidence of ownership or lease agreement for the property upon which the business is located:

(A) during normal working hours at the lessor's or lease facilitator's permanent place of business, or

(B) through a certified letter request signed by the director or the director's designee;

(3) fails to notify the division of a change of address within ten days after such change;

(4) fails to notify the division of a change of lessor/lease facilitator's name or ownership within ten days after such a change;

(5) fails to observe the fee restrictions as described in Occupations Code, §2301.357 and §§2301.551 - 2305.556;

(6) fails to maintain leasing and/or advertisement records as described in these rules;

(7) fails to remain regularly and actively engaged in the business of leasing vehicles or facilitating the leasing of vehicles for which the license is issued;

(8) violates any law relating to the sale, lease, distribution, financing or insuring of motor vehicles;

(9) uses or allows use of a lessor or lease facilitator license for the purpose of avoiding any provisions of Occupations Code, Chapter 2301;

(10) makes a material misrepresentation in any application or other information filed with the division;

(11) fails to update in writing the list of lessors, including names and addresses, with which any lease facilitator executes leases within ten days of any changes to this list and upon renewal of the license;

(12) violates any state or federal law relating to the leasing of new motor vehicles.

(b) Referral fees prohibited. A lessor or lease facilitator may not, directly or indirectly, accept a fee from a dealer for referring customers who purchase or consider purchasing vehicles.

§8.176. More Than One Location.

(a) Lease facilitators must be licensed separately for each business location.

(b) Lessors or lease facilitators that relocate from a point outside the limits of a city, or relocate to a point not within the limits of the same city of the initial location are required to obtain a new license.

(c) Lessors are required to obtain a license for their primary locations. Lessors must provide the address, telephone number, and the name of a contact person for all other satellite offices that conduct business in the state of Texas.

§8.177. Established and Permanent Place of Business.

(a) A lessor or lease facilitator operating within the state of Texas must meet the following requirements at each location where vehicles are leased or offered for lease.

(1) Physical location requirements.

(A) A lessor or lease facilitator within Texas must be open to the public during normal working hours. The lessor or lease facilitator's business hours for each day of the week must be posted at the main entrance of the office, and the owner or an employee of the lessor or lease facilitator must be at the location during the posted business hours for the purpose of leasing vehicles. In the event the owner or an employee is not available to conduct business during the posted business hours, a separate sign must be posted indicating the date and time such owner or employee will resume leasing operations. The structure must be of sufficient size to accommodate and must be equipped with a desk and chairs from which the lessor or lease facilitator transacts his business. The office also must be equipped with a working land-based telephone instrument listed in the name under which the lessor or lease facilitator does business.

(B) If a licensee's office is located in a residential structure, the office must be separated completely from and have no direct access into the residential quarters and be in compliance with all applicable local zoning ordinances and deed restrictions. Such an office shall not be used as a part of the living quarters and must be readily accessible to the public without having to pass into or through any part of the living quarters.

(C) Portable-type office structures may qualify, provided they meet the minimum requirements as set forth herein.

(D) In those instances when two or more lessors or lease facilitators occupy the same business locations and conduct their respective leasing operations under different names, one office structure for all lessors or lease facilitators operating from such location will be acceptable; provided, however, each lessor or lease facilitator must have:

(i) a separate desk from which that lessor or lease facilitator transacts business;

(ii) a separate working telephone instrument, number, and listing in the lessor or lease facilitator's name with a fixed, land-based telephone company;

(iii) a separate right of occupancy meeting the requirements of this section.

(E) A lease facilitator's established and permanent place of business, as prescribed in this rule, must be physically located within the state of Texas.

(2) Sign requirements. A lessor or lease facilitator shall display a conspicuous and permanent sign at the licensed location showing the name under which the lessor or lease facilitator conducts business. Outdoor signs must contain letters no smaller than six inches in height.

(3) Lease requirements. If the premises from which a lessor or lease facilitator conducts business are not owned by the licensee, such licensee shall maintain a lease continuous for the same period of time as the lessor's or lease facilitator's license, and such lease agreement shall be on a properly executed form containing, but not limited to the following information:

(A) the names of the lessor and lessee;

(B) the legal description of the property or street address; and

(C) the period of time for which the lease is valid.

(b) A lessor whose licensed location is in another state and who does not deal directly with the public to execute leases must meet the following requirements at each location.

(1) Physical location requirements.

(A) The structure must be of sufficient size to accommodate and must be equipped with a desk and chairs from which the lessor transacts his business. The office also must be equipped with a working land-based telephone instrument listed in the name under which the lessor does business.

(B) If a lessor's office is located in a residential structure, the office must be separated completely from and have no direct access into the residential quarters and be in compliance with all applicable local zoning ordinances and deed restrictions. Such an office shall not be used as a part of the living quarters and must be readily accessible to the public without having to pass into or through any part of the living quarters.

(C) Portable-type office structures may qualify, provided they meet the minimum requirements as set forth herein.

(D) In those instances when two or more lessors occupy the same business locations and conduct their respective leasing operations under different names, one office structure for all lessors operating from such location will be acceptable; provided, however, each lessor must have:

(i) a separate desk from which that lessor transacts business;

(ii) a separate working telephone instrument, number, and listing in the lessor's name with a fixed, land-based telephone company;

(iii) a separate right of occupancy meeting the requirements of this section.

(2) Sign requirements. An out of state lessor shall display a conspicuous and permanent sign at the licensed location showing the name under which the lessor conducts business. Outdoor signs must contain letters no smaller than six inches in height.

(3) Lease requirements. If the premises from which a lessor conducts business are not owned by that person or entity, that person or entity shall maintain a lease on the property of the licensed location continuous for the same period of time as the license, and such agreement shall be on a properly executed form containing, but not limited to the following information:

(A) the names of the lessor and lessee;

(B) the legal description of the property or street address; and

(C) the period of time for which the lease is valid.

(c) Independence. A lessor or lease facilitator shall be independent of financial institutions and dealerships in location and in business activities unless that lessor or lease facilitator is an employee of, a legal subsidiary of, or an entity wholly owned by the financial institution or dealership.

(d) For the purposes of this subsection, an employee is a person who meets the requirements of §8.173(b) of this chapter (relating to License).

§8.178. Records of Leasing.

(a) Purchase and leasing records. A lessor or lease facilitator must keep a complete record of all vehicle purchases and sales for a minimum period of at least one year after the expiration of the lease. Records reflecting lease transactions that have occurred within the preceding 13 months must be available for inspection by a representative of the division at the licensed location. Records for prior time periods may be kept off-site at a location within the same county or within 25 miles of the licensed location. Upon receipt of a certified letter from the director or the director's designee, a lessor or lease facilitator must produce copies of specified records by mailing those copies to the address listed in the request within 15 days.

(b) Content of records. As used in this subsection, a complete lease file shall include:

(1) names, addresses, and telephone numbers of the lessor of the vehicle in the transaction;

(2) names, addresses, and telephone numbers of the lessee of the vehicle in the transaction;

(3) names, addresses, telephone numbers, and license numbers of the lease facilitator of the vehicle in the transaction;

(4) name, home address, and telephone number of employee of lease facilitator who handled the transaction;

(5) complete description of the vehicle involved in the transaction, including its vehicle identification number (VIN);

(6) name, address, telephone number, and general distinguishing number of the dealer selling the vehicle, as well as the franchise license number of the dealer if the vehicle in the transaction is a new motor vehicle;

(7) amount of fee received by or paid to the lease facilitator;

(8) copies of the buyers order and sales contract for the vehicle;

(9) copy of the lease contract;

(10) copies of all other contracts, agreements or disclosures between the lease facilitator and the consumer lessee;

(11) copies of the front and back of Manufacturer's Statement/Certificate of Origin or the title of the vehicle involved in the transaction.

(c) Records of advertising. A lessor or lease facilitator must maintain copies of all advertisements, brochures, scripts or electronically reproduced copies, in whatever medium appropriate, of promotional materials for a period of at least 18 months, subject to inspection upon request by a representative of the division at the business of the licensee during regular business hours.

(1) All advertisements by lessors or lease facilitators must be in accordance with Subchapter H of this chapter (relating to Advertising).

(2) Lessors and lease facilitators may not state or infer, either directly or indirectly, in any manner such as advertisements, stationery or business cards that their business involves the sale of new motor vehicles.

(d) Title assignments. All certificates of title, manufacturer's certificates of origin, or other evidence of ownership for vehicles which have been acquired by a lessor for lease must be assigned properly from the seller into the lessor's name.

(e) Letters of appointment. All letters of appointment between each lessor or lease facilitator with whom the licensee does business must be executed by both parties.

§8.179. Change of Lessor or Lease Facilitator Status.

(a) Change of ownership. A lessor or lease facilitator who proposes to sell and/or assign to another any interest in the licensed entity, whether a corporation or otherwise, so long as the physical location of the licensed entity remains the same, shall notify the division in writing within ten days by filing an application to amend the license. If the sale or assignment of any portion of the business results in a change of entity, then the purchasing/assignee entity must apply for and obtain a new license. Publicly held corporations licensed as lessors or lease facilitators need only inform the division of a change in ownership if one person or entity acquires 10% or greater interest in the licensee.

(b) Change of operating status of business location. A licensee shall obtain division approval prior to the opening of a supplemental location, or the relocation of an existing location, in accordance with §8.176 of this chapter (relating to More than One Location). Also, a licensee must notify the division when closing an existing location.

§8.180. Required Notices to Lessees.

Lessors and lease facilitators shall provide notice of the complaint procedures provided by Occupations Code, §2301.204 and §§2301.601 - 2301.613 to each lessee of a new motor vehicle with whom they transact a lease.

§8.181. General Distinguishing Number Exception.

It is not necessary for a licensed lessor to hold a general distinguishing number (GDN) in order to sell a vehicle that the lessor owns, to either the lessee or a duly licensed dealer, either directly or through a licensed wholesale auction. A licensed lessor is not allowed to purchase vehicles at a wholesale auction. Any existing GDN held by a lessor who does not otherwise qualify for a GDN shall be cancelled. A lessor whose GDN has been cancelled under this section may reapply for a GDN once all the qualifications for a GDN are met.

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 September 29, 2005.

TRD-200504378
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

SUBCHAPTER G. WARRANTY PERFORMANCE OBLIGATIONS

43 TAC §§8.201 - 8.210

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.201. Objective.

It is the objective of this subchapter to implement the intent of the legislature as declared in Occupations Code, Subchapter M, (§§2301.601 - 2301.613) and §2301.204, by prescribing rules to provide a simplified and fair procedure for the enforcement and implementation of the Texas Lemon Law (Subchapter M) and consumer complaints covered by general warranty agreements (§2301.204), including the processing of complaints, the conduct of hearings, and the disposition of complaints filed by owners of motor vehicles seeking relief under these provisions of the Code.

§8.202. Filing of Complaints.

(a) Complaints for relief under the lemon law must be in writing and filed with the division at its office in Austin. Complaints may be in letter form or any other written format or may be submitted on complaint forms provided by the division.

(b) Complaints should state sufficient facts to enable the division and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.

(c) Complaints should provide the following information:

(1) name, address, and phone number of vehicle owner;

(2) identification of vehicle by make, model, and year, and manufacturer's vehicle identification number;

(3) type of warranty coverage;

(4) name and address of dealer, or other person, from whom vehicle was purchased or leased, including the name and address of the current lessor, if applicable;

(5) date of delivery of vehicle to original owner; and in the case of a demonstrator, the date the vehicle was placed into demonstrator service;

(6) vehicle mileage at time vehicle was purchased or leased, mileage when problems with vehicle were first reported, name of dealer or manufacturer's, converter's, or distributor's agent to whom problems were first reported, and current mileage;

(7) identification of existing problems and brief description of history of problems and repairs on vehicle, including date and mileage of each repair, with copies of repair orders where possible;

(8) date on which written notification of complaint was given to the vehicle manufacturer, converter, or distributor, and if the vehicle has been inspected by manufacturer, converter, or distributor, the date and results of such inspection;

(9) any other information which the complainant believes to be pertinent to the complaint.

(d) The division's staff will provide information concerning the complaint procedure and complaint forms to any person requesting information or assistance.

(e) The filing fee required under Occupations Code, §2301.712, should be remitted with the complaint by check or money order. No filing fee is required for a complaint filed under Occupations Code, §2301.204. The filing fee is nonrefundable, but a complainant who prevails in a case is entitled to reimbursement of the amount of the filing fee. Failure to remit the filing fee with the complaint will result in delaying the commencement of the 150-day requirement provided in §8.206(12) of this chapter (relating to Hearings) and may result in dismissal of the complaint.

§8.203. Review of Complaints.

All complaints will be reviewed promptly by the division's staff to determine whether they satisfy the requirements of Occupations Codes, Chapter 2301, Subchapter M, or Occupations Code, §2301.204.

(1) If it cannot be determined whether a complaint satisfies the requirements of Occupations Code, Chapter 2301, Subchapter M, or Occupations Code, §2301.204, the complainant will be contacted for additional information.

(2) If it is determined that the complaint does not meet the requirements of Occupations Code, Chapter 2301, Subchapter M, or Occupations Code, §2301.204, the complainant will be notified of this fact.

(3) If it is determined that the complaint does meet the requirements of Occupations Code, Chapter 2301, Subchapter M, or Occupations Code, §2301.204, the complaint will be processed in accordance with the procedures set forth in this subchapter.

(4) For purposes of Occupations Code, §2301.606, the commencement of a proceeding means the filing of a complaint with the division, and the date of filing is determined by the date of receipt by the division.

§8.204. Notification to Manufacturer, Converter, or Distributor.

Upon receipt of a complaint for relief under the Occupations Code, Chapter 2301, Subchapter M, or §2301.204, notification thereof, with a copy of the complaint, will be given to the appropriate manufacturer, converter, or distributor, and a response to the complaint will be requested. A copy of the complaint and notification thereof will also be provided to the selling dealer and any other dealers that have been involved with the complaint and a response may be requested.

§8.205. Mediation; Settlement.

If, from a review of the complaint and the responses received from the manufacturer, converter, distributor, or dealer, it appears to the division staff that a settlement or resolution of the complaint may be possible without the necessity for a hearing, the division staff will attempt to effect a settlement or resolution of the complaint.

§8.206. Hearings.

Complaints which satisfy the jurisdictional requirements of the Occupations Code, §2301.204 and §§2301.601 - 2301.613, will be set for hearing and notification of the date, time, and place of the hearing will be given to all parties by certified mail.

(1) Where possible, and subject to the availability of division personnel and funds, hearings will be held in the city where the complainant resides or at a location reasonably convenient to the complainant.

(2) Hearings will be scheduled at the earliest date possible, provided that ten days prior notice, or as otherwise provided by law, must be given to all parties.

(3) Hearings will be conducted by division staff hearing officers or by independent hearing officers designated by the director.

(4) Hearings will be informal, it being the intent of this section to provide a procedure and forum which does not necessitate the services of attorneys and which does not involve strict legal formalities applicable to trials in county or district court.

(5) The parties have the right to be represented by attorneys at a hearing, although attorneys are not necessary. Any party who intends to be represented by an attorney at a hearing must notify the division and the other party at least five business days prior to the hearing and failure to do so will constitute grounds for postponement of the hearing if requested by the other party.

(6) The parties have the right to present their cases in full, including testimony from witnesses; documentary evidence such as repair orders, warranty documents, vehicle sales contract, etc., subject to the hearing officer's rulings.

(7) By agreement of the parties and with the approval of the hearing officer, the hearing may be conducted by written submissions only or by telephone.

(8) Except for hearings conducted by written submission only, each party will be subject to being questioned by the other party, within limits to be governed by the hearing officer.

(9) Except for hearings conducted by written submission only or by telephone, the complainant will be required to bring the vehicle in question to the hearing for the purpose of having the vehicle inspected and test driven, unless otherwise ordered by the hearing officer upon a showing of good cause as to why the complainant should not be required to bring the vehicle to the hearing.

(10) The division may have the vehicle in question inspected prior to the hearing by an expert, where the opinion of such expert will be of assistance to the hearing officer and the director in arriving at a decision. Any such inspection shall be made upon prior notice to all parties who shall have the right to be present at such inspection, and copies of any findings or report resulting from such inspection will be provided to all parties prior to, or at, the hearing.

(11) Except for hearings conducted by written submission only, all hearings will be recorded on tape by the hearing officer. Copies of the tape recordings of a hearing will be provided to any party upon request and upon payment as provided by law.

(12) All hearings will be conducted expeditiously. However, if a division hearing officer has not issued a decision within 150 days after the Occupations Code, §§2301.601 - 2301.613 complaint and filing-fee were received, division staff shall notify the parties by certified mail that complainant has a right to file a civil action in state district court to pursue rights under §§2301.601 - 2301.613. The 150-day period shall be extended upon request of the complainant or if a delay in the proceeding is caused by the complainant. The notice will inform the complainant of the right to elect to continue the lemon law complaint through the division.

§8.207. Contested Cases: Decisions and Final Orders.

To expedite the resolution of cases filed under Occupations Code, Chapter 2301, Subchapter M, or §2301.204, the director may conduct hearings and issue final orders for the enforcement of these sections, including the delegation of this duty to hearing officers. Review of the hearings officers' decisions and final orders shall be according to the procedures as follows:

(1) A hearing officer will prepare a written decision and final order as soon as possible but not later than 60 days after the hearing is closed, or as otherwise provided by law. The decision and order will include the hearing officer's findings of fact and conclusions of law.

(2) The decision and final order shall be sent to all parties of record by certified mail.

(3) The decision and order is final and binding on the parties, in the absence of a timely motion for rehearing, on the expiration of the period for filing a motion for rehearing.

(4) A party who disagrees with the decision and final order may file a motion for rehearing within 20 days from the date of the notification of the final order. A motion for rehearing must include all the specific reasons, exceptions, or grounds that are asserted by a party as the basis of the request for a rehearing. It shall recite, if applicable, the specific findings of fact, conclusions of law, or any other portions of the decision to which the party objects. Replies to a motion for rehearing must be filed with the director within 30 days after the date of the notification of the final order. A party or attorney of record notified by mail is presumed to have been notified on the third day after the date on which the order was mailed.

(5) The director must act on the motion within 45 days after the date of notification of the final order, or as otherwise provided by law, or it is overruled by operation of law. The director may, by written order, extend the period for filing, replying to, and taking action on a motion for rehearing, not to exceed 90 days after the date of

notification of the final order. In the event of an extension of time, the motion for rehearing is overruled by operation of law on the date fixed by the written order of extension, or in the absence of a fixed date, 90 days after the date of notification of the final order.

(6) If the director grants a motion for rehearing, the parties will be notified by first class mail. A rehearing will be scheduled as promptly as possible. After rehearing, the director shall issue a final order and any additional findings of fact or conclusions of law necessary to support the decision or order. The director may also issue an order granting the relief requested in a motion for rehearing or replies thereto without the need for a rehearing. If a motion for rehearing and the relief requested is denied, an order so stating will be issued.

(7) A party who has exhausted all administrative remedies, and who is aggrieved by a final decision in a contested case from which appeal may be taken is entitled to judicial review pursuant to Occupations Code, §§2301.751 - 2301.756, under the substantial evidence rule. The petition shall be filed in a district court of Travis County or in the Court of Appeals for the Third Court of Appeals District within 30 days after the decision or order is final and appealable. A copy of the petition must be served on the director and any other parties of record. After service of the petition on the director and within the time permitted for filing an answer, the director shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding. If the court orders new evidence to be presented to the director, the director or the director's designee may modify the findings and decision or order by reason of the new evidence, and shall transmit the additional record to the court.

§8.208. Decisions.

Unless otherwise indicated, this section applies to decisions made pursuant to Occupations Code, Chapter 2301, Subchapter M. Decisions shall give effect to the presumptions provided in Occupations Code, §2301.605, where applicable.

(1) If it is found that the manufacturer, distributor, or converter is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect in the complainant's vehicle which creates a serious safety hazard or substantially impairs the use or market value of the vehicle after a reasonable number of attempts, and that the affirmative defenses provided under Occupations Code, §2301.606, are not applicable, the director shall order the manufacturer, distributor, or converter to replace the vehicle with a comparable vehicle, or accept the return of the vehicle from the owner and refund to the owner the full purchase price of the vehicle, less a reasonable allowance for the owner's use of the vehicle.

(2) In any decision in favor of the complainant, the director will accommodate the complainant's request with respect to replacement or repurchase of the vehicle, to the extent possible.

(3) Where a refund of the purchase price of a vehicle is ordered, the purchase price shall be the amount of the total purchase price of the vehicle, but shall not include the amount of any interest or finance charge or insurance premiums. The award to the vehicle owner shall include reimbursement for the amount of the lemon law complaint filing fee paid by or on behalf of the vehicle owner. The refund shall be made payable to the vehicle owner and the lienholder, if any, as their interests require.

(4) There is a rebuttable presumption that a motor vehicle has a useful life of 120,000 miles. Except in cases where the preponderance of the evidence shows that the vehicle has a longer or shorter expected useful life than 120,000 miles, the reasonable allowance for the owner's use of the vehicle shall be that amount obtained by adding subparagraphs (A) and (B) of this paragraph.

(A) the product obtained by multiplying the purchase price of the vehicle, as defined in paragraph (3) of this section, by a fraction having as its denominator 120,000 and having as its numerator the number of miles that the vehicle traveled from the time of delivery to the owner to the first report of the defect or condition forming the basis of the repurchase order; and

(B) 50% of the product obtained by multiplying the purchase price by a fraction having as its denominator 120,000 and having as its numerator the number of miles that the vehicle traveled after the first report of the defect or condition forming the basis of the repurchase order. The number of miles during the period covered in this paragraph shall be determined from the date of the first report of the defect or condition forming the basis of the repurchase order through the date of the hearing.

(5) There is a rebuttable presumption that the useful life of a towable recreational vehicle is 3,650 days (10 years). Except in cases where preponderance of the evidence shows that the vehicle has a longer or shorter expected useful life than 3,650 days (10 years), the reasonable allowance for the owner's use of the towable recreational vehicle shall be that amount obtained by adding subparagraphs (A) and (B) of this paragraph.

(A) The product obtained by multiplying the purchase price of the towable recreational vehicle, as defined in paragraph (3) of this section, by a fraction having as its denominator 3,650 days (10 years), except the denominator shall be 1,825 days (5 years), if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of days from the time of delivery to the owner to the first report of the defect or condition forming the basis of the repurchase order.

(B) 50% of the product obtained by multiplying the purchase price by a fraction having as its denominator 3,650 days (10 years), except the denominator shall be 1,825 days (5 years), if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of days of ownership after the first report of the defect or condition forming the basis of the repurchase order. The number of days during the period covered in this paragraph shall be determined from the date of the first report of the defect or condition forming the basis of the repurchase order through the date of the hearing.

(C) Any day or part of a day that the vehicle is out of service for repair will be deducted from the numerator in determining the reasonable allowance for use of a towable recreational vehicle in this paragraph.

(6) Except in cases involving unusual and extenuating circumstances, supported by a preponderance of the evidence, where refund of the purchase price of a leased vehicle is ordered, the purchase price shall be allocated and paid to the lessee and the lessor, respectively as follows.

(A) The lessee shall receive the total of:

(i) all lease payments previously paid by him to the lessor under the terms of the lease; and

(ii) all sums previously paid by him to the lessor in connection with the entering into the lease agreement, including, but not limited to, any capitalized cost reduction, down payment, trade-in, or similar cost, plus sales tax, license and registration fees, and other documentary fees, if applicable.

(B) The lessor shall receive the total of:

(i) the actual price paid by the lessor for the vehicle, including tax, title, license, and documentary fees, if paid by lessor,

and as evidenced in a bill of sale, bank draft demand, tax collector's receipt, or similar instrument; plus

(ii) an additional 5.0% of such purchase price plus any amount or fee, if any, paid by lessor to secure the lease or interest in the lease;

(iii) provided, however, that a credit, reflecting all of the payments made by the lessee, shall be deducted from the actual purchase price which the manufacturer, converter, or distributor is required to pay the lessor, as specified in clauses (i) and (ii) of this subparagraph.

(C) When the director orders a manufacturer, converter, or distributor to refund the purchase price in a lease vehicle transaction, the vehicle shall be returned to the manufacturer, converter, or distributor with clear title upon payment of the sums indicated in subparagraphs (A) and (B) of this paragraph. The lessor shall transfer title of the vehicle to the manufacturer, converter, or distributor, as necessary in order to effectuate the lessee's rights under this rule. In addition, the lease shall be terminated without any penalty to the lessee.

(D) Refunds shall be made to the lessee, lessor, and any lienholders as their interest may appear. The refund to the lessee under subparagraph (A) of this paragraph shall be reduced by a reasonable allowance for the lessee's use of the vehicle. A reasonable allowance for use shall be computed according to the formula in paragraph (4) or (5) of this section, using the amount in subparagraph (B)(i) of this paragraph as the applicable purchase price.

(7) In any award in favor of a complainant, the director may require the dealer involved to reimburse the complainant, manufacturer, converter, or distributor, for the cost of any items of options added to the vehicle but only to the extent that one or more of such items or options contributed to the defect that served as the basis for the order or repurchase or replacement. In no event shall this paragraph be interpreted to mean that a manufacturer, converter, or distributor, will be required to repurchase a vehicle due to a defect or condition that was solely caused by a dealer add-on item or option.

(8) If it is found by the director that a complainant's vehicle does not qualify for replacement or repurchase, then the director shall enter an order dismissing the complaint insofar as relief under Occupations Code, §2301.604. However, the director may enter an order in any proceeding, where appropriate, requiring repair work to be performed or other action taken to obtain compliance with the manufacturer's, converter's, or distributor's, warranty obligations.

(9) If the vehicle is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing to the date of repurchase, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party shall have the right to request reconsideration by the director of the repurchase price contained in the final order.

(10) The director will issue a written order in each Occupations Code, Chapter 2301, Subchapter M or §2301.204 case in which a hearing is held and a copy of the order will be sent to all parties.

§8.209. Incidental Expenses.

(a) When a refund of the purchase price of a vehicle is ordered, the complainant shall be reimbursed for certain incidental expenses incurred by the complainant from loss of use of the motor vehicle because of the defect or nonconformity which is the basis of the complaint. The expenses must be reasonable and verified through receipts or similar written documents. Reimbursable incidental expenses include but are not limited to the following costs:

(1) alternate transportation;

(2) towing;

(3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle;

(4) meals and lodging necessitated by the vehicle's failure during out-of-town trips;

(5) loss or damage to personal property;

(6) attorney fees if the complainant retains counsel after notification that the respondent is represented by counsel; and

(7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use.

(b) Incidental expenses shall be included in the final repurchase price required to be paid by a manufacturer, converter, or distributor to a prevailing complainant or in the case of a vehicle replacement, shall be tendered to the complainant at the time of replacement.

(c) In regards to the cost of items or accessories presented under subsection (a)(7) of this section, the hearing officer shall consider the permanent nature, functionality, and value added by the items or accessories and whether the items or accessories are original equipment manufacturer parts (OEM) or non-OEM parts.

§8.210. Compliance with Order Granting Relief.

Compliance with the director's order will be monitored by the director.

(1) A complainant is not bound by the director's decision and order and may either accept or reject the decision.

(2) If a complainant does not accept the director's final decision, the proceeding before the director will be deemed concluded and the complaint file closed.

(3) If the complainant accepts the director's decision, then the manufacturer, converter, or distributor and the dealer to the extent of the dealer's responsibility, if any, shall immediately take such action as is necessary to implement the director's decision and order.

(4) If a manufacturer, converter, or distributor replaces or repurchases a vehicle pursuant to a director order, reacquires a vehicle to settle a complaint filed under Occupations Code, Chapter 2301, Subchapter M or §2301.204, or brings a vehicle into the state of Texas which has been reacquired to resolve a warranty claim in another jurisdiction, the manufacturer, converter, or distributor shall, prior to resale of such vehicle, re-title the vehicle in Texas and issue a disclosure statement on a form provided by or approved by the director. In addition, the manufacturer, converter, or distributor reacquiring the vehicle shall affix a disclosure label provided by or approved by the director on an approved location in or on the vehicle. Both the disclosure statement and the disclosure label shall accompany the vehicle through the first retail purchase. Neither the manufacturer, converter, or distributor nor any person holding a license or general distinguishing number issued by the division under the Code or, Transportation Code, Chapter 503, shall remove or cause the removal of the disclosure label until delivery of the vehicle to the first retail purchaser. A manufacturer, converter, or distributor shall provide the director, in writing, the name, address, and telephone number of any transferee, regardless of residence, to whom the manufacturer, distributor, or converter, as the case may be, transfers the vehicle within 60 days of each transfer. The selling dealer shall return the completed disclosure statement to the director within 60 days of the retail sale of a reacquired vehicle. Any manufacturer, converter, or distributor or holder of a general distinguishing number who violates this section is liable for a civil penalty or other sanctions prescribed by the Code. In addition, the manufacturer, converter, or

distributor must repair the defect or condition in the vehicle that resulted in the vehicle being reacquired and issue, at a minimum, a basic warranty (12 months/12,000 mile, whichever comes first), except for non-original equipment manufacturer items or accessories, on a form provided by or approved by the director, which warranty shall be provided to the first retail purchaser of the vehicle.

(5) In the event of any conflict between this rule and the terms contained in a cease and desist order, the terms of the cease and desist order shall prevail.

(6) The failure of any manufacturer, converter, distributor or dealer to comply with a decision and order of the director within the time period prescribed in the order may subject the manufacturer, converter, or distributor, or dealer to formal action by the division and the assessment of civil penalties or other sanctions prescribed by Occupations Code, Chapter 2301, for the failure to comply with an order of the director.

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

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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SUBCHAPTER H. ADVERTISING

43 TAC §§8.241 - 8.271

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §§2301.005, 2301.155, 2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301, and §2301.476; Transportation Code, §§501.0234, 503.039, 503.061 - 503.071.

§8.241. Objective.

The objective of this subchapter is to implement the intent of the legislature as declared in Occupations Code, Chapter 2301, by regulating the advertising of persons under the jurisdiction of director of the Motor Vehicle Division by requiring truthful and accurate advertising practices for the benefit of the citizens of this state.

§8.242. General Prohibition.

A person advertising motor vehicles shall not use false, deceptive, unfair, or misleading advertising. In addition to a violation of a specific advertising rule, any other advertising or advertising practices found by the director to be false, deceptive, or misleading, whether or not enumerated herein, shall be deemed violations of the Code, and shall also be considered violations of the general prohibition.

§8.243. Specific Rules.

The violation of an advertising rule shall be considered by the director as a prima facie violation of Occupations Code, Chapter 2301.

§8.244. Definitions.

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

(1) Advertisement--An oral, written, graphic, or pictorial statement made in the course of soliciting business, including, without limitation, a statement or representation made in a newspaper, magazine, or other publication, or contained in a notice, sign, poster, display, circular, pamphlet, or letter, or on radio, the Internet, or via an on-line computer service, or on television. The term does not include an in-person oral communication by a dealer's employee with a prospective purchaser.

(2) Advertising provision--

(A) A provision of the Code relating to the regulation of advertising; or

(B) a rule relating to the regulation of advertising adopted pursuant to the authority of the Code.

(3) Bait advertisement--An alluring but insincere offer to sell or lease a product of which the primary purpose is to obtain leads to persons interested in buying or leasing merchandise of the type advertised and to switch consumers from buying or leasing the advertised product in order to sell or lease some other product at a higher price or on a basis more advantageous to the advertiser.

(4) Balloon payment--Any scheduled payment made as required by a consumer credit transaction that is more than twice as large as the average of all prior scheduled payments except the down payment.

(5) Buyers guide--A form as required by the Federal Trade Commission under 16 Code of Federal Regulations, Part 455. This form is to be completed and displayed on the side window of a vehicle that has been driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer.

(6) Clear and conspicuous--The statement, representation, or term being disclosed is of such size, color, contrast, and audibility and is presented so as to be readily noticed and understood. All language and terms, including abbreviations, shall be used in accordance with their common or ordinary usage and meaning.

(7) Code--Occupations Code, Chapter 2301.

(8) Dealership addendum--A form which is to be displayed on a window of a motor vehicle when the dealership installs special features, equipment, parts or accessories, or charges for services not already compensated by the manufacturer or distributor for work required to prepare a vehicle for delivery to a buyer. The addendum is to disclose:

(A) that it is supplemental;

(B) any added feature, service, equipment, part, or accessory charged and added by the dealership and the retail price therefore;

(C) any additional charge to the selling price such as additional dealership markup; and

(D) the total dealer selling price. The dealership addendum form shall not be deceptively similar in appearance to the manufacturer's label, which is required to be affixed by every manufacturer to the windshield or side window of each new motor vehicle under the Automobile Information Disclosure Act.

(9) Demonstrator--A new motor vehicle that is currently in the inventory of the automobile dealership and used or has been used primarily for test drives by customers and other dealership purposes and so designated by the dealership.

(10) Disclosure--Required information that is clear, conspicuous, and accurate.

(11) Factory executive/official vehicle--A new motor vehicle that has been used exclusively by an executive or official of the dealer's franchising manufacturer, distributor, or their subsidiaries.

(12) Internet--A system that connects computers or computer networks.

(13) Licensee--Any person required to obtain a license from the Motor Vehicle Division.

(14) Manufacturer's label--The label required by the Automobile Information Disclosure Act, 15 United States Code 1231-1233, to be affixed by the manufacturer to the windshield or side window of each new automobile delivered to the dealer.

(15) On-line service--A network that connects computer users.

(16) Rebate or cash back--A sum of money refunded to a purchaser or for the benefit of the purchaser after full payment has been rendered. The purchaser may choose to reduce the amount of the purchase price by the sum of money or the purchaser may opt for the money to be returned to himself or for his benefit subsequent to payment in full.

(17) Subsequent violation--Conduct that is the same or substantially the same as conduct the division has previously alleged to be a violation of an advertising provision.

§8.245. Availability of Vehicles.

(a) A licensee may advertise a specific vehicle or line make of vehicles for sale if.

(1) the specific vehicle or line is in the possession of the licensee at the time the advertisement is placed, or the vehicle may be obtained from the manufacturer or distributor or some other source, and this information is clearly and conspicuously disclosed in the advertisement; and

(2) the price advertisement sets forth the number of vehicles available at the time the advertisement is placed or a dealer can show he has available a reasonable expectable public demand based on prior experience. In addition, if an advertisement pertains to only one specific vehicle, then the advertisement must also disclose the vehicle's stock number or vehicle identification number.

(b) This section does not prohibit general advertising of vehicles by a manufacturer, dealer advertising association, or distributor and the inclusion of the names and addresses of the dealers selling such vehicles in the particular area.

(c) Motor vehicle dealers may advertise a specific used vehicle or vehicles for sale if:

(1) The specific used vehicle or vehicles is in the possession of the dealer at the time the advertisement is placed; and

(2) The title certificate to the used vehicle has been assigned to the dealer.

§8.246. Accuracy.

All advertised statements shall be accurate, clear, and conspicuous.

§8.247. Untrue Claims.

The following statements are prohibited.

(1) Statements such as "write your own deal," "name your own price," "name your own monthly payments," or statements with similar meaning.

(2) Statements such as "everybody financed," "no credit rejected," "we finance anyone," and other similar statements representing or implying that no prospective credit purchaser will be rejected because of his inability to qualify for credit.

(3) Statements representing that no other dealer grants greater allowances for trade ins, however stated, unless the dealer can show such is the case.

(4) Statements representing that because of its large sales volume a dealer is able to purchase vehicles for less than another dealer selling the same make of vehicles, unless the dealer can show such is the case.

§8.248. Layout.

The layout, headlines, illustrations, or type size of a printed advertisement and the broadcast words or pictures of radio/TV advertisements shall not convey or permit an erroneous or misleading impression as to which vehicle or vehicles are offered for sale or lease at featured prices. No advertised offer, expression, or display of price, terms, down payment, trade in allowance, cash difference, savings, or other such material terms shall be misleading and any necessary qualifications shall be clearly, conspicuously, and accurately set forth to prevent misunderstanding.

§8.249. Manufacturer's Suggested Retail Price.

The suggested retail price of a new motor vehicle when advertised by a manufacturer or distributor shall include all costs and charges for the vehicle advertised, except that destination and dealer preparation charges, and any registration, certificate of title, license fees, or an additional registration fee, if any, charged by a full service deputy as provided by Transportation Code, §502.114; any taxes; and any other fees or charges that are allowed or prescribed by law may be excluded from such price, provided that the advertisement clearly and conspicuously states that such costs and charges are excluded. However, with respect to advertisements placed with local media in Texas by a manufacturer or distributor which include the names of the local dealers for the vehicles advertised, if the price of a vehicle is stated in the advertisement, such price must include all costs and charges for the vehicle advertised, including destination and dealer preparation charges and may exclude only any registration, certificate of title, license fees, or an additional registration fee, if any, charged by a full service deputy as provided by Transportation Code, §502.114; any taxes; and any other fees or charges that are allowed or prescribed by law.

§8.250. Dealer Price Advertising.

(a) When featuring an advertised sale price of a new or used motor vehicle, the dealer must be willing to sell the vehicle for such advertised price to any retail buyer. The advertised sale price shall be the price before the addition or subtraction of any other negotiated items. The only charges that may be excluded from the advertised price are:

(1) any registration, certificate of title, license fees, or an additional registration fee, if any, charged by a full service deputy as provided by Transportation Code, §502.114;

(2) any taxes; and

(3) any other fees or charges that are allowed or prescribed by law.

(b) A qualification may not be used when advertising the price of a vehicle such as "with trade," "with acceptable trade," "with dealer-arranged financing," "rebate assigned to dealer," or "with down payment."

(c) If a price advertisement discloses a rebate cash back or discount savings claim, the price of the vehicle must be disclosed as well as the price of the vehicle after deducting the incentive.

(1) If an advertisement discloses a discount savings claim, this incentive must be disclosed as a deduction from the manufacturer's suggested retail price (MSRP). The following is an acceptable format for advertising a price with a discount savings claim.
Figure: 43 TAC §8.250(c)(1)

(2) If an advertisement discloses a rebate, this incentive must be disclosed as a deduction from the advertised price. The following is an acceptable format for advertising a price with a rebate.
Figure: 43 TAC §8.250(c)(2)

(3) If an advertisement discloses both a rebate and a discount savings claim, the incentives must be disclosed as a deduction from the manufacturer's suggested retail price (MSRP). The following is an acceptable format for advertising a price with a rebate and a discount savings claim.
Figure: 43 TAC §8.250(c)(3)

(d) In the event that the manufacturer offers a discount on a package of options, then that discount should be disclosed above or prior to the manufacturer's suggested retail price (MSRP) with a total price of the vehicle before option discounts. The following is an acceptable format.
Figure: 43 TAC §8.250(d)

(e) If a rebate is only available to a selected portion of the public and not the public as a whole, the price should be disclosed as in subsection (c) of this section first and then the nature of the limitation and the amount of the limited rebate may be disclosed. The following is an acceptable format.
Figure : 43 TAC §8.250(e)

§8.251. Identification.

(a) When the price of a vehicle is advertised, the following must be disclosed:

(1) model year;

(2) make;

(3) model line and style or model designation; and

(4) whether the vehicle is a used, demonstrator, or a factory executive/official vehicle.

(b) Expressions such as "fully equipped," "factory equipped," "loaded," and other such terms shall not be used in any advertisement that contains the price of a vehicle unless the optional equipment of the vehicle is listed in the advertisement.

(c) An illustration of a motor vehicle used in an advertisement must be substantially the same as that of the motor vehicle advertised.

§8.252. Advertising at Cost or Invoice.

(a) The term "dealer's cost" or other reference to the cost of the vehicle shall not be used.

(b) The use of the term "invoice" or "invoice price" in advertising shall not be used.

§8.253. Trade-in Allowances.

No guaranteed trade-in amount or range of amounts shall be used in advertising.

§8.254. Used Vehicles.

A used vehicle shall not be advertised in any manner that creates the impression that it is new. A used vehicle shall be identified as either "used" or "pre owned." Terms such as "program car," "special purchase," "factory repurchase," or other similar terms are not sufficient to designate a vehicle as used, and these vehicles must be identified as "used" or "pre-owned."

§8.255. Demonstrators, Factory, Executives/Official Vehicles.

If a demonstrator or factory executive/official vehicle is advertised, the advertisement must clearly and conspicuously identify the vehicle as a demonstrator or factory executive/official vehicle. A demonstrator or factory official vehicle may not be advertised or sold except by a dealer franchised and licensed to sell that line make of new motor vehicle.

§8.256. Auction.

Terms such as "auction" or "auction special" and other terms of similar import shall be used only in connection with a vehicle offered or sold at a bona fide auction.

§8.257. Free Offers.

No merchandise or enticement may be described as "free" if the vehicle can be purchased or leased for a lesser price without the merchandise or enticement or if the price of the vehicle has been increased to cover the cost or any part of the cost of the merchandise or enticement. The advertisement shall clearly and conspicuously disclose the conditions under which the "free" offer may be obtained.

§8.258. Authorized Dealer.

The term "authorized dealer" or a similar term shall not be used unless the advertising dealer holds both a franchise and a division license to sell those vehicles he is holding himself out as "authorized" to sell.

§8.259. Manufacturer and Distributor Rebates.

It is unlawful for a manufacturer or distributor to advertise any offer of a rebate, interest or finance charge reduction, or other financial inducement or incentive, for the benefit of the purchaser of a vehicle if the selling dealer contributes in any manner to that program, unless the advertisement discloses that the dealer's contribution may affect the final negotiated price of the vehicle.

§8.260. Rebate and Financing Rate Advertising by Dealers.

(a) It is unlawful for a dealer to advertise an offer of a manufacturer's or distributor's rebate, interest or finance charge reduction, or other financial inducement or incentive if the dealer contributes to the program, unless such advertising discloses that the dealer's contribution may affect the final negotiated price of the vehicle.

(b) An advertisement containing an offer of an interest or finance charge incentive that is paid for or financed by the dealer rather than the manufacturer or distributor, shall disclose that the dealer pays for or finances the interest or finance charge rate reduction, the amount of the dealer's contribution in either a dollar or percentage amount, and that such arrangement may affect the final negotiated price of the vehicle.

(c) An offer to pay, promise to pay, or tender cash to a buyer of a motor vehicle as in a rebate or cash back program may not be advertised, unless it is offered and paid in part by the motor vehicle manufacturer or distributor directly to the retail purchaser or assignee of the retail purchaser and unless the advertisement sets forth the disclosures required by this rule.

§8.261. Lease Advertisements.

Vehicle lease advertisements shall clearly and conspicuously disclose that the advertisement is for the lease of a vehicle. Statements such as "alternative financing plan," "drive away for $ per month," or other terms or phrases that do not use the term "lease," do not constitute adequate disclosure of a lease. Lease advertisements shall not contain the phrase "no down payment" or words of similar import if any outlay of money is required to be paid by the customer to lease the vehicle. Lease terms that are not available to the general public shall not be included in advertisements directed at the general public, or all limitations and qualifications applicable to the lease terms advertised shall be clearly and conspicuously disclosed.

§8.262. Manufacturer Sales; Wholesale Prices.

A motor vehicle shall not be advertised for sale in any manner that creates the impression that it is being offered for sale by the manufacturer or distributor of the vehicle. An advertisement shall not contain terms such as "factory sale," "fleet prices," "wholesale prices," "factory approved," "factory sponsored," "manufacturer sale," use a manufacturer's name or abbreviation in any manner calculated or likely to create an impression that the vehicle is being offered for sale by the manufacturer or distributor, or use any other similar terms which indicate sales other than retail sales from the dealer.

§8.263. Savings Claims; Discounts.

(a) A savings claim or discount offer is prohibited except to advertise a new motor vehicle, and the advertisement must show the difference between the dealer's sale price and the manufacturer's, distributor's or converter's total suggested list or retail price.

(1) If a savings claim or discount offer includes only a dealer discount, the advertisement shall disclose that the discount is from the MSRP. The following is an acceptable format for advertising a dealer discount: "$2,000 discount off MSRP".

(2) A savings claim or discount offer that includes a manufacturer's customer rebate must disclose the amount of the rebate as well as the amount of the dealer's discount. The following is an acceptable format for advertising a savings claim with a rebate and a dealer discount: "$2,000 savings off MSRP ($1,500 dealer discount and $500 rebate.)"

(3) If a savings claim discloses a manufacturer's option package discount, then that discount must be disclosed prior to the discount off MSRP. The savings claim shall be advertised as a total savings. The following is an acceptable format for advertising a total savings claim: "Total Savings $3,000 ($1,000 option package discount, $1,500 dealer discount off MSRP, and $500 rebate.)"

(b) The featured savings claim or discount offer for a new motor vehicle, when advertised, must be the savings claim or discount which is available to any and all members of the buying public.

(c) If an option that is added by a dealer is not a factory-available option, a savings claim may not be advertised on that vehicle. If a dealer has added an option obtained from the manufacturer or distributor of the motor vehicle and disclosed the option and its factory suggested retail price on a dealership addendum, the dealer may advertise a savings claim on that vehicle as long as the option is listed, and the difference is shown between the dealer's sale price and the factory suggested retail price of the vehicle including the factory available option.

(d) Statements such as "up to," "as much as," "from," shall not be used in connection with savings or discount claims.

(e) No person may advertise a savings claim or discount offer on used motor vehicles.

§8.264. Sales Payment Disclosures.

An advertisement that contains the amount of a down payment, in either a percentage or dollar amount; the amount of any payment, in either a percentage or dollar amount; the number of payments; the period of repayment; or the amount of any finance charge, must include the following:

(1) the amount or percentage of the down payment;

(2) the terms of repayment (from which the number of months to make repayment and the amount per month can be determined) including any balloon payment;

(3) the annual percentage rate or APR; and

(4) the amount of annual percentage rate, if increased, after consummation of the credit transaction.

§8.265. Payment Disclosure - Lease.

(a) An advertisement that promotes a consumer lease and contains the amount of any payment; or a statement of any capitalized cost reduction or other payment or that no payment is required prior to or at consummation or by delivery, if delivery occurs after consummation, must clearly and conspicuously include the following:

(1) that the transaction advertised is a lease;

(2) the total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;

(3) the number, amounts, and due dates or periods of scheduled payments under the lease;

(4) a statement of whether or not a security deposit is required; and

(5) a statement that an extra charge may be imposed at the end of the lease term where the lessee's liability, if any, is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

(b) Except for a periodic payment, a reference to a charge as described in subsection (a)(2) of this section, i.e., to components of the total due at lease signing or delivery, cannot be more prominently advertised than the disclosure of the total amount due at lease signing or delivery.

(c) If a percentage rate is advertised, that rate shall not be more prominent than any of the following disclosures stated in the advertisement, with the exception of paragraph (19) of this subsection, the notice required to accompany the rate.

(1) Description of payments.

(2) Amount due at lease signing or delivery.

(3) Payment schedule and total amount of periodic payments.

(4) Other itemized charges that are not included in the periodic payment. These charges include the amount of any liability that lease imposes upon the lessee at the end of the lease term.

(5) Total of payments.

(6) Payment calculation:

(A) Gross capitalized cost.

(B) Capitalized cost reduction.

(C) Adjusted capitalized cost.

(D) Residual value.

(E) Depreciation and any amortized amounts.

(F) Rent charge.

(G) Total of base periodic payments.

(H) Lease term.

(I) Base periodic payment.

(J) Itemization of other charges that are a part of the periodic payment.

(K) Total periodic payment.

(7) Early termination conditions and disclosure of charges.

(8) Maintenance responsibilities.

(9) Purchase option.

(10) Statement referencing nonsegregated disclosures.

(11) Liability between residual and realized values.

(12) Right of appraisal.

(13) Liability at the end of the lease term based on residual value.

(14) Fees and taxes.

(15) Insurance.

(16) Warranties or guarantees.

(17) Penalties and other charges for delinquency.

(18) Security interest.

(19) Limitations on rate information.

(d) If a lessor provides a percentage rate in an advertisement, a notice stating that "this percentage may not measure the overall cost of financing this lease" shall accompany the rate disclosure. The lessor shall not use the term "annual percentage rate," "annual lease rate," or any equivalent term.

(e) A multi-page advertisement that provides a table or schedule of the required disclosures is considered a single advertisement if, for lease terms that appear without all of the required disclosures, the advertisement refers to the page or pages on which the table or schedule appears.

(f) A merchandise tag stating any item listed in subsection (a) of this section, must comply with the disclosures in subsection (a) of this section by referring to a sign or display prominently posted in the lessor's place of business that contains a table or schedule of the required disclosures.

(g) An advertisement made through television or radio stating any item listed in subsection (a) of this section, must state in the advertisement:

(1) that the transaction advertised is a lease;

(2) the total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;

(3) the number, amounts, and due dates or periods of scheduled payments under the lease; and

(4) Either:

(A) a toll-free telephone number along with a reference that such number may be used by consumers to obtain the information in subsection (a) of this section. The toll-free telephone number shall be available for no fewer than ten days, beginning on the date of the broadcast and the lessor shall provide the information in subsection (a) of this section orally or in writing upon request; or

(B) direct the consumer to a written advertisement in a publication of general circulation in the community served by the media station, including the name and the date of the publication, with a statement that the required disclosures in subsection (a) of this section are included in the advertisement. The written advertisement shall be published beginning at least three days before and ending at least 10 days after the broadcast.

§8.266. Bait Advertisement.

"Bait" advertisement shall not be used by any person.

§8.267. Lowest Price Claims.

(a) Representing a lowest price claim, best price claim, best deal claim, or other similar superlative claims shall not be used in advertising.

(b) If a dealer advertises a "meet or beat" guarantee, then the advertisement must clearly and conspicuously disclose the conditions and requirements necessary in order for a person to receive any advertised cash amount.

§8.268. Fleet Prices.

Terms such as "fleet prices" or "fleet sales" or other terms implying that retail individual customers will be afforded the same price and/or discount as multi purchase commercial businesses shall not be used in advertising.

§8.269. Bankruptcy/Liquidation Sale.

No licensee may willingly misrepresent the ownership of a business for the purpose of holding a liquidation sale, auction sale, or other sale which represents that the business is going out of business. A person who advertises a liquidation sale, auction sale, or going out of business sale shall state the correct name and permanent address of the owner of the business in the advertisement. A person may not conduct a sale advertised with the phrase "going out of business," "closing out," "shutting doors forever," or "bankruptcy sale," "foreclosure," or "bankruptcy," or similar phrases or words indicating that an enterprise is ceasing business unless the business is closing its operations and follows the procedures required by the Business and Commerce Code, Chapter 17, Subchapter F.

§8.270. Finding of Violation.

No person shall be held to be in violation of the rules, including the general prohibition, except upon a finding thereof made by the director after notice and hearing as provided in Occupations Code, Chapter 2301.

§8.271. Enforcement.

(a) The division may file a complaint against a licensee alleging a violation of an advertising provision pursuant to Occupations Code, §2301.203, only if the division can show:

(1) that the licensee who allegedly violated an advertising provision has received from the division a notice of an opportunity to cure the violation by certified mail, return receipt requested, in compliance with subsection (b) of this section relating to effectiveness of notice; and

(2) that the licensee committed a subsequent violation of the same advertising provision within the period beginning 15 days and ending 12 months after the licensee has received the notice required by paragraph (1) of this subsection.

(b) An effective notice issued under subsection (a)(1) of this section must:

(1) state that the division has reason to believe that the licensee violated an advertising provision and identify the provision;

(2) set forth the facts upon which the division bases its allegation of a violation; and

(3) state that if the licensee commits a subsequent violation of the same advertising provision within the time set forth in subsection (a)(2) of this section, the division will formally file a complaint.

(c) As a part of the cure procedure, the director may require a licensee, who allegedly violated an advertising provision, to publish a retraction notice to effect an adequate cure of the alleged violation. An adequate retraction notice must:

(1) appear in a newspaper of general circulation in the area in which the alleged violation occurred;

(2) appear in that portion of the newspaper, if any, devoted to motor vehicle advertising;

(3) identify the date and the medium of publication, print, electronic or other, in which the advertising alleged to be a violation appeared; and

(4) identify the alleged violation of the advertising provision and contain a statement of correction.

(d) Performance of a cure is made solely for the purpose of settling an allegation and is not an admission of a violation of these rules, the Code, or other law.

This agency hereby certifies that the 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 September 29, 2005.

TRD-200504380
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING
SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

43 TAC §15.55

The Texas Department of Transportation (department) proposes amendments to §15.55, Construction Cost Participation, concerning economically disadvantaged counties.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §222.053(b), authorizes the Texas Transportation Commission (commission) to require matching funds from a local government for state highway improvement projects. The commission previously adopted rules, codified at 43 TAC §15.55, establishing local government cost participation requirements for state highway improvement projects.

Transportation Code, §222.053(c), requires the commission to adjust local matching funds requirements for local governments located in an economically disadvantaged county. Transportation Code, §222.053(a), defines the term "economically disadvantaged county" as a county that has, in comparison to other counties in the state: (1) below average per capita taxable property value; (2) below average per capita income; and (3) above average unemployment.

Existing §15.55(b) describes how the commission will implement Transportation Code, §222.053(c).

House Bill 1107, 79th Legislature, Regular Session, 2005, amended Transportation Code, §222.053 to, among other things: (1) require the commission to certify a county as an economically disadvantaged county on an annual basis as soon as possible after the comptroller reports on the economic indicators listed under Transportation Code, §222.053(a); (2) require the commission to determine whether to make an adjustment at the time the local government submits a proposal for a project; and (3) authorizes the commission to delegate any of its powers under Transportation Code, §222.053, to the department's executive director or the director's designee.

To implement the provisions of House Bill 1107 and to expedite the processing of adjustments to local matching funds requirements for local governments in economically disadvantaged counties, §15.55 is amended to: (1) require the executive director or the director's designee, instead of the commission, to adjust minimum local matching funds requirements for local governments in economically disadvantaged counties; (2) require the commission to certify a county as an economically disadvantaged county on an annual basis as soon as possible after the comptroller reports on the economic indicators specified by law and rule; and (3) require the executive director or the director's designee to determine whether to make an adjustment at the time the local government submits a proposal for a highway improvement 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 or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the section as proposed.

James L. Randall, P.E., Director, Transportation Planning and Programming, 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

Mr. Randall 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 an expedited procedure for adjusting local matching funds requirements for local governments in economically disadvantaged counties. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to James L. Randall, P.E., Director, Transportation Planning and Programming, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2005.

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, §222.053.

§15.55. Construction Cost Participation.

(a) Required cost participation. The commission may require, request, or accept from a local government matching or other funds, rights-of-way, utility adjustments, additional participation, planning, documents, or any other local incentives.

(b) Economically disadvantaged counties. In evaluating a proposal for a highway improvement project with a local government that consists of all or a portion of an economically disadvantaged county, the executive director [~~commission~~] shall, for those projects in which the commission is authorized by law to provide state cost participation, adjust the minimum local matching funds requirement after receipt of a request for adjustment under paragraph (3) of this subsection [~~evaluating a local government's effort and ability to meet the requirement~~].

(1) Commission certification. The commission will certify a county as an economically disadvantaged county on an annual basis as soon as possible after the comptroller reports on the economic indicators listed under §15.51(7) of this subchapter (relating to Definitions).

[~~(1) Request for adjustment. The city council, county commissioners court, district board, or similar governing body of a local government that represents all or a portion of an economically disadvantaged county shall submit a request for adjustment to the local district office of the department. The request will include, at a minimum:~~]

[~~(A) the proposed project scope;~~]

[~~(B) the estimated total project cost;~~]

[~~(C) a breakdown of the anticipated total cost by category (e.g., right-of-way, utility adjustment, plan preparation, construction);~~]

[~~(D) the proposed participation rate;~~]

[~~(E) the nature of any in-kind resources to be provided by the local government;~~]

[~~(F) the rationale for adjusting the minimum local matching funds requirement; and~~]

[~~(G) any other information considered necessary to support a request.~~]

(2) Local match adjustment [~~Evaluation~~]. In determining the [~~evaluating a request for an~~] adjustment to the local matching funds requirement, and a local government's effort and ability to meet the requirement, the commission will consider a local government's:

(A) population level;

(B) bonded indebtedness;

(C) tax base;

(D) tax rate;

(E) extent of in-kind resources available; and

(F) economic development sales tax.

(3) Request for adjustment. The city council, county commissioners court, district board, or similar governing body of a local government that represents all or a portion of an economically disadvantaged county, shall submit a request for adjustment to the local district office of the department. The request will include, at a minimum:

(A) the proposed project scope;

(B) the estimated total project cost;

(C) a breakdown of the anticipated total cost by category (e.g., right-of-way, utility adjustment, plan preparation, construction);

(D) the proposed participation rate;

(E) the nature of any in-kind resources to be provided by the local government;

(F) the rationale for adjusting the minimum local matching funds requirement; and

(G) any other information considered necessary to support a request.

(4) Timing of determination. The executive director will determine whether to make an adjustment at the time the local government submits a proposal for a highway improvement project.

(5) Definition. For purposes of this subsection, "executive director" means the executive director or his or her designee, not below the level of district engineer or division or office director.

(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.

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Richard D. Monroe
General Counsel
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SUBCHAPTER J. DESIGN CONSIDERATIONS

43 TAC §15.122

The Texas Department of Transportation (department) proposes amendments to §15.122, concerning design considerations.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §201.615, requires the department to consider various design factors when developing transportation projects that involve the construction, reconstruction, rehabilitation, or resurfacing of a highway, other than a maintenance resurfacing project. The section describes those design factors that will be considered during the development of transportation projects in which the department has design and construction or funding responsibilities.

Existing §§15.120 - 15.122 provide the design factors that the department is required to consider during transportation project

development. Section 15.120 describes how these design factors will be considered during the development of transportation projects. Section 15.121 provides the definitions for the subchapter. Section 15.122 provides the current design factors which will be considered by the department.

To comply with House Bill 2702, 79th Legislature, Regular Session, 2005, §15.122 is amended to address the addition of aesthetic characteristics among those design factors considered by the department during transportation project development. The inclusion of input from each affected local community, with respect to the aesthetic character of the project, is also added. Transportation projects that involve the rehabilitation or resurfacing of a bridge or highway are excluded from these additional design considerations.

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 direct fiscal implications for state or local governments as a result of enforcing or administering the amended section. There are no anticipated economic costs for persons required to comply with the amendments as proposed.

Mark A. Marek, P.E., Director, Design Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amended section.

PUBLIC BENEFIT

Mr. Marek has also determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of enforcing or administering the amendments will be the consistent consideration of the aesthetic character of a project. There will be no adverse effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Mark A. Marek, P.E., Director, Design 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 November 14, 2005.

STATUTORY AUTHORITY

The amendments are proposed for adoption under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.614.

§15.122. Design Considerations.

The factors as provided in paragraph (1) of this section will be considered when transportation projects are developed in order to provide transportation systems and alternatives that are comfortable, safe, durable, cost-effective, accessible, environmentally sensitive, aesthetically pleasing, and that consider other transportation modes.

(1) Factors. The department, through a district, local government or MPO, shall consider the following factors when developing transportation projects:

(A) the extent to which the project promotes safety;

(B) the durability of the project;

(C) the economy of maintenance of the project;

(D) the impact of the project on:

(i) the natural and artificial environment;

(ii) the scenic and aesthetic character of the area in which the project is located;

(iii) preservation efforts; and

(iv) each affected local community and its economy;[~~and~~]

(E) the access for other modes of transportation, including those that promote physically active communities; and

(F) except for transportation projects that involve the rehabilitation or resurfacing of a bridge or highway, the aesthetic character of the project, including input from each affected local community.

(2) Assessment. The factors provided in paragraph (1) of this section will be assessed when developing transportation projects.

(A) Safety will be considered throughout the project development process. Each type of project will be evaluated, appropriate engineering studies will be completed, and appropriate design guidelines will be utilized with sound engineering judgment in order to accomplish the purpose of that particular transportation project. Safety is integral to properly engineering each project to address the anticipated needs and conditions.

(B) Durability and economy of maintenance will be incorporated into each project as it is developed in order to provide the most cost-effective and reliable products available through engineering study and evaluation. Final selection of products will be based on accepted design practices, specifications, availability of products, testing, and construction industry standards. The appropriate combination of products in each project will provide a project with a reasonably long life and will require reasonable upkeep to preserve its originally intended service life.

(C) The factors listed in paragraph (1)(D) of this section are all factors considered in the environmental review and public involvement process as prescribed in Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement for Transportation Projects) that is an integral part of the development of each project.

(D) Access for other modes of transportation will be considered during the project development process by developing plans and projects that contain, where appropriate, interconnections with other transportation facilities, including bicycle transportation facilities, pedestrian walkways, and trails.

(E) Except for transportation projects that involve the rehabilitation or resurfacing of a bridge or highway, the aesthetic character of the project will be considered during the project development process by developing plans and projects that contain, where appropriate, aesthetic enhancements to the transportation facilities. Input from each affected local community is gathered as part of the public involvement process as prescribed in Chapter 2, Subchapter C of this title that is an integral part of the development of each project.

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

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Richard D. Monroe
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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

The Texas Department of Transportation (department) proposes the repeal of Chapter 15, Subchapter L, §§15.140 - 15.145, concerning Abandonment of Rail Line by Rural Rail Transportation District and Chapter 15, Subchapter M, §§15.150 - 15.155, concerning Rail Facilities.

EXPLANATION OF PROPOSED REPEALS

House Bill 3588, 78th Legislature, Regular Session, 2003, and House Bill 2702, 79th Legislature, Regular Session, 2005, broadened the department's responsibilities concerning rail facilities. The enactment of these bills requires the adoption of new rules concerning rail facilities. Due to the growing department responsibilities in this area and the growing number of administrative rules the department will be required to promulgate, the department is creating a new Chapter in Title 43 of the Texas Administrative Code entitled Rail Facilities. Existing rules in Chapter 15, Transportation Planning and Programming, concerning rail are being repealed and simultaneously adopted in the new rail facilities chapter.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals. There are no anticipated economic costs for persons required to comply with the repeals.

James Randall, P.E., Director, Transportation Planning and Programming Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT

Mr. Randall has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be the consolidation of rules concerning rail facilities. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals may be submitted to James Randall, P.E., Director, Transportation Planning and Programming 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 November 14, 2005.

SUBCHAPTER L. ABANDONMENT OF RAIL LINE BY RURAL RAIL TRANSPORTATION DISTRICT

43 TAC §§15.140 - 15.145

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

STATUTORY AUTHORITY

The repeals 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.

CROSS REFERENCE TO STATUTE

Texas Civil Statutes, Article 6550c, §5(r).

§15.140. Purpose.
§15.141. Definitions.
§15.142. Application.
§15.143. Public Hearing.
§15.144. Approval.
§15.145. Limitation.

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

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SUBCHAPTER M. RAIL FACILITIES

43 TAC §§15.150 - 15.155

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

STATUTORY AUTHORITY

The repeals 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.

CROSS REFERENCE TO STATUTE

Texas Civil Statutes, Article 6550c, §5(r).

§15.150. Purpose.
§15.151. Definitions.
§15.152. Public Involvement.
§15.153. Criteria.
§15.154. Construction and Maintenance Contracts.
§15.155. Leasing of Rail Facilities.

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

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CHAPTER 21. RIGHT OF WAY
SUBCHAPTER A. LAND ACQUISITION PROCEDURES

43 TAC §21.16

The Texas Department of Transportation (department) proposes an amendment to §21.16, concerning use of options to purchase for advance acquisition of real property.

EXPLANATION OF PROPOSED AMENDMENT

Transportation Code, Chapter 202, Subchapter F, and Chapter 227, Subchapter D, authorize the Texas Transportation Commission (commission) to purchase options to acquire property for possible use in or in connection with any transportation facility, including, but not limited to, the Trans-Texas Corridor. Transportation Code, §202.112, was amended by House Bill 2702, 79th Legislative Session, Regular Session, 2005. The commission is amending this rule to be consistent with that legislation.

The proposed amendment to §21.16 will change the maximum length of the primary option period, as well as each subsequent extension, from 7 to 5 years. Each renewal period will be by agreement of the original grantor of the option or the grantor's heirs or assigns.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendment as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendment. There are no anticipated economic costs for persons required to comply with the section as proposed.

John P. Campbell, P.E., 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 amendment.

PUBLIC BENEFIT

Mr. Campbell 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 amendment will be to further the department's mission to provide an efficient, timely, cost effective and fair process of acquiring real property needed for development of transportation facilities. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendment may be submitted to John P. Campbell, P.E., 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 November 14, 2005.

STATUTORY AUTHORITY

The amendment is 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, §202.112.

§21.16. Use of Options To Purchase for Advance Acquisition of Real Property.

(a) The department may execute an option contract for the acquisition of right of way and control of development rights if the Texas Transportation Commission has authorized the expenditure of option fees for a transportation facility project or corridor and the district engineer determines that:

(1) the property to be optioned is or may possibly be used in or in connection with the transportation facility;

(2) the size and location of the property to be optioned is reasonably related to the possible future design and alignment of the transportation facility; and

(3) the terms of the option contract may be economically beneficial to the department by:

(A) establishing the purchase price at current market value as of the date of the option contract;

(B) establishing a methodology for determining a purchase price at the time the option is exercised to avoid the necessity for condemnation;

(C) restricting development or improvements that would substantially increase the purchase price; or

(D) reducing the time required for the acquisition of the property.

(b) An option contract shall be for a primary period of not more than 5 [~~7~~] years, but may be subject to one or more extensions beyond the primary term, each extension period not to exceed 5 years.

(c) An option fee to be paid to the property owner may be:

(1) a one-time fee paid at the time the option contract is executed;

(2) in the form of periodic payments; or

(3) a combination of paragraphs (1) and (2) of this subsection.

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

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CHAPTER 26. REGIONAL MOBILITY AUTHORITIES

The Texas Department of Transportation (department) proposes amendments to §26.2, Definitions, §26.11, Petition, §26.33, Design and Construction, and §26.51, Conflict of Interest, concerning regional mobility authorities.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 370, authorizes the creation of regional mobility authorities (RMAs) for the purpose of constructing, maintaining, and operating transportation projects in a region of this state. Transportation Code, §370.038, requires the Texas Transportation Commission (commission) to adopt rules governing the creation of an RMA and various powers of an RMA. The commission has previously adopted rules under §370.038, codified at 43 TAC Chapter 26.

House Bill 2702 and Senate Bill 1131, 79th Legislature, Regular Session, 2005, amended Transportation Code, Chapter 370 to make various revisions concerning RMAs. The proposed rule amendments implement House Bill 2702 and Senate Bill 1131 and make other technical revisions to the commission's rules governing RMAs.

Section 26.2, Definitions, is amended to: (1) add to the definition of "County" the cities of Laredo, Brownsville, McAllen, and Port Aransas, to implement amendments enacted by House Bill 2702 and Senate Bill 1131 that authorize these cities to create and operate RMAs; (2) exclude from the definition of "transportation project" an airport that on September 1, 2005, was served by one or more air carriers engaged in scheduled interstate transportation, to implement the provision of House Bill 2702 that has the effect of prohibiting an RMA from acquiring or improving this type of aviation facility; and (3) add to the definition of "transportation project" the term "transit system" to implement the provisions of House Bill 2702 that authorizes RMAs to establish transit systems.

Section 26.11, Petition, is amended to provide that the cities of Laredo, Brownsville, McAllen, and Port Aransas may petition the commission for approval to create an RMA. This amendment implements provisions of House Bill 2702 and Senate Bill 1131.

Section 26.33, Design and Construction, is amended to: (1) clarify, consistent with past practice, that if an RMA receives financial assistance from the department for an RMA turnpike project and the requirements of the commission's rules relating to financial assistance for toll facilities conflict with any provision of §26.33, the most stringent requirements will apply; and (2) revise the caption for §26.33(e) to include construction criteria in order to better reflect the scope and substance of the current provisions of the subsection.

Section 26.51, Conflict of Interest, is amended to state that in addition to the prohibitions and restrictions of this section, a director of an RMA is subject to Local Government Code, Chapter 171. This language implements similar language in House Bill 2702.

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. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Phillip Russell, Director, Texas Turnpike Authority, 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

Mr. Russell 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 the effective regulation of RMAs, consistent with state statute. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Phillip Russell, Director, Texas Turnpike Authority, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2005.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §26.2

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, §370.038, which requires the commission to adopt rules governing regional mobility authorities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 370.

§26.2. Definitions.

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

(1) AASHTO--The American Association of State Highway and Transportation Officials.

(2) Board--The board of directors of a regional mobility authority.

(3) Commission--The Texas Transportation Commission.

(4) County--Includes the cities [~~City~~] of El Paso, Laredo, Brownsville, McAllen, and Port Aransas.

(5) Director--A director of a board.

(6) Department--The Texas Department of Transportation.

(7) Environmental Permits, Issues, and Commitments (EPIC)--Any permit, issue, coordination, commitment, or mitigation obtained to satisfy social, economic, or environmental impacts of a transportation project, including, but not limited to, sole source aquifer coordination, wetland permits, stormwater permits, traffic noise abatement, threatened or endangered species coordination, archeological permits, and any mitigation or other commitment associated with any of those issues.

(8) Executive director--The executive director of the department or the executive director's designee not below district engineer, division director, or office director.

(9) Fiscal year--An accounting period of 12 months that is consistent, to the extent feasible, with the fiscal year of an RMA's member counties.

(10) Governmental entity--A municipality, county, the department, or other public entity authorized to construct, maintain, and operate a transportation project within the region of a regional mobility authority.

(11) Metropolitan planning organization--An organization designated to carry out the transportation planning process in prescribed urbanized areas as required by 23 U.S.C. §134 [~~Title 23, United States Code, §134~~].

(12) Nonattainment area--An area designated by the U.S. Environmental Protection Agency as not meeting the air quality standards outlined in the Clean Air Act.

(13) Petitioner--The county or counties petitioning for the creation of a regional mobility authority.

(14) Public utility facility--Means:

(A) a water, wastewater, natural gas, or petroleum pipeline or associated equipment;

(B) an electric transmission or distribution line or associated equipment; or

(C) telecommunications information services, or cable television infrastructure or associated equipment, including fiber optic cable, conduit, and wireless communications facilities.

(15) RMA--A regional mobility authority.

(16) Revenue--Fares, fees, rents, tolls, and other money received by an authority from the ownership or operation of a transportation project.

(17) State Implementation Plan--The plan prepared by the Texas Commission on Environmental Quality as required by 42 USC §7410 to attain and maintain air quality standards.

(18) Surplus revenue--Revenue that exceeds:

(A) the regional mobility authority's debt service requirements for a transportation project, including the redemption or purchase price of bonds subject to redemption or purchase as provided in the applicable bond proceedings;

(B) coverage requirements of a bond indenture for a transportation project;

(C) costs of operation and maintenance for a transportation project;

(D) cost of repair, expansion, or improvement of a transportation project;

(E) funds allocated for feasibility studies; and

(F) necessary reserves as determined by the regional mobility authority.

(19) Transportation project--Means:

(A) a turnpike project;

(B) a system designated under Transportation Code, §[~~Section~~] 370.034;

(C) a passenger or freight rail facility, including:

(i) tracks;

(ii) a rail line;

(iii) switching, signaling, or other operating equipment;

(iv) a depot;

(v) a locomotive;

(vi) rolling stock;

(vii) a maintenance facility; and

(viii) other real and personal property associated with a rail operation;

(D) a roadway with a functional classification greater than a local road or rural minor collector;

(E) a ferry;

(F) an airport, other than an airport that on September 1, 2005 was served by one or more air carriers engaged in scheduled interstate transportation, as those terms were defined by 14 C.F.R. §1.1 on that date;

(G) a pedestrian or bicycle facility;

(H) an intermodal hub;

(I) an automated conveyor belt for the movement of freight;

(J) a border crossing inspection station;

(K) an air quality improvement initiative;

(L) a public utility facility; [~~and~~]

(M) a transit system; and

(N) if applicable, projects and programs listed in the most recently approved state implementation plan for the area covered by the RMA, including an early action compact.

(20) Turnpike project--A highway of any number of lanes, with or without grade separations, owned or operated by an RMA under this chapter and any improvement, extension, or expansion to that highway, including:

(A) an improvement to relieve traffic congestion and promote safety;

(B) a bridge, tunnel, overpass, underpass, interchange, entrance plaza, approach, toll house, service road, or ramp;

(C) an administration, storage, or other building the RMA considers necessary for the operation of a turnpike project;

(D) a property right, easement, or interest the RMA acquires to construct or operate the turnpike project; and

(E) a parking area or structure, rest stop, park, and any other improvement or amenity the RMA considers necessary, useful, or beneficial for the operation of a turnpike project.

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

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SUBCHAPTER B. CREATION OF A REGIONAL MOBILITY AUTHORITY

43 TAC §26.11

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, §370.038, which requires the commission to adopt rules governing regional mobility authorities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 370.

§26.11. Petition.

(a) One or more counties may petition the commission for approval to create an RMA. The petition shall include:

(1) an adopted resolution from the commissioners court of each county indicating its approval of the creation by the county of an RMA;

(2) a description of how the RMA would improve mobility in the region;

(3) a description of a potential candidate transportation project or system of projects the RMA may undertake depending on study outcomes, including:

(A) an explanation of how the project or system of projects will be consistent with the appropriate policies, strategies, and actions of the Texas Transportation Plan, and, if appropriate, with the metropolitan transportation plan developed by the metropolitan planning organization;

(B) a brief description of any known environmental, social, economic, or cultural resource issues, such as impacts on wetlands and other water resources, endangered species, parks, neighborhoods, businesses, historic buildings or bridges, and archeological sites;

(C) the name and address of any individuals or organizations known to be opposed to any element of the project or system of projects, and a description of any known controversies concerning the project or system of projects; and

(D) a preliminary financing plan for the project or system of projects, which shall include an estimate of the following information, if available to the petitioner:

(i) total estimated cost, including planning, design, right of way acquisition, environmental mitigation, and construction; and

(ii) proposed financing, specifying the source and use of the funds, including debt financing and department contributions, identified as a loan or a grant;

(4) a commitment by the RMA to be fully responsible for identifying all EPIC, obtaining all required environmental permits, and other required environmental approvals;

(5) a brief description of any other transportation projects the petitioner is currently considering to be developed by the RMA; and

(6) the representation criteria and the appointment process for board members.

(b) The cities [~~City~~] of El Paso, Laredo, Brownsville, McAllen, or Port Aransas may petition the commission for approval to create an RMA in the same manner as a county under subsection (a) of this section. Instead of the requirements of subsection (a)(1) of this section, the city must submit a resolution from its city council indicating its approval of the creation by the city of an RMA.

(c) For purposes of this subchapter, a system means a combination or network of transportation projects that the RMA may undertake.

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

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SUBCHAPTER D. APPROVAL OF A TRANSPORTATION PROJECT

43 TAC §26.33

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, §370.038, which requires the commission to adopt rules governing regional mobility authorities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 370.

§26.33. Design and Construction.

(a) Applicability. This section applies to an RMA transportation project that will connect to the state highway system or a department rail facility.

(b) State or federal funds. RMA turnpike projects that use federal or state funds provided by the department must also comply with Chapter 27, Subchapter E of this title (relating to Financial Assistance for Toll Facilities). If a requirement of Chapter 27, Subchapter E conflicts with any provision of this section, the most stringent requirement, as determined by the executive director, will apply.

(c) Responsibility. The RMA is fully responsible for the design and construction of each project it undertakes, including ensuring that all EPIC are addressed in project design and construction.

(d) Design criteria for highway facilities.

(1) State criteria. All designs developed by or on behalf of the RMA shall comply with the latest version of the department's manuals, including, but not limited to, the Roadway Design Manual, Pavement Design Manual, Hydraulic Design Manual, the Texas Manual on Uniform Traffic Control Devices, Bridge Design Manual, and the Texas Accessibility Standards.

(2) Alternative criteria. An RMA may request approval to use different accepted criteria for a particular item of work. Alternative criteria may include, but are not limited to, the latest version of the AASHTO Policy on Geometric Design of Highways and Streets, the AASHTO Pavement Design Guide, and the AASHTO Bridge Design Specifications. The use of alternative criteria is subject to the approval of the Federal Highway Administration for those projects involving federal funds. The executive director may approve the use of alternative criteria if the alternative criteria are determined to be sufficient to protect the safety of the traveling public and protect the integrity of the transportation system.

(3) Exceptions to design criteria. An RMA may deviate from the state or alternative criteria for a particular design element on a case by case basis after determining that the particular criteria could not reasonably be met due to physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution. Documentation of the exceptions shall be retained by the RMA and furnished to the department in accordance with subsection (h) of this section.

(e) Design and construction criteria for rail facilities. Rail facilities developed by or on behalf of the RMA shall comply with the current version of the American Railway Engineering and Maintenance of Way Association (AREMA) standards.

(f) Access. For proposed projects that will change the access control line to an interstate highway, the RMA shall submit to the department all data necessary for the department to request Federal Highway Administration approval.

(g) Construction specifications for highway projects.

(1) All plans, specifications, and estimates developed by or on behalf of the RMA shall conform to the latest version of the department's Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, and shall conform to department required special specifications and special provisions.

(2) The executive director may approve the use of an alternative specification if the proposed specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public.

(h) Design and construction review and approval.

(1) Applicability. This subsection applies to the segment of an RMA transportation project that connects to the state highway system or a department rail facility, including an overpass, underpass, intersection, or interchange.

(2) Exceptions to design criteria. An RMA may request approval to deviate from the state or alternative criteria for a particular design element on a case by case basis. The request for approval shall state the criteria for which an exception is being requested and must include a comprehensive description of the circumstances and engineering analysis supporting the request. The executive director may approve an exception after determining that the particular criteria could not reasonably be met due to physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution.

(3) Preliminary plan review. When design of the connection is approximately 30% complete, the RMA shall send the following preliminary design information to the department for review and approval in accordance with the procedures and timeline established in the project development agreement described in §26.34 of this subchapter:

(A) a design schematic depicting plan, profile, and superelevation information for each roadway and rail line;

(B) typical sections showing existing and proposed horizontal dimensions, cross slopes, location of profile grade line, pavement layer thickness and composition, earthen slopes, right of way lines, if applicable, rail cross ties, type and size of rail and ballast type;

(C) bridge, retaining wall, and sound wall layouts, including, where applicable, an indication of structural capacity in terms of design loading;

(D) hydraulic studies and drainage area maps showing the drainage of waterways entering the project and local project drainage; and

(E) the location and text of proposed mainlane guide signs shown on a schematic that includes lane lines or arrows indicating the number of lanes.

(4) Final plan review. When final plans are complete, the RMA shall send the following information to the executive director for review and approval in accordance with the procedures and timelines established in the project development agreement described in §26.34 of this subchapter:

(A) seven copies of the final set of plans, specifications, and engineer's estimate (PS&E) that have been signed and sealed by the responsible engineer; and

(B) revisions to the preliminary design submission previously approved by the department summarized or highlighted for the department.

(5) Contract bidding and award. The RMA shall not advertise the project for receipt of bids until it has received approval of the PS&E from the department. This paragraph does not apply to a project developed under a comprehensive development agreement.

(6) Contract revisions.

(A) All contract revisions related to the connections to the department facility shall comply with the latest version of the applicable national or state administration criteria and manuals, and must be submitted to the department for its records. Major contract revisions must be submitted to the executive director for approval prior to beginning the revised construction work. Procedures governing the executive director's approval, including time limits for department review, shall be included in the project agreement described in §26.34 of this subchapter.

(B) For purposes of this subsection, "major contract revision" means a revision to a construction contract that:

(i) reduces geometric design or structural capacity below project design criteria;

(ii) changes the location or configuration of the physical connection to the department facility;

(iii) changes the placement of columns and other structural elements within the department's right of way;

(iv) changes the traffic control plan in a manner that reduces the capacity on the department facility as shown on the approved PS&E;

(v) changes the access on a controlled access facility; or

(vi) for federally funded projects, eliminates or revises EPICs.

(i) As-built plans. Within six months after final acceptance of the construction project, the RMA shall file with the department a set of the as-built plans incorporating any contract revisions. These plans

shall be signed, sealed, and dated by a Texas licensed professional engineer [~~in Texas~~] certifying that the project was constructed in accordance with the plans and specifications.

(j) Document and information exchange. If available, the RMA agrees to deliver to the department all materials used in the development of the project including, but not limited to, aerial photography, computer files, surveying information, engineering reports, environmental documentation, general notes, specifications, and contract provision requirements.

(k) State and federal law. The RMA shall comply with all federal and state laws and regulations applicable to the project and the state highway system, and shall provide or obtain all applicable permits, plans, and other documentation required by a federal or state entity.

(l) Work on state right of way. All work required within the limits of state owned right of way shall be accomplished only pursuant to express written agreement with 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.

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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SUBCHAPTER F. MISCELLANEOUS OPERATION PROVISIONS

43 TAC §26.51

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, §370.038, which requires the commission to adopt rules governing regional mobility authorities.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 370.

§26.51. Conflict of Interest.

(a) Prohibited conduct for directors and employees. A director or employee of an RMA may not:

(1) accept or solicit any gift, favor, or service that might reasonably tend to influence the director or employee in the discharge of official duties or that the director or employee knows or should know is being offered with the intent to influence the director's or employee's official conduct;

(2) accept other employment or engage in a business or professional activity that the director or employee might reasonably expect would require or induce the director or employee to disclose confidential information acquired by reason of the official position;

(3) accept other employment or compensation that could reasonably be expected to impair the director's or employee's independence of judgment in the performance of the director's or employee's official duties;

(4) make personal investments, including investments of a spouse, that could reasonably be expected to create a conflict between the director's or employee's private interest and the interest of the RMA or that could impair the ability of the individual to make independent decisions;

(5) intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the director's or employee's official powers or performed the director's or employee's official duties in favor of another; or

(6) have a personal interest in an agreement executed by the RMA.

(b) Eligibility of directors and chief administrative officer.

(1) A person is not eligible to serve as a director or chief administrative officer of an RMA if the person or the person's spouse:

(A) is employed by or participates in the management of a business entity or other organization, other than a political subdivision, that is regulated by or receives funds from the department, the RMA, or a member county;

(B) directly or indirectly owns or controls more than a 10% interest in a business or other organization that is regulated by or receives funds from the department, the RMA, or a member county;

(C) uses or receives a substantial amount of tangible goods, services, or funds from the department, the RMA, or a member county; or

(D) is required to register as a lobbyist under Government Code, Chapter 305, because of the person's activities for compensation on behalf of a profession related to the operation of the department, the RMA, or a member county.

(2) A person is not eligible to serve as a director or chief administrative officer of an RMA if the person is an officer, employee, or paid consultant of a Texas trade association in the field of road construction or maintenance, public transportation, rail, or aviation, or if the person's spouse is an officer, manager, or paid consultant of a Texas trade association in the field of road construction or maintenance, public transportation, rail, or aviation.

(3) Except as provided in Transportation Code, §370.251(g), a person is not ineligible to serve as a director or chief administrative officer of an RMA if the person has received funds from the department, the RMA, or a member county for acquisition of highway right of way.

(4) The commission may approve an exception to the requirements of subsection (b)(1)(A) of this section if:

(A) the RMA or the applicable county has properly disclosed to the public the details of the potential conflict;

(B) the potential conflict concerns employment with an entity that receives funds from a member county; and

(C) the commission determines that the employment will not result in the director or chief administrative officer incurring any obligation of any nature that is in substantial conflict with the director or officer's proper discharge of his or her duties on behalf of the RMA.

(c) In addition to the prohibitions and restrictions of this section, a director is subject to Local Government Code, Chapter 171.

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

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CHAPTER 26. REGIONAL MOBILITY AUTHORITIES
SUBCHAPTER E. TRANSFER OF TXDOT FERRY

43 TAC §§26.41 - 26.43, 26.45, 26.46

The Texas Department of Transportation (department) proposes amendments to §26.41, Request, §26.42, Public Involvement, §26.43, Approval, §26.45, Reimbursement, and §26.46, Use of Surplus Revenue, concerning conversion and transfer of department facility.

EXPLANATION OF PROPOSED AMENDMENTS

House Bill 2702, 79th Legislature, Regular Session, 2005, revised and restructured state law pertaining to the conversion of a non-tolled state highway (toll conversion) and the transfer of a tolled state highway to another governmental entity.

Prior to the enactment of H.B. 2702, there were four statutes governing toll conversion. Transportation Code, §362.0041, authorized the department to convert a non-tolled state highway to a tolled state highway. Transportation Code, §284.009, authorized the department to convert a non-tolled state highway and transfer the highway to a county operating under Transportation Code, Chapter 284, for operation as a county toll road. Transportation Code, §366.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional tollway authority (RTA) for operation as an RTA turnpike. Transportation Code, §370.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional mobility authority (RMA) for operation as an RMA turnpike. Transportation Code, §370.035, also authorized the department to transfer a tolled state highway to an RMA.

H.B. 2702 repealed these four statutes and re-codified Transportation Code, §362.0041 as Transportation Code, §228.202.

Former Transportation Code, §361.282, authorized the department to transfer a department toll project to certain listed governmental entities. H.B. 2702 re-codified this section as Transportation Code, §228.151 and revised it so that it allows the department to transfer a department toll project to any governmental entity that has the authority to operate a tolled highway or to a local government corporation created under Transportation Code, Chapter 431.

One purpose of the repeal of the conversion statutes and the expansion of the transfer statutes was, instead of having four separate and inconsistent toll conversion statutes and two separate and inconsistent toll transfer statutes, to have one toll conversion statute that allows the department to convert a state highway and one transfer statute that allows the department to transfer a toll project to most governmental entities, including those entities that previously had toll conversion statutes. The ultimate legal affect is nearly identical to former law, yet the statutes are consolidated to allow for uniformity.

Current Subchapter E, §§26.41 - 26.45 govern the conversion of a tolled state highway to an RMA turnpike and the transfer of a tolled state highway and a department ferry to an RMA.

These proposed rule amendments recognize the consolidation of the statutes and remove all references to toll conversion and to the transfer of a tolled state highway to an RMA (those subjects will be covered by other rules). The rules are amended so that they only apply to the transfer of a department ferry to an RMA. By separate, simultaneous action of the Texas Transportation Commission (commission), the department is proposing the repeal of its current rules governing the conversion of non-tolled state highways to tolled county and RTA toll projects and amendments to its rules governing the conversion of a non-tolled state highway to a tolled state highway and the transfer of a tolled state highway to another entity, including an RMA.

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. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Phillip Russell, Director, Texas Turnpike Authority 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

Mr. Russell 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 accurate administrative rules that are consistent with law. 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 8:30 a.m. on Wednesday, November 9, 2005, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:00 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 Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Phillip Russell, Director, Texas Turnpike Authority 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 November 14, 2005.

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, §370.037.

§26.41. Request.

(a) An RMA may request the commission to[~~:~~]

[~~(1) convert a non-tolled segment of the state highway system to a turnpike project and transfer that segment to the RMA;~~]

[~~(2) transfer an existing turnpike project that is part of the state highway system to the RMA; or~~]

[~~(3)~~] transfer a department owned and operated ferry to an RMA.

(b) A request submitted under subsection (a) of this section must be in writing and must include:

(1) an explanation of how the proposed transfer is an integral part of the region's overall plan to improve mobility in the region;

(2) an explanation of how the request complies with §26.43(a)(3) and (4) of this subchapter;

(3) copies of any completed studies concerning the transfer;

(4) a brief description of any known environmental, social, economic, or cultural resource issues, such as impacts on wetlands and other water resources, endangered species, parks, neighborhoods, businesses, historic buildings or bridges, and archeological sites concerning the transfer; and

(5) the name and address of any individuals or organizations known to be opposed to the transfer, and a description of any known controversies concerning the transfer.

§26.42. Public Involvement.

(a) If the commission determines that the proposed transfer is an integral part of the region's overall plan to improve mobility in the region, the department will:

(1) hold one or more public hearings in each county in which the project is located for the purpose of seeking oral comments;

(2) hold one or more informal public meetings, which will be held, if practicable, in the project area; and

(3) solicit written comments.

(b) Notice of a solicitation of written comments, a public meeting, and a public hearing held under subsection (a) of this section will be:

(1) published in the *Texas Register;*

(2) published in one or more newspapers of general circulation in each of the counties in which the [~~highway or~~] ferry is located;

(3) published in a newspaper, if any, published in each of the counties of the applicable authority;

(4) posted on the department's website, with a link to the RMA's website, if available; and

(5) posted on the RMA's website, if available, with a link to the department's website.

(c) The department will publish and post notices under subsection (b) of this section at least 10 days prior to the date of a hearing or meeting.

(d) A notice published or posted under subsection (b) of this section will inform the public that the RMA's request and any studies submitted by the RMA in support of the request are available for review at one or more designated offices of the department and can be found on the websites of the department and, if available, the RMA. The notice will provide the links to the request and studies. The department will not make studies available on the websites if it determines such action to be impractical due to size of the files.

§26.43. Approval.

(a) The commission may, after considering public input concerning the proposed transfer, approve a proposed transfer under this subchapter if:

(1) the RMA agrees to assume all liability and responsibility for the safe and effective maintenance and operation of the [~~highway or~~] ferry upon its transfer;

(2) the RMA agrees to assume all liability and responsibility for compliance with all federal laws, regulations, and policies applicable to the [~~highway or~~] ferry;

(3) the commission determines that the transfer is in the public interest;

(4) the RMA agrees to assume all liability and responsibility for EPIC; and

[~~(5) for the transfer of a non-tolled highway, the commission determines that the public has a reasonable alternative route on nontoll roads; and~~]

(5) [~~(6)~~] the RMA has adopted rules providing criteria and guidelines for approval of the transfer of a ferry [~~or highway~~].

[~~(b) The commission will consider impacts on residential neighborhoods and the length of the alternative route when considering whether an alternative route is reasonable.~~]

(b) [~~(c)~~] Commission approval under this section is conditioned on the approval of the governor.

§26.45. Reimbursement.

(a) An authority shall reimburse the commission for the cost of a transferred [~~highway or~~] ferry unless the commission determines that the transfer will result in a substantial net benefit to the state, the department, and the traveling public that equals or exceeds the cost.

(b) In computing the cost of the [~~highway or~~] ferry, the commission will:

(1) include the total amount spent by the department for the original construction of the [~~highway or~~] ferry, including the costs associated with the preliminary engineering and design engineering for plans, specifications, and estimates, the acquisition of necessary rights-of-way, and actual construction of the [~~highway or~~] ferry and all necessary appurtenant facilities; and

(2) consider the anticipated future costs of expanding, improving, maintaining, operating, or extending the [~~highway or~~] ferry to be incurred by the RMA and not by the department if the [~~highway or~~] ferry is transferred.

§26.46. Use of Surplus Revenue.

Notwithstanding the provisions of §26.53 of this chapter (relating to Surplus Revenue) to the contrary, the commission may, as a condition to the transfer, require that expenditures of surplus revenue, if any, derived from a transferred [~~highway or~~] ferry be made to implement projects included in the metropolitan transportation plan or the department's unified transportation program. Within the project operating agreement described under §26.54 of this chapter (relating to Project Operating Agreement), the commission and the RMA shall, prior to transfer, mutually agree to the amount of expenditures subject to this section and projects to be funded under this section. These provisions may be revised at any time upon agreement of both parties.

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

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CHAPTER 27. TOLL PROJECTS
SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

43 TAC §§27.1 - 27.6

The Texas Department of Transportation (department) proposes amendments to §§27.1 - 27.5, and new §27.6, concerning comprehensive development agreements.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

House Bill 2702, 79th Legislature, Regular Session, 2005, repealed the provisions of Transportation Code, Chapter 361, relating to comprehensive development agreements, and reenacted and amended those provisions in Transportation Code, Chapter 223, new Subchapter E (CDA statutes). New Subchapter E expands the types of projects eligible for development under a comprehensive development agreement (CDA), provides more flexibility in determining the submittal requirements in a request for qualifications or proposals, and provides more flexibility in negotiating the terms of a comprehensive development agreement with the apparent best value proposer.

The number of projects being developed under the department's CDA program has grown substantially. Given the size of the program and the size and complexity of projects developed under comprehensive development agreements, there is a need to clarify and expand the role of the Texas Transportation Commission (commission) in the comprehensive development agreement procurement process, and to amend the rules relating to that process in order to ensure that the procurement process is more efficient and transparent.

With the size, scope, and magnitude of the department's CDA program, there has been an increasing number of ethical and conflict of interest issues that have arisen, particularly issues relating to consultants interested in potentially working for both the department and for a proposer for a project to be developed under a comprehensive development agreement, and relating to department employees and consultants involved in the procurement process. One purpose of the amendments and new section is to protect the integrity and fairness of the CDA program and all procurements carried out by the department as a part of the program by avoiding circumstances where certain consultants or CDA proposers obtain, or have the appearance of obtaining, an unfair competitive advantage as a result of work performed for the department or that raise other actual or apparent conflicts of interest.

The proposed amendments and new section are necessary to comply with House Bill 2702, to define the commission's role in the comprehensive development agreement procurement process, and to make other changes needed to make the procurement process more efficient and transparent. This includes providing an informal process for resolving protests raised by CDA proposers relating to the terms of procurement documents, responsiveness or short-listing determinations, and the award of a comprehensive development agreement. The amendments make other changes to the rules needed to improve readability and clarity.

Section 27.1 is amended to implement changes to the CDA statutes enacted in House Bill 2702, including amendments to those statutes to expand the types of projects eligible to be developed under a comprehensive development agreement. The amendments also recognize that one of the objectives of the CDA program is to minimize department financial contributions to pay project costs, given that the department does not have sufficient funding to pay for all needed projects.

Section 27.2 is amended to implement changes to the CDA statutes enacted in House Bill 2702, including expanding amendments to those statutes to expand the types of projects eligible for development under a comprehensive development agreement, to clarify that a proposal review fee is only required to be tendered with an unsolicited proposal, and to define additional words and terms used in the rules.

Section 27.3 is amended to clarify the rights reserved by the department in administering CDA procurements. The CDA statutes authorize the department to include in negotiations the possible inclusion in the comprehensive development agreement of aspects of unsuccessful proposals. Applicable law also allows the

department to waive minor deficiencies in a qualifications submittal or proposal and to permit clarifications. Doing so would allow the department to enhance competition in procurements and to continue to review what may be the proposal providing the best value to the department. The amendments also recognize that a proposer's designation in its proposal of information it claims is excepted from disclosure is subject to the concurrence of the Office of the Attorney General.

The provisions in §27.3 relating to the submission of a proposal review fee are amended to provide that a review fee is only required to be tendered with an unsolicited proposal, and to provide for the reduction of those fees to amounts the department currently anticipates would be incurred to review a proposal for a particular project. Those costs will vary depending on the complexity of the project and whether the department has already planned for the development of the project. The amendments provide for a lower fee if the project is in the department's unified transportation program, and authorize the executive director to approve a lower fee based on the complexity of the project.

State law authorizes the refund of a fee collected or received by a state agency through mistake of fact or law. Under that provision, §27.3 provides that a proposal review fee that is submitted with a proposal for a project that is not an eligible project, or that the department is not otherwise legally authorized to accept, shall be returned to the proposer. All other proposal review fees are nonrefundable. Section 27.3 is also amended to, as authorized under the CDA statutes, prescribe additional requirements for alternative forms of security provided under a comprehensive development agreement. Section 27.3 is further amended to require the department to adopt an ethics policy applicable to comprehensive development agreement procurements and to prescribe requirements for that policy.

Section 27.4 is amended to clarify that the commission must approve the issuance of a request for qualifications or request for proposals relating to a project to be developed under a comprehensive development agreement. Section 27.4 also implements changes to the CDA statutes enacted in House Bill 2702, makes conforming changes, and clarifies that the commission must approve the amount of payment for work product required to be stipulated in a request for proposals.

Section 27.4 also provides that the department will submit a recommendation to the commission regarding the approval of the detailed proposal determined to provide the apparent best value to the department and the award of the comprehensive development agreement. These amendments are consistent with current practice, including current conditions to award imposed by the commission for past projects.

Section 27.5 is amended to provide that the department will make an initial determination whether to further evaluate an unsolicited proposal. If the department determines that further evaluation of the proposal is warranted, based on the criteria prescribed in §27.5, a recommendation will be made to the commission to issue a request for competing proposals and qualifications. This amendment will provide a more efficient process for rejecting proposals that do not comport with the criteria established for unsolicited proposals.

Section 27.5 is also amended to require the private entity that submitted the original unsolicited proposal to submit a supplemental proposal in response to the request for competing proposals and qualifications. The submission of a supplemental proposal that contains the information required in the request for competing proposals and qualifications is necessary in order to provide an "apples to apples" comparison of proposals. Section 27.5 is further amended to clarify that any proposal that is received during the response period prescribed in a request for competing proposals and qualifications that is deemed by the department to be a noncompeting proposal, will be evaluated as a new unsolicited proposal in accordance with the requirements of §27.5.

New Section 27.6 prescribes exclusive procedures for protests filed by proposers for projects to be developed under a comprehensive development agreement. These procedures are intended to provide an informal process for resolving protests raised by CDA proposers relating to the terms of procurement documents, responsiveness or short-listing determinations, and the award of a comprehensive development agreement. The commission believes providing an informal process for resolving protests will lead to a CDA program and procurement process that is more transparent and that will, as required by the CDA statutes, promote fairness, obtain private participants in projects, and promote confidence among those participants. By submitting a proposal, a proposer agrees to the exclusive protest procedure and agrees the decision on the protest is final and conclusive.

Section 27.6 prescribes requirements for informal discussions before certain protests may be filed with the department, prescribes deadlines for protests, prescribes the information that must be contained in a protest and where it shall be filed, authorizes other proposers to file statements in support of or in opposition to the protest, and provides that the protest shall be decided on the basis of written submissions.

Section 27.6 provides that the request for qualifications, request for competing proposals and qualifications, or request for proposals will specify the department employee assigned the responsibility for issuing a decision on the protest within 30 days of its filing. In order to ensure an objective evaluation of the protest by a person not involved in proposal evaluations, the designated employee may not be a member of a subcommittee or committee involved in the evaluation of proposals for the project. Section 27.6 also prescribes requirements for the protestant's payment of the department's costs if a protest is denied. This is intended to ensure that only legitimate protests are filed.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new section 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 and new section. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Phillip Russell, Director, Texas Turnpike Authority 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 and new section.

PUBLIC BENEFIT

Mr. Russell 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 and new section will be to make the comprehensive development agreement procurement process more efficient and transparent and to

facilitate agreements with private participants in those projects. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new section may be submitted to Phillip Russell, Director, Texas Turnpike Authority, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2005.

STATUTORY AUTHORITY

The amendments and new section 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, §223.209, which requires the commission to adopt rules governing selection of an entity for a comprehensive development agreement and negotiations.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 223, Subchapter E.

§27.1. Statement of Policy.

(a) It is the policy of the department to consider the feasibility of private involvement in projects the department [~~every turnpike project it~~] undertakes. The objectives of this policy are to:

(1) expand the scope of [~~turnpike~~] projects studied;

(2) accelerate the construction and completion of [~~turnpike~~] projects;

(3) reduce the overall costs of a [~~turnpike~~] project; [~~and~~]

(4) minimize department financial contributions to pay the costs of a project; and

(5) maximize the benefits of [~~turnpike~~] project facilities.

(b) To encourage private participation in eligible projects, the department may issue requests for proposals from private entities to acquire, design, develop, finance, construct, reconstruct, extend, expand, maintain, or operate eligible [~~turnpike~~] projects under a comprehensive development agreement. The department will also accept unsolicited proposals from private entities to acquire, design, develop, finance, construct, reconstruct, extend, expand, maintain, or operate eligible [~~turnpike~~] projects under a comprehensive development agreement, and will evaluate those proposals in accordance with these rules and the requirements of Transportation Code, Chapter 223, Subchapter E [~~Turnpike Act~~]. The department will consider the extent to which private involvement in existing and future [~~turnpike~~] projects of the department is practicable and beneficial, and will analyze whether department participation is practicable and beneficial with respect to projects proposed by responsible private parties. The department may formulate selection criteria for its use in considering the private entities with which the department may contract to undertake responsibilities for eligible [~~its~~] projects, as well as for evaluation of projects suggested to the department as suitable for private participation.

(c) These rules apply to private involvement in the acquisition, design, development, financing, construction, reconstruction, extension, expansion, maintenance, or operation of all or part [~~substantially all~~] of an eligible [~~a turnpike~~] project or of multiple eligible [~~turnpike~~] projects. These rules are not intended to limit or otherwise apply to the department's procurement of goods and services in the ordinary course of its operations, for which the department may seek private participation in accordance with [~~the Turnpike Act and other~~] applicable laws, rules, and policies.

§27.2. Definitions.

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

(1) Commission--The Texas Transportation Commission.

(2) Comprehensive development agreement--An agreement with a private entity that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of an eligible [~~a turnpike~~] project and may also provide for the financing, acquisition, maintenance, or operation of an eligible [~~a turnpike~~] project.

(3) Department--The Texas Department of Transportation.

(4) Design--Includes planning services, technical assistance, and technical studies provided in support of the environmental review process undertaken with respect to a [~~turnpike~~] project, as well as surveys, investigations, the development of reports, studies, plans and specifications, and other professional services provided for a project.

(5) Eligible project--A project described in Transportation Code, §223.201, and including a:

(A) toll project;

(B) facility or a combination of facilities on the Trans-Texas Corridor, as defined in §24.11 of this title (relating to Comprehensive Development Agreements);

(C) state highway improvement project that includes both tolled and nontolled lanes and that may include nontolled appurtenant facilities;

(D) state highway improvement project in which the private entity has an interest in the project;

(E) state highway improvement project financed wholly or partly with the proceeds of private activity bonds, as defined by Section 141(a), Internal Revenue Code of 1986; or

(F) project that combines a toll project and a rail facility as defined in Transportation Code, §91.001.

(6) Executive director--The executive director of the department or designee not below the level of assistant executive director.

(7) [~~(5)~~] Proposal review fee--A fee prescribed by these rules that is required to [~~must~~] be tendered with any unsolicited proposal [~~or with any proposal submitted under §27.5(d) of this subchapter~~].

(8) [~~(6)~~] Request for proposals--A request for submittal of a detailed proposal from private entities to acquire, design, develop, finance, construct, reconstruct, extend, expand, maintain, or operate an eligible project [~~turnpike projects pursuant to the Turnpike Act~~].

(9) [~~(7)~~] Request for qualifications--A request for submission by a private entity of a description of that entity's experience, technical competence, and capability to complete a proposed project, and such other information as the department considers relevant or necessary [~~a proposed financial plan for the proposed project~~].

[~~(8) Turnpike Act--Transportation Code, Chapter 361.~~]

(10) [~~(9)~~] Toll [~~Turnpike~~] project--Has the meaning assigned by Transportation Code, §201.001 [~~A toll highway constructed, maintained or operated under Transportation Code, Chapter 361 as part of the state highway system and any improvement, extension or expansion to the highway, including:~~]

[(A) a facility to relieve traffic congestion and promote safety;]

[(B) a bridge, tunnel, overpass, underpass, interchange, entrance plaza, approach, toll house, service road, ramp, or service station;]

[(C) an administration, storage, or other building the department considers necessary to operate the project;]

[(D) property rights, easements and interests the department acquires to construct or operate the project;]

[(E) a parking area or structure, rest stop, park, and any other improvement or amenity the department considers necessary, useful, or beneficial for the operation of a turnpike project; and]

[(F) a toll-free facility that is appurtenant to and necessary for the efficient operation of a turnpike project, including a service road, access road, ramp, interchange, bridge, or tunnel].

§27.3. General Rules for Private Involvement.

(a) Solicited and unsolicited proposals. The rules in this subchapter address the manner by which the department intends to evaluate submissions received from private entities in response to requests for qualifications and proposals issued by the department, as well as unsolicited proposals received by the department.

(b) Reservation of rights. The department reserves all rights available to it by law in administering these rules, including without limitation the right in its sole discretion to:

(1) withdraw a request for qualifications or a request for proposals at any time, and issue a new request;

(2) reject any and all qualifications submittals or proposals, whether solicited or unsolicited, at any time;

(3) terminate evaluation of any and all qualifications submittals or proposals, whether solicited or unsolicited, at any time;

(4) issue a request for qualifications relating to a project described in an unsolicited proposal after the rejection or termination of the evaluation of the proposal and any competing proposals;

(5) suspend, discontinue, or terminate comprehensive development agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties;

(6) negotiate with a proposer without being bound by any provision in its proposal, whether solicited or unsolicited;

(7) negotiate with a proposer to include aspects of unsuccessful proposals for that project in the comprehensive development agreement;

(8) request or obtain additional information about any proposal from any source [, whether solicited or unsolicited];

(9) [(8)] modify, issue addenda to, or cancel any request for qualifications or request for proposals;

(10) waive deficiencies in a qualifications submittal or proposal, accept and review a non-conforming qualifications submittal or proposal, or permit clarifications or supplements to a qualifications submittal or proposal;

(11) [(9)] revise, supplement, or make substitutions for all or any part of these rules; or

(12) [(10)] retain or return all or any portion of the fees required to be paid by proposers under this subchapter, as provided in subsection (h) of this section.

(c) [(b)] Costs incurred by proposers. Except as provided in §27.4(f) [(n)] of this subchapter, under no circumstances will the state, the department, or any of their agents, representatives, consultants, directors, officers or employees be liable for, or otherwise obligated to, reimburse[,] the costs incurred by proposers, whether or not selected for negotiations, in developing solicited or unsolicited proposals or in negotiating agreements.

(d) Department information. Any and all information the department makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind except as may be expressly specified in the request for qualifications or request for proposals. Proposers may not rely upon any oral responses to inquiries.

(e) Procedure for communications. If a proposer has a question regarding these rules or any request for qualifications or request for proposals issued by the department, the proposer shall [must] submit the question in writing to the person responsible for receiving all submissions, as designated in the request for qualifications or request for proposals, and the department will provide the responses [answers] in writing.

(f) Compliance with rules. In submitting any proposal, [whether solicited or unsolicited,] the proposer shall be deemed to have unconditionally and irrevocably consented and agreed to the foregoing provisions and all other provisions of this subchapter [these rules].

(g) [(c)] Proposer information submitted to department. All qualifications submittals or proposals [, whether solicited or unsolicited,] submitted to the department become the property of the department and may be, except as provided by Transportation Code, §223.204 [§361.3023], subject to the Public Information Act, Government Code, Chapter 552. Proposers should familiarize themselves with the provisions of Transportation Code, §223.204 [§361.3023] and the Public Information Act. In no event shall the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable to a proposer for the disclosure of all or a portion of a proposal submitted under this subchapter. If the department receives a request for public disclosure of all or any portion of a proposal, the department will notify the applicable proposer of the request and inform such proposer that it has an opportunity to assert, in writing, a claimed exception under the Public Information Act or other applicable law within the time period specified in the department's notice and allowed under the Public Information Act. If a proposer has special concerns about information it desires to make available to the department, but which it believes constitutes a trade secret, proprietary information or other information excepted from disclosure, the proposer should specifically and conspicuously designate that information as such in its proposal. The proposer's designation shall not be dispositive of the trade secret, proprietary, or exempted nature of the information so designated.

(h) [(d)]Proposal review fee. A [nonrefundable and] nonnegotiable proposal review fee shall [may] be required for any unsolicited proposal submitted under this subchapter and [or for any proposal submitted under §27.5(d) of this subchapter. The proposal review fee shall be] applied by the department to offset the cost of processing and reviewing the proposal [applicable proposals]. An [Any] unsolicited proposal for a project in the department's unified transportation program must be accompanied by a proposal review fee of $5,000 [$20,000]. An unsolicited proposal for a project that is not in the department's unified transportation program must be accompanied by a [The] proposal review fee of $10,000 [for any proposal submitted during the period described in §27.5(d) of this subchapter shall be $20,000, unless otherwise expressly provided in the department's notice described in that

section]. The executive director may approve a proposal review fee for a particular project in a lower amount. In approving a lower fee, the executive director shall consider the complexity of the project. Failure to submit the required proposal review fee [, if any,] shall bar the department's consideration of the applicable proposal. All fees shall be submitted in the form of a cashier's check made payable to the department. A proposal review fee that is submitted with a proposal for a project that is not an eligible project, or that the department is not otherwise legally authorized to accept shall be returned to the proposer. All other proposal review fees are nonrefundable.

(i) [(e)] Sufficiency of proposal. All proposals, whether solicited or unsolicited, should be as thorough and detailed as possible so that the department may properly evaluate the potential feasibility of the proposed project as well as the capabilities of the proposer and its team members to provide the proposed services and complete the proposed project.

(j) [(f)] Project studies. Studies that the department deems necessary as to route designation, civil engineering, traffic and revenue, environmental compliance, and any other matters will be assigned, conducted, and paid for as negotiated between the department and the successful proposer and set forth in the comprehensive development agreement or in any separate contract for consultant services. Unless otherwise provided in the request for proposals [issued with respect to a solicited proposal], the department will favor proposals [, whether solicited or unsolicited,] in which the costs for studies will be advanced by the private entity, particularly if the advance is at the private entity's risk [developer]. The department may elect to pay [reserves the right to discharge], in whole or in part, the costs for such studies in its sole discretion [and pursuant to the Turnpike Act]. The department may require that the financial plan for each proposal [, whether solicited or unsolicited,] provide for reimbursement of all related expenses incurred by the department, as well as any department study funds utilized [,] in connection with the project.

(k) [(g)] Proposer's additional responsibilities. The department, in its sole discretion, may authorize the successful proposer to seek licensing, permitting, approvals, and participation required from other governmental entities and private parties, subject to such oversight and review by the department as specified in the comprehensive development agreement or in any separate contract for consultant services.

(l) [(h)] Proposer's work on environmental review of project. The department may solicit proposals or accept unsolicited proposals in which the proposer is responsible for providing assistance in the environmental review and clearance of the proposed project, including the preparation of environmental impact assessments and analyses and the provision of technical assistance and technical studies to the department or its environmental consultant relating to the environmental review and clearance of the proposed project. The environmental review and the documentation of that review shall at all times be conducted as directed by the department and subject to the oversight of the department, and shall comply with all requirements of state and federal law, applicable federal regulations, and the National Environmental Policy Act (42 U.S.C. §4321 et seq.), if applicable, including but not limited to the study of alternatives to the proposed project and any proposed alignments, procedural requirements, and the completion of any and all environmental documents required to be completed by the department and any federal agency acting as a lead agency. The department:

(1) shall determine the scope of work to be performed by the private entity [developer] or its consultants [consultant] or subcontractors [subcontractor];

(2) shall specify the level of design, alternatives to be reviewed, impacts to consider, and other information to be provided by the private entity [developer] or its consultants [consultant] or subcontractors [subcontractor]; and

(3) shall independently review any studies and conclusions reached by the private entity [developer] or its consultants [consultant] or subcontractors [subcontractor] before their inclusion in an environmental document.

(m) [(i)] Effect of environmental requirements on comprehensive development agreement. Completion of the environmental review is required before the private entity [developer] may be authorized to conduct and complete the final design and start construction of a project. Additionally, all applicable state and federal environmental permits and approvals must be obtained before the private entity [developer] may start construction of the portion of a project requiring the permit or approval. Unless and until that occurs, the department is not bound to any further development of the project. The department, and any federal agency acting as a lead agency, may select an alternative other than the one in the proposed project, including [but not limited to] the "no-build" alternative. A comprehensive development agreement shall provide that the agreement will be modified as necessary to address requirements in the final environmental documents, and shall provide that the agreement may be terminated if the "no-build" alternative is selected or if another alternative is selected that is incompatible with the requirements of the agreement.

(n) [(j)] Public meetings and hearings. All public meetings or hearings required to be held pursuant to applicable law or regulation will be directed and overseen by the department, with participation by such other parties as it deems appropriate.

(o) [(k)] Additional matters. Any matter not specifically addressed in this subchapter which pertains to the acquisition, design, development, financing, construction, reconstruction, extension, expansion, maintenance, or operation of a [turnpike] project pursuant to this subchapter, shall be deemed to be within the primary purview of the commission, and all decisions pertaining thereto, whether or not addressed in this subchapter, shall be as determined by the commission, subject to the provisions of [the Turnpike Act and other] applicable law.

(p) [(l)] Performance and payment security. The [As provided in the Turnpike Act, the] department shall require a private entity [developer] entering into a comprehensive development agreement to provide a performance and [or] payment bond or an alternative form of security in an amount, in the department's sole determination, that is sufficient to ensure the proper performance of the agreement, and to protect the department and payment bond beneficiaries supplying labor or materials to the private entity [developer] or a subcontractor of the private entity [developer]. Bonds and alternate forms of security shall be in the form and contain the provisions required in the request for proposals or the comprehensive development agreement, with such changes or modifications as the department determines to be in the best interest of the state. In addition to, or in lieu of, performance and payment bonds, the department may require:

(1) a cashier's check drawn on a federally insured financial institution, and drawn to the order of the department;

(2) United States bonds or notes, accompanied by a duly executed power of attorney and agreement authorizing the collection or sale of the bonds or notes in the event of the default of the private entity [developer] or a subcontractor of the private entity [developer], or such other act or event that, under the terms of the comprehensive development agreement, would allow the department to draw upon or access such security;

(3) an irrevocable letter of credit issued or confirmed by a financial institution to the benefit of the department, meeting the credit rating and other requirements prescribed by the department, and providing coverage for a period of at least one year following final acceptance of the project and completion of any warranty period; [~~or~~]

(4) an irrevocable letter signed by a guarantor meeting the net worth or other financial requirements prescribed in the request for proposals or comprehensive development agreement, and which guarantees, to the extent required under the request for proposals or comprehensive development agreement, the full and prompt payment and performance when due of the private entity's [~~developer's~~] obligations under the comprehensive development agreement and other documents and agreements executed by the private entity [~~developer~~] in connection with the comprehensive development agreement; or

(5) any other form of security deemed suitable by the department.

(q) Ethics policy. The department shall adopt an ethics policy applicable to comprehensive development agreement procurements that includes:

(1) conflict of interest guidelines applicable to private entities interested in participating in the department's comprehensive development agreement program;

(2) conflict of interest requirements applicable to department employees and consultants involved in the comprehensive development agreement program, including provisions relating to impermissible interests held by an employee or consultant in a proposer or project; and

(3) provisions relating to the acceptance of gifts and benefits by department employees.

§27.4. Solicited Proposals.

(a) Applicability. If the department develops a concept for private participation in an eligible [a ~~turnpike~~] project, it will solicit participation in accordance with the requirements of this section.

(b) Request for qualifications - notice. If authorized by the commission to issue a request for qualifications for an eligible project, the [~~The~~] department will set forth the basic criteria for professional experience, technical competence [~~expertise, financial capability~~], and capability to complete a proposed project, and such other information as the department considers relevant or necessary [~~end-product expectations~~] in the [a] request for qualifications and will publish it at a minimum in the Texas Register and in one or more newspapers of general circulation in this state. The department may also elect to furnish the request for qualifications to businesses in the private sector that the department otherwise believes might be interested and qualified to participate in the [~~turnpike~~] project which is the subject of the request for qualifications.

(c) Request for qualifications - content. At its sole option, the department may elect to furnish conceptual designs, fundamental details, technical studies and reports or detailed plans of the proposed project in the request for qualifications. The request for qualifications may request one or more conceptual approaches to bring the project to fruition.

[~~(d) The request for qualifications may request one or more conceptual approaches to bring the turnpike project to fruition. The request for qualifications shall request a proposed financial plan for the project that includes projected project costs and proposed sources of funds.~~]

(d) [~~(e)~~] Request for qualifications - evaluation. The department, after evaluating the submissions received in response to a request for qualifications, will identify those entities that will be considered qualified to submit detailed proposals for a proposed project. In evaluating the submissions, the department will consider such qualities that the department considers relevant to the project, which may include the private [~~each~~] entity's financial condition, management stability, technical [~~technological~~] capability, experience, staffing, and organizational structure [~~, project commitment, and such other qualities that the department considers relevant to the successful completion of the project~~]. The request for qualifications will include the criteria used to evaluate the submissions and the relative weight given to the criteria. The department shall advise each entity providing a submission whether it is on the "short-list" of qualified entities.

(e) [~~(f)~~] Requests for proposals. If authorized by the commission, the [~~The~~] department will issue a request for proposals from all private entities qualified for the short-list, consisting of the submission of detailed documentation regarding the [~~turnpike~~] project. The request for proposals may require the submission of additional information relating to:

(1) the proposer's qualifications and demonstrated technical competence;

(2) the feasibility of developing the project as proposed;

(3) detailed engineering or architectural designs;

(4) the proposer's ability to meet schedules;

(5) a detailed financial plan, including costing methodology, cost proposals, and project financing approach; or

(6) any other information the department considers relevant or necessary.

(f) Requests for proposals - payment for work product. The request for proposals shall, as authorized under Transportation Code, §223.203(m), stipulate the maximum amount of money the department will pay to an unsuccessful proposer that submits a detailed proposal that is responsive to the requirements of the request for proposals. The commission shall approve the amount of the payment to be stipulated in the request for proposals.

(g) Joint proposal by private entity and environmental consultant. If the department solicits proposals in which an entity affiliated with the proposing private entity [~~developer~~] will act as the department's environmental consultant for the proposed project, the request for proposals may require the submission of a consolidated joint proposal from the private entity [~~developer~~] and the environmental consultant or subcontractor that results in a comprehensive development agreement and separate contract for environmental services.

(h) Detailed proposal evaluation criteria. The proposals will be evaluated by the department based on those evaluation criteria the department deems appropriate for the project, which may include [~~as to their feasibility (including~~] the reasonableness of any [~~the~~] financial plan submitted by a proposer [~~)~~], the reasonableness of the project schedule [~~realistic time frame~~], reasonableness of assumptions (including those related to ownership, legal liability, law enforcement, and operation and maintenance of the project), forecasts, financial exposure and benefit to the department, compatibility with other planned or existing transportation facilities, likelihood of obtaining necessary approvals and other support, cost and pricing, toll rates and projected usage, scheduling, environmental impact, manpower availability, use of technology, governmental liaison, and project coordination, with attention to efficiency, quality of finished product and such other criteria, including conformity with department policies, guidelines and standards, as may be deemed appropriate by the department to maximize the overall performance of the project and the resulting benefits

to the state. Specific evaluation criteria and requests for pertinent information will be set forth in the request for proposals.

(i) Apparent best value proposal. Based on the evaluation and the evaluation criteria described under subsection (h) of this section [,] and set forth in the request for proposals, the department will rank all proposals that are complete, responsive to the request for proposals, and in conformance with the requirements of this subchapter, and may select the private entity whose proposal offers the apparent best value to the department. If the request for proposals provides for a consolidated joint proposal to be submitted for a separate environmental consultant contract as well as the comprehensive development agreement, the request for proposals shall specify how the two parts of the proposal will be evaluated in making the overall best value determination. [The proposers will be notified in writing of the department's rankings. The department shall also make the rankings available to the public.]

(j) Selection of entity. The department shall submit a recommendation to the commission regarding approval of the proposal determined to provide the apparent best value to the department. The commission may approve or disapprove the recommendation, and if approved, will award the comprehensive development agreement to the apparent best value proposer. Award may be subject to the successful completion of negotiations, any necessary federal action, execution by the executive director of the comprehensive development agreement, and satisfaction of such other conditions that are identified in the request for proposals or by the commission. The proposers will be notified in writing of the department's rankings. The department shall also make the rankings available to the public. [Final selection of any proposal will be dependent, in part, on the adequacy of the financial plan presented in that proposal. The department will review the adequacy of the financial plan presented in the proposal and determine if it is based on reasonable financial assumptions.]

(k) Negotiations with selected entity. If authorized by the commission, [Only if a proposal is determined to be financially feasible and to provide a reasonable basis for further development of the proposal will] the department will [then] attempt to negotiate a comprehensive development agreement with the apparent best value proposer [that party] to design, develop, construct, reconstruct, extend, expand, maintain, [repair,] or operate the [turnpike] project and (if included in the request for proposals) an environmental consultant contract. [The Attorney General or the Attorney General's designated representative will be included in the negotiations with the proposer.] If a comprehensive development agreement satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the overall best value, the department will formally end negotiations with that proposer and, in its sole discretion, either:

(1) reject all proposals;

(2) [terminate or suspend the evaluation of all proposals;]

[(3) cancel the request for proposals;]

[(4)] modify the request for proposals and begin again the submission of proposals; or

(3) [(5)] proceed to the next most highly ranked proposal and attempt to negotiate a comprehensive development agreement with that entity [party] in accordance with this paragraph.

(l) Negotiations with environmental consultant. If an environmental consultant contract satisfactory to the department cannot be negotiated with the selected consultant, the department may elect to terminate negotiations and proceed with the negotiation of the comprehensive development agreement only.

[(m) If during the course of negotiations with the highest ranking proposer it appears that the proposal will not provide the department with the overall best value, the department may enter into negotiations with the proposer submitting the next highest ranking proposal.]

[(n) The request for proposals shall, as authorized under Transportation Code, §361.3022(m) and other applicable law, stipulate the amount of money the department will pay to an unsuccessful proposer that submits a detailed proposal that is responsive to the requirements of the request for proposals.]

§27.5. Unsolicited Proposals.

(a) Applicability. Private entities may submit unsolicited proposals to the department requesting participation in an eligible [a turnpike] project [to be constructed pursuant to the Turnpike Act]. Unsolicited proposals that comply with the requirements of this section shall be processed in accordance with the requirements of this section.

(b) Proposal contents. A proposal requesting department participation in a proposed [turnpike] project shall be filed with the department and must include the following information:

(1) the limits, scope, and location of the proposed project, including all proposed interconnections with other transportation facilities;

(2) the results expected from project implementation and the critical factors for the project's success;

(3) all studies previously completed by the proposer concerning the project;

(4) [complete] information concerning the experience, expertise, technical competence, and qualifications of the proposer and of each member of the proposer's management team and of other key employees, [or] consultants, and subcontractors, including the name, address, and professional designation of each member of the proposer's management team and of other key employees, [or] consultants, and subcontractors, the capability of the proposer to undertake [develop] the proposed project, and information responsive to the evaluation criteria listed in §27.4(d) [(e)] of this subchapter;

(5) [a proposed financial plan for the proposed project that includes, at a minimum, projected project costs and proposed sources of funds;]

[(6)] a specific description of the level and nature of participation sought from the department, including technical support and financial participation;

(6) [(7)] to the extent then available, information relevant to [necessary for] the department's performance of [department to carry out] its environmental review responsibilities under §27.3(l) [(h)] and (m) [(i)] of this subchapter;

(7) [(8)] [a listing of anticipated opponents and] a description of potential social, economic, and environmental impacts [,] and potentially competing facilities [and proposers];

(8) [(9)] other information of probable interest to the department; and

(9) [(10)] the proposal review fee required [of $20,000 in the form prescribed] by §27.3(h) [(d)] of this subchapter.

(c) Evaluation of unsolicited proposal. Any proposal properly filed with the department in accordance with subsection (b) of this section and accompanied by the proper proposal review fee will be reviewed by the department. The department may meet with the proposer as necessary to clarify the proposal, or may issue requests for clarification. Based on that review and any clarification, [an initial

recommendation will be made to the commission as to whether] the department will determine whether to [should] further evaluate its requested participation in the applicable [turnpike] project. If the department determines that further evaluation of the proposal is warranted, a recommendation will be made to the commission to issue a request for competing proposals and qualifications. That recommendation shall be based on whether the proposed project:

(1) is compatible with existing and planned transportation facilities; and

(2) furthers state, regional, and local transportation plans, programs, policies, and goals, as well as [the proposal's responsiveness to] such other [evaluation] criteria as the department deems relevant.

(d) Approval to request competing proposals and qualifications. If the [initial] recommendation is that the department further evaluate the proposal and its requested participation in the applicable [turnpike] project, and the commission approves that recommendation, the department will publish notice of that decision and provide an opportunity for the submission of competing proposals and qualifications as provided in this section. The department will publish a notice in the Texas Register and in one or more newspapers of general circulation in this state. The notice will state that the department has received an unsolicited proposal under these rules [and the Turnpike Act], that it intends to evaluate the proposal, that it may negotiate a comprehensive development agreement with the proposer based on the proposal, and that it will accept for simultaneous consideration any competing proposals and qualifications that the department receives in accordance with these rules within 45 days of the initial publication of the notice in the Texas Register, or such additional time as authorized by commission order. In determining whether to authorize additional time for submission of competing proposals and qualifications, the commission will consider the complexity of the proposed project. The notice will summarize the proposed [turnpike] project, and identify its proposed location and any proposed interconnections with other transportation facilities [, and provide a conceptual design]. [The department also may provide traffic counts, forecasts, and other available data either in the notice or upon request of any party responding to the notice.] The notice will also specify the criteria that will be used to evaluate the [unsolicited proposal and any competing] proposals, and the relative weight given to the criteria. The department may provide traffic counts, forecasts, conceptual designs, and other available technical studies, reports, and data either in the request for competing proposals and qualifications or upon request of any entity responding to the request.

(e) Submission of supplemental proposal by original proposer. The private entity submitting the original unsolicited proposal shall be required to submit a proposal in response to the request for competing proposals and qualifications. A proposal submitted by that entity and any other entity in response to a request [a notice] must contain the information required by subsection (b) of this section and any other information required in the request.

(f) [(e)] Exclusive procedure to consider competing proposals. Failure by a prospective proposer to submit a competing proposal [, together with the proper proposal review fee in the form prescribed by §27.3(d) of this subchapter,] within the 45-day period or such additional time as authorized by the commission, shall preclude the proposal from consideration by the department unless and until the department terminates consideration of, or negotiations on, the original unsolicited proposal, as supplemented in response to the request for competing proposals and qualifications, and any and all competing proposals received within that time period. The department shall [will] not be obligated to grant requests to extend the time period to submit competing proposals. The [; and the] receipt of one or more competing unsolicited proposals during that period will not trigger the posting or publication of a new notice or the commencement of any new time period.

(g) [(f)] Noncompeting proposals. If the [The] department receives [recognizes that it may receive] proposals that have certain characteristics in common with the original unsolicited proposal, yet differ in other material respects [. In those cases], the department reserves the right, in its sole discretion, to treat such a proposal as either a competing proposal or a noncompeting proposal. Because of the consequences to a proposer of failing to submit a proposal that the department could later deem a competing proposal within the 45-day period, or such additional time as authorized by the commission, prospective proposers are strongly urged to monitor the department's notices of unsolicited proposals received, and be prepared to submit within that time period if they perceive that a proposal they are considering or are preparing bears certain similarities to, or has characteristics in common with, an unsolicited proposal which is the subject of a notice. A proposal that is deemed to be noncompeting will be evaluated as a new unsolicited proposal in accordance with this section.

(h) [(g)] Evaluation of proposals - competing proposals. Upon the expiration of the 45-day period, or such additional time as authorized by the commission, the department will subject the original unsolicited proposal, as supplemented in response to the request for competing proposals and qualifications, together with any and all properly submitted competing proposals, to the following evaluation process. If one or more properly submitted competing proposals are received, the department shall review the proposals [, together with the original unsolicited proposal,] utilizing the evaluation criteria set forth in §27.4(d) [(e)] of this subchapter and the request for competing proposals and qualifications, and the information specified in subsection (b) of this section. The department will identify those proposers that will be considered qualified to submit detailed proposals for the proposed project, and the process will proceed in the manner described in §27.4(e)-(l) [(e)-(n)] of this subchapter.

(i) [(h)] Evaluation of proposals - no competing proposals. If no properly submitted competing proposal is received, the department will evaluate the original unsolicited proposal, as supplemented in response to the request for competing proposals and qualifications, proceeding [request a detailed proposal containing the information described in §27.4(f) of this subchapter from the proposer submitting the original unsolicited proposal, and will proceed], to the extent applicable, in the manner described in §27.4(h)-(l) [(g)-(n)] of this subchapter.

§27.6. Protest Procedures.

(a) Applicability. This section prescribes exclusive procedures for protests regarding:

(1) allegations that the terms of a request for qualifications, request for competing proposals and qualifications, or request for proposals are wholly ambiguous, contrary to legal requirements applicable to the procurement, or exceed the department's authority;

(2) a determination as to whether a qualifications submittal or proposal is responsive to the requirements of the request for qualifications, request for competing proposals and qualifications, or request for detailed proposals, as applicable;

(3) short-listing determinations; and

(4) award of a comprehensive development agreement.

(b) Required early communication for certain protests. Protests concerning the issues described in subsection (a)(1) of this section may be filed only after the proposer has informally discussed the nature and basis of the protest with the department, following the procedures for those discussions prescribed in the request for

qualifications, request for competing proposals and qualifications, or request for detailed proposals, as applicable.

(c) Deadlines for protests.

(1) Protests concerning the issues described in subsection (a)(1) of this section must be filed as soon as the basis for the protest is known, but no later than 20 calendar days prior to the date for submission of the qualifications submittal or proposal, unless the protest relates to an addendum to the request, in which case the protest must be filed no later than 5 business days after the addendum is issued.

(2) Protests concerning the issues described in subsection (a)(2) of this section must be filed no later than 5 business days after receipt of the notification of non-responsiveness.

(3) Protests concerning the issues described in subsections (a)(3) and (4) of this section must be filed no later than 10 business days after the earliest of the notification of short-listing or intent to award, and the public announcement of the short-listing determination or the apparent best value proposer.

(d) Content of protest. Protests shall completely and succinctly state the grounds for protest, its legal authority, and its factual basis, and shall include all factual and legal documentation in sufficient detail to establish the merits of the protest. Statements shall be sworn and submitted under penalty of perjury.

(e) Filing of protest. Protests shall be filed in the manner and at the address specified in the request for qualifications, request for competing proposals and qualifications, or request for proposals, and a copy of the protest shall be submitted to all other proposers for the project.

(f) Comments from other proposers. Other proposers may file statements in support of or in opposition to the protest within 7 days of the filing of the protest. The department shall promptly forward copies of all such statements to the protestant. Any statements shall be sworn and submitted under penalty of perjury.

(g) Burden of proof. The protestant shall have the burden of proving its protest. No hearing will be held on the protest. The protest shall be decided on the basis of written submissions.

(h) Decision on protest. The department employee specified in the request for qualifications, request for competing proposals and qualifications, or request for proposals, as applicable, shall issue a decision on the protest within 30 days of the filing of the protest. The designated employee shall not be a member of a subcommittee or committee involved in the evaluation of proposals for the project.

(i) Protestant's payment of costs. If a protest is denied, the proposer filing the protest shall be liable for the department's costs reasonably incurred to defend against or resolve the protest, including legal and consultant fees and costs, and any unavoidable damages sustained by the department as a consequence of the protest.

(j) Rights and obligations of proposers. Each proposer, by submitting its proposal, expressly recognizes the limitation on its rights to protest provided in this section, and expressly waives all other rights and remedies and agrees that the decision on the protest is final and conclusive. If a proposer disregards, disputes, or does not follow the exclusive protest remedies provided in this section, it shall indemnify and hold the department and its officers, employees, agents, and consultants harmless from and against all liabilities, fees and costs, including legal and consultant fees and costs, and damages incurred or suffered as a result of such proposer's actions. Each proposer, by submitting a proposal, shall be deemed to have irrevocably and unconditionally agreed to this indemnity obligation.

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 September 30, 2005.

TRD-200504439
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

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SUBCHAPTER B. TRANSFER OF DEPARTMENT TOLL PROJECTS AND CONVERSION OF NON-TOLL STATE HIGHWAYS

43 TAC §§27.11 - 27.16

The Texas Department of Transportation (department) proposes amendments to §27.11, Purpose, §27.12, Definitions, §27.13, Transfer of Turnpike Projects, and §27.14, Conversion of Non-toll State Highways, concerning the transfer of department toll projects and conversion of non-toll state highways, new §27.15, Project Development for Transferred Toll Projects, and new §27.16, Toll Projects of Other Entities Within State Highway Right of Way.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

House Bill 2702, 79th Legislature, Regular Session, 2005, revised and restructured state law pertaining to the conversion of a non-tolled state highway (toll conversion) and the transfer of a tolled state highway to another governmental entity.

Prior to the enactment of H.B. 2702, there were four statutes governing toll conversion. Transportation Code, §362.0041, authorized the department to convert a non-tolled state highway to a tolled state highway. Transportation Code, §284.009, authorized the department to convert a non-tolled state highway and transfer the highway to a county operating under Transportation Code, Chapter 284, for operation as a county toll road. Transportation Code, §366.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional tollway authority (RTA) for operation as an RTA turnpike. Transportation Code, §370.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional mobility authority (RMA) for operation as an RMA turnpike. Transportation Code, §370.035, also authorized the department to transfer a tolled state highway to an RMA.

H.B. 2702 repealed these four statutes and re-codified Transportation Code, §362.0041 as Transportation Code, §228.202.

Former Transportation Code, §361.282, authorized the department to transfer a department toll project to certain listed governmental entities. H.B. 2702 re-codified this section as Transportation Code, §228.151 and revised it so that it allows the department to transfer a department toll project to any governmental

entity that has the authority to operate a tolled highway or to a local government corporation created under Transportation Code, Chapter 431.

One purpose of the repeal of the conversion statutes and the expansion of the transfer statutes was, instead of having four separate and inconsistent toll conversion statutes and two separate and inconsistent toll transfer statutes, we now have one conversion statute that allows the department to convert a state highway and one transfer statute that allows the department to transfer a toll project to most governmental entities, including those entities that previously had conversion statutes. The ultimate legal affect is nearly identical to former law, yet the statutes are consolidated to allow for uniformity.

These proposed amendments and new sections, among other things, recognize the consolidation of the statutes, particularly the consolidation of the transfer statutes. By separate, simultaneous Texas Transportation Commission (commission) action, the department is proposing the repeal of its current rules governing the conversion of non-tolled state highways to tolled RMA, county, and RTA toll projects and the repeal of its rule governing the transfer of a department toll project to an RMA.

Section 27.11, Purpose, is amended to reflect the new statutes and revised terminology.

Section 27.12, Definitions, is amended to: (1) add definitions for the terms "AASHTO," and "entity", used in new §27.15; (2) add a definition for Environmental Permits, Issues, and Commitments (EPIC), a term used in amended §27.13 and new §27.15; and (3) revise the definition of "turnpike project" to reflect the new terminology and the re-codification of H.B. 2702.

Section 27.13, Transfer of Toll Projects, governs the transfer of a department toll project to another entity. The section is amended to: (1) reflect re-codification; (2) reflect new terminology used in H.B. 2702; (3) reflect that H.B. 2702 amended the transfer statute so that it applies to any governmental entity that has the authority to operate a toll project; (4) require a written commitment from the receiving entity that the entity will assume all liability and responsibility for the safe and effective maintenance and operation of the highway on its transfer--this provision is added to protect the department from liability and to help ensure the safety of the traveling public; (5) require a written commitment from the receiving entity that the entity will assume all liability and responsibility for existing and future environmental permits, issues, and commitments--this provision is added to protect the department from liability, to help ensure compliance with state and federal environmental law, and to help enhance environmental protection; (6) require a commitment from the receiving entity that the entity will provide for public involvement and will conduct a study of the social and environmental impact of all proposed improvements to the toll project--this provision is added to enhance environmental protection; and (7) require proper public notice and public involvement to ensure that the commission considers public input prior to approving a transfer.

Section 27.14, Conversion of Non-toll State Highways, is amended to: (1) revise the statutory cite to reflect re-codification; (2) revise terminology to be consistent with H.B. 2702; (3) add a provision that requires the public notice advertising the proposed conversion to advise the public of any anticipated transfer of the highway under §27.13; (4) recognize that an entity other than the commission may set tolls; (5) as required by H.B. 2702, provide that the commission will not convert a highway unless the conversion is approved by the qualified voters who vote in an election and who reside in the limits of a county if any part of the highway or segment to be converted is located in an unincorporated area of the county, or a municipality in which the highway or segment to be converted is wholly located.

New §27.15, Project Development for Transferred Toll Projects, governs the future development of a toll project that was leased, sold, or transferred under §27.13, and that is located within the right of way of a state highway.

New §27.15(a), Applicability, states that the section only applies to a transferred project located within the right of way of a state highway. The department is currently considering proposing the transfer of various state highways to regional mobility authorities. Commonly, the highway to be transferred will be tolled mainlanes that are in between non-tolled state highways. The department believes that if a separate entity operates a facility on the same right of way as a department facility, the state has an interest in helping ensure the safe and effective development, design, and construction of any improvements within that right of way.

New §27.15(b), State or federal funds, clarifies that a receiving entity's toll project that uses federal or state funds provided by the department must also comply with the department's rules concerning financial assistance for toll facilities.

New §27.15(c), Environmental review and public involvement, requires the receiving entity to conduct a study of the social and environmental impacts and to provide for public involvement in the same manner as required of the department for a department project. This policy ensures the proper consideration of environmental issues and an appropriate minimum level of public involvement.

New §27.15(d), Responsibility, emphasizes that the receiving entity is responsible for the design and construction of its projects, including ensuring that all EPICs are addressed.

New §27.15(e), Design criteria, describes the design criteria for projects that must comply with this section. To protect the public safety, these projects must be developed in compliance with the department's established manuals, which provide the appropriate design criteria for various facility types. Recognizing that there may be situations when the use of alternative acceptable criteria would be beneficial to the project, provisions are included to identify when the county may use alternative criteria. The department will allow the use of alternative criteria if it finds that the use of alternative criteria would adequately protect the safety of the traveling public and the integrity of the transportation system.

In recognition that it is not always possible to comply with design criteria, provisions are also included so an entity may deviate from established criteria for a particular design element on a case-by-case basis. The entity must determine that the particular criteria could not reasonably be met because of physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution. This process is similar to that used by the department and other states to minimize the risk of tort liability and to ensure that deviations from design criteria are well documented and are not made arbitrarily.

New §27.15(f), Access, provides that for proposed projects that will change the access control line to an interstate highway, the entity shall submit to the department all data necessary for the department to request Federal Highway Administration approval. This policy will ensure compliance with federal law.

New §27.15(g), Construction specifications, describes the requirements pertaining to construction specifications applicable

to an entity's project. To provide a quality project and to ensure compatibility with the rest of the state's transportation system, particularly to an adjacent state highway, entities are required to use the department's specifications on projects subject to this section. These specifications have been proven over time to provide high quality and durable facilities. In addition, highway construction contractors across the state are familiar with department specifications; therefore, the use of these specifications should result in economic savings to the entity. However, if the entity asks to use an alternative specification for a particular item of work, the executive director may approve the request if the proposed specification ensures the quality and durability of the finished product while protecting the safety of the traveling public.

New §27.15(h), Design and construction review and approval, describes the department's review of an entity's design and construction. This subsection applies to the segment of an entity's project that connects to the state highway system, such as an interchange. As part of the department's oversight of the state highway system, the department must ensure that any connection to a state highway is developed in accordance with all applicable federal and state laws and regulations and that the appropriate design criteria are being properly utilized.

Determining potential areas of non-compliance as early in project development as possible will benefit all parties by minimizing unnecessary costs and delays through early agreements on required design changes. If these issues are not discovered until all detailed design work has been completed, then changes will delay the project. The 30% phase of design development is commonly regarded as the point at which schematic design is complete. At this point the basic geometry of the facility will have been determined and the items listed for submission to the department should be available for review.

A design schematic depicting plan, profile, and super elevation is needed for the department to verify that the curvature and pavement cross slope provided are appropriate for the design speed and class of highway. Typical sections are required to enable department review of the facility's proposed cross section for the entire right of way width.

Structural (bridge, retaining, and sound wall) layouts are required for the department to ensure the provision of adequate foundations, crashworthy railing, and necessary horizontal and vertical clearance to adjacent features. Structural capacity information is also required to ensure that the proposed structures will safely handle the anticipated loadings. Hydraulic studies and drainage area maps will enable department review of drainage throughout the project.

Submission of a signing schematic will ensure that the project design is compatible with the appropriate placement of guide signs that comply with the Texas Manual on Uniform Traffic Control Devices.

New §27.15(h) also describes the requirements for department approval of the final plans. The entity is required to submit the final plans, specifications, and engineer's estimate (PS&E) so the department can verify that the PS&E complies with applicable state and federal regulations and that the appropriate design criteria have been met. The entity is required to summarize any design changes made since approval of the preliminary design so the department can readily determine that the alterations comply with the established design criteria for the project.

To ensure that an entity does not rely on insufficient design criteria or inadequate traffic control, the subsection requires the PS&E to be approved by the department before the project is advertised for bids.

Section 27.15(h) also ensures that contract revisions related to the connections to the department facility will comply with applicable design criteria and requires the entity to submit major contract revisions to the department.

New §27.15(i), As-built plans, requires the entity to provide the department with a final set of as-built plans, signed, sealed, and dated by a professional engineer certifying that the project was constructed in accordance with the plans. This submission is necessary for the department to have a final record of as-built plans. These plans are often needed by the department for future reference for a variety of purposes, including reconstruction and maintenance of the highway once it is part of the state highway system

New §27.15(j), Document and information exchange, describes the requirements of the entity to provide the department with copies of available documents and materials used by the entity. Since these facilities are adjacent to department facilities, the department needs this information for possible future use in plan production work.

New §27.15(k), State and federal law, affirms the responsibility of the entity to comply with all applicable laws with regard to the project.

New §27.15(l), Work on state right of way, protects the safety of the traveling public, by requiring the entity to obtain express written agreement from the department before performing any work within the limits of state-owned right of way.

New §27.15(m), Project development agreement, requires the entity and the department to enter into an agreement governing the development of the entity's project. The agreement is intended to help ensure proper communication between the two parties, to encourage compliance with the commission's rules, and to provide a mechanism for the parties to address issues not resolved by the rules. To help ensure the expeditious development of a project, the agreement will include timelines governing approvals by the executive director under this section.

New §27.16, Toll Projects of Other Entities Within State Highway Right of Way, authorizes the department to license, lease, or transfer real property to an entity such as a regional mobility authority or a regional tollway authority to construct and operate a toll project of the entity within the right of way of a state highway. The section recognizes the regional transportation benefits to be gained by allowing an RMA or RTA to, in a typical scenario, build tolled express lanes in the median of a nontolled state highway. The section further provides that if the department does not transfer any real property improvements to an entity, then §27.13, concerning the transfer of a toll project, does not apply; however, the commission may opt to apply one or more requirements of that section. The commission interprets the intent of Transportation Code, §228.151, to apply to the transfer of a highway facility, not merely the transfer of real property or an interest in real property.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new sections 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 and new sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Phillip Russell, Director, Texas Turnpike Authority Division, Texas Department of Transportation, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new sections.

PUBLIC BENEFIT

Mr. Russell 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 and new sections will be the ability to transfer and convert state highways only after public involvement and the consideration of relevant issues. 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 8:30 a.m. on Wednesday, November 9, 2005, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:00 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 Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new sections may be submitted to Phillip Russell, Director, Texas Turnpike Authority 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 November 14, 2005.

STATUTORY AUTHORITY

The amendments and 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, and more specifically, Transportation Code, §228.204, which requires the commission to adopt rules governing the approval of a conversion of a highway.

CROSS REFERENCE TO STATUTE: Transportation Code, §228.151 and §228.202.

§27.11. Purpose.

Transportation Code, §228.151 [~~§361.282~~], authorizes the Texas Department of Transportation to lease, sell, or transfer a toll [~~turnpike~~] project to certain entities if approved by the Texas Transportation Commission and the governor. Transportation Code, §228.202 [~~§362.0041~~], authorizes the Texas Transportation Commission under certain circumstances to convert a non-toll segment of the state highway system to a Texas Department of Transportation toll [~~turnpike~~] project. This subchapter prescribes the policies and procedures governing commission approval of the lease, sale, or transfer of a toll [~~turnpike~~] project or the conversion of a non-toll segment of the state highway system to a toll [~~turnpike~~] project.

§27.12. Definitions.

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

(1) AASHTO--The American Association of State Highway and Transportation Officials.

(2) [~~(1)~~] Commission--The Texas Transportation Commission.

(3) [~~(2)~~] Department--The Texas Department of Transportation.

(4) Entity--The governmental entity that receives a toll project under §27.13 of this subchapter (relating to Transfer of Toll Projects).

(5) Environmental Permits, Issues, and Commitments (EPIC)--Any permit, issue, coordination, commitment, or mitigation obtained to satisfy social, economic, or environmental impacts of a toll project, including, but not limited to, sole source aquifer coordination, wetland permits, stormwater permits, traffic noise abatement, threatened or endangered species coordination, archeological permits, and any mitigation or other commitment associated with any of those issues.

(6) [~~(3)~~] Executive director--The chief administrative officer of the department or designee.

(7) [~~(4)~~] Toll [~~Turnpike~~] project--A toll [~~turnpike~~] project of the Texas Department of Transportation, as defined by Transportation Code, §201.001(b) [~~Chapter 361~~].

§27.13. Transfer of Toll [~~Turnpike~~] Projects.

(a) Requirements. Transportation Code, §228.151, authorizes the department to lease, sell, or transfer a toll project or system, including a non-tolled state highway or a segment of a non-tolled state highway converted to a toll project, to a governmental entity that has the authority to operate a tolled highway or a local government corporation created under Transportation Code, Chapter 431.

[~~(a) Requirements. Transportation Code, §361.282, authorizes the department to lease, sell, or otherwise convey all, or any portion of, a turnpike project to certain entities if the commission and the governor approve the transfer of the project as being in the best interests of the state and the entity receiving the turnpike project.~~]

(b) Request. To secure approval under this section, the receiving entity must submit to the executive director:

(1) [a ~~written commitment to the commission to maintain the facility in a safe and efficient manner; and~~]

[~~(2)~~] an evaluation of the impact of such action on regional mobility and project financial viability;

(2) a written commitment that the entity will assume all liability and responsibility for the safe and effective maintenance and operation of the highway on its transfer;

(3) a written commitment that the entity will assume all liability and responsibility for existing and future EPIC, including obtaining all environmental permits and approvals and for compliance with all federal and state environmental laws, regulations, and policies applicable to the highway and related improvements;

(4) a written commitment that the entity agrees to provide for public involvement and to conduct a study of the social and environmental impact of all proposed improvements to a toll project; and

(5) if applicable, a written commitment that the entity agrees to comply with the design and construction standards of §27.15 of this subchapter (relating to Project Development for Transferred Toll Projects) when developing projects on the transferred highway.

(c) Approval.

(1) In order to approve the lease, sale, or transfer [~~conveyance~~] of a project, and after considering public comment received under subsection (e) of this section, the commission must find that such transfer:

(A) [~~(1)~~] is in the best interests of the state;

(B) [~~(2)~~] is in the best interests of the entity receiving the project; and

(C) [~~(3)~~] will not adversely affect:

(i) [~~(A)~~] the financial viability of the project; or

(ii) [~~(B)~~] regional mobility.

(2) The commission may not approve the lease, sale, or transfer unless the governor approves the transfer as being in the best interests of the state and the entity receiving the project.

(d) Reimbursement. The receiving entity must agree to reimburse the department for any expenditures of the department for the construction, operation, and maintenance of the project that have not been reimbursed with the proceeds of bonds issued by the commission for the project, unless the commission finds that the transfer will result in substantial net benefits to the state, the department, and the public that equal or exceed the amount of the repayment waived.

(e) Public involvement.

(1) As part of the information that will be used by the commission in determining whether to lease, sell, or transfer a toll project, the department will:

(A) hold one or more hearings in each county in which that project is located for the purpose of receiving oral comments; and

(B) solicit written comments.

(2) Notice of a solicitation of written comments and a public hearing held under paragraph (1) of this subsection will be:

(A) published in the *Texas Register;*

(B) published in one or more newspapers of general circulation in each of the counties in which the involved toll project is located; and

(C) posted on the department's website.

(3) The department will publish and post notices under paragraph (2) of this subsection at least 10 days prior to the date of the hearing.

(4) The department will prepare a summary of the public hearings and all comments received in response to the notice and hearings.

§27.14. Conversion of Non-toll State Highways.

(a) Purpose. Transportation Code, §228.202 [~~§362.0041~~], provides that if the commission determines the conversion of a non-toll segment of the state highway system to a toll facility will improve overall mobility in the region or is the most feasible and economic means to accomplish necessary expansion, improvements, or extensions to that segment of the state highway system, the segment may be converted to a department toll [~~turnpike~~] project by order of the commission.

(b) Public involvement.

(1) As part of the information that will be used by the commission in determining whether to convert a non-toll segment of the state highway system to a department toll [~~turnpike~~] project, the department will:

(A) hold one or more public hearings in each county in which the project is located for the purpose of receiving oral comments;

(B) hold one or more informal public meetings, which will be held, if practicable, in the project area; and

(C) solicit written comments.

(2) Notice of a solicitation of written comments, a public meeting, and a public hearing held under paragraph (1) of this subsection will be:

(A) published in the *Texas Register;*

(B) published in one or more newspapers of general circulation in each of the counties in which the involved segment of highway is located; and

(C) posted on the department's website.

(3) The department will publish and post notices under paragraph (2) of this subsection at least 10 days prior to the date of the hearing or meeting.

(4) A notice published or posted under paragraph (2) of this subsection will inform the public that any studies relevant to the proposed conversion are available for review at one or more designated offices of the department and can be found on the department's website. The notice will provide links to the studies. The department will not make studies available on the website if it determines such action to be impractical due to the size of the files. The notice will advise the public of any anticipated transfer of the highway under §27.13 of this subchapter (relating to Transfer of Toll Projects).

(5) The department will prepare a summary of the public hearings and all comments received in response to the notice and hearings.

(c) Criteria.

(1) Subject to the requirements of subsection (e) of this section, the [~~The~~] commission may, after considering public input concerning the proposed conversion and whether the public has a reasonable alternative route on non-toll roads, approve the conversion of [~~convert~~] a non-toll highway to a department toll [~~turnpike~~] project if the commission finds that:

(A) the conversion is the most feasible and economic means to accomplish necessary expansion, improvements, or extensions to that segment of the state highway system; [the commissioners court of each county in which the highway is located has approved the proposed conversion;]

(B) [the commission concludes that] based on existing and/or forecasted traffic volumes, the project is projected to be capable of generating revenue from tolls at rates to be set by the commission or another entity sufficient to satisfy project-related debt and maintenance and operating expenses allocable to the project;

(C) the conversion will improve regional mobility; [and]

(D) construction of the necessary expansion, improvements, or extension can be accomplished efficiently and expeditiously; and [.]

(E) the conversion is in the best interest of the State of Texas.

(2) The commission will consider impacts on residential neighborhoods and the length of the alternative route when considering whether an alternative route is reasonable.

(d) Preliminary approval. Subject to the requirements of subsection (e) of this section, the [The] commission may grant preliminary approval of a conversion, with final approval conditioned on the completion of preliminary studies necessary for the commission to make the findings required by subsection (c) of this section, including social, economic, and environmental studies and the preparation of traffic and revenue forecasts. As part of the preliminary studies, the department will hold one or more additional hearings. The department will publish and post notice of a hearing held under this subsection in accordance with subsection (b)(2) of this section. The commission may grant final approval of the conversion consistent with the requirements of subsections (c) and (e) of this section.

(e) Conversion. [If the commission finds that the conversion of a non-toll segment of the state highway system to a turnpike project is the most feasible and economic means to accomplish necessary expansion, improvements, or extensions to that segment of the state highway system and that such conversion is in the best interest of the State of Texas, that segment may be converted to a turnpike project by order of the commission.]

(1) If the commission approves a conversion under subsection (c) of this section, the department will seek approval of the commissioners court of each county within which the highway or segment is located.

(2) If approved under paragraph (1) of this subsection, the commission will by order convert the segment to a toll project if the conversion is approved by the qualified voters who vote in an election under Transportation Code, §228.208, and who reside within the limits of:

(A) a county, if any part of the highway or segment to be converted is located in an unincorporated area of the county; or

(B) a municipality in which the highway or segment to be converted is wholly located.

(f) Limitation. Toll revenue collected from the operation of a converted segment of highway may only be used to finance the improvement, extension, expansion, or operation of the converted segment of highway.

§27.15. Project Development for Transferred Toll Projects.

(a) Applicability. This section applies to:

(1) a toll project that was leased, sold, or transferred under §27.13 of this subchapter (relating to Transfer of Toll Projects) and that is located within the right of way of a state highway; and

(2) a toll project of another governmental entity that is located within the right of way of a state highway.

(b) State or federal funds. An entity's toll project that uses federal or state funds provided by the department must also comply with Chapter 27, Subchapter E of this title (relating to Financial Assistance for Toll Facilities).

(c) Environmental review and public involvement.

(1) When an entity proposes to develop a toll project that had been leased, sold, or transferred under §27.13 of this subchapter, the entity shall:

(A) conduct a study of the social and environmental impacts of the project in accordance with Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement for Transportation Projects);

(B) provide for public involvement by complying with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects); and

(C) develop the project in accordance with §2.50 of this title (relating to Financial Assistance for Toll Facilities and Pass-Through Toll Projects) if the entity requests federal-aid or federal-aid and state highway funds to assist with the project.

(2) Respective roles and responsibilities. The entity shall request that the department make a determination of the respective roles and responsibilities of the entity and the department under Chapter 2, Subchapter C, of this title. The entity shall comply with the department's directives. The directives will specify who will conduct the following work, either by the entity or by the department:

(A) preparation and completion of environmental studies;

(B) submission of appropriate environmental documentation for department review;

(C) preparation of any document revisions;

(D) submission of copies of the environmental studies and documentation adequate for distribution;

(E) preparation of legal and public notices for department review and use;

(F) arrangements for appropriate public involvement, including court reporters and accommodations, if requested, for persons with special communication or physical needs related to the public hearing;

(G) preparation of public meeting and hearing materials;

(H) preparation of any responses to comments;

(I) preparation of public meeting and public hearing summary and analysis, and the comment and response reports, and submission of a verbatim transcript of any public hearing and a signed certification that any hearing has been held in accordance with §2.43(c) of this title, the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987; and

(J) submission of documentation showing that all EPIC have been or will be completed, including copies of permits or other approvals required prior to construction.

(d) Responsibility. The entity is fully responsible for the design and construction of each project it undertakes, including ensuring that all EPIC are addressed in project design and construction.

(e) Design criteria.

(1) State criteria. All designs developed by or on behalf of the entity shall comply with the latest version of the department's manuals, including, but not limited to, the Roadway Design Manual, Pavement Design Manual, Hydraulic Design Manual, the Texas Manual on Uniform Traffic Control Devices, Bridge Design Manual, and the Texas Accessibility Standards.

(2) Alternative criteria. An entity may request approval to use different accepted criteria for a particular item of work. Alternative criteria may include, but are not limited to, the latest version of the AASHTO Policy on Geometric Design of Highways and Streets, the AASHTO Pavement Design Guide, and the AASHTO Bridge Design Specifications. The use of alternative criteria is subject to the approval of the Federal Highway Administration for those projects involving federal funds. The executive director may approve the use of alternative criteria if the alternative criteria are determined to be sufficient to protect the safety of the traveling public and the integrity of the transportation system.

(3) Exceptions to design criteria. An entity may deviate from the state or alternative criteria for a particular design element, on a case by case basis, after determining that the particular criteria could not reasonably be met due to physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution. Documentation of the exceptions shall be retained by the entity and furnished to the department in accordance with subsection (h) of this section.

(f) Access. For proposed projects that will change the access control line to an interstate highway, the entity shall submit to the department all data necessary for the department to request Federal Highway Administration approval.

(g) Construction specifications.

(1) All plans, specifications, and estimates developed by or on behalf of the entity shall conform to the latest version of the department's Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, and shall conform to department required special specifications and special provisions.

(2) The executive director may approve the use of an alternative specification if the proposed specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public.

(h) Design and construction review and approval.

(1) Applicability. This subsection applies to the segment of an entity's toll project that connects to the state highway system, including an overpass, underpass, intersection, or interchange.

(2) Exceptions to design criteria. An entity may request approval to deviate from the state or alternative criteria for a particular design element on a case by case basis. The request for approval shall state the criteria for which an exception is being requested and must include a comprehensive description of the circumstances and engineering analysis supporting the request. The executive director may approve an exception after determining that the particular criteria could not reasonably be met due to physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution.

(3) Preliminary plan review. When design of the connection is approximately 30% complete, the entity shall send the following preliminary design information to the department for review and approval in accordance with the procedures and timelines established in the project development agreement described in subsection (m) of this section:

(A) a design schematic depicting plan, profile, and superelevation information for each roadway;

(B) typical sections showing existing and proposed horizontal dimensions, cross slopes, location of profile grade line, pavement layer thickness and composition, earthen slopes, and right of way lines;

(C) bridge, retaining wall, and sound wall layouts, including, where applicable, an indication of structural capacity in terms of design loading;

(D) hydraulic studies and drainage area maps showing the drainage of waterways entering the project and local project drainage; and

(E) the location and text of proposed mainlane guide signs shown on a schematic that includes lane lines or arrows indicating the number of lanes.

(4) Final plan review. When final plans are complete, the entity shall send the following information to the executive director for review and approval in accordance with the procedures and timelines established in the project development agreement described in subsection (m) of this section:

(A) seven copies of the final set of plans, specifications, and engineer's estimate (PS&E) that have been signed and sealed by the responsible engineer; and

(B) revisions to the preliminary design submission previously approved by the department summarized or highlighted for the department.

(5) Contract bidding and award. The entity shall not advertise the project for receipt of bids until it has received approval of the PS&E from the department.

(6) Contract revisions.

(A) All contract revisions related to the connections to the department facility shall comply with the latest version of the applicable national or state administration criteria and manuals, and must be submitted to the department for its records. Major contract revisions must be submitted to the executive director for approval prior to beginning the revised construction work. Procedures governing the executive director's approval, including time limits for department review, shall be included in the project agreement described in subsection (m) of this section.

(B) For purposes of this subsection, "major contract revision" means a revision to a construction contract that:

(i) reduces geometric design or structural capacity below project design criteria;

(ii) changes the location or configuration of the physical connection to the department facility;

(iii) changes the placement of columns and other structural elements within the department's right of way;

(iv) changes the traffic control plan in a manner that reduces the capacity on the department facility as shown on the approved PS&E;

(v) changes the access on a controlled access facility; or

(vi) for federally funded projects, eliminates or revises EPICs.

(i) As-built plans. Within six months after final acceptance of the construction project, the entity shall file with the department a set of the as-built plans incorporating any contract revisions. These plans shall be signed, sealed, and dated by a licensed professional engineer in Texas certifying that the project was constructed in accordance with the plans and specifications.

(j) Document and information exchange. If available, the entity agrees to deliver to the department all materials used in the development of the project including, but not limited to, aerial photography, computer files, surveying information, engineering reports, environmental documentation, general notes, specifications, and contract provision requirements.

(k) State and federal law. The entity shall comply with all federal and state laws and regulations applicable to the project and the state highway system, and shall provide or obtain all applicable permits, plans, and other documentation required by a federal or state entity.

(l) Work on state right of way. All work required within the limits of state-owned right of way shall be accomplished only pursuant to express written agreement with the department.

(m) Project development agreement. The entity and the department shall enter into an agreement governing the development of a project under this section. The agreement shall, at a minimum, include:

(1) the responsibilities of each party concerning the design and construction of the project and EPIC;

(2) procedures governing the submittal of information required by this section;

(3) timelines governing approvals by the executive director under this section; and

(4) other terms or conditions mutually agreed upon by the parties.

§27.16. Toll Projects of Other Entities Within State Highway Right of Way.

(a) The department may, by license, lease, or transfer of real property, authorize a governmental entity with the authority to construct and operate a toll project, to construct a toll project within the right of way of a state highway.

(b) If the department authorizes construction of a toll project under subsection (a) of this section, and the department does not transfer any improvements to department property, then §27.13 of this subchapter (relating to Transfer of Toll Projects) does not apply. The commission may, however, in its discretion, order the department to comply with one or more of the requirements of §27.13.

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 September 30, 2005.

TRD-200504434

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

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SUBCHAPTER D. REGIONAL TOLLWAY AUTHORITIES

The Texas Department of Transportation (department) proposes amendments to §27.40, Purpose, and the repeal of §27.43, Transfer of Existing Public Highways, concerning regional tollway authorities.

EXPLANATION OF PROPOSED AMENDMENTS AND REPEAL

House Bill 2702, 79th Legislature, Regular Session, 2005, revised and restructured state law pertaining to the conversion of a non-tolled state highway (toll conversion) and the transfer of a tolled state highway to another governmental entity.

Prior to the enactment of H.B. 2702, four statutes governed toll conversion. Transportation Code, §362.0041, authorized the department to convert a non-tolled state highway to a tolled state highway. Transportation Code, §284.009, authorized the department to convert a non-tolled state highway and transfer the highway to a county operating under Transportation Code, Chapter 284, for operation as a county toll road. Transportation Code, §366.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional tollway authority (RTA) for operation as an RTA turnpike. Transportation Code, §370.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional mobility authority (RMA) for operation as an RMA turnpike. Transportation Code, §370.035, also authorized the department to transfer a tolled state highway to an RMA.

H.B. 2702 repealed these four statutes and re-codified Transportation Code, §362.0041 as Transportation Code, §228.202.

Former Transportation Code, §361.282, authorized the department to transfer a department toll project to certain listed governmental entities. H.B. 2702 re-codified this section as Transportation Code, §228.151 and revised it so that it allows the department to transfer a department toll project to any governmental entity that has the authority to operate a tolled highway or to a local government corporation created under Transportation Code, Chapter 431.

One purpose of the repeal of the toll conversion statutes and the expansion of the transfer statutes was, instead of having four separate and inconsistent toll conversion statutes and two separate and inconsistent toll transfer statutes, to have one toll conversion statute that allows the department to convert a state highway, and one transfer statute that allows the department to transfer a toll project to most governmental entities, including those entities that previously had their own toll conversion statutes. The ultimate legal affect is nearly identical to former law, yet the statutes are consolidated to allow for uniformity.

Section 27.40, Purpose, describes the purpose of the subchapter concerning RTAs. The section includes a description of §27.43, which governs the transfer and conversion of a department toll project to an RTA turnpike. This language is deleted to reflect the repeal of §27.43.

Section 27.43, Transfer of Existing Public Highway, is repealed due to the repeal of the enabling legislation by H.B. 2702 and the consolidation of toll conversion and transfer statutes.

Separate, simultaneous action of the Texas Transportation Commission (commission) amends §27.13, Transfer of Toll Projects, to reflect the revisions of H.B. 2702, particularly to apply the transfer provisions to all governmental entities that are authorized to operate a toll project, including an RTA, and also amends §27.14, Conversion of Non-toll State Highways, to reflect H.B. 2702 amendments. These proposed sections will apply to the conversion of a non-tolled state highway and the subsequent transfer of that section to an RTA.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and repeal 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 and repeal. There are no anticipated economic costs for persons required to comply with the amendments and repeal as proposed.

Phillip Russell, Director, Texas Turnpike Authority Division, Texas Department of Transportation, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and repeal.

PUBLIC BENEFIT

Mr. Russell has also determined that for each year of the first five years the amendments and repeal are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and repeal will be administrative rules that are consistent with statutory authority. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and repeal may be submitted to Phillip Russell, Director, Texas Turnpike Authority 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 November 14, 2005.

43 TAC §27.40

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

None.

§27.40. Purpose.

Transportation Code, Chapter 366, authorizes two or more counties, if one of the counties has a population of not less than 300,000 and the counties form a contiguous territory, to create a regional tollway authority for the purpose of the expansion and improvement of transportation facilities and systems in this state. Unless one of the counties has a population of 1.5 million or more, the creation of a regional tollway authority requires that the counties gain the approval of the Texas Transportation Commission. [~~Chapter 366 also authorizes the Texas Transportation Commission to transfer a segment of the free state highway system to a regional tollway authority, to be owned, operated, and maintained as a turnpike project.~~] Transportation Code, §201.113 authorizes the Texas Transportation Commission and a regional tollway authority to enter into an agreement for the improvement by a regional tollway authority of portions of the state highway system. This subchapter prescribes the policies and procedures governing commission approval of the creation of a regional tollway authority[~~, the transfer of a segment of the free state highway system to a regional tollway authority,~~] and an improvement to the state highway system by a regional tollway authority.

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 September 30, 2005.

TRD-200504435
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

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43 TAC §27.43

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

STATUTORY AUTHORITY

The repeal is 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.

§27.43. Transfer of Existing Public Highways.

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

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

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CHAPTER 27. TOLL PROJECTS

The Texas Department of Transportation (department) proposes amendments to §27.70, Purpose, §27.73, Commission Approval of County Toll Project, and §27.74, Design and Construction Standards for Toll Road Projects, new §27.72, Conveyance of State Ferry, new §27.75, Commission Order Directing that County Toll Project Shall Not Become Part of the State Highway System, and the repeal of §27.72, Transfer of State Highways, all concerning county toll roads and ferries.

EXPLANATION OF PROPOSED AMENDMENTS, NEW SECTIONS, AND REPEAL

TOLL CONVERSION

House Bill 2702, 79th Legislature, Regular Session, 2005, revised and restructured state law pertaining to the conversion of a non-tolled state highway (toll conversion) and the transfer of a tolled state highway to another governmental entity.

Prior to the enactment of H.B. 2702, four statutes governed toll conversion. Transportation Code, §362.0041, authorized the department to convert a non-tolled state highway to a tolled state highway. Transportation Code, §284.009, authorized the department to convert a non-tolled state highway and transfer the highway to a county operating under Transportation Code, Chapter 284, for operation as a county toll road. Transportation Code, §366.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional tollway authority (RTA) for operation as an RTA turnpike. Transportation Code, §370.035, authorized the department to convert a non-tolled state highway and transfer the highway to a regional mobility authority (RMA) for operation as an RMA turnpike. Transportation Code, §370.035, also authorized the department to transfer a tolled state highway to an RMA.

H.B. 2702 repealed these four statutes and re-codified Transportation Code, §362.0041 as Transportation Code, §228.202.

Former Transportation Code, §361.282, authorized the department to transfer a department toll project to certain listed governmental entities. H.B. 2702 re-codified this section as Transportation Code, §228.151 and revised it so that it allows the department to transfer a department toll project to any governmental entity that has the authority to operate a tolled highway or to a local government corporation created under Transportation Code, Chapter 431.

One purpose of the repeal of the conversion statutes and the expansion of the transfer statutes was, instead of having four separate and inconsistent toll conversion statutes and two separate and inconsistent toll transfer statutes, to have one toll conversion statute that allows the department to convert a state highway and one transfer statute that allows the department to transfer a toll project to most governmental entities, including those entities that previously had their own toll conversion statutes. The ultimate legal affect is nearly identical to former law, yet the statutes are consolidated to allow for uniformity.

COUNTY TOLL PROJECTS

Transportation Code, Chapter 284, authorizes certain counties to construct and operate toll projects. Transportation Code, §284.008(c), provides that a county toll project becomes a part of the state highway system and the Texas Transportation Commission (commission) shall maintain the project without toll when the project's debt is paid.

Transportation Code, §362.051, provides that a governmental or private entity must obtain the commission's approval before beginning construction of a toll project that is to become a part of the state highway system. Harris and Dallas County are excepted from this requirement. To implement this section as it pertains to a county toll project under Chapter 284, the commission previously adopted §27.73.

H.B. 2702 amended Transportation Code, §284.008 by adding Subsection (d) to allow the commission, upon request of a county, to adopt an order stating that a county toll project will not become part of the state highway system as required by Subsection (c).

FERRIES

Senate Bill 1131, 79th Legislature, Regular Session, 2005, added Transportation Code, §284.001, to authorize those counties empowered to construct and operate toll projects under Chapter 284 to construct and operate ferries. S.B. 1131 also added §284.011 to authorize the commission to transfer a department operated ferry to a county.

SECTION BY SECTION ANALYSIS

Section 27.70, Purpose, is amended to remove the reference to toll conversion and to add a reference to new Transportation Code, §284.008(d) and Transportation Code, §284.011.

Existing §27.72 governs the conversion of a non-tolled state highway to a county toll road. Due to the repeal and consolidation of toll conversion and transfer statutes, this section is proposed for repeal.

New §27.72, governs the process by which the commission will approve the conveyance of a department ferry to certain counties or to a local government corporation.

New §27.72(a) requires a county or local government that requests a conveyance to submit a request that includes an explanation of how the proposed conveyance will improve overall mobility in the region, copies of any completed studies concerning the transfer, a brief description of any known environmental, social, economic, or cultural resource issues, and the name and address of any known opponents. This information is necessary to assist the commission in making its decision under subsection (d) of this section. The requestor must also provide a copy of its criteria and guidelines for approval of the conveyance. State law requires the requestor to adopt this information.

New §27.72(b) requires public notice of the proposed transfer, a public hearing, and the opportunity for the public to submit written comments. These requirements are necessary to allow the commission to evaluate public support for the transfer, as required by subsection (d) of this section.

New §27.72(c) requires the requestor to reimburse the department for the department's cost of a conveyed ferry. The subsection describes how the commission will compute the cost. The language in this subsection is required by statute.

New §27.72(d) lists the conditions under which the commission will approve the conveyance. As required by statute, the commission must determine that the proposed conveyance is an integral part of the region's overall plan to improve mobility in the region, the county agrees to assume all liability and responsibility for the maintenance and operation of the ferry on its conveyance, the commissioners' court in which the ferry is located has approved the ferry, and the governing body of the municipality has approved the conveyance, if any of the docking facilities used by the ferry are located in a municipality with a population of 8,000 or less. To protect the state from liability, to encourage compliance with federal law, and to encourage public involvement and protection of the environment, this subsection also requires that the county agree to assume all liability and responsibility for compliance with all applicable federal laws, to assume all liability and responsibility for existing and future environmental permits, issues, and commitments, to provide for public involvement, and to conduct a study of the social and environmental impact of all proposed improvements to the ferry.

New §27.72(e) authorizes the commission to grant preliminary approval of the conveyance, with final approval conditioned on the completion of preliminary studies necessary for the commission to make the findings required by subsection (d) of this section.

New §27.72(f) provides that if the commission approves a conveyance under §§27.72(c) or (e), the commission will notify the governing body of the municipality in which the ferry is located so that the governing body may order an election on the approval of the conveyance. As required by state law, this subsection provides that the commission will convey the ferry if approved by a majority of the voters. This subsection also requires, if applicable, approval of the conveyance by United States Department of Transportation. Finally, to protect the state from liability, this subsection provides that, upon conveyance, the commission will remove the ferry from the state highway system, and the county shall assume all liability, responsibility, and duty for financing, design, construction, maintenance, and operation of the ferry.

Section 27.73, Commission Approval of County Toll Project, is amended. The section governs the statutorily required approval of a county toll project.

Section 27.73(a) is amended to better describe the statutory scheme that requires commission approval of a county toll project.

Section 27.73(c) is added to clarify the applicability of different rules governing toll projects and to require the county to conduct a study of the social and environmental impacts and provide for public involvement in accordance with Chapter 2, Subchapter C, since the project will be part of the state highway system.

In order to clarify roles and responsibilities of the county and the department and to maximize flexibility in that regard, §27.73(d) is added to better outline the responsibilities of the county and the department in conducting the environmental review and public involvement.

Section 27.74, Design and Construction Standards for Toll Road Projects, is amended to remove the reference to §27.72. This reference is no longer necessary due to the repeal of existing §27.72.

New §27.75, Commission Order Directing that County Toll Project Shall Not Become Part of the State Highway System, is added to implement S.B. 1131.

New §27.75(a), Purpose, describes the purpose of the section.

New §27.75(b), Request, requires a county seeking approval under this section to submit the following information: (1) a detailed schematic indicating the location of interchanges and mainlanes so that the commission may evaluate the complexity and impact of the project; (2) justification for not being required to comply with the design, construction, environmental review, and public involvement requirements that the county would have to comply with if the county did not gain approval under this section - this information is necessary to assist the commission in its evaluation under subsection (c)(2) of this section; and (3) a description of the county's experience in developing toll facilities - also necessary to assist the commission in its evaluation under subsection (c)(2) of this section.

New §27.75(c), Commission order, provides that the commission will approve the county's request if it determines: (1) permanent operation and ownership of the project as a county road will be an efficient and effective method to provide transportation services in the region; and (2) the county has the ability to provide, and a past record of providing, safe and effective highway facilities without department oversight or regulation. These criteria will allow the commission: to help ensure that its decision to exempt the county from department regulation will not harm the traveling public; to ensure that the county sufficiently considers public input and environmental impacts; and to ensure that permanent county ownership of the project will not harm transportation in the region.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments, new sections, and repeal 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, new sections, and repeal. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Phillip Russell, Director, Texas Turnpike Authority 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, new sections, and repeal.

PUBLIC BENEFIT

Phillip Russell has also determined that for each year of the first five years the amendments, new sections, and repeal are in effect, the public benefit anticipated as a result of enforcing or administering the amendments, new sections and repeal will be the development of an effective transportation system. 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 8:30 a.m. on Wednesday, November 9, 2005, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:00 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 Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588

at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments, new sections, and repeal may be submitted to Phillip Russell, Director, Texas Turnpike Authority 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 November 14,2005.

SUBCHAPTER F. COUNTY TOLL ROADS AND FERRIES

43 TAC §§27.70, 27.72 - 27.75

STATUTORY AUTHORITY

The amendments and 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, and Transportation Code, §284.011, which requires the commission to adopt rules governing the transfer of a department ferry to a county.

CROSS REFERENCE TO STATUTE

Transportation Code, §§284.008(d), 284.011, and 362.051.

§27.70. Purpose.

Transportation Code, §284.011 [~~§284.009~~] authorizes the Texas Transportation Commission (commission) to convey a ferry operated by the Texas Department of Transportation (department) [~~non-toll state highway or a segment of a non-toll state highway~~] to a county or a local government corporation for operation and maintenance as a county ferry [~~toll road project~~] under Transportation Code, Chapter 284. Transportation Code, §362.051 provides that a governmental or private entity must obtain the commission's approval before beginning construction of a toll road, toll bridge, or turnpike that is to be part of the state highway system. Transportation Code, §284.009(d) authorizes the commission, if requested by a county, to adopt an order stating that a county toll project will not become a part of the state highway system upon payment of project debt. This subchapter prescribes policies and procedures governing the implementation of these statutes [~~commission approval of the transfer of a non-toll segment of the state highway system to a county and the approval of a county toll road project that is to be part of the state highway system~~].

§27.72. Conveyance of State Ferry.

(a) Request.

(1) Transportation Code, §284.011, authorizes the commission to convey a ferry operated by the department under Transportation Code, §342.001, to a county or local government corporation incorporated under Transportation Code, Chapter 431 in a county to which Transportation Code, Chapter 284 applies.

(2) A county or local government corporation may request a conveyance under this section by submitting a written request that includes:

(A) an explanation of how the proposed conveyance will improve overall mobility in the region;

(B) copies of any completed studies concerning the transfer;

(C) a copy of the county's or local government corporation's criteria and guidelines for approval of the conveyance of a ferry;

(D) a brief description of any known environmental, social, economic, or cultural resource issues, such as impacts on wetlands and other water resources, endangered species, parks, neighborhoods, businesses, historic buildings or bridges, and archeological sites concerning the transfer; and

(E) the name and address of any individuals or organizations known to be opposed to the transfer, and a description of any known controversies concerning the transfer.

(b) Public involvement.

(1) As part of the information that will be used by the commission in determining whether to convey a ferry, the department will:

(A) hold one or more public hearings in the county in which the ferry is located for the purpose of receiving oral comments; and

(B) solicit written comments.

(2) Notice of a solicitation of written comments and a public hearing held under paragraph (1) of this subsection will be:

(A) published in the Texas Register;

(B) published in one or more newspapers of general circulation in the county in which the ferry is located;

(C) posted on the department's website, with a link to the county's website, if available; and

(D) posted on the county's website, if available, with a link to the department's website.

(3) The department will publish and post notices under paragraph (2) of this subsection at least 10 days prior to the date of the hearing.

(4) The department will prepare a summary of the public hearings and all comments received in response to the notice and the hearings.

(c) Reimbursement. The county or local government corporation shall reimburse the department for the cost of a conveyed ferry unless the commission determines that the conveyance will result in a substantial net benefit to the state, the department, and the traveling public that equals or exceeds that cost. In computing the cost of the ferry, the commission will include the total dollar amount spent by the department for the original construction of the ferry, including the costs associated with the preliminary engineering and design engineering for plans, specifications, and estimates, the acquisition of necessary rights-of-way, and actual construction of the ferry and all necessary appurtenant facilities, and will consider the anticipated future costs of expanding, improving, maintaining, or operating the ferry to be incurred by the county or local government corporation and not by the department if the ferry is conveyed.

(d) Criteria. Subject to the requirements of Subsection (f) of this section, the commission may, after considering public input concerning the proposed conveyance, approve the transfer of a ferry to the county or local government corporation if:

(1) the commission determines that the proposed conveyance is an integral part of the region's overall plan to improve mobility in the region;

(2) the county agrees to assume all liability and responsibility for the safe and effective maintenance and operation of the ferry on its conveyance;

(3) the county agrees to assume all liability and responsibility for compliance with all federal laws, regulations, and policies applicable to the ferry;

(4) the county agrees to assume all liability and responsibility for existing and future EPIC, including obtaining all environmental permits and approvals and for compliance with all federal and state environmental laws, regulations, and policies applicable to the ferry and related improvements;

(5) the county agrees to provide for public involvement and to conduct a study of the social and environmental impact of all proposed improvements to the ferry;

(6) the commissioners' court of the county in which the ferry is located has approved the transfer; and

(7) the governing body of the municipality has approved the conveyance, if any of the docking facilities used by the ferry are located in a municipality with a population of 8,000 or less.

(e) Preliminary approval. Subject to the requirements of subsection (f) of this section, the commission may grant preliminary approval of the conveyance of a ferry, with final approval conditioned on the completion of preliminary studies necessary for the commission to make the findings required by subsection (d) of this section, including social, economic, and environmental studies. The commission may require the county to pay for or complete all or a portion of the preliminary studies. Upon completion of the preliminary studies, the department will hold one or more additional public hearings. The department will publish and post notice of a hearing held under this subsection in accordance with subsection (b)(2) of this section. The commission may grant final approval of the conveyance consistent with the requirements of subsections (d) and (f) of this section.

(f) Conveyance.

(1) If the commission approves a conveyance under subsection (D) or (e) of this section, the commission will notify the governing body of the municipality in which the ferry is located so that the governing body may order an election on the approval of the conveyance.

(2) The commission will convey the ferry if approved by a majority of the voters in the municipality and, if required by federal law, by the United States Department of Transportation. Coincident with the conveyance, the commission will remove the ferry from the designated state highway system, and the county shall assume all liability, responsibility, and duty for financing, design, construction, maintenance and operation of the ferry.

§27.73. Commission Approval of County Toll Project [~~Approval~~].

(a) Purpose. Transportation Code, Chapter 284, authorizes a county to construct a toll road project. Transportation Code, §362.051 provides that a governmental or private entity must obtain the commission's approval before beginning construction of a toll project that is to be a part of the state highway system. Transportation Code, §284.008(c) specifies that a county's toll road project will become a part of the state highway system when all the bonds and interest on the bonds of the project are paid, thereby requiring commission approval of a county toll road project under Transportation Code, §362.051. This section prescribes the procedure by which a county may obtain commission approval under Transportation Code, §362.051. This section does not apply to a county toll project for which the commission has adopted an order under Transportation Code, §284.008(d), stating that the project will not become a part of the state highway system under §284.008(c). This section also does not apply to a county with a population of more than 1.5 million.

[~~(a) Requirements. Transportation Code, §362.051 provides that a governmental or private entity must obtain the commission's approval before beginning construction of a toll road, toll bridge, or turnpike that is to be part of the state highway system.~~]

(b) Request. To secure approval of a toll road project under this section, a county shall submit a written request for approval to the executive director. The request must be accompanied by:

(1) a summary of the anticipated financing plan for purposes of seeking the approval described in subsection (e)(2) [~~(c)(2)~~] of this section;

(2) traffic and revenue forecasts;

(3) a detailed schematic indicating the location of interchanges and mainlanes;

(4) a report identifying relocations or reconstruction to state highway system facilities anticipated in connection with the proposed toll road project;

(5) an evaluation of the toll road project's integration into the state highway system;

(6) documentation demonstrating that the environmental review and public involvement for the project have been conducted in the manner prescribed by Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement for Transportation Projects); and

(7) a written commitment to comply with the design and construction standards prescribed in §27.74 of this subchapter when developing the toll road project.

(c) Environmental review and public involvement.

(1) When a county proposes to develop a toll road project under this section, the county shall conduct a study of the social and environmental impacts of the project in accordance with Chapter 2, Subchapter C, of this title.

(2) The county shall provide for public involvement by complying with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects).

(3) When a county proposes to develop a toll road project under this section and requests federal-aid or federal-aid and state highway funds to assist with the project, the project shall be developed in accordance with §2.50 of this title (relating to Financial Assistance for Toll Facilities and Pass-Through Toll Projects).

(4) When a county proposes a toll road project under this section and no federal-aid or state highway funds are used, the county shall complete environmental studies and public involvement in accordance with all applicable federal and state requirements and in accordance with Chapter 2, Subchapter C, of this title.

(d) Respective roles and responsibilities. The county shall request that the department make a determination of the respective roles and responsibilities of the county and the department under Chapter 2, Subchapter C, of this title. The county shall comply with the department's directives. The directives will specify who will conduct the following work, either by the county or by the department:

(1) preparation and completion of environmental studies;

(2) submission of appropriate environmental documentation for department review;

(3) preparation of any document revisions;

(4) submission of copies of the environmental studies and documentation adequate for distribution;

(5) preparation of legal and public notices for department review and use;

(6) arrangements for appropriate public involvement, including court reporters and accommodations if requested for persons with special communication or physical needs related to the public hearing;

(7) preparation of public meeting and hearing materials;

(8) preparation of any responses to comments;

(9) preparation of public meeting and public hearing summary and analysis, the comment and response reports, and submission of a verbatim transcript of any public hearing and a signed certification that the hearing has been held in accordance with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects), the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987; and

(10) submission of documentation showing that all EPIC have been or will be completed, including copies of permits or other approvals required prior to construction.

(e) [(c)] Approval. In deciding whether to approve a county toll road project, the commission will consider whether:

(1) the toll road project may be effectively integrated into the state highway system;

(2) the department is able to construct any connecting roads necessary for the toll road project to generate sufficient revenue to pay the debt incurred for its construction; and

(3) the environmental review and public involvement for the toll road project have been conducted in the manner prescribed by Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement for Transportation Projects).

[(d) Exception. This section does not apply to a county with a population of more than 1.5 million.]

§27.74. Design and Construction Standards for Toll Road Projects.

(a) Applicability. This section applies to county toll road projects that are subject to [§27.72 or] §27.73 of this subchapter.

(b) - (l) (No change.)

§27.75. Commission Order Directing that County Toll Project Shall Not Become Part of the State Highway System.

(a) Purpose. Transportation Code, §282.008(c), provides that, except as provided in Transportation Code, §282.008(d), a county toll project becomes a part of the state highway system and the commission shall maintain the project without toll when the project debt is paid. §284.008(d) provides that before construction of a county toll project, a county may request that the commission adopt an order stating that the project will not become a part of the state highway system. This section governs the procedure by which a county may seek approval under Transportation Code, §284.008(d).

(b) Request. A county seeking commission approval under this section shall submit a written request to the department before the county enters into a contract for construction of the toll project. The request shall include:

(1) a detailed schematic indicating the location of interchanges and mainlanes; and

(2) justification for not being required to comply with the design, construction, environmental review, and public involvement requirements of §27.73 and §27.74 of this subchapter (relating to Commission Approval of County Toll Project and Design and Construction Standards for Toll Road Projects);

(3) a description of the county's experience in developing toll facilities; and

(4) a resolution in support of the request adopted by the county commissioners court.

(c) Commission order. The commission will approve a request submitted under subsection (b) of this section if the commission determines that:

(1) permanent operation and ownership of the project as a county road will be an efficient and effective method to provide transportation services in the region; and

(2) the county has the ability to provide, and a past record of providing, safe and effective highway facilities without department oversight or regulation.

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 September 30, 2005.

TRD-200504437
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

SUBCHAPTER F. COUNTY TOLL ROADS

43 TAC §27.72

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

STATUTORY AUTHORITY

The repeal is 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 Transportation Code, §284.011, which requires the commission to adopt rules governing the transfer of a department ferry to a county.

CROSS REFERENCE TO STATUTE

Transportation Code, §§284.008(d), 284.011, and 362.051.

§27.72. Transfer of State Highways.

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 September 30, 2005.

TRD-200504438

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2005
For further information, please call: (512) 463-8630

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 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 §15.13, §15.14

The General Land Office withdraws the emergency new §15.13 and §15.14 which appeared in the September 16, 2005, issue of the *Texas Register* (30 TexReg 5885).

Filed with the Office of the Secretary of State on September 26, 2005.

TRD-200504285
Trace Finley
Policy Director
General Land Office
Effective date: September 26, 2005
For further information, please call: (512) 475-1859

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 the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 358. MEDICAID ELIGIBILITY

SUBCHAPTER D. RESOURCES

1 TAC §358.430

The Texas Health and Human Services Commission (HHSC) adopts amendments to §358.430(f)(2), concerning Transfer of Assets and calculation of the penalty period, in its Medicaid Eligibility chapter, with changes to the proposed text as published in the June 17, 2005, issue of the *Texas Register* (30 TexReg 3491). The text of the rule will be republished.

Minor changes have been made throughout the rule to change references regarding the Texas Department of Human Services (DHS) to the Department of Aging and Disability Services (DADS). Changes were also made to update incorrect citations.

The amendment to §358.430(f)(2) was undertaken to change the current HHSC policy of disregarding fractional remainders in calculating the length of a period of ineligibility caused by a transfer of assets without compensation by an individual who applies for or receives Medicaid or by that individual's spouse. When an individual applies for Medicaid and the individual or the individual's spouse transferred an asset without compensation during the applicable "look back" period before the date of the Medicaid application (36 or 60 months), such a transfer can result in a period of ineligibility. The length of the ineligibility period is determined by dividing the amount of the uncompensated transfer by the monthly average private pay rate for nursing facility care in the state. Under current HHSC policy, fractional remainders that result from this calculation are disregarded, resulting in whole month periods of ineligibility. As a result of this rule change, fractional remainders will be considered, so that the resulting period of ineligibility may be days, or months and days.

Under Government Code, §2007.003(b), HHSC has determined that Chapter 2007 of the Government Code does not apply to these rules. The change this rule amendment makes does not implicate a recognized interest in private real property. Accordingly, HHSC is not required to complete a takings impact assessment regarding these rules.

HHSC received written comments on the amendment from two estate planners and one anonymous comment. A summary of the comments and the HHSC's responses follow. The HHSC Council voted to support the proposal at its April 1, 2005 meeting.

Comment: One commenter asked if a divisor would be used to calculate penalty periods under the proposed rule, and if so, the amount of the divisor. This commenter did not comment directly on the proposed rule language.

Response: HHSC has made no changes to the proposed rule as a result of the comment. In response to the comment, the proposed rule provides that a divisor will be used that reflects the average monthly private pay cost of care in a nursing facility in Texas, as determined by HHSC. HHSC makes this determination using data from nursing facility cost reports. HHSC adjusts the cost report data for inflation by using the Skilled Nursing Facility market basket inflator, which the federal Centers for Medicare and Medicaid Services periodically determines and publishes. Following this methodology, HHSC has determined that the amount of the divisor effective September 1, 2005 will be $3,549.

Comment: One commenter indicated that because the proposed rule contemplates that penalty periods for uncompensated transfers will be calculated to the day rather than only in terms of whole months, the words monthly and month in §358.430(f)(1), (4), and (6) should be changed to daily and day.

Response: HHSC disagrees with the comment and has made no changes to the rule language as proposed. The Social Security Act, §1917(c)(1)(D-E), uses the words "month" and "monthly," requires that the penalty begin with the first day of the first month during which assets have been transferred, and requires that the length of the penalty period be based on the average monthly cost in the state to a private patient of nursing facility services. The language in the rule as proposed is therefore consistent with federal law. However, in response to the comment, HHSC agrees to adopt policy language that will allow a member of the public to determine in terms of days whether a transfer would result in a penalty, and if so, the length of the penalty.

Comment: One commenter objects to the proposed rule being applicable to applications filed on or after the effective date of the rule amendment. The commenter asserts that the law instead requires the proposed rule to apply to transfers of assets made on or after the effective date of the rule amendment.

Response: HHSC disagrees with the comment and has made no changes to the rule language as proposed. HHSC has received written confirmation from the Centers for Medicare and Medicaid Services that federal law requires the rule change to apply to applications filed on or after its effective date. The suggestion that the rule change must apply only to transfers of assets that occur on or after the effective date of the rule change is inconsistent with federal law. It would violate §1902(a)(17) of the Social Security Act because it would have the effect of applying different eligibility standards to Medicaid applicants depending on when they transferred assets instead of depending on when they applied for assistance.

The amendment is adopted under Government Code, §531.0055 and §531.021, which provide the Texas Health and Human Services Commission with the authority to supervise the administration and operation of the Medicaid program and to administer federal medical assistance funds.

§358.430. Transfer of Assets.

(a) Introduction.

(1) The Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) (P.L. 103-66) revised policy for transfers of assets that occur on or after August 11, 1993, when an uncompensated value remains.

(2) The penalty for transfers of assets affects payments for institutional facility services (nursing facility care, intermediate care facility for mentally retarded (ICF/MR) vendor services, care in state schools, and care in institutions for mental diseases) and eligibility for home/community-based waiver services. Both the client and the service provider are notified of the penalty period.

(3) Except for state school clients, institutional clients remain eligible for all other Medicaid benefits and continue to receive monthly identification forms for the length of the penalty period. For state school clients, Medicaid eligibility is denied for any penalty period resulting from an uncompensated transfer of assets. This is because the only benefit received is vendor payments.

(4) If a home/community-based waiver client's Medicaid eligibility requires receipt of waiver services, then the client is ineligible for all Medicaid benefits for the length of the penalty period. Denial of home/community-based waiver services based on an uncompensated transfer does not disqualify the client for pure Qualified Medicare Beneficiary (QMB) or Specified Low-Income Medicare Beneficiary (SLMB) benefits. If all eligibility criteria for QMB or SLMB are met, the Department of Aging and Disability Services (DADS) staff certify the client for TP 23 or TP 24, as appropriate.

(5) Clients in the community who are eligible for Medicaid may transfer assets without penalty, provided they do not become institutionalized or apply for home/community-based waiver services. Transfers do not affect eligibility for QMB or SLMB benefits.

(6) In spousal situations, if assets are transferred to a third party before institutionalization or by the community spouse, DADS does not include the uncompensated amount of the transfer in calculating the protected resource amount or countable resources upon application for Medicaid.

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

(1) Client--"Client" includes the client himself, as well as:

(A) the client's spouse;

(B) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the client or client's spouse; and

(C) any person, including a court or administrative body, acting at the direction or upon the request of the client or the client's spouse.

(2) Assets--"Assets" include all income and resources of the client and of his spouse. This includes income or resources which the client or his spouse is entitled to but does not receive because of any action by:

(A) the client or his spouse;

(B) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the client or his spouse; or

(C) any person, including a court or administrative body, acting at the direction or upon the request of the client or his spouse. Examples of actions which would cause income or resources not to be received are: irrevocably waiving pension income, waiving the right to receive an inheritance, not accepting or accessing injury settlements, and tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of the plaintiff.

(c) Transfer of income.

(1) The client may incur a transfer penalty by transferring income on or after August 11, 1993. Transfers of income include:

(A) waiving the right to receive an inheritance even in the month of receipt;

(B) giving away a lump sum payment even in the month of receipt; or

(C) irrevocably waiving all or part of federal, state, or private pensions or annuities.

(2) The date of transfer is the date of the actual change in income, if on or after August 11, 1993. Interspousal transfers of income are permitted (for example, obtaining a court order to have community property pension income paid to a community spouse).

(3) Because revocable waivers of pension benefits can be revoked and the benefits reinstated, no uncompensated value is developed, and no transfer-of-assets penalty is incurred. Such waivers are subject to the utilization-of-benefits policy, and the client must apply for reinstatement of the full pension amount or he is ineligible for all Medicaid benefits.

(d) Exceptions to transfers of assets.

(1) Transfer of the client's home does not result in a penalty when the title is transferred to his:

(A) spouse, who lives in the home (the transfer penalty applies when the community-based spouse transfers the home without full compensation);

(B) minor or disabled child (a disabled child must meet Social Security Administration disability criteria; there is no age limit for a disabled child for transfer of assets purposes);

(C) sibling who has equity interest in the home and has lived there for at least one year before the client's institutionalization; or

(D) son or daughter (other than a disabled or minor child) who lived in the home for at least two years before the client's institutionalization and provided care that prevented institutionalization. To substantiate this claim, there must be a written statement from the client's attending physician or a professional social worker familiar with the case documenting the care provided by the son or daughter.

(2) Assets, including the client's home, may be transferred without resulting in a penalty when:

(A) transferred to the client's spouse or to another for the sole benefit of that spouse, or from the client's spouse to another for the sole benefit of that spouse;

(B) transferred to the client's child, or to a trust (including an exception trust described in §358.417(f) of this title (relating to Trusts--August 11, 1993, and After)) established solely for the benefit

of the client's child. The child must meet Social Security Administration disability criteria. There is no age limit for a disabled child for transfer of assets purposes;

(C) transferred to a trust, including an exception trust as specified in §358.417(f) of this title, established for the sole benefit of an individual under 65 years of age who is disabled as defined under SSI;

(D) satisfactory evidence exists that the client intended to dispose of the resource at fair market value;

(E) satisfactory evidence exists that the transfer was exclusively for some purpose other than to qualify for Medicaid;

(F) imposition of a penalty would cause undue hardship;

(G) a client changes a joint bank account to establish separate accounts to reflect correct ownership of and access to funds; or

(H) a client purchases an irrevocable funeral arrangement or assigns ownership of an irrevocable funeral arrangement to a third party.

(3) In determining whether an asset was transferred for the sole benefit of a spouse, child, or disabled individual, there must be a written instrument of transfer, such as a trust document, which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. The instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, there can be no exemption from the penalty. Exception trusts created under §358.417(f) of this title are exempt from the actuarially sound distribution provisions of this section.

(4) The situations in paragraphs (1) - (3) of this subsection are the only situations in which an uncompensated transfer does not result in a penalty for institutional care or home/community-based waiver services. Under the transfer provisions of OBRA 1993, the home is not an excluded resource for institutional clients. Therefore, if the home of an institutionalized client is transferred, unless the transfer meets one of the criteria in paragraphs (1) - (3) of this subsection, it could affect payment for the client's institutional care.

(e) Look-back period.

(1) Penalties may be assessed for transfers occurring on or after the look-back date. Penalties cannot be assessed for time frames prior to the look-back period.

(2) The law prescribes a 36-month look-back period for most uncompensated transfers. However, there is a 60-month look-back period for certain transfers involving trusts. The look-back periods for trusts and distributions from trusts are defined in subparagraphs (A) and (B) of this paragraph.

(A) Revocable trusts.

(i) Payments from a revocable trust to or for the benefit of someone other than the client have a 60-month look-back period.

(ii) Making a revocable trust irrevocable with payments from corpus/income foreclosed to the client is a transfer of assets and has a 60-month look-back period.

(B) Irrevocable trusts.

(i) Payments from an irrevocable trust (where trustee distributions are not foreclosed to the client) which are made to (or for the benefit of) someone other than the client have a 36-month look-back period.

(ii) Creating an irrevocable trust where trustee payments are foreclosed to the client is a transfer of assets with a 60-month look-back period.

(iii) Creating an irrevocable trust where the trustee initially has discretion to make payments to the client (or for his benefit), but where payments are foreclosed to the client at a later date is a transfer of assets as of the date payments are foreclosed to the client. The look-back period is 60 months.

(3) The look-back period is 36 months (or 60 months) from the later of the date of:

(A) institutionalization; or

(B) Medicaid application.

(4) When a client is already a Medicaid recipient before entering a nursing facility (NF), intermediate care facility for mentally retarded (ICF-MR), state school, or institution for mental diseases (IMD), the look-back period begins with institutional entry.

(5) When a client applies and is certified for Medicaid more than once because of multiple institutional stays or periods of ineligibility, the look-back date is based on the later of the earliest application for Medicaid or the initial entry into the facility.

(6) When a client applies for a home/community-based waiver program, the look-back period is 36 months or 60 months from the later of the date:

(A) of application for waiver services (completed, signed application form is received in DADS office); or

(B) after application that the client transfers assets.

(7) When a client applies for institutional care or a home/community-based waiver but is not certified and then reapplies, a new look-back period is based on the latest application.

(8) When a client applies and is certified for a home/community- based waiver program, subsequently is denied, and reapplies for waiver services, the initial look-back period is still in effect.

(9) When a look-back period is established, the client is certified, and then moves from an institutional program to a home/community-based waiver program or vice-versa, the initial look-back period is still in effect. This is true even when there is a gap in eligibility periods.

(10) Any additional transfers of assets that occur after the client is certified for Medicaid may be assessed a penalty.

(f) Calculation of penalty period.

(1) There is no limit to the penalty period under OBRA 1993. The penalty period is determined by dividing the uncompensated value of all assets transferred by the average monthly cost of nursing facility care for a private pay patient.

(2) The penalty period calculation applies to the transfer of both income and resources.

(3) The same penalty period calculation is used for clients who apply for home/community-based waiver programs. Penalty periods continue to run if a client moves from an institutional program to a home/community-based waiver program or vice-versa.

(4) The penalty period begins the month of transfer. However, a new penalty period cannot be imposed while a previous penalty period is still in effect. Therefore, the penalty periods assessed under OBRA 1993 rules for multiple transfers that overlap run separately but consecutively.

(5) If a penalty period ends and a subsequent transfer occurs, a new penalty period is established effective the month of the subsequent transfer. This means there may be a gap between penalty periods.

(6) When multiple transfers occur during the look-back period in such a way that the penalty periods for each overlap, the transfers are treated as a single event. The uncompensated values are lumped together and divided by the average monthly rate for a private-pay patient in a nursing facility. If multiple transfers occur in such a way that the penalty periods do not overlap, then the transfers are treated as separate events and the penalty periods are calculated separately.

(g) Apportioning penalty periods between spouses.

(1) When a spouse transfers an asset that results in a penalty for the client, the penalty period must, in certain instances, be apportioned between the spouses. Both spouses must be eligible for Medicaid institutional services or home/community-based waiver services during the same time period for apportionment to occur. Apportionment occurs when:

(A) the spouse is institutionalized and is Medicaid eligible; or

(B) the spouse would be eligible for home/community-based waiver services; and

(C) some portion of the penalty against the client remains at the time the above conditions are met.

(2) When one spouse is no longer subject to a penalty (for example, the spouse no longer receives institutional or home/community-based waiver services, or the spouse dies), the remaining penalty period applicable to both spouses must be served by the remaining spouse.

(h) Return of transferred asset.

(1) For transfers occurring on or after August 11, 1993, if the transferred asset is subsequently returned to the client, the transfer is nullified and the penalty period is erased retroactive to the month of transfer. The asset is treated as though never transferred, and is excluded or counted, as appropriate, in determining the client's eligibility for those months in which the asset was in someone else's possession. In spousal cases, if the client/spouse transferred an asset before the client entered the nursing facility and the asset is returned after institutionalization, the protected resource amount (PRA) must also be recalculated.

(2) For a penalty period to be nullified, all of the asset in question or its fair market value must be returned to the client. When only part of an asset or its equivalent value is returned, the penalty period can be reduced but not eliminated. For example, if only half the value of the asset is returned, the penalty period can be reduced by one-half. Payment on the principal of a note is the return of a transferred asset and reduces the penalty accordingly.

(i) Spouse-to-spouse transfers under spousal impoverishment provisions.

(1) There are no restrictions on interspousal transfers occurring from the date of institutionalization to the date of the MAO application; the reason is that at application and through-out the initial eligibility period, (12 full months following the medical effective date) the combined countable resources of the couple are considered in determining eligibility. For the same reason, interspousal transfers are also permitted before institutionalization. A penalty can result when the community spouse transfers assets to a third party, not for the sole benefit of either spouse.

(2) To remain eligible at the end of the initial eligibility period, the institutionalized spouse must reduce resources to which he has access at least to the resource limit. If the institutionalized spouse chooses, he may, during the initial eligibility period, transfer resources from his name to the community spouse's name with no penalty applied to the transfer. The transfer-of-assets policy applies only to transfer of assets for less than fair market value to individuals other than the community spouse if not for the sole benefit of that spouse.

(3) Transfer penalties apply when the community spouse transfers his separate property before institutionalization, or after institutionalization but before the MAO certification. Transfer penalties apply when the community spouse transfers community property both before and after institutionalization, if not for the sole benefit of the spouse.

(j) Compensation. Compensation, in the form of funds, real property, or services, must actually have been provided to the client. Future compensation does not satisfy the compensation requirement except for annuities which are actuarially sound. Compensation, however, may be in the form of payment or assumption of a legal debt owed by the individual making the transfer. Compensation is not allowed for services that would be normally provided by a family member (such as house painting or repairs, mowing lawns, grocery shopping, cleaning, laundry, preparing meals, transportation to medical care). The client must provide valid receipts for financial expenditures or written statements from the people who were paid to provide the services. If the client receives additional cash compensation that was not a part of the transfer agreement from the party who received the transferred asset, the uncompensated value of the transferred asset must be reduced by the amount of the additional compensation and as of the date the compensation is received. Cash compensation includes direct payments to a third party to meet the client's food, shelter, or medical expenses, including nursing facility bills, incurred after the date of the transfer. Compensation for a transferred asset must be provided according to terms of an agreement established on or before the date of transfer. This agreement must have been established exclusively for purposes other than obtaining or retaining eligibility for Medicaid services.

(k) Client participation in transfers. Any action by the client's co-owner(s) to eliminate the client's ownership interest or control of a joint asset, with or without the client's consent, is a transfer of assets. Placing another person's name on an account or other asset that results in limiting the client's control of an asset (right to dispose) is a transfer of assets.

(l) Rebuttal procedures.

(1) Notification of opportunity for rebuttal. If any amount of uncompensated value exists, DADS advises the client or responsible party of the amount of uncompensated value and the length of the penalty period. The penalty period applies unless the client provides convincing evidence that the disposal was solely for some purpose other than to obtain Medicaid services. If, within the periods specified in this paragraph, the client or responsible party makes no effort to rebut the presumption that the transfer was solely to obtain Medicaid services, DADS will assume that the presumption is valid. The rebuttal period is five workdays after oral notification (by DADS to the client) and seven workdays after written notification.

(2) Rebuttal of the Presumption. Transfer-of-assets statutes presume that all transfers for less than fair market value are to

obtain Medicaid services. The client or responsible party is responsible for providing convincing evidence that the transaction in question was exclusively for some other purpose. To rebut the presumption, the client or responsible party must provide a written statement and any relevant documentation to substantiate his statement. The statement, oral or written, must include at least the following:

(A) purpose for transferring the asset;

(B) attempts to dispose of the asset at fair market value;

(C) reason for accepting less than fair market value for the asset;

(D) means of or plan for self-support after the transfer; and

(E) relationship to the person to whom the asset was transferred.

(m) Undue Hardship.

(1) A client may claim undue hardship when imposition of a transfer penalty would result in discharge to the community and/or inability to obtain necessary medical services so that his life is endangered. Undue hardship also exists when imposition of a transfer penalty would deprive the client of food, clothing, shelter, or other necessities of life. Undue hardship relates to hardship to the client, not the relatives or responsible parties of the client. Undue hardship does not exist when imposition of the transfer penalty merely causes the client inconvenience or when imposition might restrict his lifestyle but would not put him at risk of serious deprivation.

(2) Undue hardship may exist when any one of the following conditions specified in subparagraphs (A) - (C) of this paragraph exists:

(A) location of the receiver of the asset is unknown to the client, or other family members, or other interested parties, and the client has no place to return in the community and/or receive the care required to meet his needs;

(B) client can show that physical harm may come as a result of pursuing the return of the asset, and the client has no place to return in the community and/or receive the care required to meet his needs; or

(C) receiver of the asset is unwilling to cooperate with the client and DADS, and the client has no place to return in the community and/or receive the care required to meet his needs.

(3) If a client claims undue hardship, DADS must make a decision on the situation as soon as possible but within 30 days of receipt of the request for a waiver of the penalty. The client has the right to appeal an adverse decision on undue hardship.

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 September 28, 2005.

TRD-200504332
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 1, 2005
Proposal publication date: June 17, 2005
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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 15. ALTERNATIVE FUELS RESEARCH AND EDUCATION DIVISION

The Railroad Commission of Texas adopts amendments to §15.105, relating to Definitions; §15.125, relating to Application; §15.140, relating to Rebate Amount; Minimum Efficiency Factor or Performance Standard; §15.150, relating to Assignment of Rebate; §15.155, relating to Compliance; §15.160, relating to Complaints; §15.205, relating to Definitions; §15.305, relating to Definitions; and §15.405, relating to Definitions, without changes to the versions published in the August 5, 2005, issue of the *Texas Register* (30 TexReg 4415). The Commission adopts the amendments to incorporate provisions related to grant-funded rebate and incentive programs and to clarify certain administrative and procedural provisions.

In §15.105, relating to Definitions, the Commission amends the definitions of "application," to include a reference to a propane equipment supplier; "available funds," to include funds available from gifts and grants; and "safety inspection," to include a reference to a propane equipment supplier. This change would apply to programs such as the Commission's grant-funded low-NOx forklift initiative program, in which a propane equipment supplier rather than a propane dealer co-signs a consumer's application. The Commission also adds new definitions of "installation date," as the date on which propane service for eligible equipment is established, i.e., the date the gas is turned on, and "propane equipment supplier," as a Railroad Commission LP-gas licensee, company representative or operations supervisor who sells, leases or services eligible equipment to or for consumers; who has completed and submitted the form prescribed by the Commission to participate in a rebate or incentive program as a propane equipment supplier; and who is a regular or potential supplier of eligible equipment to an applicant. The Commission also amends the definition of "propane dealer" to correct the name of the administrative unit of the Commission that licenses LP-gas companies and maintains records of their company representatives and operations supervisors.

In §15.125, relating to Application, the Commission amends subsection (a) to include a reference to a propane equipment supplier. The Commission also amends subsection (c) to clarify that applications for rebates or incentives will be considered in the order they are received and paid in the order of their installation dates. In addition, the Commission adds a new subsection (d) to clarify that a rebate or incentive will be paid out of funds appropriated for the fiscal year in which the installation date occurs, unless the Commission obligates or reserves funds from a different fiscal year to pay rebates or incentives. The Commission amends current subsection (e), redesignated as subsection (f), by adding a sentence clarifying that it is the installation date that determines whether funds are available and the rebate or incentive amount in effect, and to re-designate former subsections (d), (e), (f) and (g) as (e), (f), (g) and (h), respectively.

In §15.140, relating to Rebate Amount; Minimum Efficiency Factor or Performance Standard, the Commission amends subsection (a) to clarify that the amount of a rebate or incentive paid

on an approved application is the amount that is in effect on the installation date rather than on the date the application is approved.

In §15.150, relating to Assignment of Rebate, the Commission adds a reference to a propane equipment supplier, to allow a consumer to assign a rebate or incentive to a propane equipment supplier as well as to a propane dealer. This change would apply to programs such as the Commission's grant-funded low-NOx forklift initiative program, in which a propane equipment supplier rather than a propane dealer co-signs a consumer's application. The Commission also amends this section to specify that the rebate amount assigned is the amount in effect on the installation date rather than on the date the application is approved.

In §15.155, relating to Compliance, the Commission amends subsections (a) and (b) by subjecting a participating propane equipment supplier to the same sanctions as an applicant or propane dealer who submits false information or otherwise violates program rules.

In §15.160, relating to Complaints, the Commission amends subsection (b) by correcting the name of the Railroad Commission section that handles complaints that an installation does not comply with the Commission's LP-gas safety rules.

In §§15.205, 15.305, and 15.405, the Commission corrects the name of the section of the Commission that handles certain LP-gas activities.

The Commission received no comments on the proposed amendments.

SUBCHAPTER B. PROPANE CONSUMER REBATE PROGRAM

16 TAC §§15.105, 15.125, 15.140, 15.150, 15.155, 15.160

The Commission adopts the amendments under the Texas Natural Resources Code, §113.241, which authorizes the Commission to adopt all necessary rules relating to the purposes of Texas Natural Resources Code, Chapter 113, Subchapter I, and activities regarding the use of LP-gas and other environmentally beneficial alternative fuels that are or have the potential to be effective in improving the quality of air in this state; §113.243, which authorizes the Commission to research, develop, and implement marketing, advertising, and informational programs relating to alternative fuels to make alternative fuels more understandable and readily available to consumers; §113.2435, which authorizes the Commission to establish consumer rebate programs for purchasers of appliances and equipment fueled by LP-gas or other environmentally beneficial alternative fuels for the purpose of achieving energy conservation and efficiency and improving the quality of air in this state; and §113.246, which requires the Commission to adopt rules necessary for the administration, collection, reporting, and payment of the fees payable or collected under this subchapter.

Statutory authority: Texas Natural Resources Code, §§113.241, 113.243, 113.2435, and 113.246.

Cross-reference to statute: Texas Natural Resources Code, Chapter 113.

Issued in Austin, Texas, on September 27, 2005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 27, 2005.

TRD-200504303
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: October 17, 2005
Proposal publication date: August 5, 2005
For further information, please call: (512) 475-1295

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SUBCHAPTER C. MEDIA REBATE PROGRAM

16 TAC §15.205

The Commission adopts the amendments under the Texas Natural Resources Code, §113.241, which authorizes the Commission to adopt all necessary rules relating to the purposes of Texas Natural Resources Code, Chapter 113, Subchapter I, and activities regarding the use of LP-gas and other environmentally beneficial alternative fuels that are or have the potential to be effective in improving the quality of air in this state; §113.243, which authorizes the Commission to research, develop, and implement marketing, advertising, and informational programs relating to alternative fuels to make alternative fuels more understandable and readily available to consumers; §113.2435, which authorizes the Commission to establish consumer rebate programs for purchasers of appliances and equipment fueled by LP-gas or other environmentally beneficial alternative fuels for the purpose of achieving energy conservation and efficiency and improving the quality of air in this state; and §113.246, which requires the Commission to adopt rules necessary for the administration, collection, reporting, and payment of the fees payable or collected under this subchapter.

Statutory authority: Texas Natural Resources Code, §§113.241, 113.243, 113.2435, and 113.246.

Cross-reference to statute: Texas Natural Resources Code, Chapter 113.

Issued in Austin, Texas, on September 27, 2005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mary Ross McDonald
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Railroad Commission of Texas
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SUBCHAPTER D. HIGHWAY SIGNAGE REBATE PROGRAM

16 TAC §15.305

The Commission adopts the amendments under the Texas Natural Resources Code, §113.241, which authorizes the Commission to adopt all necessary rules relating to the purposes of Texas Natural Resources Code, Chapter 113, Subchapter I, and activities regarding the use of LP-gas and other environmentally beneficial alternative fuels that are or have the potential to be effective in improving the quality of air in this state; §113.243, which authorizes the Commission to research, develop, and implement marketing, advertising, and informational programs relating to alternative fuels to make alternative fuels more understandable and readily available to consumers; §113.2435, which authorizes the Commission to establish consumer rebate programs for purchasers of appliances and equipment fueled by LP-gas or other environmentally beneficial alternative fuels for the purpose of achieving energy conservation and efficiency and improving the quality of air in this state; and §113.246, which requires the Commission to adopt rules necessary for the administration, collection, reporting, and payment of the fees payable or collected under this subchapter.

Statutory authority: Texas Natural Resources Code, §§113.241, 113.243, 113.2435, and 113.246.

Cross-reference to statute: Texas Natural Resources Code, Chapter 113.

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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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Mary Ross McDonald
Managing Director
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For further information, please call: (512) 475-1295

SUBCHAPTER E. MANUFACTURED HOUSING INCENTIVE PROGRAM

16 TAC §15.405

The Commission adopts the amendments under the Texas Natural Resources Code, §113.241, which authorizes the Commission to adopt all necessary rules relating to the purposes of Texas Natural Resources Code, Chapter 113, Subchapter I, and activities regarding the use of LP-gas and other environmentally beneficial alternative fuels that are or have the potential to be effective in improving the quality of air in this state; §113.243, which authorizes the Commission to research, develop, and implement marketing, advertising, and informational programs relating to alternative fuels to make alternative fuels more understandable and readily available to consumers; §113.2435, which authorizes the Commission to establish consumer rebate programs for purchasers of appliances and equipment fueled by LP-gas or other environmentally beneficial alternative fuels for the purpose of achieving energy conservation and efficiency and improving the quality of air in this state; and §113.246, which requires the Commission to adopt rules necessary for the administration, collection, reporting, and payment of the fees payable or collected under this subchapter.

Statutory authority: Texas Natural Resources Code, §§113.241, 113.243, 113.2435, and 113.246.

Cross-reference to statute: Texas Natural Resources Code, Chapter 113.

Issued in Austin, Texas, on September 27, 2005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Mary Ross McDonald
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For further information, please call: (512) 475-1295

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 62. CAREER COUNSELING SERVICES

16 TAC §§62.1, 62.10, 62.20, 62.21, 62.40, 62.60, 62.70, 62.71, 62.80, 62.90

The Texas Department of Licensing and Regulation ("Department") adopts the repeal of existing rules at 16 Texas Administrative Code, Chapter 62, §§62.1, 62.10, 62.20, 62.21, 62.40, 62.60, 62.70, 62.71, 62.80 and 62.90, concerning the Career Counseling Services program without changes to the proposal as published in the July 29, 2005, issue of the *Texas Register* (30 TexReg 4293).

Acts of the 79th Texas Legislature, House Bill 2856 repealed statutory requirements regarding the regulation of career counseling services, Texas Occupations Code, Chapter 2502 effective June18, 2005. Therefore, the Department adopts the repeal of existing administrative rules regarding the regulation of career counseling services since there is no longer a statutory requirement to regulate career counseling services under the provisions of Texas Occupations Code, Chapter 2502 as set forth in House Bill 2856.

The Department drafted and distributed the proposed repeal to persons internal and external to the agency in addition to publishing it in the *Texas Register*. The proposal was published in the July 29, 2005, issue of the *Texas Register* and the comment period closed on August 29, 2005. No comments were received regarding the proposal.

The repeal is adopted under House Bill 2856, Acts of the 79th Texas Legislature and Texas Occupations Code, Chapter 51, which authorizes the Department to adopt rules as necessary

to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51 and Chapter 2502. No other statutes, articles, or codes are affected by the repeal.

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 September 30, 2005.

TRD-200504410
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: October 20, 2005
Proposal publication date: July 29, 2005
For further information, please call: (512) 463-7348

CHAPTER 73. ELECTRICIANS

16 TAC §§73.10, 73.20 - 73.28, 73.40, 73.53, 73.60, 73.70, 73.80

The Texas Department of Licensing and Regulation ("Department") adopts amended rules at 16 Texas Administrative Code, §§73.10, 73.20 - 73.26, 73.40, 73.53, 73.60, 73.70, and 73.80 and adopts new rules §73.27 and §73.28 regarding the electrical safety and licensing program without changes to the text as published in the August 12, 2005, issue of the *Texas Register* (30 TexReg 4591) and will not be republished.

These rules are necessary to facilitate administration of statutory changes to Texas Occupations Code, Chapter 1305 (the Act) and to clarify where needed.

Section 73.10, paragraphs (8) and (12) are amended to include entities since the Act was amended at §1305.001(12-a) to define persons as individuals.

Paragraphs (9), (10), (11), (15), and (16) were amended to provide that individual licensees may also provide services through an employing governmental entity to address a new exemption at §1305.003(d) for political subdivisions of this state.

Paragraph (9) was also amended to define a master electrician as a person working on behalf of an electrical sign contractor to recognize that a master electrician is now allowed to serve as the master for electrical sign contractors. §1305.153(b).

Paragraph (14) is amended to recognize that a master electrician may now supervise a journeyman sign electrician. §1305.153(b).

Paragraph (17) is amended to delete the reference to §1305.003. The exemption for maintenance work found at §1305.003(8) was amended to be an exemption for work performed by businesses. The definition is still needed to define work performed by maintenance electricians.

Paragraph (19) is amended to delete the reference to authorized representatives since §1305.003(19) is amended to include the same language as the rule except for the deleted reference.

New paragraph (20) is added to define electrical sign apprentices, a new term added to the Act at §1305.161(b).

New paragraph (21) is added to define the term "a principal place of business" which is added to an exemption for certain industrial plants at §1305.003(14).

New paragraph (22) is added to define the term "on-the-job training", which appears several times in the rules. The change reflects the language found in Section 12 of HB 1317, 79th Legislature, which refers to "on-the-job electrical experience".

Section 73.20(c) is amended to add the word "individual" to the requirement that all applicants must pass an examination. This is a clarifying amendment.

Section 73.21(a) is amended to add the word "individual" before the word "applicant" to clarify the section.

Section 73.21(b) is amended to reference HB 1317 which extended the period of time during which qualified applicants may obtain a license without passing an examination.

New §73.21(b)(2) is added to recognize new §1305.202(b), which provides that persons licensed by a municipality or regional licensing authority may obtain a state issued license if the municipality or authority ceases its licensing program.

Section 73.24 is amended by adding a new subsection (a) to address waiver of examination for persons holding a license in a state having a reciprocity agreement with Texas. This amendment is made to address authority granted by the original statute.

Section 73.24(b), (old subsection (a)), is amended to clarify the conditions under which the Executive Director may waive an examination requirement.

Section 73.24 is amended to add a new subsection (d) to establish by rule a new limitation on certain persons applying for a license without examination, based on licensure by a municipality or regional authority. HB 1317 at §12(2) provides that such persons may obtain a state license that is equivalent to the license issued by a municipality or region.

Section 73.24 is amended to add a new subsection (e) to address certain applicants for masters' licenses pursuant to provisions of HB 1317, §12(1).

Section 73.25(b) and (e) are amended to add the word individual in referring to continuing education requirements for licensees. This is a clarifying amendment.

Section 73.26 is amended by deleting subsection (d). The deleted section limited the effect of the rule to certain applications filed before May 31, 2005. HB 1317 at §12 directs the Commission to consider alternative documentation, the use of which is defined by the rule. With the deletion the rule remains effective.

New §73.27, Licensing Requirements--Temporary Apprentice, is added to establish a procedure for issuance of temporary apprentice licenses in response to §1305.161(c).

New §73.28, Licensing Requirements--Emergency Licenses is added to establish procedures for issuance of emergency licenses in response to §1305.1615.

Section 73.53 is amended by deleting the word "individual" from the heading. The wording of the rule itself correctly addresses all licenses. This is a clarifying amendment.

Section 73.60(d)(1) is amended by deleting the word "individually" and replacing it with the word "alone" to allow the rule to address all licensees. This is a clarifying amendment.

Section 73.70(a) is amended to add the phrase "or employing governmental entity" to allow licensees employed by governmental entities to work other than through a licensed contractor. §1305.003(d).

Section 73.70(b), (c), and (i) are amended to delete the use of "he or she" to refer to a licensee. This is a clarifying amendment.

Section 73.70(k) is deleted. The original Act at §1305.101(2) provides that the version of the National Electric Code adopted by the Commission is the code for the state. The deleted language is in conflict with that provision.

Rule 73.80(a)(9) is amended to change the electrical apprentice fee to $20. Section 73.80(a) is amended by adding a new paragraph (10) to include electrical sign apprentices.

Section 73.80(b) is amended to reflect the change from a two-year to a one-year period for late renewal of a license.

Section 73.80(c)(2) is amended to change the duplicate license fee for an electrical apprentice to $20. Section 73.80(c) is amended to add paragraph (3) to set a fee for a duplicate license for an electrical sign apprentice.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. Three individuals and one organization filed comments concerning the proposed rules. One person proposed a statutory change which will not be addressed here and noted a typographical error in §73.60(c). Review of the official rules published at 16 TAC, Chapter 73, §73.60(c) does not indicate any typographical errors in the rule.

The other persons and the Associated Builders and Contractors of Greater Houston commented concerning proposed amendments to §73.24(e) that require applicants applying in an area that has no licensing program for licensure as master electricians without passing an examination to both live and work in the area. All three commenters objected to the requirement to live and work in the area and they all expressed the view that where a person lives has no effect on the persons ability to perform electrical work. The effect that the Commission addresses with this rule is that of the statutory language. House Bill 1317 ("HB 1317"), 79th Legislature at Section 12 extended until December 31, 2005, the grandfathering period set out in Section 3(a)(1), Chapter 1062, Acts of the 78th Legislature, Regular Session, 2003. The earlier Act that established a grandfathering period for persons meeting certain qualifications specifically addressed where an applicant worked while the language of HB 1317 used language addressing the area in which a person is applying. Since HB 1317 extended the grandfathering period and did not eliminate any earlier provision other than the expiration date, the concept of "working" and the new phrase "applying in" must be considered together. The Electrical Safety and Licensing Advisory Board considered these issues and recommended the language of the rule as published. The Texas Commission of Licensing and Regulation makes no change to the rule as published.

The amendments and new rules are adopted under Texas Occupations Code, Chapters 51 and 1305, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200504411
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER A. ADMINISTRATION

16 TAC §402.102

The Texas Lottery Commission adopts amendments to 16 TAC §402.102, relating to Bingo Advisory Committee without changes to the proposed text as published in the July 29, 2005, issue of the *Texas Register* (30 TexReg 4296).

The purpose of the amendments is to continue the Bingo Advisory Committee so that the Committee can continue to advise the Commission as provided for in this rule. The amendments change the date the Bingo Advisory Committee will automatically abolish and cease to exist unless the Commission affirmatively votes to continue the Bingo Advisory Committee from August 31, 2005 to August 31, 2006. At the July 11, 2005 Commission meeting, the Commission voted to continue the Bingo Advisory Commission and to propose an abolishment date of August 31, 2006.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Occupations Code, §2001.054 which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Government Code, §467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction; and Occupations Code, §2001.057 which authorizes the Commission to adopt rules governing the operation of the Bingo Advisory Committee.

The amendment implements Occupations Code, Chapter 2001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200504359
Kimberly L. Kiplin
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Texas Lottery Commission
Effective date: October 18, 2005
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For further information, please call: (512) 344-5113

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1017

The Texas Education Agency (TEA) adopts new §61.1017, concerning optional flexible year programs for school districts. The new section is adopted with changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4170). The new section replaced an earlier proposal which was withdrawn. The adopted new rule establishes specifications for the administration of the Optional Flexible Year Program in accordance with Texas Education Code (TEC), §29.0821, as added by Senate Bill 346, 78th Texas Legislature, 2003.

Senate Bill 346, 78th Texas Legislature, 2003, added TEC, §29.0821, authorizing the Optional Flexible Year Program. The Optional Flexible Year Program provides districts with flexibility in designing the instructional program for students who did not or are not likely to perform successfully on state assessments administered under TEC, §39.023, or who would not otherwise be promoted to the next grade level. The instructional calendar for students who fall into these risk categories must provide for no fewer than 180 days. Districts may request a reduction in the required days of attendance for students who do not fall into these risk categories in order to provide intensive instructional services to those students with greater educational needs. The instructional calendar for students who do not fall into these risk categories may be reduced, but not below 170 days. Districts who wish to use this option are required to seek prior approval from the commissioner to modify the instructional calendar.

The commissioner of education is authorized to adopt rules for the administration of the program. The adopted new 19 TAC §61.1017, Optional Flexible Year Program, establishes general provisions, defines eligibility, specifies program criteria, describes the approval process, and delineates funding calculations. The new rule includes language requiring local board approval of the modified instructional calendar. The new rule also requires districts to obtain approval to waive staff development days and teacher preparation days from the campus site-based decision-making committee. These changes are a result of public comment received during the original publication period (March 2005).

In response to public comment, an additional modification was made to the rule text since published as proposed in July 2005. Language was added in subsections (c) and (d) to clarify that the campus site-based decision-making committees approve any changes to staff development opportunities.

Districts will be required to seek prior approval for the modification of their instructional calendar by submitting a written request to the Texas Education Agency State Funding Division. No specific application form will be required. Districts should be prepared to provide evaluations or other evidence regarding the effectiveness of their approach, if requested.

Following is a summary of public comment received regarding proposed new 19 TAC §61.1017 and the corresponding agency response.

Comment. The Texas Classroom Teachers Association requested that the need for approval by the campus site-based decision-making committee be expanded to include waivers of teacher preparation days.

Agency response. The agency agrees that this requested change would clarify the intention to have campus site-based decision-making committees approve any changes to staff development opportunities, including time provided for teacher preparation. Additional language was added to subsections (c) and (d) to clarify that intent.

The new section is adopted under the Texas Education Code, §29.0821, which authorizes the commissioner of education to adopt rules for the administration of optional flexible year programs.

The new section implements the Texas Education Code, §29.0821.

§61.1017. Optional Flexible Year Program.

(a) General provisions. In accordance with Texas Education Code (TEC), §29.0821, a school district may modify their instructional calendar to provide a flexible year program to meet the educational needs of its students, including providing intensive instructional services. A school district approved by the commissioner of education to implement an Optional Flexible Year Program (OFYP) may reduce the number of instructional days for certain students.

(b) Eligibility. A student is eligible to participate in the OFYP if the student meets one or more of the following criteria.

(1) The student did not or is not likely to achieve a passing score on an assessment instrument administered under TEC, §39.023.

(2) The student is not eligible for promotion to the next grade level.

(c) Program criteria.

(1) A school district may reduce the number of instructional days during the regular school year for students who are not eligible for participation in this program to no fewer than 170 days.

(2) A school district must provide at least 180 days of instruction to those students who meet the eligibility criteria defined in subsection (b) of this section.

(3) In accordance with subsection (d) of this section, a school district may request waivers for no more than five days of staff development or teacher preparation in order to provide additional days of instruction.

(4) A school district that provides transportation services must continue to provide these services during the OFYP.

(5) A school district that participates in the National School Lunch Program or the National School Breakfast Program must continue to provide these services during the OFYP.

(6) A school district may require educational support personnel to provide service as necessary for an OFYP.

(7) Each educator employed under a ten-month contract must provide the minimum days of service required under TEC, §21.401, notwithstanding the reduction in the number of instructional days or in the number of staff development days.

(d) Approval process. To implement an OFYP, a school district must request prior approval from the commissioner of education.

(1) A school district must submit a letter to the Texas Education Agency division responsible for state funding describing the proposed modifications to the instructional calendar, including a description of the OFYP that will be provided under TEC, §29.0821. The letter must indicate the date on which the board of trustees approved the modified instructional calendar. If the district is requesting a waiver of staff development days or teacher preparation days, the letter must also indicate that the request to waive staff development days or teacher preparation days has been approved by the campus site-based decision-making committee. The letter must be submitted no later than 90 days prior to the first day of the proposed instructional calendar in which the district is requesting to implement the OFYP.

(2) Approval to modify the number of instructional days is limited to one year. Extensions may be approved by submitting subsequent applications.

(3) No approval will be granted that reduces the number of instructional days to fewer than 170 days.

(4) The commissioner may require a school district to provide an evaluation that demonstrates the success of their approach as a condition of approval.

(e) Funding. For a school district that operates an OFYP, the calculation of average daily attendance is modified to reflect the approved instructional calendar. For students placed on a reduced instructional calendar, the reported number of days of instruction used as the divisor in calculating average daily attendance shall reflect the reduced number of days (no fewer than 170). For eligible students served through the OFYP, the reported number of days of instruction used as the divisor in calculating average daily attendance shall reflect the scheduled number of days (180 or more) in which instruction took place.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200504327
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: October 18, 2005
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For further information, please call: (512) 475-1497

TITLE 22. EXAMINING BOARDS

PART 27. BOARD OF TAX PROFESSIONAL EXAMINERS

CHAPTER 623. REGISTRATION AND CERTIFICATION

22 TAC §§623.8 - 623.10, 623.12, 623.17, 623.18

The Board of Tax Professional Examiners adopts amendments to §§623.8 - 623.10 and 623.12 and adopts new §623.17, and §623.18, concerning Registration and Certification. Section 623.17 is adopted with changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4175). Sections 623.8 - 623.10, 623.12, and 623.18 are adopted without changes and will not be republished.

The adopted rules will enhance the overall required training of all registrants of the Board.

No comments were received regarding adoption of the amendments and new rules.

The amendments and new rules are adopted under the authority of Texas Civil Statutes Occupations Code, Chapter 1151 Property Taxation Professional Certification Act, which provides the Board of Tax Professional Examiners 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.

§623.17. Training for Chief Appraisers.

(a) House Bill 2382, 79th Legislature, Regular Session, 2005, requires the board to implement not later than January 1, 2006 a training program for newly appointed chief appraisers.

(b) The chief appraiser training program will provide the appointee with information regarding:

(1) Property Taxation Professional Certification Act;

(2) the programs operated by the board;

(3) the role and functions of the board;

(4) the rules of the board, with an emphasis on the rules that relate to ethical behavior;

(5) the role and functions of the chief appraiser, the appraisal district board of directors, and the appraisal review board;

(6) the importance of maintaining the independence of an appraisal office from political pressure;

(7) the importance of prompt and courteous treatment of the public;

(8) the finance and budgeting requirements for an appraisal district, including appropriate controls to ensure that expenditures are proper; and

(9) the requirements of:

(A) the open meetings law, Chapter 551, Government Code;

(B) the public information law, Chapter 552, Government Code;

(C) the administrative procedure law, Chapter 2001, Government Code;

(D) other laws relating to public officials, including conflict-of-interest laws; and

(E) the standards of ethics imposed by the Uniform Standards of Professional Appraisal Practice.

(c) The training program may only be provided by a provider approved by the board.

(d) Section 3(b) and (c), House Bill 2382, 79th Legislature, Regular Session, 2005, provide, respectively that a person is not required to complete the training program for newly appointed chief appraisers to serve as a chief appraiser for an appraisal district until July 1, 2006 and that the change in law made by the enactment of Section 5.042, Tax Code prohibiting a person from serving as chief appraiser unless the person has completed the training program for newly appointed chief appraisers applies only to a chief appraiser appointed on or after July 1, 2006.

(e) A person may serve in a temporary, provisional, or interim capacity as chief appraiser for a period of up to one year without completing the training required by this section.

(f) This training is not required for a county assessor-collector who serves as chief appraiser under Section 6.05(c) of the Tax 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 September 29, 2005.

TRD-200504361
David E. Montoya
Executive Director
Board of Tax Professional Examiners
Effective date: October 19, 2005
Proposal publication date: July 22, 2005
For further information, please call: (512) 305-7301

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE
SUBCHAPTER V. FINANCIAL ASSURANCE FOR CLASS B SEWAGE SLUDGE FOR LAND APPLICATION UNITS

30 TAC §§37.9090, 37.9095, 37.9100, 37.9105, 37.9110, 37.9115, 37.9120, 37.9125, 37.9130, 37.9135, 37.9140, 37.9145, 37.9150, 37.9155

The Texas Commission on Environmental Quality (commission) adopts new §§37.9090, 37.9095, 37.9100, 37.9105, 37.9110, 37.9115, 37.9120, 37.9125, 37.9130, 37.9135, 37.9140, 37.9145, 37.9150, and 37.9155. Sections 37.9095, 37.9100, 37.9105, 37.9110, and 37.9130 are adopted *with changes* to the proposed text as published in the April 8, 2005, issue of the *Texas Register* (30 TexReg 2024). Sections 37.9090, 37.9115, 37.9120, 37.9125, 37.9135, 37.9140, 37.9145, 37.9150, and 37.9155 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking implements the requirements of House Bill 2546, 78th Legislature, 2003, which provides additional restrictions and requirements for persons who land apply Class B sewage sludge to help ensure more protection for citizens, land, and water. A corresponding rulemaking is published in this issue of the *Texas Register* that includes changes to 30 TAC Chapter 312, Sludge Use, Disposal, and Transportation.

SECTION BY SECTION DISCUSSION

New Subchapter V of Chapter 37 is adopted to provide financial assurance requirements relating to commercial liability insurance and environmental impairment insurance for Class B sewage sludge. The new subchapter also outlines the administrative procedures and requirements relating to these types of financial assurance for Class B sewage sludge.

New §37.9090, concerning Applicability, identifies who is subject to this subchapter and those entities that are exempt.

New §37.9095, concerning Definitions, defines the terms that are used throughout this chapter. Section 37.9095 is adopted with a minor change for improved readability.

New §37.9100, concerning Commercial Liability Insurance, requires a responsible person subject to this subchapter to obtain commercial liability insurance to ensure funds are available to third-party claimants in the event bodily injury or property damage results from Class B sewage sludge land application at the facilities covered. This coverage must be evidenced by either a Certificate of Insurance for Commercial Liability or an Endorsement for Commercial Liability. Minimum requirements of the insurance policy are set out to ensure the agency's financial assurance position is protected. This section also explains that $3 million in coverage will be required to demonstrate financial assurance for all subject facilities and further requires a responsible person to notify the commission whenever a claim results. Section 37.9100 is adopted with changes to the proposed text based on a comment received during the comment period to include the same remedy provisions for failure to pay a premium as required under §37.9105(d).

New §37.9105, concerning Environmental Impairment Insurance, requires a responsible person subject to this subchapter to obtain environmental impairment insurance to ensure funds are available to the executive director in the event corrective action is required related to the facilities covered. This coverage must be evidenced by a Certificate of Insurance for Environmental Impairment. Minimum requirements of the insurance policy are set out to ensure the agency's financial assurance position is protected. This section also explains that $3 million in coverage will be required to demonstrate financial assurance for all subject facilities. It further requires the responsible person to maintain the policy in full force and effect until the executive director consents to termination of the insurance policy. The policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance. Section 37.9105 is adopted with changes to the proposed text for improved readability and to add a reference in §37.9105(d) to an applicable section.

New §37.9110, concerning Submission of Documents, requires that evidence of financial assurance be submitted by the responsible person in conjunction with a Class B sewage sludge land application permit and when requested by the executive director. This section requires that insurance coverage must be in effect on or before the date that a permit application is received by the agency. Section 37.9110(a) is adopted with changes to the proposed text to add the word "application."

New §37.9115, concerning Approval of Mechanisms, explains that the executive director shall determine the acceptability of the financial assurance mechanisms submitted.

New §37.9120, concerning Incapacity of Responsible Person or Insurance Company, requires a responsible person to notify the commission in the event the responsible person is named as part of a bankruptcy proceeding. This section also requires a responsible person to obtain alternative insurance coverage in the event the insurance company that issued the current policy declares bankruptcy or experiences an insurance rating downgrade below that of A-.

New §37.9125, concerning Transfer of Ownership or Operational Control, requires a responsible person transferring ownership or operational control to comply with this subchapter until the responsible person assuming the ownership or operational control has demonstrated compliance with this subchapter as determined by the executive director.

New §37.9130, concerning Drawing on the Financial Assurance Mechanisms, allows the executive director to call on the environmental impairment insurance policy when a responsible person fails to perform corrective action when required under this subchapter. Section 37.9100 is adopted with changes to the proposed text to change the word "shall" to "may."

New §37.9135, concerning Continuous Financial Assurance Required, requires the responsible person to maintain continuous financial assurance through the duration of the permit or completion of corrective action, whichever is later.

New §37.9140, concerning Termination of Mechanisms, describes the criteria that must be met before the executive director will release the financial assurance mechanism.

New §37.9145, concerning Certificate of Insurance for Commercial Liability, establishes an acceptable form of providing evidence of commercial liability insurance coverage on behalf of the responsible person. The form must be executed by an authorized representative of the issuing insurance company.

New §37.9150, concerning Endorsement for Commercial Liability, establishes an acceptable form of providing evidence of commercial liability insurance coverage on behalf of the responsible person. The form amends the policy to conform with the criteria set out in §37.9100 and must be executed by an authorized representative of the issuing insurance company.

New §37.9155, concerning Certificate of Insurance for Environmental Impairment, establishes the form that must be executed by an authorized representative of the issuing insurance company to provide evidence of environmental impairment insurance coverage on behalf of the responsible person.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the adopted rules is to provide additional protection with regard to water quality and the health and safety of the citizens who live near land application sites. Therefore, it is not anticipated that the adopted rules will 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 commission concludes that these adopted rules do not meet the definition of a major environmental rule.

Furthermore, even if the adopted rules did meet the definition of a major environmental rule, the rules are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the adopted rules do not exceed an express requirement of state law but instead implement the statutory requirements for requiring financial assurance requirements relating to commercial liability insurance and environmental impairment insurance for Class B sewage sludge. Third, there is no delegation agreement that would be exceeded by these adopted rules because none relates to this subject matter area. Fourth, the commission adopts these rules under Texas Health and Safety Code, §361.121, as amended by House Bill 2546, and not solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an assessment of whether the rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rules is to provide additional protection with regard to water quality and the health and safety of the citizens who live near land application sites. The adopted rules would substantially advance this stated purpose by adding several requirements intended to improve tracking and reporting of regulated sites and the quality of sludge; adding several additional requirements for applicants, such as nutrient management plans and proof of insurance coverage; and restricting permittees from accepting sludge transported in open containers.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property because the rules do not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted rules would improve the commission's ability to ensure proper management of the land application of Class B sewage sludge. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rules are consistent with CMP goals and policies because the rulemaking is an administrative rule that includes financial assurance, notice, and other procedural requirements for permit holders of Class B sewage sludge; will not have a direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

PUBLIC COMMENT

A public hearing for this rulemaking was held on May 3, 2005, in Austin. The comment period closed on May 9, 2005. Written comments were received from the commission's Office of Public Interest Counsel (OPIC).

RESPONSE TO COMMENTS

OPIC commented that the rules do not expressly provide for a remedy for failure to pay a premium for the required commercial liability insurance as provided for in the proposed environmental impairment insurance requirements. OPIC recommended having the same remedy provisions for the nonpayment of the premium for both types of insurance and recommended adding language identical to §37.9105(d) under the commercial liability insurance provisions.

The commission agrees with this comment and added language in §37.9100(e) as follows: "The responsible person must maintain the policy in full force and effect until the executive director consents to termination of the policy as provided in §37.9140 of this title (relating to Termination of Mechanisms). Failure to pay the premium, without substitution of alternate commercial liability insurance coverage as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary including revocation of the permit."

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; Texas Water Code, §5.103 and §5.105, which establish the commission's general authority to adopt rules; Texas Water Code, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; Texas Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste; Texas Health and Safety Code, §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; Texas Health and Safety Code, §361.022, which provides the state's public policy for preferred methods for generating, treating, storing, and disposing of municipal sludge as reuse; Texas Health and Safety Code, §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; Texas Health and Safety Code, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and Texas Health and Safety Code, §361.121, as amended by House Bill 2546, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment insurance.

The adopted new sections implement House Bill 2546.

§37.9095. Definitions.

(a) Definitions for terms that appear throughout this subchapter are defined in Subchapter A of this chapter (relating to General Financial Assurance Requirements), §312.8 of this title (relating to General Definitions), and Solid Waste Disposal Act, §361.121 (relating to Land Application of Certain Sludge; Permit Required).

(b) In the liability insurance requirements of this subchapter, the terms "bodily injury" and "property damage" have the meanings given these terms by applicable state law. However, these terms do not include those liabilities which, consistent with standard industry practices, are excluded from coverage in liability policies for bodily injury and property damage. The commission intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry.

(c) For the purposes of this subchapter, the term "corrective action" includes the activities to remediate events resulting from a permitted sewage sludge land application facility in accordance with Chapter 350 of this title (relating to Texas Risk Reduction Program) or otherwise directed by the executive director.

§37.9100. Commercial Liability Insurance.

(a) A responsible person subject to this subchapter shall obtain and maintain a commercial liability insurance policy that must:

(1) reflect the responsible person as the insured;

(2) reflect total coverage of not less than $3 million per occurrence with an annual aggregate of not less than $3 million, exclusive of legal defense costs;

(3) be issued by an insurance company licensed to transact the business of insurance in Texas or eligible to provide insurance as an excess or surplus lines insurer in Texas that has a rating of A- or better by A.M. Best Company;

(4) designate the Texas Commission on Environmental Quality as an additional insured; and

(5) be evidenced by either a certificate of insurance worded identically to the wording specified in §37.9145 of this title (relating to Certificate of Insurance for Commercial Liability) or an endorsement worded identically to the wording specified in §37.9150 of this title (relating to Endorsement for Commercial Liability).

(b) The insurance afforded under the policy must provide that:

(1) it guarantees bodily injury and property damage protection by allowing compensation to all persons injured or property damaged as a result of Class B sewage sludge land application and entitled to compensation under the applicable provisions of state law;

(2) bankruptcy or insolvency of the insured shall not relieve the insurer of its obligations under the policy to which the required certificate of insurance or endorsement is attached;

(3) the insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement from the insured for any such payment made by the insurer;

(4) cancellation of the insurance, whether by the insurer, the insured, or a parent corporation providing insurance coverage for its subsidiary, or by a firm having an insurable interest in and obtaining liability insurance on behalf of the owner or operator of the facility, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the executive director;

(5) any other termination of this insurance will be effective only upon written notice and only after the expiration of 30 days after a copy of such written notice is received by the executive director;

(6) whenever requested by the executive director, the insurer agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements; and

(7) the insurer shall notify the executive director within 30 days by certified mail in the event the insurance policy expires or is not renewed unless prior notice has been given in accordance with this subsection.

(c) A single $3 million annual aggregate coverage and per occurrence limit may be obtained for all facilities for which the responsible person is required to provide commercial liability insurance.

(d) The responsible person shall notify the executive director in writing within 30 days whenever a claim results in a reduction in the amount of liability coverage required by this subchapter.

(e) The responsible person must maintain the policy in full force and effect until the executive director consents to termination of the policy as provided in §37.9140 of this title (relating to Termination of Mechanisms). Failure to pay the premium, without substitution of alternate commercial liability insurance coverage as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary including revocation of the permit.

§37.9105. Environmental Impairment Insurance.

(a) A responsible person subject to this subchapter shall obtain and maintain an environmental impairment insurance policy that must:

(1) reflect the responsible person as the insured;

(2) reflect total coverage of not less than $3 million per occurrence with a policy limit of not less than $3 million, exclusive of legal defense costs;

(3) be issued by an insurance company licensed to transact the business of insurance in Texas or eligible to provide insurance as an excess or surplus lines insurer in Texas that has a rating of A- or better by A.M. Best Company;

(4) designate the Texas Commission on Environmental Quality as an additional insured; and

(5) be evidenced by a certificate of insurance worded identically to the wording specified in §37.9155 of this title (relating to Certificate of Insurance for Environmental Impairment).

(b) The insurance afforded under the policy must provide the following.

(1) The insurance policy must guarantee that funds be available to provide for corrective action related to the facility. The policy must also guarantee that once corrective action begins, the insurer shall be responsible for paying out funds, up to an amount equal to the policy limit, upon the direction of the executive director, to such party or parties as the executive director specifies.

(2) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the policy limit of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the responsible person and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice of cancellation, termination, or failure to renew by both the executive director and the responsible person, as evidenced by the return receipts.

(3) Cancellation, termination, or failure to renew may not occur and the policy must remain in full force and effect in the event that on or before the date of expiration:

(A) corrective action is ordered by the executive director or by a United States district court or other court of competent jurisdiction;

(B) the responsible person is named as debtor in a voluntary or involuntary proceeding under Title 11(Bankruptcy), United States Code; or

(C) the premium due is paid.

(4) Each policy must contain a provision allowing assignment of the policy to a successor responsible person. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(5) Whenever requested by the executive director, the insurer agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

(c) A single $3 million policy limit and per occurrence limit may be obtained for all facilities for which the responsible person is required to provide environmental impairment insurance.

(d) The responsible person must maintain the policy in full force and effect until the executive director consents to termination of the policy as provided in §37.9140 of this title (relating to Termination of Mechanisms). Failure to pay the premium, without substitution of alternate environmental impairment insurance coverage as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary including revocation of the permit.

(e) The policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance with a statute, regulation, order, notice, or government instruction.

§37.9110. Submission of Documents.

(a) As part of a Class B sewage sludge land application permit application, a responsible person subject to this subchapter must submit:

(1) either a Certificate of Insurance for Commercial Liability or Endorsement for Commercial Liability as evidence of commercial liability insurance coverage; and

(2) a Certificate of Insurance for Environmental Impairment as evidence of environmental impairment insurance coverage.

(b) The mechanisms must reflect that insurance coverage is in effect on or before the date that the permit application is received.

(c) When requested by the executive director, a responsible person subject to this subchapter must submit proof of Environmental Impairment and/or Commercial Liability insurance.

§37.9130. Drawing on the Financial Assurance Mechanisms.

The executive director may make a written demand for performance under the environmental impairment policy when a responsible person who is required to comply with this subchapter has failed to perform corrective action when required.

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 September 30, 2005.

TRD-200504401
Stephanie Bergeron Perdue
Director, Environmental Division
Texas Commission on Environmental Quality
Effective date: October 20, 2005
Proposal publication date: April 8, 2005
For further information, please call: (512) 239-5017

CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (commission or TCEQ) adopts amendments to §§115.167, 115.169, 115.219, 115.427, and 115.429; and corresponding revisions to the state implementation plan (SIP). Section 115.429 is adopted *with changes* to the proposed text as published in the May 27, 2005, issue of the *Texas Register* (30 TexReg 3078). Sections 115.167, 115.169, 115.219, and 115.427 are adopted *without changes* to the proposed text and will not be republished.

These amendments will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 1990 Federal Clean Air Act (FCAA) Amendments authorized EPA to designate areas failing to meet national ambient air quality standards (NAAQS) for ozone as nonattainment and to classify them according to severity. The Beaumont-Port Arthur (BPA) one-hour ozone nonattainment area consists of Hardin, Jefferson, and Orange Counties. The BPA area was originally classified as a "serious" one-hour ozone nonattainment area in 1991, and was required to meet the one-hour ozone NAAQS by November 1999. Based on subsequent review of the BPA area's ozone monitoring data showing lower recorded ozone levels, EPA reclassified BPA as "moderate" on April 2, 1996. The commission adopted a series of SIP revisions culminating in the "Super SIP" submitted in July 1996, which contained only controls for volatile organic compounds (VOCs). However, the BPA region did not attain the one-hour ozone standard by the November 1996 deadline for moderate areas. Based on photochemical modeling demonstrating transport from the Houston-Galveston-Brazoria (HGB) ozone nonattainment area, the commission requested an extension of the attainment date to November 2007, the attainment date for HGB.

On April 16, 1999, EPA proposed, in the *Federal Register*, to extend the BPA attainment date to November 15, 2007, based on its ozone transport policy in effect at the time. EPA's transport policy provided that in determining the appropriate attainment date for an area, EPA may consider the effect of transport of ozone or its precursors from an upwind area that interferes with the downwind area's ability to attain. On May 15, 2001, EPA approved the transport demonstration and extended the attainment date for the BPA area to November 15, 2007, while retaining the area's classification as "moderate." Environmental groups subsequently challenged EPA's extension of attainment dates based on transport in the United States Court of Appeals for the Fifth Circuit. BPA was one of three areas in the nation for which suits were filed. On December 11, 2002, the Fifth Circuit Court of Appeals ruled that EPA is not authorized by the FCAA to extend the area's attainment date based on transport. On June 19, 2003, EPA proposed, in the *Federal Register*, to reclassify BPA to either serious or severe, with a November 2005 attainment date for either classification. EPA published final action in the *Federal Register* on March 30, 2004, effective April 29, 2004, and determined that the BPA area failed to attain the one-hour NAAQS by the deadline for moderate areas (November 15, 1996) as well as for serious areas (November 15, 1999), as set forth in the FCAA. EPA reclassified BPA from moderate to serious nonattainment under the FCAA, as codified in 42 United States Code (USC), §§7401 *et seq.*, with an attainment date of the one-hour ozone standard by November 15, 2005. This reclassification required Texas to submit a SIP revision within one year of the reclassification.

The commission adopted the required SIP revision on October 27, 2004. This adoption fulfills commitments made by the commission in that submittal to address major source applicability cutoffs for purposes of reasonably available control technology (RACT) and to address contingency measures previously adopted under the 15% rate-of-progress (ROP) requirements.

Under 42 USC, §7511(b), the EPA is required to issue control techniques guideline (CTG) guidance documents for the purpose of assisting states in developing RACT controls for major sources of VOC emissions. In turn, each state is required to submit a revision to its SIP that implements RACT regulations for VOC sources in moderate or above one-hour ozone nonattainment areas. 42 USC, §7511(b)(2)(A) requires states to submit RACT regulations for VOC sources that are covered by a CTG issued after November 15, 1990 (the enactment date of the 1990 FCAA), but prior to the time of attainment. Similarly, 42 USC, §7511(b)(2)(C), requires that RACT be applied to major VOC sources located in moderate or above one-hour ozone nonattainment areas that are not the subject of a CTG; such sources are known as "non-CTG" sources. Limits in state rules must be at least as stringent as the CTG limits or otherwise must be determined to meet RACT.

The reclassification of BPA from moderate to serious nonattainment resulted in a change in the major source definition from 100 tons per year (tpy) to 50 tpy. Rules in Chapter 115 for two source categories exempt sources at accounts that have less than 100 tpy of VOC. In order to ensure that RACT is applied to

all major sources in BPA, the commission is adopting a change in the exemption levels in these rules from 100 tpy to 50 tpy of VOC to conform to the major source threshold for sources in serious nonattainment areas. The two source categories are batch process operations and shipbuilding and repair operations. Shipbuilding and repair operations include surface coating of ships and offshore oil or gas drilling platforms. The commission published rules for RACT requirements for batch processes in BPA on November 12, 1999, and published rules for RACT requirements for shipbuilding and repair operations on April 3, 1998.

This adopted rulemaking also deletes §115.219(d), which requires control of VOCs from marine terminals in the BPA nonattainment area. This rule was adopted as a contingency measure in Chapter 115, Subchapter C, Division 1, on January 4, 1995. States are required by 42 USC, §7502(C)(9) to submit a SIP that provides for the implementation of contingency measures to be undertaken if the area fails to make reasonable further progress, or to attain the one-hour NAAQS by the attainment date. This measure was not implemented by the commission, even though the BPA area failed to achieve attainment of the one-hour NAAQS by the attainment date, November 15, 1996.

Photochemical modeling indicates that reductions in nitrogen oxide (NO_x) emissions in BPA are more effective in reducing ozone levels than reductions in VOC emissions. Therefore, the BPA SIP is being revised to remove the marine vessel loading contingency measure. The adopted rule change deletes this contingency measure for the BPA nonattainment area from Chapter 115. Voluntary reductions in NO_x emissions that have been made by three companies in the BPA area and additional voluntary reductions that have occurred as a result of the Texas Emissions Reduction Plan (TERP) exceed the reductions in VOC emissions that would have resulted from implementation of the marine vessel loading measure. EPA has indicated that NO_x emission reductions equivalent to 3% of the target level for 1996 could be used to replace the marine vessel loading contingency measure. A target level for 1996 was not available. The initial reasonable further progress requirement for 1990 - 1996 was VOC only; NO_x reductions were allowed to be used as part of ROP for target year 1999. The NO_x target level for 1999 (as reported in the post-1996 ROP demonstration SIP for BPA, adopted October 27, 2004) is 303.37 tons per day (tpd). That SIP indicates that the 9% reduction from 1996 to 1999 was 7% VOC and 2% NO_x. Thus, the "target" 1996 NO_x value would have been 2% higher than the 1999 target, or 309.56 tpd. The 3% reduction required for the contingency measure would thus be 9.3 tpd.

In 2004, three companies in the BPA area (Mobil Chemical Company, Division of Exxon Mobil Oil Corporation; Motiva Enterprises LLC; and Premcor Refining Group, Inc.) agreed to make voluntary reductions in emissions. On December 15, 2004, the commission adopted a revision to the BPA SIP incorporating the agreed orders to make these voluntary reductions federally enforceable. The agreed orders included NO_x reductions of 2,359 tpy, which is equivalent to 6.46 tpd.

The TERP program provides grants to eligible projects in nonattainment areas and affected counties to offset the incremental costs associated with reducing emissions of NO_x. Projects in the BPA area that have been funded thus far together with future TERP projects are projected to result in NO_x reductions of 3.0 tpd by 2007.

Total NO_x emission reductions from the agreed orders and TERP projects total 9.46 tpd. These reductions were not relied upon in any pre-2004 ROP or attainment demonstration. These reductions are real, permanent, and federally enforceable. They will occur within the same time frame as reductions from the contingency measure would have occurred, or sooner. For these reasons, the NO_x emissions reductions resulting from the agreed orders and TERP projects are sufficient to replace the marine vessel loading contingency measure.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the sections to bring the existing rule language into agreement with guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004. This includes, but is not limited to, replacing the term "shall" with "must" and replacing the term "which" with "that."

Subchapter B, General Volatile Organic Compound Sources

Division 6, Batch Processes

§115.167, Exemptions

The adopted amendment to §115.167(1)(A) changes the exemption level for sites in BPA from 100 tpy of VOC to 50 tpy of VOC in order to ensure that RACT is applied at all major sources. This change is necessary because of the reclassification of the BPA area to serious nonattainment with respect to the one-hour ozone standard.

§115.169, Counties and Compliance Schedules

The adopted amendment to §115.169 revises the existing text in §115.169(a) to specify that the owner or operator of batch process operations at an account that has total VOC emissions (determined before control but after the last recovery device) of 100 tpy or more shall continue to comply with this division as required by 30 TAC §115.930. This change ensures that sources currently subject to the batch process control requirements of this division continue to comply with the applicable requirements. The reference to the compliance date of December 31, 2001, is deleted because this date has passed. The rulemaking also deletes the requirement that these sources continue to comply with the requirements of Subchapter B, Division 2, until the batch process operations are in compliance with the requirements of Subchapter B, Division 6. This wording is no longer necessary because the affected operations are already required to be in compliance with the requirements of Division 6.

The adopted amendment to §115.169 adds a new subsection (c), to specify that the owner or operator of batch process operations in Hardin, Jefferson, and Orange Counties that become subject to the control requirements because of the change in exemption level shall comply with the requirements as soon as practicable, but no later than December 31, 2006. These batch process operations must continue to comply with the requirements of Subchapter B, Division 2, concerning Vent Gas Control, until these batch process operations are in compliance with the requirements of Subchapter B, Division 6.

Subchapter C, Volatile Organic Compound Transfer Operations

Division 1, Loading and Unloading of Volatile Organic Compounds

§115.219, Counties and Compliance Schedules

The adopted amendment to §115.219 deletes subsection (d). Current analyses indicate that this contingency measure is no longer needed in order for the BPA area to reach attainment with the one-hour ozone standard. Measures that have been

implemented to reduce NO_x emissions have exceeded the reduction targets needed for reasonable further progress. The excess NO_x reductions are more effective in reducing ozone formation than the VOC reductions from implementation of this contingency measure would have been.

Subchapter E, Solvent-Using Processes

Division 2, Surface Coating Processes

§115.427, Exemptions

The adopted amendment to §115.427(a)(3)(H) changes the exemption level for sources in the BPA from 100 tpy to 50 tpy of VOC in order to ensure that RACT is applied at all major sources. This change is necessary because of the reclassification of the BPA area to serious nonattainment with respect to the one-hour ozone standard.

§115.429, Counties and Compliance Schedules

The adopted amendment to §115.429 adds a new subsection (c), to specify that shipbuilding and repair facilities in Hardin, Jefferson, and Orange Counties that become subject to the control requirements because of the change in exemption level must comply with the requirements as soon as practicable, but no later than December 31, 2006. Shipbuilding and ship repair facilities that are already subject to the control requirements must remain in compliance as specified in §115.429(a). The wording of §115.429(c) has been revised from proposal to add the words "equal to or" before "greater than 50 tons per year" to clarify that shipbuilding and ship repair operations in Hardin, Jefferson, and Orange Counties with emissions of 50 tpy must comply with the requirements as soon as practicable, but no later than December 31, 2006.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule amendments are one element of the BPA SIP and require major sources in BPA to apply RACT to obtain VOC emissions reductions and remove a contingency measure for marine vessel loading in the BPA nonattainment area. These adopted rule amendments are necessary to comply with the requirements of the FCAA and to achieve attainment in the BPA ozone nonattainment area. The adopted rules are not anticipated to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, the adopted amendments do not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rule amendments implement requirements of 42 USC, §7410 and §7511. Under 42 USC, §§7410, *et seq.*, states are required to adopt a SIP that provides for "implementations, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. For nonattainment areas that are designated as moderate and above, 42 USC, §7511a(b)(2)(C) requires states to submit SIPs that include provisions to require implementation of RACT at major stationary sources of VOCs that are in the nonattainment area. As discussed previously, this rulemaking amends major source exemptions from 100 tpy to 50 tpy to reflect BPA's reclassification to serious and require RACT at major sources that emit 50 tpy or more VOCs. In addition, this rulemaking removes a contingency measure for marine vessel loading. This measure was not implemented and, as discussed previously, the commission has demonstrated that NO_x emission reductions resulting from the agreed orders concerning voluntary emission reductions at three companies in the BPA area and TERP projects are sufficient to replace the marine vessel loading contingency measure.

As discussed earlier in this preamble, this rulemaking implements the requirements of 42 USC, §7410 and §7511. The adopted rules do not exceed a requirement of a delegation agreement or a contract between state and federal government. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. The adopted rules were not developed solely under the general powers of the agency, but are adopted under the Texas Clean Air Act (TCAA), as codified in Texas Health and Safety Code (THSC), §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking action and performed an analysis of whether the adopted rules are subject to Texas Government Code, Chapter 2007. The specific purpose of these revisions is to amend major source exemption levels for batch processes and surface coating processes in the BPA nonattainment area due to BPA's reclassification by EPA to a serious ozone nonattainment area and to remove a contingency measure that was never implemented in the BPA ozone nonattainment area.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rulemaking because it is reasonably taken to fulfill an obligation mandated by federal law. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established them. Under 42 USC, §§7410, *et seq.* and related provisions, states must submit, for approval by EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. For ozone nonattainment areas that are designated moderate or above, 42 USC, §7511a(b)(2)(C), requires that RACT be applied at major stationary sources of VOCs. Through this adopted rulemaking and SIP revision, the commission is implementing RACT at major sources of VOCs in the BPA area by amending the major source

exemption levels from 100 tpy to 50 tpy, the level for major stationary sources of VOCs in serious ozone nonattainment areas. This adopted rulemaking also removes a contingency measure for loading of VOCs into marine vessels in the BPA area. Under 42 USC, §7502(c)(9), states must submit, as part of their SIP, contingency measures to be implemented if an area fails to make reasonable further progress or fails to attain the NAAQS by the attainment date. As discussed previously, this measure was never implemented and the commission has demonstrated that NO_x emission reductions resulting from the agreed orders concerning voluntary emission reductions at three companies in the BPA area and TERP projects are sufficient to replace the marine vessel loading contingency.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the purpose of these amendments does not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the BPA area exceeding the federal ozone NAAQS, which adversely affects public health, primarily through irritation of the lungs. This adopted rulemaking will ensure that additional VOC emission reductions will be achieved at major stationary sources through the implementation of RACT in the BPA. VOC is an ozone precursor that reacts with NO_x in sunlight to form ozone. The action will specifically advance the health and safety purpose by reducing VOC levels, and consequently ozone levels in the BPA nonattainment area. In addition, this adopted rulemaking removes a contingency measure that has not been implemented. The removal of the contingency measure does not specifically advance the health and safety purpose by reducing ozone levels in the BPA nonattainment area, but is part of a larger scheme to reduce ozone levels as expeditiously as possible in the BPA nonattainment area. Consequently, these adopted amendments meet the exemption in Texas Government Code, §2007.003(b)(13). This rulemaking therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the adopted amendments do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the rulemaking is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore considered the applicable goals and policies of the Texas Coastal Management Program (CMP) during the rulemaking process.

The commission determined that, under 31 TAC §505.22, the rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of these amendments. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 115 requirements at their sites affected by the revisions to Chapter 115.

PUBLIC COMMENT

Public hearings were held on the proposed rules in Beaumont on June 16, 2005, at 2:00 p.m. and 6:00 p.m. No oral comments were received at the hearings. The public comment period ended at 5:00 p.m. on June 17, 2005. The commission received one written comment from EPA.

RESPONSE TO COMMENTS

EPA expressed appreciation that the commission had proposed rule changes for shipbuilding and repair and batch processes. These were two source categories where EPA had determined a possibility that not all major sources were covered by RACT.

The commission appreciates the support.

EPA requested that TCEQ review the point source inventory to confirm that all major sources had been covered by RACT rules and provide the documentation.

Staff has reviewed the point source inventory to confirm that all major sources are covered by RACT rules in this chapter and 30 TAC Chapter 117. Documentation of the review is provided in Appendix T of the SIP revision to be submitted to EPA in September 2005. The commission has confirmed that, with the exception of the batch process rules and the shipbuilding and ship repair rules, there are no exemptions for VOC sources that have potential to emit greater than or equal to 50 tpy but less than 100 tpy. With this rulemaking, the exemption levels for these rules are being changed to 50 tpy. The review of the inventory indicated only nine sites that might be classified as major sources of VOC at the 50 tpy definition that were not already considered major at the 100 tpy definition. One of these sites would be covered by RACT rules in this rulemaking. The other sites are covered by appropriate RACT rules in this chapter. The rules in Chapter 117 regarding control of NO_x emissions define a major source in the BPA area at 50 tpy. Thus, all major sources of NO_x emissions in the BPA area are covered by RACT rules in Chapter 117.

EPA commented that the reduction in emissions for marine vessel loading from 13.10 tpd in 1990 to 1.92 tpd in 2002 must be documented as real, permanent, and federally enforceable in order to be creditable as a contingency measure.

The commission is no longer using the actual reduction in VOC emissions from marine vessel loading as a contingency measure. Instead, the commission has documented that equivalent reductions in NO_x emissions have been used to replace the marine vessel loading contingency measure as discussed previously in this preamble. The reductions used to replace the marine vessel loading contingency measure are real, permanent, and federally enforceable.

EPA commented that if the TCEQ wishes to substitute the reductions from the lean burn engine rule for the marine vessel loading contingency measure, then it must show a 3% reduction of the target level from 1996 because that is the attainment year that triggered the reclassification from "moderate" to "serious" for the one-hour standard. Further, EPA stated that TCEQ must show that the reductions occurred in 2004 or earlier, were not relied upon in any pre-2004 ROP plans and attainment demonstrations, and were above the level of reductions required for RACT.

A target level for 1996 was not available. The initial reasonable further progress requirement for 1990 - 1996 was VOC only; NO_x reductions were allowed to be used as part of ROP for target year 1999. The target level for 1999 (as reported in the post-1996 ROP demonstration SIP for BPA, adopted October 27, 2004) is 303.37 tpd. That SIP indicates that the 9% reduction from 1996 to 1999 was 7% VOC and 2% NO_x. Thus, the "target" 1996 NO_x value would have been 2% higher than the 1999 target, or 309.56 tpd. The 3% reduction required for the contingency measure would thus be 9.3 tpd. Instead of using NO_x emission reductions from gas-fired, lean-burn stationary internal combustion engines rated 300 horsepower or greater to replace the marine vessel loading contingency measure, the commission is relying upon voluntary reductions in NO_x emissions that have been made by three companies in the BPA area and additional voluntary reductions that will occur as a result of TERP projects. In 2004, three companies in the BPA area agreed to make voluntary reductions in emissions. On December 15, 2004, the commission adopted a revision to the BPA SIP incorporating the agreed orders to make these voluntary reductions federally enforceable. The agreed orders included NO_x reductions of 2,359 tpy, which is equivalent to 6.46 tpd. TERP projects in the BPA area that have been funded thus far together with future TERP projects are projected to result in NO_x reductions of 3.0 tpd. Total NO_x emission reductions from the agreed orders and TERP projects total 9.46 tpd. These reductions were not relied upon in any pre-2004 ROP or attainment demonstration. These reductions are real, permanent, and federally enforceable and will occur within the same time frame as reductions from the contingency measure would have occurred, or sooner. For these reasons, the NO_x emissions reductions resulting from the agreed orders and TERP projects are sufficient to replace the marine vessel loading contingency measure.

SUBCHAPTER B. GENERAL VOLATILE ORGANIC COMPOUND SOURCES
DIVISION 6. BATCH PROCESSES

30 TAC §115.167, §115.169

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These amendments are also adopted under THSC, TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

These adopted amendments implement THSC, §§382.002, 382.011, 382.012, and 382.017.

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 September 30, 2005.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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SUBCHAPTER C. VOLATILE ORGANIC COMPOUND TRANSFER OPERATIONS
DIVISION 1. LOADING AND UNLOADING OF VOLATILE ORGANIC COMPOUNDS

30 TAC §115.219

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under THSC, TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, and 382.017.

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.

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SUBCHAPTER E. SOLVENT-USING PROCESSES

DIVISION 2. SURFACE COATING PROCESSES

30 TAC §115.427, §115.429

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These amendments are also adopted under THSC, TCAA, §382.002, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

These adopted amendments implement THSC, §§382.002, 382.011, 382.012, and 382.017.

§115.429. Counties and Compliance Schedules.

(a) The owner or operator of each surface coating operation in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Montgomery, Nueces, Orange, Tarrant, Victoria, and Waller Counties shall continue to comply with this division (relating to Surface Coating Processes) as required by §115.930 of this title (relating to Compliance Dates).

(b) The owner or operator of each surface coating operation in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties shall comply with this division as soon as practicable, but no later than June 15, 2007.

(c) The owner or operator of each shipbuilding and ship repair operation in Hardin, Jefferson, and Orange Counties that when uncontrolled emits a combined weight of volatile organic compounds from ship and offshore oil or gas drilling platform surface coating operations equal to or greater than 50 tons per year and less than 100 tons per year shall comply with this division as soon as practicable, but no later than December 31, 2006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 312. SLUDGE USE, DISPOSAL, AND TRANSPORTATION

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§312.4, 312.8 - 312.13, 312.44, 312.48, 312.82, 312.122, and 312.145. Sections 312.4, 312.8, 312.9, 312.11 - 312.13, 312.44, 312.48, 312.82, and 312.145 are adopted *with changes* to the proposed text as published in the April 8, 2005, issue of the *Texas Register* (30 TexReg 2032). Sections 312.10 and 312.122 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking implements the requirements of House Bill (HB) 2546, 78th Legislature, 2003, which provides additional restrictions and requirements for persons who land apply Class B sewage sludge to help ensure more protection for citizens, land, and water. A corresponding rulemaking is published in this issue of the *Texas Register* that includes changes to 30 TAC Chapter 37, Financial Assurance.

SECTION BY SECTION DISCUSSION

Administrative changes are adopted throughout the sections to bring the existing rule language into agreement with Texas Register requirements, agency guidelines, and guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

Section 312.4, Requirements for Sewage Sludge Permit, Registration, or Notification, is adopted to amend the title to "Required Authorizations or Notifications." A provision is added to allow continuation of land application of Class B sewage sludge under existing registration if an administratively complete permit application has been submitted on or before September 1, 2002. This extension will cease when a final decision on the permit application is made by the commission. Subsection (a)(1) adds the requirement that all registrations for the land application of Class B sewage sludge expire on or before August 31, 2003, unless an administratively complete permit application was submitted on or before September 1, 2002, in which case the person holding such registration may continue operations under the existing registration until final commission action on the permit application. Paragraph (1) states that for registrations that also authorize the use of Class A sewage sludge, domestic septage, or water treatment plant sludge, only the provisions for the use of Class B sewage sludge expire on August 31, 2003; the other provisions expire on the expiration date of the registration or when a permit issuing the use of Class A sewage sludge, domestic septage, or water treatment plant sludge is issued for the site. The sentence "All provisions for this activity in any registration are void after August 31, 2003." is deleted from this subsection. A new paragraph (5) adds the HB 2546 provision prohibiting the issuance of a Class B sludge land application permit for a unit located in a county that borders the Gulf of Mexico and is within 500 feet of any water well or surface water. Subsection (b)(2) has been reformatted and names have been updated to

enhance clarity and readability. Existing language in subsection (c) has been deleted and replaced with new subsection (c)(1) stating that "Effective September 1, 2003, registrations may only be obtained for the land application of Class A sludge that does not meet the requirements of subsection (b) of this section, water treatment plant sludge, and domestic septage." New subsection (c)(2) states that "The effective date of the registration is the date that the executive director signs the registration in accordance with §312.12(d) of this title. Site registration information on file with the commission must be confirmed or updated, in writing, whenever the mailing address and/or telephone number of the owner or operator is changed, or requested by the executive director." The commission deletes subsection (d) pertaining to term limits for registrations and permits and moves the unchanged language to §312.10(m), and reletters current subsection (e) as subsection (d). The commission deletes subsection (f) pertaining to Class B sewage sludge land application permit application fees and moves the language to §312.9. Section 312.4 is adopted with minor changes to the proposed text to improve readability.

Section 312.8, General Definitions, adds, deletes, and renumbers definitions as appropriate. Paragraph (1) is adopted with changes to the proposed text to provide consistency with 30 TAC §321.32(35). A new paragraph (10) has been added to define "Applied uniformly." Paragraph (15), which defines "CFR" as Code of Federal Regulations, is deleted because it is not necessary. A new paragraph (16) has been added to define "Certified nutrient management specialist." A new paragraph (41) has been added to define "Harvesting." A new paragraph (43) has been added to define "Incorporation." A new paragraph (53) has been added to define "Major sole-source impairment zone." Paragraph (53) is adopted with changes to the proposed text to provide consistency with Texas Water Code, §26.502. A new paragraph (78) has been added to define "Sole-source surface drinking water supply." Paragraph (79) is adopted with changes to the proposed text to more accurately reflect the term as defined in 30 TAC Chapter 332, Composting.

Section 312.9, Sludge Fee Program, changes subsections (b) and (d) to modify the due date for annual reports to September 30. Subsection (d) is amended to add a requirement that provides the annual reporting period to be the period from September 1 of the previous calendar year to August 31 of the current calendar year, and the fees assessed in subsection (b) must be paid by the registrant or permittee on or before the due date specified in the invoice. In subsection (d), "Texas Natural Resource Conservation Commission (TNRCC)" is replaced with "Texas Commission on Environmental Quality." A new subsection (g) is added to list the requirements for permit application fees for land application of Class B sewage sludge that were previously listed under §312.4(f). New subsection (g)(1) clarifies that the applications for a minor amendment or permit transfer related to Class B sewage sludge land application permits would be subject to 30 TAC §305.53 instead of the fee structure of the new subsection (f). Section 312.9 is adopted with a minor change to improve readability.

Section 312.10, Permits and Registration Applications Processing, rewords subsection (b) to improve clarity. Outdated names are corrected in subsections (c) and (d). Subsection (d) updates references by adding a reference to Texas Water Code, §5.552(c), and requires that the public notice include the anticipated date of the first land application of sludge to the proposed land application unit as required by HB 2546. Subsection (f) is revised to improve clarity. The existing language in subsection (g), which was nullified by HB 2546, is deleted and replaced with new language that states "All registration applications for Class A sludge, water treatment plant sludge, and domestic septage are subject to the application processing procedures and requirements in §§281.18 - 281.20 of this title." Subsection (h) extends the provisions of this subsection pertaining to cancellation requests to permits. Subsection (i) clarifies that it is applicable to all registrations and permits instead of to only registrations and permits for land application of sewage sludge. Subsection (j) corrects a grammatical error. Subsection (k) updates applicability of requirements for major amendments to registrations by excluding sludge registrations that are now authorized under a permit. The commission creates a new subsection (m) to incorporate the language moved from §312.4(d), pertaining to term limits for registrations and permits.

Section 312.11, Permits, amends subsection (a) by adding the unchanged existing language in subsection (d)(5), which will be deleted. Subsection (c) deletes the existing language and restructures the subsection for clarity and readability as well as adds requirements from HB 2546 that applications for land application of Class B sludge include the name and mailing address of the owner of each tract of land within 1/4 mile of the site. The first line of subsection (d) has been reworded to improve clarity and readability. In subsection (d)(2)(F), relettered as subsection (d)(2)(E), the acronym for NRCS is used as it was defined previously in the section. New subsection (d)(5) requires Class B sewage sludge land application permit applicants to submit proof of a commercial liability insurance policy and environmental impairment policy. New subsection (d)(6) requires Class B sewage sludge land application permit applicants to submit a nutrient management plan (NMP) prepared by a certified nutrient management specialist. Existing subsection (d)(5) is deleted and moved to subsection (a). New subsection (e) requires permittees of Class B sewage sludge land application sites to comply with the requirements of Chapter 37, Subchapter V. Existing subsections (e) - (g) are relettered to subsections (f) - (h). Existing subsection (h) is relettered to subsection (i); the requirements for permittees to provide written notice of changes under certain conditions are moved to new subsection (j) for clarity and readability. New subsection (k) provides requirements for facilities located in a major sole-source impairment zone. New subsection (k)(1) states that the permittee is required to have a nitrogen and phosphorus-based NMP prepared by a certified nutrient management specialist according to certain standards. New subsection (k)(2) requires that when annual soil tests indicate phosphorus levels greater than 200 parts per million in the zero to six-inch zone, the permittee is required to follow a nutrient utilization plan (NUP) approved by the commission. New subsection (k)(3)(A) - (H) lists the types of people who are authorized to develop a NUP. New subsection (k)(4) requires a permittee to follow the NUP until the soil phosphorus level is reduced below 200 parts per million. Subsection (k)(4) is adopted with changes to the proposed text to clarify the definition of critical phosphorus level. Thereafter, the permittee can resume implementing the requirements of the NMP. New subsection (k)(5) requires the permittee to maintain a vegetative cover in the designated buffer zones. Section 312.11 is adopted with minor changes to the proposed text to improve readability.

Section 312.12, Registration of Land Application Activities, amends the title of the section to "Registrations." Subsection (b) updates the title of a section cited, deletes a reference to §312.11, and rewords this subsection to limit its applicability to Class A sludge, water treatment sludge, and/or domestic

septage. The words "sewage sludge" have been replaced by "material to be land applied" as appropriate throughout subsection (b)(1), except subsection (b)(1)(C)(iv), where the word "sewage sludge" was replaced by "Class A sludge, water treatment sludge, and/or domestic septage." This was amended because, as required by HB 2912 and HB 2546, a Class B sewage sludge land application site requires a permit, not a registration. Subsection (b)(1)(E) deletes the requirement that the notarized signature of each applicant be checked against the commission requirements. The words "as applicable" are inserted in subsection (b)(1)(H) - (J) to account for the fact that the information requested to be submitted may be applicable to only certain types of registration applications. Subsection (b)(1)(H)(ii) has been reworded and reformatted for clarity and readability and to also include existing requirements from subsection (b)(1)(H)(iv). Subsection (b)(2) deletes the words "have the continuing obligation to" to improve clarity and readability. Subsection (c) has been streamlined to eliminate its applicability to sewage sludge registrations, which are no longer allowed under HB 2912 and HB 2546. A new subsection (e) requires that the special provisions for sites located in sole-source impairment zones listed in §312.11(k) are also applicable to registered land application sites. Section 312.12 is adopted with a change to the proposed text to correct the citation in subsection (e) from §312.11(1) to §312.11(k) relating to the major sole-source impairment zone.

Section 312.13, Actions and Notice, amends subsection (b)(2) to delete redundant citations and deletes the outdated requirement of notice to landowners adjacent to any proposed Class B sewage sludge land application site. New subsection (b)(3) lists the new notice requirements of HB 2546 for land application of Class B sewage sludge. New subsection (b)(3)(A) lists the applicable citations, requires that the public notice include anticipated first date of land application of sludge to the site, and requires that the notice also be sent to landowners living on the property located within 1/4 mile of any proposed site. New subsection (b)(3)(B) notes that a resident landowner within 1/4 mile of the proposed sludge land application site is an "affected person." Subsection (b)(3)(B) is adopted with changes from the proposed text based on a comment received during the comment period to include that the rule does not exclude other persons from being considered "affected persons." Amendments to subsection (c) correct citations and names, remove inconsistencies, and update the rules, including removal of an outdated phrase regarding registration requirements for Class B sludge land application, which is no longer allowed. Subsection (c)(1) is amended to specify that the public notice requirements are not applicable to water treatment sludge registrations.

Section 312.44, Management Practices, improves clarity and readability in subsections (a) and (b). Subsection (c) is amended to include the existing subsection (d) and is reworded, simplified, and reformatted to improve clarity and readability. New subsection (c) adds a provision requiring vegetative cover on a 200-foot buffer zone for sites located in a major sole-source impairment zone. Subsection (e) is relettered to subsection (d), the citations are corrected, and updates are made to the language to extend the buffer zone requirements to permits as well as registrations. Subsection (f) is relettered as subsection (e), and language is moved to relettered subsection (f). Subsection (g) is relettered as subsection (f) and now includes the provision that is deleted and moved from the previous subsection regarding the option of temporarily allowing the sludge application rates to exceed the agronomic rates on a case-by-case basis for reclamation sites. Subsections (h) and (i) are relettered as subsections (g) and (h), respectively. New subsection (h)(2) - (6) uses the word "shall" in place of "may" with regard to the site conditions under which sewage sludge "may" not be applied. Subsection (j) is relettered as subsection (i) and makes a grammatical correction. Subsection (k) is relettered to subsection (j), and subsection (j)(1) is reworded to provide that a land application site "must"(previously "shall") be selected and the site operated in a manner to prevent public health nuisances. Subsection (l) is relettered to subsection (k) and extends soil testing requirements to sludge land application permits. Subsection (k)(1) and (2) is reworded for clarity and readability. In accordance with HB 2546, new subsection (l) requires that a sign be posted on a Class B sewage sludge land application site meeting the specified requirements, and new subsection (m) specifies that a Class B sewage sludge land application permit holder must ensure that the sludge is delivered to the site in a covered container with covering secured firmly at the front and back.

Section 312.48, Reporting, updates names and makes several grammatical corrections. The amendments to paragraph (1) group the current provisions with some changes for clarity and readability into a new paragraph (1)(A) and require that annual reports be submitted by September 30 of each year. New paragraph (1)(B) incorporates the current provisions in paragraph (2) and also changes the submission date to September 30. New paragraph (1)(C) requires that a Class B sewage sludge land application permit holder submit evidence of compliance with an NMP, a completed Annual Sludge Summary Report Form, and proof of commercial liability insurance and environmental impairment insurance. New paragraph (2) lists the requirements for and the contents of quarterly reports, and the due dates for Class B sewage sludge land application permit holders. Section 312.48 is adopted with minor changes to improve readability.

Section 312.82, Pathogen Reduction, makes grammatical corrections to subsection (a) by replacing "give" with "given" where applicable to sewage that is prepared for sale or given away in a bag or other container. Subsection (b)(1)(C) is updated to require that a minimum of seven representative samples of sewage sludge be taken for fecal coliform testing by adding the word "representative" to be consistent with 40 Code of Federal Regulations Part 503. Subsection (b)(3)(F) requires that the turf grown on land where sewage sludge is applied "may" (instead of "shall") not be harvested for at least one year after application of sewage when this turf is used on a land with high potential for public exposure or a lawn. Section 312.82 is adopted with minor changes to improve readability.

Section 312.122, Registrations and Permits, replaces TNRCC with commission and Watershed Management Division with Water Quality Division.

Section 312.145, Transporters - Recordkeeping, modifies subsection (a) related to trip tickets by replacing "shall" with "must." Subsection (b)(2) is amended to rename the catchline. Subsection (b)(4) is amended to rename the catchline and to change the reporting deadline to be more reasonable. Subsection (d) updates the agency name.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the adopted rules is to provide additional protection with regard to water quality and the health and safety of citizens who live near a land application site. Therefore, it is not anticipated that the adopted rules will 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 commission concludes that these adopted rules do not meet the definition of a major environmental rule.

Furthermore, even if the adopted rules did meet the definition of a major environmental rule, the rules are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the adopted rules do not exceed an express requirement of state law but instead implement the statutory requirements for the land application of sewage sludge. Third, there is no delegation agreement that would be exceeded by these adopted rules because none relates to this subject matter area. Fourth, the commission adopts these rules under Texas Health and Safety Code, §361.121, as amended by HB 2546 and not solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an assessment of whether the rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rules is to provide additional protection with regard to water quality and the health and safety of citizens who live near a land application site. The adopted rules would substantially advance this stated purpose by adding several requirements intended to improve tracking and reporting of regulated sites and the quality of sludge; adding several additional requirements for applicants, such as NMPs and proof of insurance coverage; and restricting permittees from accepting sludge transported in open containers.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property because the adopted rules do not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted rules would improve the commission's ability to ensure proper management of the land application of Class B sewage sludge. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with CMP goals and policies because the rulemaking is an administrative rule that includes financial assurance, notice, and other procedural requirements for permit holders of Class B sewage sludge; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendments will not violate (exceed) any standards identified in the applicable CMP goals and policies.

PUBLIC COMMENT

A public hearing for this rulemaking was held on May 3, 2005, in Austin. The comment period closed on May 9, 2005. Written comments were received from Lower Colorado River Authority (LCRA); City of Austin (COA); Water Environment Association of Texas (WEAT); and the commission's Office of Public Interest Counsel (OPIC).

All commenters either opposed portions of the rulemaking or supported the rulemaking with suggested changes.

RESPONSE TO COMMENTS

OPIC commented that the proposed rules may be interpreted as providing that only landowners within 1/4 mile of the proposed land application unit who live on the land are considered "affected persons." Therefore, OPIC recommended adding a sentence to the end of §312.13(b)(3)(B) that reads: "This rule does not exclude other persons from being considered 'affected persons' under 30 TAC section 55.203."

The commission agrees with this comment and made the suggested change.

LCRA commented that the rules do not adequately address how soil conditions are determined. LCRA suggested specifying use of soil moisture monitoring devices to eliminate subjectivity and prevent sludge application during these conditions.

The commission does not agree with this comment. Current commission rules allow the executive director to impose more restrictive requirements on a case-by-case basis when necessary to protect public health and the environment. The commission has required additional requirements including usage of moisture monitoring devices prior to sludge land application in the past. No change has been made to the proposed rules in response to this comment.

LCRA commented that the commission should modify §312.44(h)(6) to specify that the floodway designation made by the Federal Emergency Management Agency (FEMA) is acceptable, as well as by the commission, based on credible

scientific information provided by the applicant or by an affected or interested party.

This comment is beyond the scope of the current rulemaking, the purpose of which is to implement the requirements of HB 2546. In addition, it is the current practice of the TCEQ to use FEMA maps to determine whether the site is in floodway. No changes have been made to the proposed rules in response to this comment.

LCRA commented that §312.44 should be modified to prohibit land application of sludge in the 100-year floodplain.

This comment is beyond the scope of the current rulemaking, the purpose of which is to implement the requirements of HB 2546. In addition, current commission rules prohibit land application of sludge within a designated floodway. Commission rules also prohibit land application of sludge during rainstorms or during periods in which surface soils are water- saturated. No changes have been made to the proposed rules in response to this comment.

LCRA commented that a stakeholder process should be undertaken by the commission to develop a guidance document for standardizing the requirements for the Sludge Management Plan.

This comment is beyond the scope of the current rulemaking, the purpose of which is to implement the requirements of HB 2546. No changes have been made to the proposed rules in response to this comment.

LCRA commented that §312.11 should be modified to include a provision for the executive director to have the discretion, on a case-by-case basis, to require surface water quality monitoring at sites where sludge land application could impact human health and/or the environment.

This comment is beyond the scope of the current rulemaking, the purpose of which is to implement the requirements of HB 2546. In addition, §312.44(c) and (i) list the required best management practices and other requirements that are designed to prevent contamination of surface waters from the land application of sewage. These provisions include restrictions on slopes, permeability, thickness of acceptable permeability soils, and other restrictions such as the permittee is not allowed to apply sewage sludge when surface soils are water-saturated, frozen, or snow-covered, or during rainstorms. Finally, §312.6 gives the executive director the authority to impose more stringent requirements on a case-by-case basis when necessary to protect public health and the environment. No changes have been made to the proposed rules in response to this comment.

COA commented that the critical phosphorus limit of 200 parts per million, while appropriate for certain soils and situations, may be unnecessarily restrictive for other soils and conditions. COA recommended modifying the proposed rules to incorporate a provision that permits consideration of a "critical phosphorus level" other than 200 parts per million on a case-by-case basis based on the soil analysis and soil types.

The commission does not agree with this comment. The critical phosphorus limit applies only in a major sole-source impairment zone, and the 200 parts per million limit for phosphorous is consistent with other agency rules regarding the major sole-source impairment zones. No changes have been made to the proposed rules in response to this comment.

WEAT commented that an NMP and NUP required for sites located in impaired water quality zones in §312.11(d)(6) were originally developed for manures and fertilizers, and therefore, should be modified to account for lower phosphorus availability in biosolids (sewage sludge) relative to manure and fertilizers. WEAT commented that the latest research findings, specifically by O'Conner, *et al.*, 2002, as well as by Peters and Basta, 1996, should be taken into consideration. WEAT commented that Pennsylvania and Florida are considering such changes.

This comment is beyond the scope of the current rulemaking, the purpose of which is to implement the requirements of HB 2546. No changes have been made to the proposed rules in response to this comment.

WEAT commented that while §312.11(d)(6) states that an NMP be developed by a certified nutrient management specialist, it does not adequately address the proper training of a certified nutrient management specialist to address consideration of lower phosphorus availability in biosolids (sewage sludge) relative to manures and fertilizers because most of the body of knowledge in this area is based on manure and fertilizer usage, not sewage sludge. WEAT commented that it encourages the commission to work with providers of certified nutrient management specialists to ensure training is tailored to land application of sewage sludge.

The training requirements for certification of nutrient management specialists apply to land application of sewage sludge as well as manures. The providers of this training are currently working with the United States Department of Agriculture Natural Resources Conservation Service to revise the tool for nutrient management/utilization plans for wastes to include the utilization of sludge. This revised tool, which is taught during the training to certify nutrient management specialists, should be available soon for future training classes. No changes have been made to the proposed rules in response to this comment.

WEAT commented that the commission should sponsor an advisory group to explore the phosphorus availability and NMPs unique to sewage sludge land application.

This comment is beyond the scope of the current rulemaking, the purpose of which is to implement the requirements of HB 2546. No changes have been made to the proposed rules in response to this comment.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§312.4, 312.8 - 312.13

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; Texas Water Code, §5.103 and §5.105, which establish the commission's general authority to adopt rules; Texas Water Code, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; Texas Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste; Texas Health and Safety Code, §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; Texas Health and Safety Code, §361.022, which provides the state's public policy

for preferred methods for generating, treating, storing, and disposing of municipal sludge as reuse; Texas Health and Safety Code, §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; Texas Health and Safety Code, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and Texas Health and Safety Code, §361.121, as amended by HB 2546, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment insurance.

The adopted amendments implement HB 2546.

§312.4. Required Authorizations or Notifications.

(a) Permits. Except where in conflict with other chapters in this title, a permit shall be required before any storage, processing, incineration, or disposal of sewage sludge, except for storage allowed under this section, §312.50 of this title (relating to the Storage and Staging of Sludge at Beneficial Use Sites), §312.61(c) of this title (relating to Applicability), §312.147 of this title (relating to Temporary Storage), and §312.148 of this title (relating to Secondary Transportation of Waste). Any permit authorizing disposal of sewage sludge shall be in accordance with any applicable standards of Subchapter C of this chapter (relating to Surface Disposal) or §312.101 of this title (relating to Incineration). No permit will be required under this chapter if issued in accordance with other requirements of the commission, as specified in §312.5 of this title (relating to Relationship to Other Requirements).

(1) Effective September 1, 2003, a permit is required for the beneficial land application of Class B sewage sludge. All registrations for the land application of Class B sewage sludge will expire on or before August 31, 2003. A person holding a registration to land apply sewage sludge who submitted an administratively complete permit application on or before September 1, 2002, may continue operations under the existing registration until final commission action on the permit application. For registrations that also authorize the use of Class A sewage sludge, domestic septage, or water treatment plant sludge, only the provisions for the use of Class B sewage sludge will expire on August 31, 2003; the other provisions will expire on the expiration date of the registration or when a permit authorizing the use of Class A sewage sludge, domestic septage, or water treatment plant sludge is issued for the site.

(2) The effective date of a permit is the date that the executive director signs the permit.

(3) Site permit information on file with the commission must be confirmed or updated, in writing, whenever the mailing address and/or telephone number of the owner or operator is changed, or whenever requested by the commission.

(4) If a permit is required under this chapter, all activities at the site under this chapter, except transportation, shall be incorporated in the permit.

(5) The commission may not issue a Class B sewage sludge permit for a land application unit that is located both in a county that borders the Gulf of Mexico and within 500 feet of any water well or surface water.

(b) Notification of certain Class A sewage sludge land application activities.

(1) If sewage sludge meets the metal concentration limits in §312.43(b)(3) of this title (relating to Metal Limits), the Class A pathogen reduction requirements in §312.82(a) of this title (relating to Pathogen Reduction), and one of the requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), it will not be subject to the requirements of §312.10 of this title (relating to Permit and Registration Applications Processing), §312.11 of this title (relating to Permits), §312.12 of this title (relating to Registration of Land Application Activities), and §312.13 of this title (relating to Actions and Notices), except as provided in this subsection.

(2) Any generator in Texas or any person who first conveys sewage sludge from out of state into the State of Texas and who proposes to store, land apply, or market and distribute sewage sludge meeting the standards of this subsection shall submit notification to the executive director, at least 30 days prior to engaging in such activities for the first time on a form approved by the executive director. A completed notification form shall be submitted to the Land Application Team of the Water Quality Division by certified mail, return receipt requested. The notification must contain information detailing:

(A) sewage sludge composition, all points of generation, and wastewater treatment facility identification;

(B) name, address, and telephone number of all persons who are being proposed to receive the sewage sludge directly from the generator;

(C) a description in a marketing and distribution plan that describes any of the following activities:

(i) to sell or give away sewage sludge directly to the public, including a general description of the types of end uses proposed by persons who will be receiving the sewage sludge;

(ii) methods of distribution, marketing, handling, and transportation of the sewage sludge;

(iii) a reasonable estimate of the expected quantity of sewage sludge to be generated or handled by the person making the notification; and

(iv) a description of any proposed storage and the methods that will be employed to prevent surface water runoff of the sewage sludge or contamination of groundwater.

(3) Thirty days after the notification has occurred, the activities regulated by this subsection may commence unless the executive director determines that the activities do not meet the requirements of this subsection or an applicant's permit. After receiving a notification, the executive director may review a generator's activities or the activities of the person conveying the sewage sludge into Texas to determine whether any or all of the requirements of this chapter are necessary. In making this determination, the executive director will consider specific circumstances related to handling procedures, site conditions, or the application rate of the sewage sludge. The executive director may review a proposal for storage of sewage sludge, considering the amount of time and the amount of material described on the notification. Also, in accordance with §312.41 of this title (relating to Applicability), any reasonably anticipated adverse effect that may occur due to a metal pollutant in the sewage sludge may also be considered.

(4) Annually, on September 1, each person subject to notification of certain Class A sewage sludge activities required by this subsection shall provide a report to the commission, which shows in detail all activities described in paragraph (2) of this subsection that occurred in the reporting period. The report must include an update of new information since the prior report or notification was submitted and all newly proposed activities. The report must also include a

description of the annual amounts of sewage sludge provided to each initial receiver from the in-state generator and for persons who convey out-of-state sewage sludge into Texas, the amounts provided from this person directly to any initial receivers. This report can be combined with the annual report(s) required under §312.48 of this title (relating to Reporting), §312.68 of this title (relating to Reporting), or §312.123 of this title (relating to Annual Report).

(c) Registration of land application sites.

(1) Effective September 1, 2003, registrations may only be obtained for the land application of Class A sludge that does not meet the requirements of subsection (b) of this section, water treatment plant sludge, and domestic septage.

(2) The effective date of the registration is the date that the executive director signs the registration in accordance with §312.12(d) of this title. Site registration information on file with the commission must be confirmed or updated, in writing, whenever the mailing address and/or telephone number of the owner or operator is changed, or requested by the executive director.

(d) Authorization. No person may cause, suffer, allow, or permit any activity of land application for beneficial use of sewage sludge unless such activity has received the prior written authorization of the commission.

§312.8. General Definitions.

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

(1) 25-year, 24-hour rainfall event--The maximum rainfall event with a probable recurrence interval of once in 25 years, with a duration of 24 hours as defined by the National Weather Service in Technical Paper Number 40, Rainfall Frequency Atlas of the United States, May 1961, and subsequent amendments, or equivalent regional or state rainfall information developed from it.

(2) Active sludge unit--A sludge unit that has not closed and/or is still receiving sewage sludge.

(3) Aerobic digestion--The biochemical decomposition of organic matter in sewage sludge into carbon dioxide, water, and other by-products by microorganisms in the presence of free oxygen.

(4) Agricultural land--Land on which a food crop, a feed crop, or a fiber crop is grown. This includes range land and land used as pasture.

(5) Agricultural management unit--A portion of a land application area contained within an identifiable boundary, such as a river, fence, or road, where the area has a known crop or land use history.

(6) Agronomic rate--The whole sludge application rate (dry weight basis) designed:

(A) to provide the amount of nitrogen needed by the crop or vegetation grown on the land; and

(B) to minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the groundwater.

(7) Anaerobic digestion--The biochemical decomposition of organic matter in sewage sludge into methane gas, carbon dioxide, and other by-products by microorganisms in the absence of free oxygen.

(8) Annual metal loading rate--The maximum amount of a pollutant (dry weight basis) that can be applied to a unit area of land during a 365-day period.

(9) Annual whole sludge application rate--The maximum amount of sewage sludge that can be applied to a unit area of land during a 365-day period.

(10) Applied uniformly--Sewage sludge placed on the land for beneficial use such that the agronomic rate is not exceeded anywhere in the application area.

(11) Apply sewage sludge or sewage sludge applied to the land--Land application or the spraying/spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil.

(12) Aquifer--A geologic formation, group of geologic formations, or a portion of a geologic formation capable of yielding groundwater to wells or springs.

(13) Base flood--A flood that has a 1% chance of occurring in any given year.

(14) Beneficial use--Placement of sewage sludge onto land in a manner that complies with the requirements of Subchapter B of this chapter (relating to Land Application for Beneficial Use and Storage at Beneficial Use Sites), and does not exceed the agronomic need or rate for a cover crop, or any metal or toxic constituent limitations that the cover crop may have. Placement of sewage sludge on the land at a rate below the optimal agronomic rate will be considered a beneficial use.

(15) Bulk sewage sludge--Sewage sludge that is not sold or given away in a bag or other container for application to the land.

(16) Certified nutrient management specialist--An organization in Texas or an individual who is currently certified as a nutrient management specialist through a United States Department of Agriculture-Natural Resources Conservation Service recognized certification program.

(17) Class A sewage sludge--Sewage sludge meeting one of the pathogen reduction requirements in §312.82(a) of this title (relating to Pathogen Reduction).

(18) Class B sewage sludge--Sewage sludge meeting one of the pathogen reduction requirements in §312.82(b) of this title.

(19) Contaminate an aquifer--To introduce a substance that causes the maximum contaminant level for nitrate in 40 Code of Federal Regulations (CFR) §141.11, as amended, to be exceeded in groundwater or that causes the existing concentration of nitrate in groundwater to increase when the existing concentration of nitrate in the groundwater already exceeds the maximum contaminate level for nitrate in 40 CFR §141.11, as amended.

(20) Cover--Soil or other material used to cover sewage sludge placed on an active sludge unit.

(21) Cover crop--Grasses or small grain crop, such as oats, wheat, or barley, not grown for harvest.

(22) Cumulative metal loading rate--The maximum amount of an inorganic pollutant (dry weight basis) that may be applied to a unit area of land.

(23) Density of microorganisms--The number of microorganisms per unit mass of total solids (dry weight basis) in the sewage sludge.

(24) Displacement--The relative movement of any two sides of a fault measured in any direction.

(25) Disposal--The placement of sewage sludge on the land for any purpose other than beneficial use. Disposal does not include placement onto the land where the activity has been approved by the

executive director or commission as storage or temporary storage and it occurs only for the period of time expressly approved.

(26) Domestic septage--Either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap.

(27) Domestic sewage--Waste and wastewater from humans or household operations that is discharged to a wastewater collection system or otherwise enters a treatment works.

(28) Dry weight basis--Calculated on the basis of having been dried at 105 degrees Celsius until reaching a constant mass (i.e., essentially 100% solids content).

(29) Experimental use--Non-routine beneficial use land application or reclamation projects where sewage sludge is added to the soil for research purposes, in pilot projects, feasibility studies, or similar projects.

(30) Facility--Includes all contiguous land, structures, other appurtenances, and improvements on the land used for the surface disposal, land application for beneficial use, or incineration of sewage sludge.

(31) Fault--A fracture or zone of fractures in any materials along which strata, rocks, or soils on one side are displaced with respect to strata, rocks, or soil on the other side.

(32) Feed crops--Crops produced primarily for consumption by domestic livestock, such as swine, goats, cattle, or poultry.

(33) Fiber crops--Crops such as flax and cotton.

(34) Final cover--The last layer of soil or other material placed on a sludge unit at closure.

(35) Floodway--A channel of a river or watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the surface elevation more than one foot.

(36) Food crops--Crops consumed by humans. These include, but are not limited to, fruits, vegetables, and tobacco.

(37) Forest--Land densely vegetated with trees and/or underbrush.

(38) Grit trap--A unit/chamber that allows for the sedimentation of solids from an influent liquid stream by reducing the flow velocity of the influent liquid stream. In a grit trap, the inlet and the outlet are both located at the same vertical level, at, or very near, the top of the unit/chamber; the outlet of the grit trap is connected to a sanitary sewer system. A grit trap is not designed to separate oil and water.

(39) Grit trap waste--Waste collected in a grit trap. Grit trap waste includes waste from grit traps placed in the drains prior to entering the sewer system at maintenance and repair shops, automobile service stations, car washes, laundries, and other similar establishments. The term does not include material collected in an oil/water separator or in any other similar waste management unit designed to collect oil.

(40) Groundwater--Water below the land surface in the saturated zone.

(41) Harvesting--Any act of cutting, picking, drying, baling, gathering, and/or removing vegetation from a field, or storing.

(42) Holocene time--The most recent epoch of the Quaternary period, extending from the end of the Pleistocene Epoch to the present. Holocene time began approximately 10,000 years ago.

(43) Incorporation--Mixing the applied material evenly through the top three inches of soil.

(44) Industrial wastewater--Wastewater generated in a commercial or industrial process.

(45) Institution--An established organization or corporation, especially of a public nature or where the public has access, such as child care facilities, public buildings, or health care facilities.

(46) Land application--The spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil.

(47) Land with a high potential for public exposure--Land that the public uses frequently and/or is not provided with a means of restricting public access.

(48) Land with a low potential for public exposure--Land that the public uses infrequently and/or is provided with a means of restricting public access.

(49) Leachate collection system--A system or device installed immediately above a liner that is designed, constructed, maintained, and operated to collect and remove leachate from a sludge unit.

(50) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(51) Liner--Soil or synthetic material that has a hydraulic conductivity of 1×10^{-7} centimeters per second or less. Soil liners must be of suitable material with more than 30% passing a number 200 sieve, have a liquid limit greater than 30%, a plasticity index greater than 15, compaction of greater than 95% Standard Proctor at optimum moisture content, and will be at least two feet thick placed in six-inch lifts. Synthetic liners must be a membrane with a minimum thickness of 20 mils and include an underdrain leak detection system.

(52) Lower explosive limit for methane gas--The lowest percentage of methane in air, by volume, that propagates a flame at 25 degrees Celsius and atmospheric pressure.

(53) Major sole-source impairment zone--A watershed that contains a reservoir that is used by a municipality as a sole source of drinking water supply for a population of more that 140,000, inside and outside of its municipal boundaries; and into which at least half of the water flowing is from a source that, on September 1, 2001, is on the list of impaired state waters adopted by the commission as required by 33 United States Code, §1313(d), as amended, at least in part because of concerns regarding pathogens and phosphorus, and for which the commission at some time prepared and submitted a total maximum daily load standard.

(54) Metal limit--A numerical value that describes the amount of a metal allowed per unit amount of sewage sludge (e.g., milligrams per kilogram of total solids); the amount of a pollutant that can be applied to a unit area of land (e.g., kilograms per hectare); or the volume of a material that can be applied to a unit area of land (e.g., gallons per acre).

(55) Monofill--A landfill or landfill trench in which sewage sludge is the only type of solid waste placed.

(56) Municipality--A city, town, county, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created by or under state law; an Indian tribe or an authorized Indian tribal organization having jurisdiction over sewage sludge management; or a designated and approved management agency under Clean Water Act, §208, as amended. The definition includes a special district created under state law, such as a water district, sewer district, sanitary district, or an integrated waste management facility as defined in Clean Water Act, §201(e), as amended, that has as one of its principal responsibilities the treatment, transport, use, or disposal of sewage sludge.

(57) Off-site--Property that cannot be characterized as "on-site."

(58) On-site--The same or contiguous property owned, controlled, or supervised by the same person. If the property is divided by public or private right-of-way, the access must be by crossing the right-of- way or the right-of-way must be under the control of the person.

(59) Operator--The person responsible for the overall operation of a facility or beneficial use site.

(60) Other container--Either an open or closed receptacle, including, but not limited to, a bucket, box, or a vehicle or trailer with a load capacity of one metric ton (2,200 pounds) or less.

(61) Owner--The person who owns a facility or part of a facility.

(62) Pasture--Land that animals feed directly on for feed crops such as legumes, grasses, grain stubble, forbs, or stover.

(63) Pathogenic organisms--Disease-causing organisms including, but not limited to, certain bacteria, protozoa, viruses, and viable helminth ova.

(64) Person who prepares sewage sludge--Either the person who generates sewage sludge during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge.

(65) Place sewage sludge or sewage sludge placed--Disposal of sewage sludge on a surface disposal site.

(66) Pollutant--An organic or inorganic substance, or a pathogenic organism that, after discharge and upon exposure, ingestion, inhalation, or assimilation into an organism either directly from the environment or indirectly by ingestion through the food chain, could, on the basis of information available to the executive director, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunction in reproduction), or physical deformations in either organisms or offspring of the organisms.

(67) Process or processing--For the purposes of this chapter, these terms shall have the same meaning as "treat" or "treatment."

(68) Public contact site--Land with a high potential for contact by the public. This includes, but is not limited to, public parks, ball fields, cemeteries, plant nurseries, turf farms, and/or golf courses.

(69) Range land--Open land with indigenous vegetation.

(70) Reclamation site--Drastically disturbed land that is reclaimed using sewage sludge. This includes, but is not limited to, strip mines and\or construction sites.

(71) Runoff--Rainwater, leachate, or other liquid that drains overland on any part of a land surface and runs off of the land surface.

(72) Seismic impact zone--An area that has a 10% or greater probability that the horizontal ground level acceleration of the rock in the area exceeds 0.10 gravity once in 250 years.

(73) Sewage sludge--Solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in treatment works. Sewage sludge includes, but is not limited to, domestic septage, scum, or solids removed in primary, secondary, or advanced wastewater treatment processes; and material derived from sewage sludge. Sewage sludge does not include ash generated during preliminary treatment of domestic sewage in a treatment works.

(74) Sewage sludge debris--Solid material such as rubber, plastic, glass, or other trash that may pass through a wastewater treatment process or sludge process or may be collected with septage. This solid material is visibly distinguishable from sewage sludge. This material does not include grit or screenings removed during the preliminary treatment of domestic sewage at a treatment works, nor does it include grit trap waste.

(75) Sludge lagoon--An existing surface impoundment located on site at a wastewater treatment plant for the storage of sewage sludge. Any other type impoundment must be considered an active sludge unit, as defined in this section.

(76) Sludge unit--Land that only sewage sludge is placed for disposal. A sludge unit must be used for sewage sludge. This does not include land that sewage sludge is either stored or treated.

(77) Sludge unit boundary--The outermost perimeter of a surface disposal site.

(78) Sole-source surface drinking water supply--A body of surface water that is identified as a public water supply in §307.10 of this title (relating to Appendices A - E) and is the sole source of supply of a public water supply system, exclusive of emergency water connections.

(79) Source-separated organic material--As defined in §332.2 of this title (relating to Definitions).

(80) Specific oxygen uptake rate--The mass of oxygen consumed per unit time per unit mass of total solids (dry weight basis) in the sewage sludge.

(81) Staging--Temporary holding of sewage sludge at a beneficial use site, for up to a maximum of seven calendar days, prior to the land application of the sewage sludge.

(82) Store or storage--The placement of sewage sludge on land for longer than seven days.

(83) Temporary storage--Storage of waste regulated under this chapter by a transporter, which has been approved in writing by the executive director, in accordance with §312.147 of this title (relating to Temporary Storage).

(84) Three hundred-sixty-five day period--A running total that covers the period between sludge application to a site and the nutrient uptake of the cover crop.

(85) Total solids--The materials in sewage sludge that remain as residue if the sewage sludge is dried at 103 degrees Celsius to 105 degrees Celsius.

(86) Transporter--Any person who collects, conveys, or transports sewage sludge, water treatment plant sludges, grit trap waste, grease trap waste, chemical toilet waste, and/or septage by roadway, ship, rail, or other means.

(87) Treat or treatment of sewage sludge--The preparation of sewage sludge for final use or disposal. This includes, but is not

limited to, thickening, stabilization, and dewatering of sewage sludge. This does not include storage of sewage sludge.

(88) Treatment works--Either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature.

(89) Unstabilized solids--Organic materials in sewage sludge that have not been treated in either an aerobic or anaerobic treatment process.

(90) Unstable area--Land subject to natural or human induced forces that may damage the structural components of an active sewage sludge unit. This includes, but is not limited to, land that the soils are subject to mass movement.

(91) Vector attraction--The characteristic of sewage sludge that attracts rodents, flies, mosquitoes, or other organisms capable of transporting infectious agents.

(92) Volatile solids--The amount of the total solids in sewage sludge lost when the sewage sludge is combusted at 550 degrees Celsius in the presence of excess oxygen.

(93) Water treatment sludge--Sludge generated during the treatment of either surface water or groundwater for potable use, which is not an industrial solid waste as defined in §335.1 of this title (relating to Definitions).

(94) Wetlands--Those areas that are inundated or saturated by surface water or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§312.9. Sludge Fee Program.

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

(1) Annual fee--A fee charged to each person holding a registration or permit under the commission's authority in Texas Health and Safety Code, Chapter 361, or a permit issued under the commission's authority in Texas Water Code, Chapter 26, except that a fee will not be assessed under this chapter as specified in §312.5 of this title (relating to Relationship to Other Requirements).

(2) Reported--Information compiled and submitted to the commission that tracks the amount of waste being stored, treated, processed, transported, or disposed of in the state; tracks the amount of processing, transporting, and disposal capacity and reserve capacity; and enables equitable assessment and collection of fees.

(3) Payment--Receipt by the commission of the full amount of the annual fee(s) due.

(b) Except as provided in subsection (f) of this section, the amount of the annual fee that is assessed is determined by weight of solids disposed of and reported to the commission as of September 30, of each year. Failure to report the disposal of sewage sludge or water treatment sludge does not exempt a registrant or permittee from this fee. The fees are as follows.

(1) The minimum fee assessed against each registration or permit is $100, regardless of whether the site is active or inactive.

(2) When water treatment sludge is mixed with a Class B sewage sludge or when sewage sludge that is classified as Class B is applied to the land for beneficial use as described in Subchapter B of this chapter (relating to Land Application for Beneficial Use and Storage at Beneficial Use Sites) the fee is $0.75 per dry ton.

(3) When sewage sludge or water treatment sludge is applied to a site for disposal and the disposal was authorized by the commission or predecessor agency prior to October 1, 1995, the fee is $1.25 per dry ton.

(4) When sewage sludge is applied to a site for disposal or when water treatment sludge is applied to a site for disposal and the activity requires a permit as specified in Subchapter F of this chapter (relating to Disposal of Water Treatment Sludge), and the disposal is authorized by the commission or predecessor agency on October 1, 1995, or thereafter, the fee is $1.25 per ton.

(5) When water treatment sludge is applied to a site for disposal and the activity does not require a permit as specified in Subchapter F of this chapter, the fee is $0.20 per dry ton.

(6) When sewage sludge is fired in a sewage sludge incinerator as described in Subchapter E of this chapter (relating to Guidelines and Standards for Sludge Incineration), the fee is $1.25 per dry ton.

(c) An annual transporter fee is assessed against each person or entity holding a registration to transport sewage sludge, water treatment sludge, domestic septage, chemical toilet waste, grease trap waste, or grit trap waste issued in accordance with Subchapter G of this chapter (relating to Transporters and Temporary Storage Provisions). The amount of the annual fee must be based upon the total annual volume of waste transported by the transporter under each registration and reported to the commission as of June 15, each year. Failure to report the transportation of waste does not exempt a registrant from this fee. The fees are as follows.

(1) For a total annual volume transported of 10,000 gallons (50 cubic yards) or less, the fee is $100.

(2) For a total annual volume transported greater than 10,000 gallons (50 cubic yards) but equal to or less than 50,000 (250 cubic yards), the fee is $250.

(3) For a total annual volume transported greater than 50,000 gallons (250 cubic yards) but equal to or less than 200,000 gallons (1,000 cubic yards), the fee is $400.

(4) For a total annual volume transported of greater than 200,000 gallons (1,000 cubic yards), the fee is $500.

(d) Sludge permit and registration holders shall submit the annual reports in accordance with §312.48(1) of this title (relating to Reporting) no later than September 30 of each calendar year, for a reporting period covering September 1 of the previous calendar year to August 31 of the current calendar year. Fees assessed in subsection (b) of this section must be paid by the registrant or permittee on or before the due date specified in the invoice each year. Fees assessed in subsection (c) of this section must be paid by the registrant after billing by the executive director, prior to September 1, of each year. Fees must be paid by check, certified check, or money order payable to the Texas Commission on Environmental Quality. The permittee or registrant of a facility failing to make payment of the fees imposed under this subchapter when due shall be assessed penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

(e) Failure of the registrant or permittee to submit the required fee within 30 days of billing, shall be sufficient cause for the commission to revoke the registration or permit and authorization to process or dispose of waste. Any entity to whom a registration or permit is transferred shall be liable for payment of the annual fee on the same basis as the transferor.

(f) No fee will be assessed for sewage sludge or water treatment sludge composted with source- separated organic material at a composting facility, including a composting facility located at a permitted landfill site. This subsection does not apply if the sludge is not used as compost and is deposited in a surface disposal site or landfill.

(g) Sludge permit holders shall submit permit application fees for Class B sewage sludge.

(1) Any person who applies for a new permit, permit renewal, or permit amendment shall pay a permit application fee. The fees in this subsection relating to application for a permit, permit renewal, or major amendment supercede the fees in §305.53 of this title (relating to Application Fee). An application for a minor amendment or permit transfer must be submitted in accordance with §305.53 of this title. The commission may not consider an application for final decision until such time as the permit application fee is paid. All permit application fees must be made payable to the commission and paid at the time the application for a permit is submitted.

(2) The executive director may not process an application until all delinquent annual fees and delinquent administrative penalties owed the commission by the applicant or for the site as delineated in the permit application are paid in full. Any permittee to whom a permit is transferred shall be liable for payment of the annual fees assessed for the permitted entity/site on the same basis as the transferor of the permit, as well as any outstanding fees and associated penalties owed the commission. If the applicant is not the permittee at the time fees become delinquent or against whom administrative penalties are assessed, the executive director may for good cause waive the applicant's liability under this subsection for payment of delinquent annual fees or delinquent administrative penalties.

(3) An applicant may file a written request for a refund in the amount of 50% of the permit application fee paid if the permit is not issued. No fees will be refunded after a new permit, permit renewal, permit modification, permit amendment, or permit transfer has been issued by the commission. Transfer of a permit will not entitle the transferor permittee to a refund, in whole or part, of any fee already paid by that permittee.

(4) The permit application fees will be between $1,000 and $5,000, based on the quantity of sewage sludge to be applied annually under the permit, as shown in the following schedule:

(A) $1,000, if the quantity is 2,000 dry tons or less;

(B) $2,000, if the quantity is greater than 2,000 dry tons but less than or equal to 5,000 dry tons;

(C) $3,000, if the quantity is greater than 5,000 dry tons but less than or equal to 10,000 dry tons;

(D) $4,000, if the quantity is greater than 10,000 dry tons but less than or equal to 20,000 dry tons; or

(E) $5,000, if the quantity is greater than 20,000 dry tons.

§312.11. Permits.

(a) The provisions of this section set the standards and requirements for permit applications to land apply, process, store, dispose of, or incinerate sewage sludge. Any information provided under this subsection must be submitted in quadruplicate form.

(b) Any person who is required to obtain or who requests a new permit or an amendment, modification, or renewal of a permit under this section is subject to the permit application procedures of §1.5(d) of this title (relating to Records of the Agency), §305.42(a) of this title (relating to Application Required), §305.43 of this title (relating to Who Applies), §305.44 of this title (relating to Signatories to Applications), §305.45 of this title (relating to Contents of Application for Permit), and §305.47 of this title (relating to Retention of Application Data). For a land application permit, the applicant must be:

(1) the owner of the application site, if the sewage sludge was generated outside this state; or

(2) the site operator, if the sewage sludge was generated in this state.

(c) A permit application must include all information in accordance with Chapter 281, Subchapter A of this title (relating to Applications Processing) and Chapter 305, Subchapter C of this title (relating to Application for Permit or Post-Closure Order), and must also include the following:

(1) the map required by §305.45(a)(6) of this title that provides the following information:

(A) the approximate boundaries of the site to be permitted, which must include all contiguous properties owned by or under the control of the applicant;

(B) the name and mailing address of the owner of each tract of land located:

(i) within 1/4 mile of the site to be permitted, as such information can be determined from the current county tax rolls at the time the application is filed, or other reliable sources, for Class B sewage sludge beneficial land use permit applications submitted on or after September 1, 2003, or applications submitted before September 1, 2003, but not administratively complete by the commission by that date;

(ii) within 1/2 mile of the site to be permitted, as such information can be determined from the current county tax rolls or other reliable sources, for a sewage sludge incineration or disposal permit application; and

(iii) adjacent to the site to be permitted, as such information can be determined from the current county tax rolls or other reliable sources, at the time the application is filed for a domestic septage or Class A sewage sludge beneficial use land application, or sewage sludge processing or storage facility;

(C) the source(s) of the information for the surrounding property owners; and

(D) the list of property owners. The list must be provided both as a hard copy, either on the map or as an attached list, and in electronic format or on four sets of self-adhesive mailing labels; and

(2) a notarized affidavit from the applicant(s) verifying land ownership of the permitted site or landowner agreement to the proposed activity.

(d) A permit application for land application of Class B sewage sludge must also include the following information:

(1) the information listed in §312.12(b)(1)(A) - (C) of this title (relating to Registration);

(2) analytical results establishing the background soil concentration of metals regulated by this chapter in the application area(s), based on the following:

(A) samples taken from the zero to six-inch zone of soil to be affected by the addition of sewage sludge (including domestic septage);

(B) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at

least one composite sample per every 80 acres or less of soil type or area being sampled;

(C) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(D) a separate composite sample taken from each United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) soil type (soils with the same characterization or texture), unless an alternate method is used; and

(E) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(3) analytical results establishing the background soil concentration of nutrients, salinity, and pH in the application area(s), based on the following:

(A) separate samples taken from the zero to six-inch and from the six to 24-inch zones of soil to be affected by the addition of sewage sludge (including domestic septage);

(B) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(C) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(D) a separate composite sample taken from each USDA NRCS soil type (soils with the same characterization or texture), unless an alternate method is used;

(E) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(4) information necessary to identify the hydrological characteristics of the surface water and groundwater within 1/4 mile of the site to be permitted;

(5) except for applications by political subdivisions, proof of a commercial liability insurance policy and an environmental impairment policy or a similar policy in accordance with Chapter 37, Subchapter V of this title (relating to Financial Assurance for Class B Sewage Sludge for Land Application Units); and

(6) proof that the applicant has minimized the risk of water quality impairment caused by nitrogen applied to the land application unit through the application of Class B sludge by having had a nutrient management plan prepared by a certified nutrient management specialist in accordance with the NRCS Practice Standard Code 590.

(e) A permittee of a Class B sewage sludge land application site shall comply with the requirements of Chapter 37, Subchapter V of this title.

(f) Any person who is issued a permit to land apply, process, store, dispose of, or incinerate sewage sludge is subject to the permit characteristics and standards set forth in §305.122 of this title (relating to Characteristics of Permits), §305.123 of this title (relating to Reservation in Granting Permit), §305.124 of this title (relating to Acceptance of Permit, Effect), §305.125 of this title (relating to Standard Permit Conditions), §305.126(d) of this title (relating to Additional Standard Permit Conditions for Waste Discharge Permits), §305.127 of this title (relating to Conditions to be Determined for Individual Permits), §305.128 of this title (relating to Signatories to Reports), and §305.129 of this title (relating to Variance Procedures).

(g) If any provision of a permit is violated during its term, the permit holder is required to report to the executive director the noncompliance in accordance with Texas Health and Safety Code, §361.121(d)(5) and §305.125(9) of this title. Each permit for the land application of sewage sludge must contain a provision requiring such reporting. Report of such information must be provided orally or by facsimile transmission (fax) to the appropriate regional office within 24 hours of the permit holder becoming aware of the noncompliance. A written submission of such information must also be provided by the permit holder to the regional office and to the Enforcement Division at the commission's Central Office (MC 149) within five working days of becoming aware of the noncompliance. The written submission must contain the following information:

(1) a description of the noncompliance and its cause;

(2) the potential danger to human health, safety, or the environment;

(3) the period of noncompliance, including exact dates and times;

(4) if the noncompliance has not been corrected, the anticipated time it is expected to continue; and

(5) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.

(h) Each sewage sludge land application permit must include a reference to the maximum quantity of sewage sludge that may be land applied under the permit.

(i) Any permittee who requests a new permit or an amendment, modification, or renewal of a permit to land apply, process, store, dispose of, or incinerate sewage sludge is subject to the standards and requirements for applications and actions concerning amendments, modifications, renewals, transfers, corrections, revocations, denials, and suspensions of permits, as set forth in §305.62 of this title (relating to Amendment), §305.63 of this title (relating to Renewal), §305.64 of this title (related to Transfer of Permits), §305.65 of this title (relating to Renewal), §305.66 of this title (relating to Permit Denial, Suspension, and Revocation), §305.67 of this title (relating to Revocation and Suspension upon Request or Consent), and §305.68 of this title (relating to Action and Notice on Petition for Revocation or Suspension).

(j) The permittee shall immediately provide written notice to the executive director of any changes to a permit or to information on soil or subsurface conditions at the site, and provide any additional information concerning changes in land ownership, site control, operator, waste composition, source of sewage sludge, or waste management methods.

(k) For land application sites located in a major sole-source impairment zone, the permittee is subject to the following provisions.

(1) The operator shall have a nutrient management plan (nitrogen and phosphorus) prepared by a certified nutrient management specialist in accordance with the USDA NRCS Practice Standard Code 590;

(2) When results of the annual soil analysis for extractable phosphorus indicate a level greater than 200 parts per million of extractable phosphorus (reported as P) in the zero to six-inch sample for a particular land application field or if ordered by the commission in order to protect the quality of water in the state, then the operator may not apply any sewage sludge to the affected area unless the land application is implemented in accordance with a detailed nutrient utilization plan (NUP) that has been approved by the commission.

(3) A NUP is equivalent to the NRCS Nutrient Management Plan Practice Standard Code 590. The nutrient management plan, based on crop removal, must be developed and certified by one of the following individuals or entities:

(A) an employee of the NRCS;

(B) a nutrient management specialist certified by the NRCS;

(C) the Texas State Soil and Water Conservation Board;

(D) Texas Cooperative Extension;

(E) an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas;

(F) a professional agronomist certified by the American Society of Agronomy;

(G) a certified professional soil scientist certified by the Soil Science Society of America; or

(H) a licensed Texas geoscientist-soil scientist, after approval by the executive director based on a determination by the executive director that another person or entity identified in this paragraph cannot develop the plan in a timely manner.

(4) After a NUP is implemented, the operator shall land apply in accordance with the NUP until soil phosphorus is reduced below 200 parts per million in the zero to six-inch sample. Thereafter, the operator shall implement the requirements of the nutrient management plan.

(5) The buffer zones must be maintained according to the applicable requirements specified in §312.44(c) of this title (relating to Management Practices).

§312.12. Registrations.

(a) After August 31, 2003, all registrations for the beneficial use of Class B sewage sludge will be void. Registrations for the beneficial use of Class A sewage sludge, water treatment plant sludge, and/or domestic septage will remain valid until they expire, are renewed, are cancelled, or are revoked.

(b) Except as provided in §312.4(b) of this title (relating to Required Authorizations or Notifications), an applicant for a registration to land apply Class A sludge, water treatment sludge, and/or domestic septage shall:

(1) submit to the executive director an original, completed application form approved by the executive director, along with the appropriate number of copies of the registration application. Each applicant shall submit to the executive director such information as may reasonably be required to enable the executive director to determine whether such land application for beneficial use activities are compliant with the terms of this chapter. Such information may include, but is not limited to, the following:

(A) a description and composition of the material to be land applied;

(B) a description of all processes generating the material to be land applied at the site;

(C) information about the site and the planned management of the material to be land applied, including the name, address, and telephone number of any landowner or operator at the site and the following information:

(i) whether such material is managed on site and/or off site from its point of generation;

(ii) a description of each on-site land application beneficial use unit or tract, including the name, address, and telephone number of all landowners, or the same information from a landowner acting as a spokesperson(s) for all the landowners, so long as the spokesperson submits to the executive director a sworn statement allowing the spokesperson to act for other persons;

(iii) a listing of the types of material to be land applied managed in each unit or tract;

(iv) a detailed description of the beneficial use occurring at each unit or tract of land where application of Class A sludge, water treatment sludge, and/or domestic septage is proposed, including proposed waste management and crop production methods; and

(v) information regarding soil characteristics and subsurface conditions where the land application site will be located;

(D) the verified legal status of the applicant(s), as applicable;

(E) the notarized signature of each applicant, in accordance with §305.44 of this title (relating to Signatories to Applications);

(F) a notarized affidavit from the applicant(s) verifying land ownership or landowner agreement to the proposed activity;

(G) technical reports and supporting data required by the application;

(H) for applications for major amendments or new registrations, information concerning surrounding landowners, including the following, as applicable:

(i) a map depicting the approximate boundaries of the tract of land owned or under the control of the applicant and each residential or business address and owner of all the tracts of land bordering the perimeter of any portion of the site;

(ii) a list on or attached to the map of the names and addresses of the owners of such tracts of land as can be determined from the current county tax rolls at the time the application is filed, and other reliable sources. The list of property owners must be provided in both hard copy and either in electronic format or on four sets of self-adhesive mailing labels; and

(iii) the source of the information;

(I) analytical results establishing the background soil concentration of metals regulated by this chapter in the application area(s), as applicable, based on the following:

(i) samples taken from the zero to six-inch zone of soil to be affected by the addition of sewage sludge (including domestic septage);

(ii) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample taken from each United States Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) soil type (soils with the same characterization or texture), unless an alternate method is used;

(v) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(J) analytical results establishing the background soil concentration of nutrients, salinity, and pH in the application area(s), as applicable, based on the following:

(i) separate samples taken from the zero to six-inch and from the six to 24-inch zones of soil to be affected by the addition of sewage sludge (including domestic septage);

(ii) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample taken from each USDA NRCS soil type (soils with the same characterization or texture), unless an alternate method is used;

(v) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(K) any information provided under this paragraph submitted to the executive director in quadruplicate form;

(2) immediately provide written notice to the executive director of any changes, requests for an amendment, modification, or renewal of a registration, or any additional information concerning changes in land ownership, changes in site control, or operator, changes in waste composition, changes in the source of sewage sludge, or waste management methods, and information regarding soils and subsurface conditions where the operation is to be located. Any information provided under this paragraph must be submitted to the executive director in duplicate form.

(c) The executive director shall determine, after review of any application, whether to approve or deny an application in whole or in part, deny with prejudice, suspend the authority to conduct an activity for a specified period of time, or amend or modify the proposed activity requested by the applicant. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for major amendment of any existing application. In consideration of such an application, the executive director shall consider all relevant requirements of this chapter and consider all information pertaining to those requirements received by the executive director regarding the application. The written determination on any application, including any authorization granted, shall be mailed to the applicant upon the decision of the executive director.

(d) At the same time that the executive director's decision is mailed to the applicant, notice of this decision must also be mailed to all parties who submitted written information on the application, as described in §312.13(c)(2) and (3) of this title (relating to Actions and Notice).

(e) For registered land application sites located in a major sole-source impairment zone, the registrant must comply with the provisions listed in §312.11(k) of this title (relating to Permits).

§312.13. Actions and Notice.

(a) Applicability. This section sets forth the manner in which action will be taken on applications filed with the executive director for either a permit or a registration to land apply, store, process, dispose of, or incinerate sewage sludge.

(b) Permit actions.

(1) All permit applications are subject to the standards and requirements as set forth in Chapter 39, Subchapters H - J of this title (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; and Public Notice of Water Quality Applications and Water Quality Management Plans), Chapter 50, Subchapters E - G of this title (relating to Purpose, Applicability, and Definitions; Action by the Commission; and Action by the Executive Director), and Chapter 55, Subchapters D - F of this title (relating to Applicability and Definitions; Public Comment and Public Meetings; and Requests for Reconsideration or Contested Case Hearing).

(2) For disposal and incineration permit applications, notice must be provided to all owners of properties within 1/2 mile of the border of any portion of the tract of land where the permitted activities would occur. For beneficial use (excluding Class B sewage sludge), processing, and storage permit applications, notice must be provided to all owners of properties adjacent to any portion of the tract of land where the permitted activities will occur. The tract of land includes all contiguous properties under the ownership or control of the applicant.

(3) For Class B sewage sludge beneficial land use permit applications:

(A) notice must be provided under Chapter 39 of this title (relating to Public Notice) and under Texas Water Code, §5.552. The notice must also contain the anticipated date of the first land application of sludge to the proposed land application unit. An applicant for a new permit, permit amendment, or permit renewal under Texas Health and Safety Code, §361.121(c), shall notify by registered or certified mail each owner of land located within 1/4 mile of the proposed land application unit who lives on that land; and

(B) an owner of the land located within 1/4 mile of the proposed land application unit who lives on the land is considered an "affected person" for purposes of Texas Water Code, §5.115, and Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment). Individuals who do not own land within 1/4 mile of the proposed land application site are not excluded from being considered "affected persons" under §55.203 of this title (relating to Determination of Affected Person).

(c) Registration actions.

(1) The public notice requirements of this subsection apply to new applications for a registration, and to applications for major amendment of a registration. The requirements of this subsection do not apply to sites where only Class A sewage sludge that has been authorized for marketing and distribution is to be land applied for beneficial use or registrations for water treatment sludge.

(2) The Office of the Chief Clerk shall mail the Notice of Receipt of Application and Declaration of Administrative Completeness along with a copy of the registration application to the county judge in the county where the proposed site is to be located.

(3) The Office of the Chief Clerk shall mail the Notice of Receipt of Application and Declaration of Administrative Completeness to the landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map.

(4) Each notice must specify both the name, affiliation, address, and telephone number of the applicant and of the commission employee who may be reached to obtain more information about the application to register the site. The notice must specify that the registration application has been provided to the county judge and that it is available for review by interested parties.

(5) Any application for a registration is subject to the standards and requirements for actions concerning amendments, modifications, transfers, and renewals of registrations, as set forth in Chapter 50, Subchapter G of this title.

(d) Public comment on registrations. A person may provide the commission with written comments on any new or major amendment applications to register a site, where applicable. The executive director shall review any written comments when they are received within 30 days of mailing the notice. The written information received will be utilized by the executive director in determining what action to take on the application for registration in accordance with §312.12(c) of this title (relating to Registrations).

(e) Motion to overturn. The applicant, public interest counsel, or other person may file with the chief clerk a motion to overturn under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) to overturn the executive director's final approval or denial of an application.

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 September 30, 2005.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

SUBCHAPTER B. LAND APPLICATION FOR BENEFICIAL USE AND STORAGE AT BENEFICIAL USE SITES

30 TAC §312.44, §312.48

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; Texas Water Code, §5.103 and §5.105, which establish the commission's general authority to adopt rules; Texas Water Code, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; Texas Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste; Texas Health and Safety Code, §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; Texas Health and Safety Code, §361.022, which provides the state's public policy for preferred methods for generating, treating, storing, and disposing of municipal sludge as reuse; Texas Health and Safety Code, §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; Texas Health and Safety Code, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and Texas Health and Safety Code, §361.121, as amended by HB 2546, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment insurance.

The adopted amendments implement HB 2546.

§312.44. Management Practices.

(a) Land application of bulk sewage sludge must not cause or contribute to the harm of a threatened or endangered species of plant, fish, or wildlife or result in the destruction or adverse modification of the critical habitat of a threatened or endangered species.

(b) Bulk sewage sludge must not be applied to agricultural land, forest, a public contact site, or a reclamation site that is flooded, frozen, or snow-covered so that the bulk sewage sludge enters a wetland or other water in the state, except as provided in a permit issued under Chapter 305 of this title (relating to Consolidated Permits) or Clean Water Act, §404.

(c) When bulk sewage sludge that does not meet Class A pathogen requirements or domestic septage is applied to agricultural land, forest, or a reclamation site, buffer zones must be established for each application area as noted in this section unless otherwise specified by the commission.

(1) Surface water:

(A) 200-foot buffer zone, if the sludge is not incorporated; for land application sites located in a major sole-source impairment zone this buffer zone must maintain a vegetative cover; or

(B) 33-foot vegetative buffer zone, if the sludge is incorporated.

(2) Other buffer zones:

(A) 150 feet, private water supply well;

(B) 500 feet, public water supply well, intake, spring or similar source, public water supply treatment plant, or public water supply elevated or ground storage tank;

(C) 200 feet, solution channel, sinkhole, or other conduit to groundwater;

(D) 750 feet, established school, institution, business, or occupied residential structure;

(E) 50 feet, public right-of-way and property boundaries; and

(F) 10 feet, irrigation conveyance canal.

(d) Any of the buffers established in subsection (c)(2)(D) and (E) of this section may be reduced or eliminated if an agreement to that effect is signed by the owners of the established school, institution, business, occupied residential structure, or adjacent property and this documentation is provided to the executive director prior to issuance of a permit or registration. Reductions or elimination of buffer zones in an existing permit or registration by agreement of the affected landowner will be considered a minor amendment of the permit or registration.

(e) Bulk sewage sludge must be applied to agricultural land, forest, or a public contact site at a whole sludge application rate that is equal to or less than the agronomic rate for the agricultural land, forest, or public contact site on which the bulk sewage sludge is applied.

(f) Bulk sewage sludge must be applied to a reclamation site at a whole application rate that is equal to or less than the agronomic rate for the reclamation site on which the bulk sewage sludge is applied, unless otherwise specified by the commission. On a case-by-case basis, a whole sludge application rate may exceed the agronomic rate for a specific time period.

(g) Groundwater protection measures.

(1) A seasonal high groundwater table must be not less than three feet below the treatment zone for soils with moderate or slower permeability (less than two inches per hour).

(2) A seasonal high groundwater table must be not less than four feet below the treatment zone for soils with moderately rapid or rapid permeability (greater than two inches per hour and less than 20 inches per hour).

(3) Seasonal generally refers to a groundwater table that may be perched on a less permeable soil or geologic unit and fluctuates with seasonal climatic variation or that occurs in a soil or geologic unit as a variation in saturation due to seasonal climatic conditions and is identified as such in a published soil survey report or similar document.

(4) Application of sludge to land having soils with greater permeability and with higher groundwater tables will be considered on a case-by-case basis, after consideration of soil pH, metal loadings onto the soil, soil buffering capacity, or other protective measures to prevent groundwater contamination.

(h) Sludge must be applied by a method and under conditions that prevent runoff of sewage sludge beyond the active application area and protect the quality of the surface water and the soils in the unsaturated zone.

(1) Sludge must be applied uniformly over the surface of the land.

(2) Sludge may not be applied to areas where permeable surface soils are less than two feet thick. The executive director will consider sites with thinner permeable surface soils, on a case-by-case basis.

(3) Sewage sludge may not be applied during rainstorms or during periods in which surface soils are water-saturated.

(4) Sludge may not be applied to areas having topographical slopes in excess of 8.0%. On a case-by- case basis, the executive director will consider sites with steeper slopes when runoff controls are proposed and utilized, incorporation of sewage sludge into the soil occurs, or for certain reclamation projects.

(5) Where runoff of sludge from the active application area is evident, the operator shall cease further sludge application until the condition is corrected.

(6) Sewage sludge may not be applied under provisions of this section on land within a designated floodway.

(i) Either a label must be affixed to the bag or other container in which sewage sludge is sold or given away for application to the land or an information sheet must be provided to the person who receives sewage sludge sold or given away in another container for application to the land. The label or information sheet must contain the following information:

(1) the name and address of the person who prepared the sewage sludge for sale or given away in a bag or other container for application to the land;

(2) a statement that prohibits the application of the sewage sludge to the land except in accordance with the instructions on the label or information sheet; and

(3) the annual whole sludge application rate for the sewage sludge that does not cause the annual metal loading rates in §312.43(b)(4) of this title (relating to Metal Limits) to be exceeded.

(j) Nuisance controls.

(1) A land application site location must be selected and the site operated in a manner to prevent public health nuisances.

(2) Sewage sludge debris must be prevented from blowing or running off site boundaries or into surface waters.

(3) If necessary or when significant nuisance conditions occur, the operator shall:

(A) minimize dust migration from the site and access roadways; and

(B) minimize objectionable odors through incorporation of sewage sludge into the soil or by taking some other type of corrective action.

(k) A permit or registration must specify the soil testing requirements for each application area.

(1) The testing frequency must take into account common agricultural methods of determining cover crop nutrient needs, soil pH, phytotoxicity, and concentrations of metals regulated by this chapter.

(2) No authorization may require soil testing of metals regulated by this chapter, at a frequency greater than once per five years or prior to submittal of a renewal application for a beneficial use site. Soil testing for metals regulated by this chapter may not be required for portions of the authorized site where sewage sludge has not been applied since the last soil metals testing was performed.

(3) Paragraph (2) of this subsection does not apply if the executive director becomes aware of circumstances warranting increased monitoring of metals regulated by this chapter, in order to address sites where metal loading into the soil is a threat to human health or environmental quality.

(l) A permit holder of a Class B sewage sludge site shall post a sign that is visible from a road or sidewalk that is adjacent to the premises on which the land application unit is located stating that a sewage sludge beneficial land application site is located on the premises.

(m) A permit holder of a Class B sewage sludge site may not accept sewage sludge, unless the sludge is transported to the land application unit in a covered container with the covering firmly secured at the front and back.

§312.48. Reporting.

Unless otherwise specified by the commission, sludge management facilities shall submit the following information to the Enforcement Division, the Wastewater Permitting Section of the Water Quality Division, and the appropriate regional office:

(1) annually by September 30 of each year:

(A) the information in §312.47 of this title (relating to Record Keeping) for the applicable requirements;

(B) the information in §312.47(a)(5)(A)(i) - (iv) of this title if:

(i) the sewage sludge does not meet the metal concentrations in §312.43(b)(3) of this title (relating to Metal Limits);

(ii) 90% or more of any of the cumulative metal loading rates in §312.43(b)(2) of this title is reached at a site; or

(iii) sewage sludge is applied to a site after 90% of any of the cumulative metal loading rates is reached at the site; and

(C) for the Class B sewage sludge beneficial land application permit holder:

(i) evidence that the permit holder is complying with the nutrient management plan developed by a certified nutrient management specialist in accordance with the United States Department of Agriculture Natural Resource Conservation Service Practice Standard Code 590;

(ii) a completed Annual Sludge Summary Report Form; and

(iii) proof of continuation of commercial liability insurance and environmental impairment insurance; and

(2) for the Class B sewage sludge beneficial land use permit holder, submit quarterly reports by the 15th day of the month following each quarter. Quarterly reports are due December 15th, March 15th, June 15th, and September 15th and must include:

(A) a Quarterly Sludge Summary Report form; and

(B) a computer-generated quarterly report containing:

(i) the source, quality, and quantity of sludge applied to the land application unit;

(ii) the location of the land application unit, either in terms of longitude and latitude or by physical address, including the county;

(iii) the dates of delivery of Class B sewage sludge;

(iv) the dates of application of Class B sewage sludge;

(v) the cumulative amount of metals applied to the land application unit through the application of Class B sewage sludge;

(vi) crops grown at the land application unit site; and

(vii) the suggested agronomic application rate for the Class B sewage sludge.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. PATHOGEN AND VECTOR ATTRACTION REDUCTION

30 TAC §312.82

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; Texas Water Code, §5.103 and §5.105, which establish the commission's general authority to adopt rules; Texas Water Code, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; Texas Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste; Texas Health and Safety Code, §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; Texas Health and Safety Code, §361.022, which provides the state's public policy for preferred methods for generating, treating, storing, and disposing of municipal sludge as reuse; Texas Health and Safety Code, §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; Texas Health and Safety Code, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and Texas Health and Safety Code, §361.121, as amended by HB 2546, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment insurance.

The adopted amendment implements HB 2546.

§312.82. Pathogen Reduction.

(a) Sewage sludge--Class A.

(1) Compliance requirements--Class A.

(A) For a sewage sludge to be classified as Class A with respect to pathogens, the requirements in subparagraphs (B) and (C) of this paragraph and the requirements of one of the alternatives listed in paragraph (2) of this subsection must be met.

(B) The requirements of the chosen alternative for pathogen reduction from paragraph (2) of this subsection must be met prior to or at the same time as the vector attraction reduction

requirements, except the requirements in §312.83(b)(6) - (8) of this title (relating to Vector Attraction Reduction).

(C) Either the density of fecal coliform in the sewage sludge must be less than 1,000 Most Probable Number per gram of total solids (dry weight basis) or the density of Salmonella (sp. bacteria) in the sewage sludge must be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed of, at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land, or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title (relating to Applicability).

(2) Compliance alternatives--Class A.

(A) Alternative 1. The temperature of the sewage sludge that is used or disposed of must be maintained at a specified value for a period of time.

(i) When the percent solids of the sewage sludge is 7.0% or higher, the temperature of the sewage sludge must be 50 degrees Celsius or higher; the time period must be 20 minutes or longer; and the temperature and time period must be determined using the equation in this clause, except when small particles of sewage sludge are heated by either warmed gases or an immiscible liquid.
Figure: 30 TAC §312.82(a)(2)(A)(i)

(ii) When the percent solids of the sewage sludge is 7.0% or higher and small particles of sewage sludge are heated by either warmed gases or an immiscible liquid, the temperature of the sewage sludge must be 50 degrees Celsius or higher, the time period must be 15 seconds or longer, and the temperature and time period must be determined using the equation in clause (i) of this subparagraph.

(iii) When the percent solids of the sewage sludge is less than 7.0% and the time period is at least 15 seconds, but less than 30 minutes, the temperature and time period must be determined using the equation in clause (i) of this subparagraph.

(iv) When the percent solids of the sewage sludge is less than 7.0%; the temperature of the sewage sludge is 50 degrees Celsius or higher; and the time period is 30 minutes or longer, the temperature and time period must be determined using the equation in this clause.
Figure: 30 TAC §312.82(a)(2)(iv)

(B) Alternative 2. The temperature and pH of the sewage sludge that is used or disposed of must be maintained at specific values for periods of time.

(i) The pH of the sewage sludge must be raised to above 12 and must remain above 12 for 72 hours.

(ii) The temperature of the sewage sludge must be above 52 degrees Celsius for 12 hours or longer during the period that the pH of the sewage sludge is above 12.

(iii) At the end of the 72-hour period during which the pH of the sewage sludge is above 12, the sewage sludge must be air dried to achieve a percent solids in the sewage sludge greater than 50%.

(C) Alternative 3. The sewage sludge that is used or disposed of must be analyzed prior to pathogen treatment to determine whether the sewage sludge contains enteric viruses and viable helminth ova.

(i) When the density of enteric viruses in the sewage sludge prior to pathogen treatment is less than one Plaque-forming Unit per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to enteric viruses until the next monitoring episode for the sewage sludge.

(ii) When the density of enteric viruses in the sewage sludge prior to pathogen treatment is equal to or greater than one Plaque-forming Unit per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to enteric viruses when the density of enteric viruses in the sewage sludge after pathogen treatment is less than one Plaque-forming Unit per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the sewage sludge that meets the enteric virus density requirement are documented.

(iii) After the enteric virus reduction in clause (ii) of this subparagraph is demonstrated for the pathogen treatment process, the sewage sludge continues to be Class A with respect to enteric viruses when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in clause (ii) of this subparagraph.

(iv) When the density of viable helminth ova in the sewage sludge prior to pathogen treatment is less than one per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to viable helminth ova until the next monitoring episode for the sewage sludge.

(v) When the density of viable helminth ova in the sewage sludge prior to pathogen treatment is equal to or greater than one per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to viable helminth ova when the density of viable helminth ova in the sewage sludge after pathogen treatment is less than one per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the sewage sludge that meets the viable helminth ova density requirement are documented.

(vi) After the viable helminth ova reduction in clause (v) of this subparagraph is demonstrated for the pathogen treatment process, the sewage sludge continues to be Class A with respect to viable helminth ova when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in clause (v) of this subparagraph.

(D) Alternative 4. The sewage sludge that is used or disposed of must be analyzed prior to pathogen treatment to determine whether the sewage sludge contains enteric viruses and viable helminth ova.

(i) The density of enteric viruses in the sewage sludge must be less than one Plaque-forming Unit per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed of, at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land, or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title.

(ii) The density of viable helminth ova in the sewage sludge must be less than one per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed of, at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land, or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title.

(E) Alternative 5 (Processes to Further Reduce Pathogens (PFRP). Sewage sludge that is used or disposed of must be

treated in one of the PFRP described in 40 Code of Federal Regulations (CFR) Part 503, Appendix B.

(F) Alternative 6 (PFRP Equivalent). Sewage sludge that is used or disposed of must be treated in a process that has been approved by the United States Environmental Protection Agency (EPA) as being equivalent to those in subparagraph (E) of this paragraph.

(b) Sewage sludge--Class B.

(1) Compliance requirements--Class B.

(A) For a sewage sludge to be classified as Class B with respect to pathogens, the requirements in subparagraphs (B) and (C) of this paragraph must be met. As an alternative for a sewage sludge to be classified as Class B, the requirements of subparagraph (B) of this paragraph and paragraph (2) of this subsection must be met.

(B) The site restrictions in paragraph (3) of this subsection must be met when sewage sludge that is classified as Class B with respect to pathogens is applied to the land for beneficial use.

(C) A minimum of seven representative samples of the sewage sludge must be collected within 48 hours of the time that the sewage sludge is used or disposed of during each monitoring episode for the sewage sludge. The geometric mean of the density of fecal coliform for the samples collected must be less than either 2,000,000 Most Probable Number per gram of total solids (dry weight basis) or 2,000,000 Colony-forming Units per gram of total solids (dry weight basis).

(2) Processes to Significantly Reduce Pathogens (PSRP) compliance alternatives--Class B. Sewage sludge that is used or disposed of must be treated in one of the PSRP described in 40 CFR Part 503, Appendix B, or must be treated by an equivalent process approved by the EPA, so long as all of the following requirements are met by the generator of the sewage sludge.

(A) Prior to use or disposal, all the sewage sludge must have been generated from a single location, except as provided in subparagraph (F) of this paragraph.

(B) An independent Texas registered professional engineer must make a certification to the generator of a sewage sludge that the wastewater treatment facility generating the sewage sludge is designed to achieve one of the PSRP at the permitted design loading of the facility. The certification need only be repeated if the design loading of the facility is increased. The certification must include a statement indicating that the design meets all the applicable standards specified in 40 CFR Part 503, Appendix B.

(C) Prior to any off-site transportation or on-site use or disposal of any sewage sludge generated at a wastewater treatment facility, the chief certified operator of the wastewater treatment facility or other responsible official who manages the PSRP at the wastewater treatment facility for the permittee, shall certify that the sewage sludge underwent at least the minimum operational requirements necessary in order to meet one of the PSRP. The acceptable processes and the minimum operational and recordkeeping requirements must be in accordance with established EPA final guidance.

(D) All certification records and operational records describing how the requirements of this paragraph were met must be kept by the generator for a minimum of three years and be available for inspection by commission staff for review.

(E) In lieu of a generator obtaining a certification as specified in subparagraph (B) of this paragraph, the executive director will accept from the EPA a finding of equivalency to the defined PSRP.

(F) If the sewage sludge is generated from a mixture of sources, resulting from a person who prepares sewage sludge from more than one wastewater treatment facility, the resulting derived product must meet one of the PSRP, and meet the certification, operation, and recordkeeping requirements of this paragraph.

(3) Site restrictions.

(A) Food crops with harvested parts totally above the land surface that touch the sewage sludge/soil mixture must not be harvested from the land for at least 14 months after the application of sewage sludge.

(B) Food crops with harvested parts below the surface of the land must not be harvested for at least 20 months after application of sewage sludge when the sewage sludge remains on the land surface for four months or longer prior to incorporation into the soil.

(C) Food crops with harvested parts below the surface of the land must not be harvested for at least 38 months after application of sewage sludge when the sewage sludge remains on the land surface for less than four months prior to the incorporation into the soil.

(D) Food crops, feed crops, and fiber crops must not be harvested for at least 30 days after application of sewage sludge.

(E) Animals must not be allowed to graze on the land for at least 30 days after application of sewage sludge.

(F) Turf grown on land where sewage sludge is applied may not be harvested for at least one year after application of sewage sludge when the harvested turf is placed on either land with a high potential for public exposure or a lawn.

(G) Public access to land with a high potential for public exposure must be restricted for at least one year after application of sewage sludge.

(H) Public access to land with a low potential for public exposure must be restricted for at least 30 days after application of the sewage sludge.

(c) Domestic septage.

(1) The site restrictions in subsection (b)(3) of this section must be met if domestic septage is applied to agricultural land, forest, or a reclamation site.

(2) The pH of domestic septage applied to agricultural land, forest, or a reclamation site must be raised to 12 or higher by alkali addition and, without the addition of more alkali, must remain at 12 or higher for a period of 30 minutes.

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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Texas Commission on Environmental Quality
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SUBCHAPTER F. DISPOSAL OF WATER TREATMENT SLUDGE

30 TAC §312.122

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; Texas Water Code, §5.103 and §5.105, which establish the commission's general authority to adopt rules; Texas Water Code, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; Texas Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste; Texas Health and Safety Code, §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; Texas Health and Safety Code, §361.022, which provides the state's public policy for preferred methods for generating, treating, storing, and disposing of municipal sludge as reuse; Texas Health and Safety Code, §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; Texas Health and Safety Code, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and Texas Health and Safety Code, §361.121, as amended by HB 2546, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment insurance.

The adopted amendment implements HB 2546.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. TRANSPORTERS AND TEMPORARY STORAGE PROVISIONS

30 TAC §312.145

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; Texas Water Code, §5.103 and §5.105, which establish the commission's general authority to adopt rules; Texas Water Code, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; Texas Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste; Texas Health and Safety Code, §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; Texas Health and Safety Code, §361.022, which provides the state's public policy for preferred methods for generating, treating, storing, and disposing of municipal sludge as reuse; Texas Health and Safety Code, §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; Texas Health and Safety Code, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and Texas Health and Safety Code, §361.121, as amended by HB 2546, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment insurance.

The adopted amendment implements HB 2546.

§312.145. Transporters - Recordkeeping.

(a) Trip tickets. Persons who collect and transport waste subject to control under this subchapter shall maintain a record of each individual collection and deposit. Such records must be in the form of a trip ticket. Similar documentation may be used with written approval by the executive director. The trip ticket must include:

(1) name, address, telephone number, and commission registration number of transporter;

(2) name, signature, address, and telephone number of the person who generated the waste and the date collected;

(3) type and amount(s) of waste collected or transported;

(4) name and signature(s) of responsible person(s) collecting, transporting, and depositing the waste;

(5) date and place where the waste was deposited;

(6) identification (permit or site registration number, location, and operator) of the facility where the waste was deposited;

(7) name and signature of facility on-site representative acknowledging receipt of the waste and the amount of waste received; and

(8) the volume of the grease and grit trap or the septic tank.

(b) Maintenance of records and reporting.

(1) Trip tickets. Trip tickets must be divided into five parts and records of trip tickets must be maintained as follows.

(A) One part of the trip ticket must have the generator and transporter information completed and be given to the generator at the time of waste pickup.

(B) The remaining four parts of the trip ticket must have all required information completely filled out and signed by the appropriate party before distribution of the trip ticket.

(C) One part of the trip ticket must go to the receiving facility.

(D) One part of the trip ticket must go to the transporter, who shall retain a copy of all trip tickets showing the collection and disposition of waste.

(E) One copy of the trip ticket must be returned by the transporter to the person who generated the waste within 15 days after the waste is received at the disposal or processing facility.

(F) One part of the trip ticket must go to the local authority, if needed.

(2) Record retention. Copies of trip tickets must be retained for five years and be readily available for review by commission staff or be submitted to the executive director upon request.

(3) Rail or barge transport. Persons who transport waste via rail or barge may use an alternate recordkeeping system, if approved by the executive director.

(4) Reporting. By July 1, transporters must submit to the executive director an annual summary of their activities for the previous period of June 1 through May 31, showing the following:

(A) amounts and types of waste collected;

(B) disposition of such wastes; and

(C) amounts and types of waste delivered to each facility.

(c) Discrepancies. A facility that receives waste must note any significant discrepancies on each copy of the trip ticket.

(1) Trip ticket discrepancies are differences between the quantity or type of waste designated on the trip ticket, and the quantity or type of waste a facility actually received. Significant discrepancies in type are obvious differences that can be discovered by inspection or waste analysis. Significant discrepancies in quantity are:

(A) for bulk weight, variations greater than 10% in weight; and

(B) for liquid waste, any variation greater than 15% in gallons.

(2) Upon discovering a significant discrepancy, the transporter must attempt to reconcile the discrepancy with the waste generator or owner or operator of the receiving facility (e.g., with telephone conversations). If the discrepancy is not resolved within 15 days after delivering the waste, the transporter must immediately submit to the executive director a letter describing the discrepancy and attempts to reconcile it, and a copy of the trip ticket.

(d) Notification. A facility that receives waste from a transporter that cannot produce a registration acknowledgment under §312.142(c) of this title (relating to Transporter Registration) must notify the appropriate regional office of the commission within three days of the waste receipt of the transporter's failure to produce a current registration authorization.

(e) Local ordinances. Where local ordinances require controls and records substantially equivalent to or more stringent than the requirements of subsection (a) of this section, transporters may use such controls and records to satisfy the commission's requirement under this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

The Texas Parks and Wildlife Commission adopts amendments to §§53.3, 53.5, and 53.60, concerning stamps, stamp fees, and license and fee exemptions, without changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4187).

The amendments generally are necessary to implement the requirements of Senate Bill 1192 and House Bill 1076, as enacted by the 79th Texas Legislature.

Senate Bill 1192 reorganized the department's game bird stamps, creating two new stamps from the current three. The white-winged dove stamp ($7) and waterfowl stamp ($7) are combined to create a single migratory game bird stamp. The fee for the stamp is $7. The stamp is required for the hunting of any migratory game bird (ducks, geese, teal, doves, coots, rails, gallinules, and sandhill cranes). The turkey stamp is eliminated and replaced by an upland game bird stamp ($7), which is required for the hunting of any non-migratory game bird (turkey, quail, pheasant, chachalaca, and prairie chicken). The legislation took effect June 20, meaning the stamp reorganization will be effective for the 2005-2006 hunting season, which began September 1, 2005.

House Bill 1076 requires the department to waive the fees for hunting and fishing licenses for a Texas resident on active duty as a member of the United States armed forces. In keeping with the waiver of license fees mandated by the legislature, the department also believes that it is appropriate to waive stamp fees for Texas residents on active duty in the United States armed forces.

The amendment to §53.3, concerning Combination Hunting and Fishing License Packages, reflects the creation of the new stamps and the elimination of the repealed stamps, and adds a new Texas resident active duty military super-combination hunting and "all water" fishing package to the list of licenses available from the department. The amendment is necessary to adjust the composition of the department's combination-license packages to reflect the creation of the new stamps and the elimination of existing stamps and to implement the provisions

of Senate Bill 1192 and House Bill 1076, enacted by the 79th Texas Legislature.

The amendment to §53.5, concerning Recreational Hunting Licenses, Stamps, and Tags, establishes the fees associated with the new stamps and eliminate references and fees for stamps that no longer exist as a result of legislative action. The amendment also eliminates a reference to the bonus deer tag, which no longer exists. The amendment is necessary to implement the provisions of Senate Bill 1192.

The proposed amendment to §53.60, concerning Stamps, revises the list of stamps to reflect the new stamp structure created by the legislature, and deletes references to the turkey, white-winged dove, and state waterfowl stamps. The amendment also provides an exemption to stamp requirements for active-duty members of the United States armed forces who are Texas residents.

The amendment to §53.3, concerning Combination Hunting and Fishing License Packages, will function by reflecting the creation of new stamps and the elimination of repealed stamps, and adds a new Texas resident active duty military super-combination hunting and "all water" fishing package to the list of licenses available from the department.

The amendment to §53.5, concerning Recreational Hunting Licenses, Stamps, and Tags, will function by establishing the fees associated with the new stamps and eliminating references and fees for stamps that no longer exist as a result of legislative action. The amendment also eliminates a reference to the bonus deer tag, which no longer exists.

The amendment to §53.60, concerning Stamps, will function by reflecting the new stamp structure created by the legislature, by deleting references to the turkey, white-winged dove, and state waterfowl stamps, and by providing an exemption to stamp requirements for active-duty members of the United States armed forces who are Texas residents.

The department received nine comments opposing adoption of the proposed rules. Only one of the commenters offered a specific reason for opposing adoption. The commenter stated that all persons should have to pay for hunting and fishing licenses. The department disagrees and responds that the provisions of House Bill 1076 require the department to waive the fees for hunting and fishing licenses for a Texas resident on active duty as a member of the United States armed forces. The Parks and Wildlife Commission does not have the authority to modify or waive this provision. No changes were made as a result of the comment.

The department received 34 comments supporting adoption of the proposed rules.

The Texas Wildlife Association commented in support of the adoption of the proposed rules.

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.3, §53.5

The amendments are adopted under the authority of Senate Bill 1192, which amended Parks and Wildlife Code, Chapter 43, by adding Subchapter S, which authorizes the commission to establish the fee for a stamp issued under the subchapter and to exempt a person or class of persons by rule from the stamp requirements of the subchapter; House Bill 1076, which requires the department to waive the fees for hunting and fishing licenses for a Texas resident on active duty as a member of the United States armed forces; and Parks and Wildlife Code, Chapter 43, Subchapter I, which authorizes the commission to exempt a person from the stamp requirement of the subchapter; Chapter 43, Subchapter M, which authorizes the commission to exempt a person from the stamp requirement of the subchapter; Chapter 43, Subchapter U, which authorizes the commission to exempt a person from the stamp requirement of the subchapter; and Chapter 50, which authorizes the commission to establish fees for combination licenses or license packages.

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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General Counsel
Texas Parks and Wildlife Department
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SUBCHAPTER B. STAMPS

31 TAC §53.60

The amendment is adopted under authority of Senate Bill 1192, which amended Parks and Wildlife Code, Chapter 43, by adding Subchapter S, which authorizes the commission to establish the fee for a stamp issued under the subchapter and to exempt a person or class of persons by rule from the stamp requirements of the subchapter; Parks and Wildlife Code, Chapter 43, Subchapter I, which authorizes the commission to exempt a person from the stamp requirement of the subchapter; Chapter 43, Subchapter M, which authorizes the commission to exempt a person from the stamp requirement of the subchapter; Chapter 43, Subchapter U, which authorizes the commission to exempt a person from the stamp requirement of the subchapter; and Chapter 50, which authorizes the commission to establish fees for combination licenses or license packages.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 55. LAW ENFORCEMENT
SUBCHAPTER A. PROOF OF RESIDENCY REQUIREMENTS

31 TAC §55.1

The Texas Parks and Wildlife Commission adopts new §55.1, concerning Proof of Residency, with changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4193).

The change adds language to clarify that the provisions of the section will not be used by license vendors to screen license buyers at the time of purchase or to check hunters and anglers in the field, replaces the word 'applicant' with the word 'person,' eliminates the U.S. passport as a mechanism for proving residency in Texas, moves the provisions applicable to active-duty military personnel to a separate paragraph, modifies the documentation requirements with respect to utility bills, adds language in adopted paragraphs (5) and (6) to clarify that they do not apply to active-duty military personnel, reduces the number of documents needed to prove residency (from four to three), and redesignates paragraphs within the section to accommodate changes.

The department wishes to make clear that the intent of the rulemaking is to use the standards established by the rule only for informational purposes or in investigations in which the department believes that a person has unlawfully obtained a resident license or permit. The change replaces the word 'applicant' with the word 'person' to prevent the misperception that proof-of-residency documentation is required at the time that a license or permit is purchased, and adds specific language stating that documentation will not be required by license vendors at the time a license or permit is purchased and will not be used to check hunters or anglers in the field. In addition, the department has determined that the use of a U.S. passport as proof of Texas residency is problematic because passports are valid for 10 years and thus are not reliably indicative of a person's residency status. The department therefore has removed the passport requirement from the rule as adopted. In addition, the department has determined that the rule as proposed potentially could have made it difficult for active-duty military personnel to meet the standards for proving six months of continuous residency, which was not the intent of the rulemaking. As a result, the rule has been changed to create a more reasonable standard for active-duty military personnel to satisfy the six-month requirement. The change would allow active-duty military personnel to satisfy the six-month requirement by possessing official documentation indicating Texas as a home of record or orders showing that the applicant has been assigned to a Texas duty station for the six months immediately preceding application for a resident license or permit. In light of the elimination of the passport as a criteria and the relocation of provisions affecting military personnel to another portion of the rule, the department has determined that it is reasonable to require only three of the remaining eight acceptable forms of documentation listed in paragraph (2), rather than four. The department also has determined that proposed paragraph (1)(C), providing for the use of utility bills to prove residency, created too stringent a standard in that it stipulated six months of utility bills from a single utility. The provision has been changed so that any combination of utility bills may be used to prove residency, provided that in the aggregate the bills indicate at least six months of continuous residence in Texas immediately prior to application for a resident license or permit.

Under current statutes, there is no single standard for authoritatively establishing the residency status of a person for the purpose of obtaining resident licenses and permits. The term 'resident' is defined in several places in the Texas Parks and Wildlife Code to mean a person that has resided in Texas for the six-month period immediately preceding an application for a license or permit. However, for the purposes of licenses issued under Parks and Wildlife Code, Chapters 42 and 46, the term 'resident' includes members of the United States armed forces on active duty, dependents of members of the United States armed forces on active duty; and members of any other category of individuals that the commission by regulation designates as residents.

House Bill 1636, enacted by the 79th Texas Legislature, Regular Session, added Parks and Wildlife Code, §11.004, which authorizes the Parks and Wildlife Commission to prescribe by rule the proof required to demonstrate residency in this state for the purpose of obtaining a license or permit issued by the department. The new rule sets forth the documentation and combinations of documentation acceptable to the department for determining or proving residency when a resident license or permit has been obtained. The new rule is necessary to provide a single, unambiguous standard that can be universally applied to all licenses and permits issued by the department.

The new rule will function by prescribing the documentation the department considers sufficient to prove that a person has resided continuously in Texas for at least six months prior to applying for a resident license or permit issued by the department, as required by the Parks and Wildlife Code.

The department received three comments opposing adoption of the new rule. Of those comments, two commenters articulated a specific reason or reasons for opposing adoption of the proposed amendment. The comments and the agency responses are as follows.

One commenter opposed adoption of the proposed new rule and stated that current rules and statutes are sufficient. The department disagrees with the comment and responds that until now there have been no regulatory provisions for determining residency and that statutory provisions, while defining 'resident' as anyone who has continuously resided in Texas for at least six months, do not stipulate what constitutes actual proof that a person has resided in Texas for six continuous months. The rules as adopted establish such standards. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed rule and stated that four separate pieces of identification seems extensive and overly burdensome if required to obtain a license each year. The commenter stated that two forms of identification would be sufficient, especially if one is a Texas driver's license, which can be verified easily. The department disagrees with the comment and responds that while it is true that a driver's license is a good form of identification, it is not as useful in determining residency status. Since people can and do violate laws regarding the possession and surrender of drivers licenses, the department believes it is not unreasonable to require additional documentation to establish that a person has indeed resided in this state for the six months immediately preceding application for a resident license or permit. The department also notes that the cumulative documentation requirement has been reduced from four items to three. No changes were made as a result of the comment.

The department received 27 comments supporting adoption of the proposed rule.

The new section is adopted under the authority of House Bill 1636, enacted by the 79th Texas Legislature, Regular Session, which authorizes the Parks and Wildlife Commission to prescribe by rule the proof required to demonstrate residency in this state for the purpose of obtaining a license or permit issued by the department.

§55.1. Proof of Residency.

The requirements of this section are in addition to any requirements of Parks and Wildlife Code, Chapters 42 and 46.

(1) Except as provided by Parks and Wildlife Code, §12.114, no person is required to possess the documentation required by paragraphs (2) or (3) of this section on their person while:

(A) purchasing a license or permit; or

(B) engaging in an activity for which a license or permit issued by the department is required.

(2) Proof that a person has resided continuously in Texas for more than six months immediately before applying for a resident license or permit issued by the department shall consist of any three of the following:

(A) a current property tax statement indicating that the person is the owner of homestead property in Texas;

(B) a valid drivers license issued by the Texas Department of Public Safety not less than six months prior to the application to the department for a resident license or permit;

(C) the most recent six months of utility bills showing the person's name and a physical address in Texas;

(D) the most recent six months of paycheck receipts showing the person's name and a physical address in Texas;

(E) a current Texas voter registration certificate showing the person's name and a physical address in Texas, issued not less than six months prior to an application to the department for a license or permit;

(F) the person's most recent tax return statement from the Internal Revenue Service showing the person's name and a physical address in Texas;

(G) a current vehicle registration showing the person's name and a physical address in Texas, issued not less than six months prior to an application to the department for a license or permit;

(H) a statement from the person's parole board or probation officer attesting to the fact that the person has continuously resided in Texas for the six months immediately preceding the application for a license or permit.

(3) For persons on active duty in the armed forces of the United States, proof of continuous residency in Texas for more than six months immediately before applying for a resident license or permit issued by the department shall consist of:

(A) military service record(s) indicating that the person's home of record is in Texas at the time of application; or

(B) military service record(s) indicating that the person has been assigned to a duty station in Texas for the six months immediately prior to the time of application.

(4) If a person is under the age of 25 and living in another state for educational purposes, proof that the person has resided continuously in Texas for more than six months immediately before applying for a license or permit issued by the department shall consist of:

(A) a notarized statement to the effect that the person is a dependent of a Texas resident; and

(B) a tuition receipt or other official evidence that the person is currently enrolled as a non-resident in an educational institution located in another state.

(5) Except for active-duty members of the armed forces of the United States, the department will not issue a resident license or permit to any person if any proof of residency presented to the department indicates residency anywhere other than Texas.

(6) Except for active-duty members of the armed forces of the United States, a person who claims residency in any other state for any purpose is not a Texas resident for the purposes of obtaining a resident license or permit from the department.

(7) Upon determination by the department that a person who obtained a resident license or permit was not eligible to obtain the license or permit, the department shall notify the person that the license is void and shall be surrendered to the department. A person that the department determines has obtained a resident license or permit unlawfully is subject to criminal prosecution.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 59. PARKS
SUBCHAPTER A. PARK ENTRANCE AND PARK USER FEES

31 TAC §59.2

The Texas Parks and Wildlife Commission adopts an amendment to §59.2, concerning Park Entrance and Use Fees, without changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4196).

The amendment implements an entrance fee range $1 - $15 for the Battleship Texas State Historic Site. The amendment is necessary to provide additional funding to maintain the current level of park services at the Battleship Texas for the benefit of the public.

The department establishes a fee range, consisting of an upper and lower value, for each type of facility or service (or combination thereof), which may vary from site to site. The purpose of the fee-range approach is to provide the flexibility for the department to make incremental adjustments to the fee structure from time to

time (within the approved ranges) in response to changing conditions over a multi-year period. The fee range proposed by the department was determined by analysis of user demographics, benefit, demand, and comparability with other providers of similar facilities and/or services operated under similar conditions, and leisure industry trends.

The rule will function by establishing the fee range for entrance fees at the Battleship Texas State Historical Site.

The department received 17 comments opposing adoption of the proposed rule. Of those comments, six commenters stated a specific reason or reasons for opposing adoption. The comments and the agency responses are as follows.

One commenter stated that since taxpayers built the Battleship Texas, there should be no fees for visitation. The commenter also stated that taxes already collected should be used for upkeep. The department disagrees with the comment and responds that the present use of the Texas is unrelated to its original function as a warship. Had the Texas not been acquired by the State of Texas it would have been scrapped. The department also responds that the cost of the operation and management of the Battleship Texas is not fully funded through tax revenues. No changes were made as a result of the comment.

One commenter stated that the department's data did not justify a doubling of the entrance fee to the Battleship Texas State Historical Site. The department disagrees with the comment and responds that the rule as adopted did not double the entrance fee to the Battleship Texas State Historical Site, but increased the range of possible fee increases. The department created room in the fee structure to implement an entrance of up to $15, but intends to increase the entrance to $10 at the present time, which is consistent with entrance fees charged at similar facilities elsewhere. No changes were made as a result of the comments.

One commenter stated that the maximum entrance fee of $15 would discourage visitation. The department, while cognizant of the fact that fee increases have the potential to impact visitation, must disagree with the comment and responds that although implementation of the fee ceiling ($15) is not expected to be necessary in the near future, the department nonetheless has an obligation to manage and maintain the site not only to provide a positive experience for visitors but also to prevent physical deterioration and threats to visitor safety. A fee increase is necessary to assist the department in carrying its obligations. No changes were made as a result of the comment.

Two commenters stated that at $15 per person, many families will be priced out of visiting. The department agrees that the $15 per person fee is not warranted at this time and responds that the $15 figure is simply the ceiling of the authorized fee range for entrance fees. A lower fee of $10 will be imposed at the current time. The department also notes that fees will be discounted for children. No changes were made as a result of the comments.

One commenter stated that active duty and retired military should be admitted free of charge. The department, while sympathetic, must disagree, and responds that although the current financial position of the state park system makes it difficult to grant fee waivers to large classes of users and still generate the crucial revenue needed to operate the system. The executive director or designee has authority to waive or discount fees in certain circumstances under 31 TAC §59.2(g). No changes were made as a result of the comment.

The department received 11 comments supporting adoption of the proposed amendment.

The amendment is adopted under Parks and Wildlife Code, §13.015, which authorizes the department to charge and collect park user fees for park services, and requires the commission to set the fees.

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 September 28, 2005.

TRD-200504339
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: October 18, 2005
Proposal publication date: July 22, 2005
For further information, please call: (512) 389-4775

SUBCHAPTER F. STATE PARK OPERATIONAL RULES

31 TAC §59.131, §59.134

The Texas Parks and Wildlife Commission adopts amendments to §59.131 and §59.134, concerning State Park Operational Rules, without changes to the proposed text as published in the June 24, 2005, issue of the *Texas Register* (30 TexReg 3719).

Texas Parks and Wildlife Department (TPWD) has noted the increasing frequency of the practice of visitors using park visitation privileges to deposit everything from household waste to construction debris in disposal facilities on state parks. Persons engaging in such conduct have discovered that it is less expensive to pay for entry to a park and dispose of garbage in remote or unsupervised areas than it is to pay to dump garbage in a landfill or other such facility. Such dumping on state parks creates unsightly and noisome detractions from recreational enjoyment and could pose health hazards to park visitors and employees (due to hazardous materials such as carcinogens, asbestos, medical waste, etc.). In any case, the practice creates an unnecessary and avoidable burden for TPWD in the form of additional time and expense in disposing of garbage that was not generated as a consequence of park visitation or travel. Therefore, TPWD has delineated the specific circumstances under which garbage may be lawfully deposited in state parks.

The amendment to §59.131 will function by providing a definition for the term 'garbage,' which is necessary to provide a precise, unambiguous meaning for purposes of informing park visitors of inappropriate or unlawful conduct and, if necessary, for enforcing the terms of the section.

The amendment to §59.134, concerning Rules of Conduct in Parks, prohibits the dumping of garbage in state parks, except for garbage generated during park visitation or garbage that could reasonably be expected to accumulate during a days' travel.

The department received no comments concerning adoption of the proposed amendments.

The amendments are adopted under Parks and Wildlife Code, §13.101, which authorizes the commission to promulgate regulations governing the health, safety, and protection of persons and property in state parks, historic sites, scientific areas, or forts under the control of the department, including public water within state parks, historic sites, scientific areas, and forts; and §13.102, which authorizes the commission to promulgate regulations governing the conservation, preservation, and use of state property whether natural features or constructed facilities; the abusive, disruptive, or destructive conduct of persons, the activities of park users, and conduct which endangers the health or safety of park users or their property.

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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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

SUBCHAPTER I. GRATUITIES

31 TAC §59.221

The Texas Parks and Wildlife Commission adopts new §59.221, concerning Acceptance of Gratuities, without changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4198). The department notes that in the proposal preamble the fiscal note stated that the department estimated an expense to the department of $34,782 per year due to FICA tax withholding. This is erroneous. The actual estimated cost to the department is $3,478.20, not $34,782.

House Bill 2685, enacted by the 79th Texas Legislature (Regular Session), added new Parks and Wildlife Code, §11.0262, which provides that an employee of the State Parks division of the department may accept a gratuity if the employee, as a primary job duty, serves food or beverages in a restaurant, cafeteria, or other food service establishment located within a state park that is owned and operated by the department, provided the employee has been authorized by the department to accept gratuities and reports the gratuities according to department rules.

The new section implements the requirements of House Bill 2685 by requiring the department to authorize those employees eligible to receive gratuities as a consequence of their department duties and by establishing the department policy with respect to the reporting of gratuities received by department employees. The new section also requires that employees be authorized by the executive director to receive gratuities as a consequence of their job duties, and stipulates that employees authorized to receive gratuities and the department will follow all applicable laws and policies with respect to the reporting and recordkeeping of income from to the acceptance of gratuities.

The new rule will function by establishing the conditions under which an employee of the department may be authorized to accept gratuities as a consequence of job duties.

The department received no comments concerning adoption of the proposed rule.

The new rule is adopted under Parks and Wildlife Code, §11.0262, as added by House Bill 2685, 79th Texas Legislature, Regular Session, 2005, which authorizes the commission to adopt rules necessary to implement the requirements of the section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

CHAPTER 65. WILDLIFE
SUBCHAPTER A. STATEWIDE HUNTING AND FISHING PROCLAMATION
DIVISION 1. GENERAL PROVISIONS

31 TAC §65.19

The Texas Parks and Wildlife Commission adopts an amendment to §65.19, concerning Hunting Deer with Dogs, with changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4200). The change alters language in proposed subsection (d). As proposed, the subsection creates an offense "for any person, during an open deer season, to be in the field on property belonging to another person" while in possession of a shotgun and buckshot or a slug and in actual or constructive possession of a dog or dogs. The change rewords the proposed language to read "for any person, during an open deer season, to be on property that the person does not own." The change is necessary because the subsection as proposed could be misconstrued to mean that the rule does not apply to persons on property such as a public roadway. The change also redesignates proposed subsection (d)(3) as subsection (e). The change is necessary because the subject of subsection (d)(3), the penalty for violation, should be addressed in a separate subsection.

House Bill 1959, enacted by the 79th Texas Legislature (Regular Session), added Parks and Wildlife Code, §62.0065, which stipulates that a person may not recklessly use a dog to hunt or pursue a deer in this state, and authorizes the Texas Parks and Wildlife Commission to prescribe by rule the type of firearm that may be

possessed during an open deer season by a person who is in actual or constructive possession of a dog while in the field on another person's land or property in Angelina, Hardin, Harris, Harrison, Houston, Jasper, Jefferson, Liberty, Montgomery, Nacogdoches, Newton, Orange, Panola, Polk, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, or Walker counties. Penal Code, §6.03, states, for the purposes of establishing the culpability that the offense requires, that "a person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

House Bill 1959 and rules adopted under the authority of H.B. 1959 are intended to provide an enforcement tool to deter the unlawful hunting of deer with dogs in East Texas counties where the activity has historically occurred and continues to be problematic.

In 1990 the department promulgated rules prohibiting the use of dogs to trail deer in Angelina, Bowie, Camp, Fannin, Franklin, Hardin, Harris, Harrison, Houston, Hunt, Jasper, Jefferson, Lamar, Liberty, Montgomery, Morris, Nacogdoches, Newton, Orange, Panola, Polk, Red River Rockwall, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Titus, Trinity, Tyler, Walker, Washington, and Wood counties. At that time, hunters could use dogs to hunt deer for roughly half of the deer season, but for the other half of the season could only use dogs to trail wounded deer. The rulemaking was necessary because the department determined that dogs were being used unlawfully to hunt deer, and that in fact the use of dogs to hunt deer, even when it was lawful to do so, was causing depletion of the resource and in the process denying others an equitable and reasonable privilege to hunt deer. Department studies in 1989 indicated that deer populations were significantly smaller and sparser in areas where hunting with dogs was prevalent than in areas where hunting with dogs was not, that hunter success with dogs was greater than hunter success without dogs, and that hunting with dogs resulted in a higher crippling rate than hunting without dogs. Accordingly, the department's 1990 rulemaking was based on the department's statutory duty to prevent the depletion of deer populations and to provide for the most equitable and reasonable privilege to hunt (Parks and Wildlife Code, §61.055).

In 2000, Wildlife Division and Law Enforcement Division personnel determined that the practice of using dogs to hunt deer had declined to the point of being nonexistent in Bowie, Camp, Fannin, Franklin, Lamar, Morris, Red River, Rockwall, Titus, and Wood counties. In 2001, the department removed those counties from the list of counties where the use of dogs was prohibited to trail wounded deer. In a rulemaking earlier this year, the department also removed Hunt and Washington counties.

However, the problem remains endemic in 22 counties in East Texas, prompting the introduction and passage of House Bill 1959.

Under the terms of H.B. 1959, a person who violates the provisions of Parks and Wildlife Code, §62.0065, or a rule adopted under the authority of Parks and Wildlife Code, §62.0065, commits a Class A misdemeanor. Such violations are currently a Class C misdemeanor. Additionally, if a person has been previously convicted of a violation of Parks and Wildlife Code, §62.0065, an additional violation of Parks and Wildlife Code, §62.0065 or a rule adopted under the authority of Parks and Wildlife Code, §62.0065, is a state jail felony.

The rule will function by prohibiting the possession of a shotgun and shotgun slugs or buckshot by any person in Angelina, Hardin, Harris, Harrison, Houston, Jasper, Jefferson, Liberty, Montgomery, Nacogdoches, Newton, Orange, Panola, Polk, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, and Walker counties while that person is in the field during an open deer season on property that the person does not own and is in actual or constructive possession of a dog.

The department received three comments opposing adoption of the proposed rule, only one of which provided a specific reason for opposing adoption. The commenter stated that the penalty should be more severe. The department disagrees with the comment and responds that the penalty is prescribed by statute and cannot be altered by rule. No changes were made as a result of the comment.

The department received 32 comments supporting adoption of the proposed amendment.

The Texas Wildlife Association commented in favor of adoption of the proposed rule.

The amendments is adopted under Parks and Wildlife Code, §62.0065, as added by House Bill 1959, 79th Texas Legislature, Regular Session, which authorizes the commission to prescribe the type of firearm that may be possessed during an open deer season by a person who is in actual or constructive possession of a dog while in the field on another person's land or property in Angelina, Hardin, Harris, Harrison, Houston, Jasper, Jefferson, Liberty, Montgomery, Nacogdoches, Newton, Orange, Panola, Polk, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, or Walker counties.

§65.19. Hunting Deer with Dogs.

(a) For the purposes of this section:

(1) 'actual possession of a dog' means the physical control of a dog;

(2) 'constructive possession of a dog' means having the power and intention to have and control a dog but without direct control of the dog, the actual presence of physical restraint upon the dog, or the actual presence of the dog at exactly the same place as the person having the dog.

(b) It is unlawful to use a dog or dogs in hunting, pursuing, or taking deer in all counties.

(c) It is lawful to use not more than two dogs in trailing a wounded deer in all counties, except in Angelina, Hardin, Harris, Harrison, Houston, Jasper, Jefferson, Liberty, Montgomery, Nacogdoches, Newton, Orange, Panola, Polk, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, and Walker counties, where dogs shall not be used to trail wounded deer.

(d) In Angelina, Hardin, Harris, Harrison, Houston, Jasper, Jefferson, Liberty, Montgomery, Nacogdoches, Newton, Orange, Panola, Polk, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, and Walker counties, it is an offense for any person, during an open deer season, to be on property that the person does not own while:

(1) in possession of a shotgun and buckshot or a slug; and

(2) in actual or constructive possession of a dog or dogs.

(e) The penalties for a violation of this section are prescribed by Parks and Wildlife Code, §62.013.

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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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

31 TAC §§65.318, 65.320, 65.321

The Texas Parks and Wildlife Commission adopts amendments to §§65.318, 65.320, and 65.321, concerning the Migratory Game Bird Proclamation. Sections 65.318 and 65.320 are adopted with changes to the proposed text as published in the May 13, 2005, issue of the *Texas Register* (30 TexReg 2842). Section 65.321 is adopted without change and will not be republished.

The change to §65.318, concerning Open Seasons and Bag and Possession Limits - Late Season Species, alters season dates and segment lengths for ducks in the High Plains Mallard Management Unit and the South Zone, alters bag limits for ducks, alters season dates for light and Canada geese in the Eastern Goose Zone, and alters the season length for sandhill cranes in Zone C.

Regarding changes to duck seasons, the proposed season for the High Plains Mallard Management Unit (HPMMU) was September 26 - October 3 and October 29 - January 24, with a season for pintail and canvasback beginning December 17 and running through January 24. The change creates a season running from October 22 - 23 and October 28 - January 29, with a season for pintail and canvasback beginning December 22 and running through January 29. The change splits the season in such a fashion as to create the maximum number of weekends for hunting opportunity within the 107-day window provided under federal frameworks. The proposed season for the South Zone was October 29 - November 27 and December 10 - January 22, with an open season for pintail and canvasback beginning December 15 and running through January 22. The change implements a season running from November 5 to November 27 and December 10 to January 29, with a season for pintail and canvasback beginning December 22 and running through January 29. The department last year implemented an exploratory season for ducks in the South Zone to see if hunters would respond favorably to an increased opportunity for the take of early arrivals and whistling ducks. Surveys indicate, however, a strong hunter preference for a later opener for the first split, provided the second segment runs to the end of the season. Therefore, since the change to accommodate hunter preference does not conflict with either the federal frameworks or the department's duty to open seasons when the supply justifies an open season, the change implements a later opening date.

The U.S. Fish and Wildlife Service (Service) continues to be concerned about breeding populations of canvasback and pintail ducks. For the last two years, the Service has not authorized full-season hunting opportunity for those two species, electing to require states to impose a truncated season-within-a-season instead. In consultation with the Central Flyway, the Service again is imposing a season-within-a-season for canvasback and pintail ducks for the 2005 - 2006 season. The truncated seasons for pintails and canvasbacks in the HPMMU and the South Zone have been adjusted in response to the changes to the season structures effected by this rulemaking in order to ensure that the 39-day season-within-a-season runs to the end of the season. The change is necessary to prevent potential hunter confusion. The change also reduces the bag limit for scaup from three to two, also required by the Service. The change also creates a bag limit for 'dusky' ducks. There has been continuing concern about potential declines in mottled duck populations. Department staff has noticed that when hunters exceed the bag limit for mottled ducks, it is frequently due to the misidentification of mottled ducks as black or Mexican-like ducks. Therefore, the change removes Mexican-like ducks from the aggregate bag limit for mallards and creates an aggregate bag limit of one duck for 'dusky' ducks (mottled, black, and Mexican-like ducks). The change is necessary to reduce the potential for accidental take of mottled ducks.

The changes to the various duck seasons also make it necessary to alter the dates of the special youth-only season in each zone. The special youth-only season traditionally is the weekend before the opening day of the general season; therefore, the special youth-only season will be October 15 - 16 in the High Plains Mallard Management Unit, and October 29 - 30 in the North and South zones.

With respect to goose seasons, the change opens the season for dark geese in the Eastern Goose Zone on November 5, rather than on October 29, as was proposed. The proposal affected all species of dark geese, but the Service's frameworks require a 72-day season for white-fronted geese due to continuing concerns over population declines. The Service has authorized a longer season for other species of dark geese (Canada geese). Following the commission policy of providing the greatest hunter opportunity possible, the change implements additional opportunity for the take of Canada geese.

With respect to sandhill cranes, the change shifts the season in Zone C to open one week later and close one week later than proposed. The change is necessary in order to allow endangered whooping cranes to migrate out of the area.

The change also corrects inaccurate references to 2004 - 2005 season dates.

The change to §65.320, concerning Extended Falconry Season-Late Season Species, moves the opening date in the South Duck Zone from January 23 to January 30 in order to accommodate the change creating a later season in that zone. The change also moves the closing date of the falconry season in the North Zone from February 13 to February 20, and in the South Zone from February 7 to February 20. The change is necessary because the seasons as proposed were predicated on the possibility of the federal frameworks allowing a 16-day teal season. The Service instead authorized a 9-day teal season, which gives the department seven additional days of opportunity for falconry.

The change also clarifies that the possession limit for pintail and canvasback ducks is two per species and not two in the aggregate.

The rules establishing the seasons and bag limits are promulgated on an annual basis. The amendment to §65.118 is necessary to establish the season dates and bag limits for the lawful take of late-season species of migratory game birds in the state in 2005 - 2006. The amendment to §65.320 is necessary to establish the season dates in 2005 - 2006 for the lawful take of late-season species of migratory game birds by means of falconry. The amendment to §65.321 is necessary to establish dates in 2005 - 2006 for the take of light geese during the special conservation season in order to participate in the multinational effort to reduce habitat degradation by snow geese on their breeding grounds in Canada. The amendments are also necessary, generally, to implement commission policy to provide the greatest hunter opportunity possible under frameworks issued by the U.S. Fish and Wildlife Service.

The rules will function, individually and collectively, to establish the times when it is lawful to take late-season species of migratory birds in the state, and the bag and possession limits for those species.

The department received three comments opposing adoption of portions of §65.318, concerning Open Seasons and Bag and Possession Limits - Late Season Species. All four commenters offered a specific reason for opposing adoption. The comments and the agency response to each are as follows.

One commenter opposed adoption of the restricted season for pintail ducks. The agency disagrees with the comment and responds that the longest season possible for pintail ducks under the federal frameworks has been adopted. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed amendment and stated that duck seasons are too long and that the bag limits are too high for species with declining populations. The department disagrees with the comment and responds that the federal frameworks under which the state regulations are formulated are based on extensive surveys of duck populations, habitat conditions on breeding and wintering grounds, harvest data, and estimates of harvest across the flyway, and are extremely reliable in terms of preventing overharvest. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed amendment and stated that the first segment of the South Zone duck season should begin immediately following the close of teal season. The department disagrees with the comment and responds that hunter preference is for a later opener. No changes were made as a result of the comment.

The department received 19 comments supporting adoption of the proposed rules.

The amendments are adopted under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

§65.318. Open Seasons and Bag and Possession Limits--Late Season.

Except as specifically provided in this section, the possession limit for all species listed in this section shall be twice the daily bag limit.

(1) Ducks, mergansers, and coots. The daily bag limit for ducks is six, which may include no more than five mallards, only two of which may be hens, two scaup, one 'dusky' duck (mottled duck, black duck, or Mexican-like duck) one canvasback, one pintail, two redheads, and two wood ducks. The daily bag limit for coots is 15. The daily bag limit for mergansers is five, which may include no more than one hooded merganser. Canvasback and pintail may be taken only during the restricted seasons provided for those species.

(A) High Plains Mallard Management Unit: October 22 - 23, 2005, and October 28, 2005 - January 29, 2006. The open season for pintail and canvasback begins December 22, 2005 and runs through January 29, 2006.

(B) North Zone: November 5 - 27, 2005 and December 10, 2005 - January 29, 2006. The open season for pintail and canvasback begins December 22, 2005 and runs through January 29, 2006.

(C) South Zone: November 5 - 27, 2005 and December 10, 2005 - January 29, 2006. The open season for pintail and canvasback begins December 22, 2005 and runs through January 29, 2006.

(2) Geese.

(A) Western Zone.

(i) Light geese: November 5, 2005 - February 7, 2006. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese: November 5, 2005 - February 7, 2006. The daily bag limit for dark geese is four, which may not include more than three Canada geese or more than one white-fronted goose.

(B) Eastern Zone.

(i) Light geese: November 5, 2005 - January 29, 2006. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese.

(I) White-fronted geese: November 5, 2005 - January 15, 2006. The daily bag limit for white-fronted geese is two.

(II) Canada geese: November 5, 2005 - January 29, 2006. The daily bag limit for Canada geese is three.

(3) Sandhill cranes. A free permit is required of any person to hunt sandhill cranes in areas where an open season is provided under this proclamation. Permits will be issued on an impartial basis with no limitation on the number of permits that may be issued.

(A) Zone A: November 5, 2005 - February 5, 2006. The daily bag limit is three. The possession limit is six.

(B) Zone B: November 26, 2005 - February 5, 2006. The daily bag limit is three. The possession limit is six.

(C) Zone C: December 24, 2005 - January 29, 2006. The daily bag limit is two. The possession limit is four.

(4) Special Youth-Only Season. There shall be a special youth-only duck season during which the hunting, taking, and possession of ducks, mergansers, and coots is restricted to licensed hunters 15 years of age and younger accompanied by a person 18 years of age or older, except for persons hunting by means of falconry under the provisions of §65.320 of this chapter (relating to Extended Falconry Season--Late Season Species). Bag and possession limits in any given zone during the season established by this paragraph shall be as provided for that zone by paragraph (1) of this section, except that pintail ducks and canvasback ducks may be taken. The bag limit for pintail

ducks is one per day and the bag limit for canvasback ducks is one per day. The possession limit is two. Season dates are as follows:

(A) High Plains Mallard Management Unit: October 15 - 16, 2005;

(B) North Zone: October 29 - 30, 2005; and

(C) South Zone: October 29 - 30, 2005.

§65.320. Extended Falconry Season--Late Season Species.

It is lawful to take the species of migratory birds listed in this section by means of falconry during the following Extended Falconry Seasons.

(1) Ducks, coots, and mergansers:

(A) High Plains Mallard Management Unit: no extended season;

(B) North Duck Zone: January 30 - February 20, 2006;

(C) South Duck Zone: January 30 - February 20, 2006.

(2) The daily bag and possession limits for migratory game birds under this section shall not exceed three and six birds, respectively, singly or in the aggregate.

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 September 29, 2005.

TRD-200504364
Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

PART 4. SCHOOL LAND BOARD

CHAPTER 155. LAND RESOURCES

SUBCHAPTER A. COASTAL PUBLIC LANDS

31 TAC §155.5

The School Land Board (Board) adopts amendments to §155.5, relating to Registration of Structures without changes to the proposed text as published in the July 15, 2005, issue of the *Texas Register* (30 TexReg 4119). This section of the Texas Administrative Code authorizes littoral property owners to register piers with the General Land Office in accordance with Texas Natural Resources Code §33.115 and §33.132. The amendments to §155.5 conform the rule to statutory changes to Texas Natural Resources Code §33.115 as amended by the 79th Legislature in H.B. 932 effective May 17, 2005.

The amendments to §155.5(c) clarify the process by which a littoral property owner may register and construct a pier. Specifically, new subsection (c)(3) adds language requiring that proof of recordation in the County Deed Records of the proposed registration be submitted to the General Land Office before a construction on a pier may begin. New subsection (e)(1) - (10) provides construction criteria for those piers that may be considered for registration under this rule. Subsections (f) and (g) have been renumbered and amended pursuant to the statutory changes rendered by HB 932 to reflect clarification of the process by which a littoral property owner, who has previously registered a structure pursuant to this rule, may make modifications, additions, or rebuild a structure.

The Board received no comments on the proposed rule.

The justification for these amendments is based on the fact that the Land Office will be able to administer the structure registration program more efficiently by streamlining the approval process for routine renewal requests for structure permits. The amendments will result in a more uniform process for the approval of structure registrations in addition to providing construction criteria for those structures eligible for registration under this rule.

The Board has reviewed these adopted actions for consistency with the applicable goals and policies Coastal Management Program (CMP) and regulations of the Coastal Coordination Council (Council). Since requests for structure registrations must meet the same criteria as set forth in subsection (a) of §155.5 for approval, as well as the policies of the CMP in 31 TAC §501.24(a)(6), the Board has determined that the adopted actions are consistent with applicable CMP goals and policies.

The amendments are adopted under Texas Natural Resources Code, §33.064, providing that the Board may adopt procedural and substantive rules which it considers necessary to administer, implement and enforce Texas Natural Resources Code, Chapter 33.

Texas Natural Resources Code, §33.115, providing that owners of littoral property may, in lieu of obtaining an easement from the School Land Board, register the structure with the General Land Office is affected by the 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 October 3, 2005.

TRD-200504454
Trace Finley
Policy Director, General Land Office
School Land Board
Effective date: October 23, 2005
Proposal publication date: July 15, 2005
For further information, please call: (512) 305-8598

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 35. PRIVATE SECURITY

SUBCHAPTER C. STANDARDS

37 TAC §35.39

The Texas Department of Public Safety adopts amendments to §35.39, concerning Private Security, without changes to the proposed text as published in the July 8, 2005, issue of the *Texas Register* (30 TexReg 3979).

Amendments to the section are necessary in order to delete subsections (e) and (f) and reformat current subsection (g) as new (e). The deletion of subsections (e) and (f) are necessary in order to eliminate a portion of the rule which has created confusion for the public and law enforcement.

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 September 27, 2005.

TRD-200504291
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: October 17, 2005
Proposal publication date: July 8, 2005
For further information, please call: (512) 424-2135

SUBCHAPTER O. FEES

37 TAC §35.233

The Texas Department of Public Safety adopts new §35.233, concerning Subscription Fee for Employee Information Updates, without changes to the proposed text as published in the July 29, 2005, issue of the *Texas Register* (30 TexReg 4320).

Adoption of the new section is necessary in order for the department to provide a mechanism for the payment of a subscription fee for online employee information updates. This fee is in addition to the fee charged for the employee information updates. The Texas Online Authority has determined that the $2.00 fee is reasonable.

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; Texas Occupations Code, Chapter 1702, and Government Code, §2054.252(g), which allows the increase of fees by the Texas Online Authority.

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 September 27, 2005.

TRD-200504290
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: October 17, 2005
Proposal publication date: July 29, 2005
For further information, please call: (512) 424-2135

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 108. EARLY CHILDHOOD INTERVENTION SERVICES

SUBCHAPTER F. SYSTEM OF FEES

40 TAC §108.293, §108.295

The Texas Health and Human Services Commission adopts amendments to Title 40, Part 2, §108.293 and §108.295, of the rules of the Department of Assistive and Rehabilitative Services, Division for Early Childhood Intervention Services, concerning the system of consumer fees entitled Family Cost Share. Section 108.293 is adopted without changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4202) and will not be republished. Section 108.295 is adopted with changes to the proposed text as published in the July 22, 2005, issue of the *Texas Register* (30 TexReg 4202). The text of the rule will be republished.

The amendments are being adopted to streamline the fee requirements for consumers.

DARS received three comments from the First Steps ECI, Spindletop MHMR program Director regarding the rules changes. Responses to the comments are noted as follows:

Section Affected and Original Proposal - §108.295(d)(1) - No change to current requirements that the family sign the Family Cost Share Agreement at intake. Summary of Commenter's Concern - To minimize unnecessary paperwork and intrusiveness for families who do not enroll, require the Agreement to be signed at initial Individual Family Service Plan meeting. Department Response and Rationale - No change. While the proposal has some merit, families need information about the cost of services early in the process and at intake seems appropriate.

Section Affected and Original Proposal - §108.295(d)(2)(A) - Adds new language regarding families who maintain enrollment for ECI children in Medicaid, CHIP, Food Stamps SSI or TANF. The new language states that families need not provide further information for family cost share determination. Summary of Commenter's Concern - To reduce confusion about the need for families to submit income information for other program purposes, the proposed new language should not be added. Department Response and Rationale - Agree to the change.

Section Affected and Original Proposal - §108.295(g)(3) - Removes existing language regarding the effective date of adjustments to cost share which currently specifies that adjustments take effect at the beginning of the next calendar month. Summary of Commenter's Concern - To ensure statewide consistent application of this provision, the proposed existing language should not be struck. Department Response and Rationale - Agree to change.

The amendments are being adopted under the Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§108.295. Administration of Family Cost Share System.

(a) Each ECI program must implement the family cost share system of sliding fees for all children enrolled in ECI comprehensive services in compliance with this subchapter and DARS-ECI policies and the contract.

(b) Prior to collection of income information or imposition of fees, parents must be fully informed of their right to receive certain ECI services at no cost, their right to refuse any services they do not wish to receive, their right to receive a review of their cost share or amounts due by an administrator of the program on request, and their right to information about any method the program may use to verify family income and allowable expenses.

(c) Programs must ensure that the inability of a family to pay for services will not result in the delay or denial of services to the child or the family.

(d) Determination of family income. The program will calculate the family's ability to pay based on the family's income in the following manner:

(1) During the intake process and at each six month and annual IFSP review the program will collect information from the family regarding the family's gross income.

(2) The program may require verification of income from families based on written local policies or may rely on family self-report of income.

(A) Except as provided in subparagraph (B) of this paragraph, families with proof of enrollment in Medicaid, CHIP, food stamps, SSI or TANF cash benefits for all children enrolled in ECI are automatically assumed to have an inability to pay. Children in the conservatorship of the State including children in foster care are automatically determined to have an inability to pay.

(B) Families enrolled in Medicaid who have private insurance and consent to having their private insurance billed will be automatically assumed to have an inability to pay and need not provide further information for family cost share determination, even if their private insurance denies all claims for coverage.

(C) Enrollment of a child in a Medicaid waiver program is not deemed to be evidence of inability to pay if the family is not eligible for other Medicaid benefits.

(D) All children with auditory or visual disabilities who are eligible for a free and appropriate public education from birth under the Texas Education Code, Section 29.003(b)(1) are exempt from the cost share system. A note of the exemption shall be included on the Family Cost Share Agreement.

(3) Once the annual gross family income has been determined, the parents may request that their annual adjusted family income be calculated by deducting allowable expenses from the gross income.

(A) Allowable expenses are those expenses expected to occur and/or be paid during the term of the IFSP and may include:

(i) Medical or dental expenses not reimbursed by insurance that the family incurred and which are expected to continue during the current IFSP period.

(ii) Payment toward outstanding medical or dental debt.

(iii) Medical and/or dental expenses and debt may include those accrued by all family members.

(iv) Childcare and respite expenses not reimbursed by other sources, not to exceed $500 per family per month.

(v) Costs and fees associated with the adoption of a child, not to exceed $5000.

(vi) Court-ordered child support payments for children who are not counted as family members or dependents in calculating the adjusted income and family cost share.

(B) The program may require verification of expenses from families based on written local policies or may rely on family self-report of expenses.

(4) Copies of income and/or expense documents need not be maintained by the program if an ECI employee reviews the documents and provides a written statement of verification, including a notation of the source of the documentation.

(5) A family who refuses to provide information for family cost share determination when requested by the program will be assessed as able to pay the highest cost share reflected on the sliding fee scale, until such time as they submit the required information. Services required to be provided at no cost will not be denied or delayed if the family fails to provide income information.

(6) If the program reviews the family's request for deductions to gross family income due to allowable expenses and finds that adjustments to the cost share are warranted, the cost share will take effect at the beginning of the next calendar month.

(7) Income is calculated based on income for all parents or guardians living in the same home with the child as a family. In situations where there is shared physical custody or shared legal or financial responsibility for a child, the adjusted income(s) of the parent(s) who financially supports the child will be considered unless conditions warrant otherwise.

(e) Determination of ability to pay and assignment of Family Cost Share.

(1) Using the sliding scale developed by DARS-ECI, the program will determine the family's assigned monthly cost share. The sliding fee scale can be obtained from DARS-ECI at 4900 North Lamar Boulevard, Austin, Texas 78751-2399 or at www.dars.state.tx.us/ecis.

(2) Families with a family income at or below 250 percent of the Federal Poverty Level will have a family cost share of $0 and are determine to have an inability to pay.

(3) Families enrolled in Medicaid who have private insurance and refuse to allow ECI to bill their private insurance, thereby preventing submission of Medicaid claims, will be assigned a monthly cost share of $10.

(f) IFSP services.

(1) Those services that must be provided at no cost to the family are:

(A) Child find;

(B) Evaluation and Assessment;

(C) Development of the Individualized Family Service Plan;

(D) All services to children with auditory or visual disabilities eligible for a free and appropriate public education from birth under the Texas Education Code, §29.003 (b)(1);

(E) Service coordination;

(F) Translation and interpreter services; and

(G) Administrative and coordination activities related to the implementation of procedural safeguards and other components of the statewide system of early intervention services.

(2) The monthly Family Cost Share is the maximum amount a family can be charged for all other services provided by ECI as part of an IFSP.

(3) The state respite program funded with state discretionary funds is not subject to the cost share system.

(4) A family will be responsible for the assigned monthly cost share unless no services, other than those listed in (1) of this subsection, were delivered in the month.

(5) The maximum monthly cost share for which the family will be responsible will be indicated on a Family Cost Share Agreement form that the family must sign.

(6) For a family with an ability to pay, services included on the IFSP which are subject to cost share shall not be provided until the family signs the Family Cost Share Agreement.

(7) Services included on the IFSP which are not subject to cost share shall begin immediately after the IFSP is developed.

(g) Review of family cost share.

(1) The family's ability to pay and cost share amount will be reviewed at the six month review and annual IFSP meeting, or at any time the family requests a review, including immediately following initial assessment of ability to pay. Programs may provide for a streamline review without completing a new Family Cost Share Agreement when there has been no change in family income or size since the previous review.

(2) ECI programs must develop a local process for a family to request reconsideration or adjustment of their assigned family cost share and/or to request a waiver of their cost share obligation, amounts currently due or overdue based on extraordinary circumstances, including amounts due based on denial of claims by a third-party payor as per subsection (h)(1)(A) of this section. Adjustments for allowable expenses should be made prior to the consideration of extraordinary expenses. Staff may initiate the review process when there is concern that the family of a child eligible for services will withdraw from services or decline to enroll in services if the cost share is not temporarily waived, and that the child may suffer harm as a result.

(A) The review should be conducted by the program director or designated administrator.

(B) Examples of circumstances that could justify a reconsideration or change of a family's assigned cost share, or that could justify a temporary waiver from their monthly cost share obligation or amounts currently due or overdue, could include but are not limited to:

(i) increase or decrease in income, including loss of job or temporary unpaid leave from employment;

(ii) short-term medical expenses not deducted during determination of adjusted income;

(iii) extraordinary child care or respite expenses not deducted during the determination of adjusted income;

(iv) additional dependants or change in family size;

(v) catastrophic loss such as fire, flood or tornado;

(vi) short-term financial hardship such as major repair to the family home or car; or

(vii) other extenuating circumstances or financial obligations which the family feels are not adequately considered in the assessment of adjusted income, assigned monthly cost share, or their ability to meet their cost share in any particular month(s).

(C) Families may be asked to submit verification of such circumstances. Refusal to do so may result in denial of the cost share adjustment.

(3) If the program determines that adjustments to the cost share are warranted, the revised cost share will take effect at the beginning of the next month. The Family Cost Share Agreement must be amended for any revision of the family cost share, and family signature must be obtained for the revised Family Cost Share Agreement.

(4) Families must be informed of the program's process for reviewing their family cost share amount before they are asked to sign the Family Cost Share Agreement.

(5) The family's last signed IFSP and Family Cost Share Agreement will remain in effect during any review process. For families without a signed Cost Share Agreement, the services included on the IFSP which are not subject to cost share shall begin or continue during any period of review.

(h) Children with Insurance.

(1) Third-party payors.

(A) With parent consent, programs must bill Medicaid, CHIP, TriCare and private insurance or other third-party payors for covered services delivered according to the IFSP. To allow the local program to establish insurance billing, in the initial six months of service, family cost share shall be set at $0 as long as the child maintains insurance coverage and the parent continues to provide the program with consent to bill the insurance for ECI services. After the initial six months, third-party reimbursement of any IFSP service(s) will satisfy the family's cost share obligation for the month the service(s) was delivered. If the third-party payor completely denies coverage for IFSP services subject to fees, the family will be responsible for the assigned cost share.

(B) Any applicable insurance co-payments for services may be paid with ECI federal funds.

(2) Billing families for services.

(A) Programs must bill the family for the assigned cost share.

(B) The assigned family cost share is the maximum amount to be billed to the family regardless of the number of children in the family receiving services from ECI.

(3) Payment and Non-Payment of Fees.

(A) Families will have 30 days from the billing date to pay their family cost share. All unpaid balances due from the family after 30 days will be considered delinquent unless the delay in payment is due to a delay in third-party reimbursement or notice of denial of a claim from a private or public third-party payor.

(B) Services subject to cost share will be suspended after 90 days for non-payment of family cost share. For families consenting to payment by third-party payors, the 90-day time period will begin when notice is first received that the third-party payor has denied all claims for reimbursement and all appeals are exhausted, if applicable. Partial reimbursement by a third-party payor will satisfy the family's cost share obligation for the month, as per paragraph (1)(A) of this subsection.

(C) Families must be notified that failure to maintain their cost share account in good standing will, after 90 days, result in the suspension of IFSP services that are subject to family cost share, and that if services are later reinstated, the program cannot guarantee that they will be reinstated on the same schedule or with the same individual service provider as prior to suspension.

(D) Service Coordination and other services not subject to family cost share must be continued during any period of suspension, except that respite vouchers may be denied for payment during a period of suspension.

(E) A notation must be made on the Family Cost Share Agreement that services subject to family cost share have been suspended due to non-payment. If a family transfers between Texas ECI programs, the Family Cost Share Agreement will be transferred to the receiving ECI program along with the IFSP.

(F) Services that have been suspended will be reinstated when the family's account is paid in full or the family negotiates an acceptable payment plan with the local program. If more than six months have transpired since suspension, the IFSP team must reassess the appropriateness of the IFSP before reinstating services. The IFSP and the Family Cost Share Agreement should reflect the date of the reinstatement of services.

(G) Programs must have a written local policy for collecting delinquent family cost share. Documentation must be kept of reasonable attempts to collect on unpaid balances. Reasonable attempts include multiple attempts at written notification, phone notification and/or e-mail. The Program Director or Administrator may modify a family's payment plan or cost share if circumstances warrant.

(i) Program fiscal and record-keeping policies.

(1) Revenue received from the family cost share may only be used for early intervention services within the ECI program and may not supplant any other local fund sources. Fees collected must be reported to the ECI state office as program income.

(2) The Family Cost Share Agreement and any financial records related to income, expenses, and payment history shall be kept separate from the child's other educational records, and should not be forwarded to a school district or other non-ECI service provider(s) at any time unless requested by the family. All financial records must be maintained in a manner consistent with Family Educational Rights and Privacy Act.

(3) The Family Cost Share Agreement and financial records must be transferred to another ECI program in the state if the child and family transfer to another ECI program.

(4) The Family Cost Share Agreement and financial records are subject to subpoena, if applicable.

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 September 28, 2005.

TRD-200504333
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Effective date: October 18, 2005
Proposal publication date: July 22, 2005
For further information, please call: (512) 424-4050

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 4. EMPLOYMENT PRACTICES

SUBCHAPTER B. JOB APPLICATION PROCEDURES

43 TAC §4.13

The Texas Department of Transportation (department) adopts an amendment to §4.13, concerning job application procedures. The amendment to §4.13 is adopted without changes to the proposed text as published in the August 12, 2005, issue of the *Texas Register* (30 TexReg 4625) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENT

Prior to June 17, 2005, Transportation Code, §201.403(a) required the department to open all department positions compensated at or above salary group 21 to applicants from inside and outside the department. This statute was enacted in 1991 under a former classification system. A salary group 21 under the 1991 classification system is now the equivalent to a group B13. The classification system in 1991 also considered group 21 and above to be director positions. The department implemented the statute by adopting §4.13, which requires the department to distribute notice of job vacancies in salary groups B13 and above to the Texas Workforce Commission.

House Bill 1814, 79th Legislature, Regular Session, 2005, amended Transportation Code, §201.403(a), effective June 17, 2005, to require the department to open positions compensated at or above salary group B17 to applicants inside and outside the department. Under the state's current classification system, a director position is considered to begin at group B17.

Consistent with the authority granted by House Bill 1814, and consistent with the state's current classification for director positions, the department adopts an amendment to §4.13 that changes the requirement to distribute notice of vacancies from salary group B13 and above to salary group B17 and above.

COMMENTS

No comments on the proposed amendment were received.

STATUTORY AUTHORITY

The amendment 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

Transportation Code, §201.403.

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 September 30, 2005.

TRD-200504440
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: October 20, 2005
Proposal publication date: August 12, 2005
For further information, please call: (512) 463-8630

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: 30 TAC §312.82(a)(2)(A)(i)

$$D > \frac{131{,}700{,}000}{10^{0.1400t}}$$

D = time in days.

t = temperature in degrees Celsius.

Figure: 30 TAC §312.82(a)(2)(A)(iv)

$$D > \frac{50{,}070{,}000}{10^{0.1400t}}$$

D = time in days.

t = temperature in degrees Celsius.

Figure: 37 TAC §23.18(f)

DPS Policy for the Use and Protection of Access to the Texas Automated Vehicle Inspection System (TAVIS).

I acknowledge that I have read the Department of Public Safety Rule for the use and protection of access to the Texas Automated Vehicle Inspection System (TAVIS) and any corresponding unique identifier protocol used to gain access to TAVIS. I understand that I must comply with the rule when accessing and using the Texas Automated Vehicle Inspection System and my failure to comply with the rule may result in suspension or revocation of the inspector's certification as well as any appropriate criminal action or administrative disciplinary action. I further acknowledge that I am responsible for the accuracy and validity of all inspections performed utilizing my access and unique identifier protocol.

Signature: ______________________________

Printed Name: ___________________________

Inspector ID #: __________________________

Date: __________________________________

Figure: 40 TAC §97.602(e)(1)

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.23	Change of ownership.
§97.25(a)	Application for an initial license after a change of ownership.
§97.212	Prohibiting material alteration of a license.
§97.213(a)-(b) separate penalties	Agency relocation.
§97.214(a)-(b) separate penalties	Notification procedures for reporting a change in agency telephone number and agency operating hours.
§97.215(a)(1)-(3) separate penalties	Notification procedures for reporting an agency name change.
§97.216	Change in agency certification or accreditation status.
§97.217(b)(1)-(2) separate penalties	Procedures for notifying DADS of a voluntary suspension of operations.
§97.218	Agency organizational changes.
§97.219(1)(A)-(B) separate penalties	Procedure for adding or deleting a category of service to the agency's license.
§97.220(a)(1)-(2) separate penalties	Providing services only within an agency's licensed service area.
§97.220(c)	Providing a written request to expand an agency's service area.
§97.220(d)	Providing written notification of a reduction of an agency's licensed service area.
§97.220(e)	Location requirements for a branch office and an alternate delivery site in the parent agency's service area.
§97.242(a)-(b)	Maintaining a current written description of the agency's organizational structure.
§97.243(a)	Appointing an administrator.
§97.243(a)	Designating a qualified alternate administrator.
§97.243(a)(1)(A)-(G) separate penalties	Responsibilities of the administrator.
§97.243(a)(2)	Requirement that the administrator or designee be available during the agency's operating hours.
§97.243(c)(1)-(2) separate penalties	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)(A)-(C)-(2)(A)-(D) separate penalties	Qualifications and conditions of the agency administrator and alternate or designee.
§97.244(b)(1)-(3) separate penalties	Qualifications of the supervising nurse and designated alternate.
§97.245(1)-(9) separate penalties	Adoption of written policies governing all personnel staffed by the agency.
§97.246(a)(1)-(7)-(b) separate penalties	An agency's personnel records and content of such records.
§97.248(a)-(b)(1)-(4) separate penalties	The use of volunteers in an agency.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.249(b)	Adoption of a written policy for the reporting of alleged acts of abuse, neglect, and exploitation of clients and reportable conduct by an employee.
§97.250(a)	Adoption of a written policy covering procedures for investigating known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.250(d)	Prohibiting an agency from retaliating against a person for filing a complaint, presenting a grievance, or providing, in good faith, information the agency.
§97.251	Adoption of a written policy for ensuring that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(3)-(4) separate penalties	An agency's business records.
§97.253(a)-(d) separate penalties	Adoption of a written policy describing whether an agency will conduct drug testing of employees that describes the method and provides a copy of the policy.
§97.254	Adoption of a written policy for ensuring that the agency submits accurate billings and insurance claims.
§97.255	Adoption of a written policy for prohibition of illegal remuneration for securing or soliciting clients or patronage.
§97.256	Adoption of a written policy that describes an agency's plan for publicly known natural disaster preparedness.
§97.281(1)-(16) separate penalties	Adoption of a written policy that specifies the agency's client care practices.
§97.282(1)-(12) separate penalties	Adoption of a written policy governing client conduct and responsibility and client rights.
§97.283	Adoption of a written policy for compliance with the Advance Directives Act, Health and Safety Code, Chapter 166.
§97.284	Adoption of a written policy for complying with the Clinical Laboratory Improvement Amendments of 1988, 42 USC, §263a, Certification of Laboratories (CLIA 1988).
§97.285(1)-(2) separate penalties	Adoption of a written policy that addresses infection control.
§97.286(a)	Adoption of a written policy for safe handling and disposal of biohazardous waste and materials, if applicable.
§97.288(a)	Adoption of a written policy that all service providers involved in the care of a client effectively coordinate the client's care.
§97.290(a)(1)-(2) separate penalties	Adoption of a written policy for ensuring that backup services are available when an agency employee or contractor is not available to deliver the services.
§97.290(b)	Adoption of a written policy for ensuring that clients are educated in how to access care from the agency or another health care provider after regular business hours.
§97.291(1)-(2)(A)-(C) separate penalties	Adoption of a written policy for an agency's written contingency plan.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.292(a)(1)-(7)-(b) separate penalties	Providing a client or a client's family with a written agreement for services, ensuring appropriate content of the agreement, obtaining an acknowledgement of receipt, and ensuring that the acknowledgement is in the client's record.
§97.293(1)-(2) separate penalties	Maintaining a current list of clients for each category of service licensed.
§97.294	Adoption of a written policy for establishing a time frame for the initiation of care or services.
§97.295(c)	Documentation requirements pertaining to an agency's transfer or discharge of a client.
§97.296(a)	Adoption of a written policy that states whether physician delegation will be honored by the agency.
§97.298	Adoption of a written policy for ensuring compliance with rules adopted by the Board of Nurse Examiners for the State of Texas in 22 TAC, Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC, Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.299	Adoption of a written policy for ensuring compliance with rules of the Board of Nurse Examiners adopted at 22 TAC Chapters 211-226 (Nursing Continuing Education, Licensure, and Practice in the State of Texas).
§97.300(a)	Adoption of a written policy for maintaining a current medication list and medication administration record.
§97.301(a)(1)-(9)(A)-(P) separate penalties	Requirements for maintaining an agency's client records.
§97.301(b)(1)-(3) separate penalties	Adoption of a written policy for retention of records.
§97.302	Adoption of a written policy for pronouncement of death if that function is carried out by an agency registered nurse.
§97.303(1), (2)(A)-(B), (3)(A)-(G) separate penalties	Standards for possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.321(a)	Branch office compliance with the regulations of its parent agency.
§97.321(c)(1)	Providing services only within a branch office licensed service area.
§97.321(c)(3)(A)-(B) separate penalties	Providing a written request to expand a branch office service area.
§97.321(c)(4)	Providing written notification of a reduction of a branch office licensed service area.
§97.321 (d)(1)-(3) separate penalties	Requirements for branch offices.
§97.321(f)	Requirement prohibiting branch offices from providing services not offered by the parent agency.
§97.322(a)	Alternate delivery site compliance with hospice services standards.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.322(b)	An alternate delivery site's independent compliance with §97.403(c), (f)(1), (i), and §97.301.
§97.322(c)(1)	Providing services only within an alternate delivery site licensed service area.
§97.322(c)(3)(A)-(B) separate penalties	Providing a written request to expand an alternate delivery site service area.
§97.322(c)(4)	Providing written notification of a reduction of an alternate delivery site licensed service area.
§97.322(d)	Requirements for hospices and alternate delivery sites.
§97.401(f)	The use of home health aides.
§97.402(b) separate penalties	Requirement for implementing a home health aide training and competency program.
§97.403(b)	Restriction on use of the word "hospice" in a title or description of a facility, organization, program, service provider, or services without a license.
§97.403(f)(4)	Retaining responsibility for payment for services.
§97.403(j)	Requirement that reassessment of a client must not reduce core services.
§97.403(k)	Informing the client of the availability of short-term inpatient care.
§97.403(l)	Making and documenting efforts to arrange for visits of clergy and other members of spiritual and religious organizations.
§97.403(u)(4)	Specifying the persons authorized to administer medications in the client's plan of care.
§97.403(w)(5)-(6), and (8) separate penalties	Physical plant requirements in a freestanding hospice that provides inpatient care.
§97.403(w)(11)(A)-(D) separate penalties	Providing and supervising meal service in a freestanding hospice that provides inpatient care.
§97.404(e)	Requirement that an agency develops operational policies that are considerate of the principles of individual and family choice and control, functional need, and accessible and flexible services.
§97.404(f)(1)-(3) separate penalties	Additional requirements for maintaining client records in an agency that provides personal assistance services.
§97.404(g)	Adoption of a written policy that addresses the supervision of agency personnel with input from the client or family on the frequency of supervision.
§97.404(g)(1)-(2)	Conditions and qualifications for supervision of agency personnel delivering personal assistance services.
§97.405(d)(1)-(2) separate penalties	Requirement for individual personnel files on all physicians.
§97.405(g)	A written transfer agreement with a local hospital for an agency that provides home dialysis services.
§97.405(h)	An agreement with a licensed end stage renal disease facility to provide backup outpatient dialysis services.
§97.405(j)	Ensuring that names of clients awaiting a donor transplant are entered in the recipient registry program.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.405(s)(1)-(7) separate penalties	Additional requirements for maintaining client records in an agency that provides home dialysis services.
§97.405(v)(1)-(2) separate penalties	Development of a written preventive maintenance program for home dialysis equipment.
§97.405(z)(1)-(7) separate penalties	Adoption of policies and procedures for emergencies addressing fire, natural disaster, and medical emergencies required of an agency that provides home dialysis services.
§97.406(1)	Adoption of a written policy for the provision of psychoactive treatments, if applicable.
§97.521(a)	Requirement for initiation of services for receiving an initial license.
§97.523(a)	Staff availability for the initial survey.
§97.523(b)	Staff availability for survey other than the initial survey.
§97.523(e)	Providing surveyor entry to the agency during regular business hours and within two hours of the surveyor's arrival at the agency.
§97.525(a)(2)	Availability of agency records.
§97.525(c)	Providing surveyor access to agency records.
§97.525(f)	Providing copies of agency records.
§97.527(b) separate penalties	Providing surveyor with audio recording of the exit conference if made by the agency.
§97.527(c) separate penalties	Providing surveyor with video recording of the exit conference if made by the agency.
§97.527(g)(1)	Time frame for submitting a plan of correction.
§97.527(g)(2)(A)-(D) separate penalties	Time frame for correcting a violation.
§97.527(g)(4)(A)	Time frame for submitting a revised plan of correction.

Figure: 40 TAC §97.602(e)(2)

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.220(b)	Maintaining adequate staff to provide services and supervise the provision of services within the service area.
§97.241(a)-(c) separate penalties	Management responsibilities.
§97.243(a)	Appointing an agency administrator and an alternate or designee.
§97.243(a)(1)-(2)	Duties of an agency administrator.
§97.243(b)(3)(A)-(D) separate penalties	Supervisory responsibilities of the supervising nurse or designee.
§97.243(b)(4)	Allowing the supervising nurse to be the administrator if the supervising nurse meets the qualifications of the administrator.
§97.243(b)(5)	Requirements for the supervision of physical, occupational, speech, or respiratory therapy; medical social services; or nutritional counseling.
§97.243(c)(1)-(2) separate penalties	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)(A)-(C)-(2)(A)-(D) separate penalties	Qualifications and conditions of the agency administrator and alternate or designee.
§97.244(b)(1)-(3) separate penalties	Qualifications of the supervising nurse and designated alternate.
§97.247(a)-(c) separate penalties	Verification of employability for unlicensed persons (criminal history checks, nurse aide registry, and employee misconduct registry).
§97.249(c)	Reporting alleged acts of abuse, neglect, and exploitation of clients.
§97.250 (b) and (c)(1)-(3) separate penalties	Enforcement of an agency's written policy for investigation of known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.251	Compliance with the agency's written policy to ensure that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(1)-(2)	An agency's financial ability to carry out its functions.
§97.281	Enforcement of a written policy for client care practices.
§97.282	Compliance with an agency policy on client conduct and responsibility and client rights.
§97.283(a)(2)	Requirement for providing a written notice of the agency's policy on advance directives.
§97.284	Compliance with the Clinical Laboratory Improvement Amendments of 1988.
§97.285(1)(A)-(C), (2) separate penalties	Enforcement and compliance with the agency's written policies on infection control.
§97.286(b)	Compliance with 25 TAC §§1.131-1.137 concerning the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.287(a)(1)-(3), (b), (c) separate penalties	An agency's Quality Assessment and Performance Improvement Program.
§97.288(a)-(b) separate penalties	Compliance with an agency's written policy for coordination of services and documentation requirements.
§97.289(a)-(b) separate penalties	An agency's use of and agreement with independent contractors and arranged services.
§97.290(a)	Ensuring that backup services are available when needed.
§97.290(b)	Ensuring that clients are educated in how to access care after hours.
§97.292(a)(1)-(7)-(b) separate penalties	Providing a client or a client's family with a written agreement for services, ensuring appropriate content of the agreement, obtaining an acknowledgement of receipt, and ensuring that the acknowledgement is in the client's record.
§97.295(a)	An agency's transfer or discharge of a client.
§97.296(a)-(b)(1)-(6) separate penalties	Enforcement of an agency's policy regarding acceptance of physician delegation orders.
§97.297(1)-(2)(A)-(B) separate penalties	Adoption and enforcement of a written policy describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.298	Enforcement of a written policy for ensuring compliance with the rules adopted by the Board of Nurse Examiners for the State of Texas in 22 TAC, Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC, Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.300(a)-(b)	The administration of medication.
§97.303	The possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.321(c)(2)	Maintaining adequate staff to provide and supervise services at a branch office.
§97.322(c)(2)	Maintaining adequate staff to provide and supervise services at an alternate delivery site.
§97.401(b)	Acceptance of a client for home health services and the initiation of services.
§97.401(d)	Requirement that qualified personnel provide and supervise all services.
§97.401(e)	Requirement that all staff providing services, delegation, and supervision be employed by or be under contract with the agency.
§97.401(g)	Age and competency of unlicensed persons providing licensed home health services.
§97.402(a)	Compliance with the Medicare Conditions of Participation (Social Security Act, Title 42, Code of Federal Regulations, Part 484.)
§97.402(c)	Compliance with §97.701(f) of this title (relating to Home Health Aides) for an agency that implements a competency evaluation program.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(a)	Compliance with the Social Security Act and the regulations in Title 42, Code of Federal Regulations, Part 418.
§97.403(c)(1)-(8) separate penalties	Adoption of a written policy for the provision of hospice services.
§97.403(d)(1)-(3) separate penalties	Requirement and conditions of the medical director for an agency that provides hospice services.
§97.403(e)(1)(A)-(D) separate penalties	Composition of an interdisciplinary team or teams.
§97.403(e)(2)(A)-(D) separate penalties	Responsibilities of the interdisciplinary team.
§97.403(e)(4)	Designating a registered nurse to coordinate implementation of the plan of care for each client.
§97.403(f)(1)	Ensuring continuity of client and family care in home and outpatient and inpatient settings.
§97.403(f)(2)(A)-(F) separate penalties	Contract requirements for providing arranged services.
§97.403(f)(3)	Professional management responsibility for arranged services.
§97.403(f)(5)(A)-(E) separate penalties	Ensuring that inpatient care is furnished only in a licensed facility and according to contract requirements.
§97.403(g)(1)-(3) separate penalties	Time requirements for contacting the client or client's representative, performing the initial health assessment visit, and initiation of services.
§97.403(h)	Performing and making available to each client a comprehensive health assessment that identifies the client's needs.
§97.403(h)(1)	Completing the comprehensive health assessment in a timely manner.
§97.403(h)(2)(A)-(C) separate penalties	Composition of the comprehensive health assessment.
§97.403(h)(3)(A)-(B) separate penalties	Requirement for updating and revising the comprehensive health assessment.
§97.403(i)(1)-(3)(A)-(G) and (4) separate penalties	Requirements for a written plan of care.
§97.403(m)	Ensuring that all core services are provided, and requirements for using contracted staff, if necessary.
§97.403(n)(1)-(3) separate penalties	Requirements for providing nursing care and services.
§97.403(o)	Qualifications of the social worker performing hospice services.
§97.403(p)	Requirements for ensuring that general medical needs of clients are met.
§97.403(q)(1)-(4) separate penalties	Requirements for providing counseling services.
§97.403(r)	Requirements for providing services, maintaining a system for ensuring identification of client needs, communication across all disciplines, and integration of services.
§97.403(s)	Requirements for having therapy services available.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(t)	Requirements for having home health aide and homemaker services available.
§97.403(t)(1)-(2) separate penalties	Requirements for RN supervisory visits to assess aide services.
§97.403(u)(1)-(3)(A)-(D) separate penalties	Requirements for providing medical supplies, appliances, and medications, as needed, for palliation and management of terminal illness and related conditions.
§97.403(v)	Requirements that inpatient care be available for pain control, symptom management, and respite.
§97.403(w)(1)(A)-(B) separate penalties	Requirements for having on-site 24-hour nursing services provided by RNs and LVNs.
§97.403(w)(2)	Having a written plan in the event of a disaster.
§97.403(w)(3)	Meeting all federal, state, and local laws, regulations, and codes pertaining to health and safety.
§97.403(w)(4)(A)-(B) separate penalties	Meeting the National Fire Protection Association Life Safety Code for fire in buildings and structures.
§97.403(w)(9)	Having available at all times a quantity of linen essential for proper care of clients and requirements to prevent the spread of infection on linens.
§97.403(w)(10)	Making provisions for isolating clients with infectious diseases.
§97.403(w)(12)(A)-(I) separate penalties	Methods and procedures for dispensing and administering medications.
§97.404(c)	Qualifications of agency staff performing personal assistance services.
§97.404(d)(1)-(4)	Tasks authorized under a personal assistance services license category.
§97.404(h)	Performance of gastrostomy tube feedings and medication administration for an agency that provides personal assistance services.
§97.405(a)	Requirements for agencies that provide peritoneal dialysis or hemodialysis services.
§97.405(c)(1)-(2) separate penalties	Qualifications and responsibilities of the medical director for an agency that provides home dialysis services.
§97.405(e)(1)(A)-(C) separate penalties	Provision and supervision of nursing services for an agency that provides home dialysis services.
§97.405(e)(2)	Provision of nutritional counseling for an agency that provides home dialysis services.
§97.405(e)(3)	Provision of medical social services for an agency that provides home dialysis services.
§97.405(f)(1)(A)-(R)(i)-(iv) separate penalties	Requirements for orientation and training of personnel providing direct care to clients receiving home dialysis services.
§97.405(f)(2)(a)-(G) separate penalties	Requirement for an orientation and skills education period for licensed nurses.
§97.405(i)	Requirement that an agency coordinate the exchange of medical and other important information when transferring a home dialysis client to a health-care facility for treatment.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.405(k)	Requirement for routine hepatitis testing of home dialysis clients and agency employees providing dialysis care.
§97.405(k)(1)(A)-(C) separate penalties	Requirements for hepatitis B screening and vaccinations for staff.
§97.405(k)(2)(A)-(E) separate penalties	Requirements for hepatitis B screening and vaccinations for clients.
§97.405(l)	Requirements for employees providing direct care to clients to have a current CPR certification.
§97.405(m)	Requirement for initial admission assessment of a client for home dialysis services.
§97.405(n)	Requirement for development of a long-term program for a client receiving home dialysis services.
§97.405(o)	Requirement that the agency conducts a history and physical of a home dialysis client at admission and annually.
§97.405(p)(1)-(2) separate penalties	Requirement for physician orders for home self-assisted dialysis treatment.
§97.405(q)(1)-(7) separate penalties	Requirements for development and implementation of a care plan for a home dialysis client.
§97.405(r)	Requirement for medication administration by licensed personnel for an agency that provides home dialysis services.
§97.405(t)(1)-(4) separate penalties	Requirements for use of water in the home dialysis setting.
§97.405(v)(1)(A)-(D)-(2) separate penalties	Requirement for a written preventive maintenance program for home dialysis equipment.
§97.405(w)(1)-(6) separate penalties	Reuse of disposable medical devices in the home dialysis setting.
§97.405 (x)(1)-(4) separate penalties	Provision of laboratory services.
§97.405(y)(1)-(2) separate penalties	Supplies for home dialysis services.
§97.405(z)(1)-(7)(A)-(C) separate penalties	Compliance with policies and procedures for emergencies addressing fire, natural disaster, and medical emergencies, required of an agency that provides home dialysis services.
§97.406(2)-(5) separate penalties	Provision of psychoactive services.
§97.407(1)-(11) separate penalties	Provision of intravenous therapy services.
§97.523(e)	Requirement to grant the surveyor access to the agency.
§97.701(a)-(g) separate penalties	Home health aides.
§95.128(a)-(n) and (q)-(r)	Home health medication aides.
§95.128(o)-(p)	Home health medication aide training program.

Figure 1: 43 TAC §8.138(b)(1)

Appendix A-1

BLACK DEALER'S TAG
MOTOR VEHICLE

0 0

TEXAS DEALER

UNREGISTERED

OWNED BY: VEHICLE 0098765

JOHN DOE MOTORS P12345

USE ON MOTOR VEHICLE ONLY AUSTIN

FOR INTRANSIT, ROAD TESTING, DEMONSTRATION AND USE
BY CHARITABLE ORGANIZATIONS

0 0

(COLOR:Black)

Figure 2: 43 TAC §8.138(b)(1)

APPENDIX A-2

DEALER TEMPORARY CARDBOARD TAG FOR MOTOR VEHICLE

INSTRUCTIONS TO DEALER

The dealer temporary cardboard tag may be used by the dealer to demonstrate or cause to be demonstrated his/her unregistered vehicles only to prospective buyers, or on vehicles loaned to charitable organizations.

The dealer temporary tag shall not be used to operate vehicles for the personal use of a dealer or his/her employees and shall not be used on commercial vehicles when carrying a load.

This tag may also be used to convey or cause to be conveyed a dealer's unregistered vehicles from his/her place of business in one part of the state to his/her place of business in another part of the state, or from his/her place of business to a place to be repaired, reconditioned, or serviced, or from the point in this state where such vehicles are unloaded to his/her place of business, or to convey such vehicles from one dealer's place of business to another dealer's place of business or from the point of purchase of such vehicles by the dealer to the dealer's place of business, or for the purpose of road testing; and such vehicles displaying this tag while being so conveyed shall be exempt from the mechanical inspection requirements of Sections 140 and 141 of the Uniform Act Regulating Traffic on Highways.

Each printed dealer tag shall contain a unique sequential number printed on the front of the tag. The number assigned to a tag may not be used more than once by a dealer.

A dealer shall maintain a record in numerical order of all dealer tags printed by that dealer and as to each vehicle such record shall consist of:

(1) the assigned sequential number from the temporary tag;
(2) the date the tag was placed on the vehicle;
(3) the purpose for issuing the tag;
(4) the name of the person in control of the vehicle on which the tag was placed; and
(5) the vehicle identification number of the vehicle.

No homemade tags are permitted to be used under any circumstances. It is the dealer's responsibility to provide to the printer current information on file with the Motor Vehicle Division.

INSTRUCTIONS TO PRINTER

The black and white dealer's temporary cardboard tags shall be cut 6" X 11" in size. The tag shown in Figure 1 of Appendix A-1 shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 7 inch centers and vertically punched on 4-1/2 inch centers. The letters in the words "UNREGISTERED VEHICLE" shall not be less than 3/4 inches high. These tags are to be printed with black letters and numerals on a white background. Each tag must contain a unique sequential number printed on the front side of the tag. Subsequent orders of tags must continue the sequential numbering from previous orders. Printed matter on the tag must be between the top and bottom margins which shall be one inch and must appear exactly as shown in figure 1, Appendix A-1 except that the dealer's number, name and city shall be the same as that shown on the General Distinguishing Number License issued by the Motor Vehicle Division. All printed matter on a dealer's temporary cardboard tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

Motorcycle dealer temporary cardboard tags shall contain the same printed information and format but shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 5 3/4-inch centers and vertically punched on 2 3/4-inch centers and the letters in the words "UNREGISTERED VEHICLE" shall not be less than 1/2 inch high. All printed matter on a motorcycle dealer temporary cardboard tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

Texas Department of Transportation - Motor Vehicle Division - Austin, Texas

Figure 1: 43 TAC §8.138(b)(2)

Appendix B-1

RED INITIAL BUYER'S TAG
MOTOR VEHICLE

0 0

TEXAS BUYER

UNREGISTERED

VEHICLE 0098765

SOLD BY:

JOHN DOE MOTORS P12345 - AUSTIN

DEALER MUST APPLY FOR TITLE & REGISTRATION OF VEHICLE
WITHIN 20 WORKING DAYS FROM THE DATE SOLD

DATE SOLD: __________ BUYERS NAME _______________ VIN ________________

0 0

(COLOR:PMS# 185)

Figure 2: 43 TAC §8.138(b)(2)

Appendix B-2

INITIAL BUYER'S TEMPORARY CARDBOARD TAG FOR MOTOR VEHICLE

INSTRUCTIONS TO DEALER

You are authorized under the Transportation Code, §503.063, to provide each customer one red cardboard buyer's tag to be used on unregistered new vehicles or used vehicles that have not been registered in the buyer's name for a period not to exceed twenty one (21) calendar days from the date the vehicle is sold. It is your responsibility as a dealer to see that the following information is placed on the tag:

1. Date Vehicle Sold
2. Vehicle Identification Number (VIN)
3. Buyer's Name

If a buyer operates an unregistered vehicle without the above information being shown, both the dealer and the buyer may be subject to a fine.

Each buyers tag printed shall contain a unique sequential number printed on the front of the tag. The number assigned to a tag may not be used more than once by a dealer.

A dealer shall maintain a record in numerical order of all buyer tags printed by that dealer and as to each vehicle such record shall consist of:

(1) the assigned sequential number from the temporary tag;
(2) the make;
(3) the vehicle identification number;
(4) the date vehicle was sold; and
(5) the name of the buyer to whom the temporary tag was issued.

No homemade tags are permitted to be used under any circumstances. It is the dealer's responsibility to provide to the printer current information on file with the Motor Vehicle Division.

INSTRUCTIONS TO PRINTER

The initial buyer's temporary cardboard tag shall be cut 6'' X 11' in size. The tag shown in Figure 1, Appendix B-1 shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 7 inch centers and vertically punched on 4-1/2 inch centers. The letters in the words "UNREGISTERED VEHICLE" shall not be less than 3/4 inches high. These tags are to be printed with red letters and numerals on a white background. Each tag must contain a unique sequential number printed on the front side of the tag. Subsequent orders of tags must continue the sequential numbering from previous orders. Printed matter on the tag must be between the top and bottom margins which shall be one inch and must appear exactly as shown in figure 1, Appendix B-1 except that the dealer's number, name and city shall be the same as that shown on the General Distinguishing Number License issued by the Motor Vehicle Division. All printed matter on a buyer's temporary cardboard tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

Motorcycle buyer's tags shall contain the same printed information and format but shall be cut 4" x 7" in size and shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 5 3/4-inch centers and vertically punched on 2 3/4-inch centers and the letters in the words "UNREGISTERED VEHICLE" shall not be less than 1/2 inch high. All printed matter on a motorcycle buyer's temporary cardboard tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

Texas Department of Transportation - Motor Vehicle Division - Austin, Texas

Figure 1: 43 TAC §8.138(b)(3)

Appendix B-3

BLUE SUPPLEMENTAL BUYER'S TAG
MOTOR VEHICLE

0 0

TEXAS BUYER

UNREGISTERED

SOLD BY: VEHICLE 0098765

JOHN DOE MOTORS P12345 - AUSTIN

USE ON MOTOR VEHICLE ONLY WHEN DEALER HAS BEEN UNABLE TO OBTAIN RELEASE OF LIEN

DATE SOLD: __________ BUYERS NAME:________________ VIN: ________________

TAG VALID FOR 42 DAYS FROM DATE SOLD

0 0

(COLOR: Reflex Blue)

Figure 2: 43 TAC §8.138(b)(3)

Appendix B-4

SUPPLEMENTAL BUYER'S TEMPORARY CARDBOARD TAG FOR MOTOR VEHICLE

INSTRUCTIONS TO DEALER

You authorized to provide a customer a blue supplemental temporary cardboard buyer's tag to be used on unregistered new or used vehicles for a period not to exceed forty-two (42) days from the date of sale under specific conditions authorized by Transportation Code §503.063 (f). The dealer may only place a blue supplemental temporary cardboard buyer's tag on a vehicle when the dealer has been unable to obtain release of lien from the lienholder. As a dealer, it is your responsibility to see that the following information is placed on the tag:

1. Date Vehicle Sold
2. Vehicle Identification Number (VIN)
3. Buyer's Name

If a buyer operates an unregistered vehicle without the above information being shown, both the dealer and the buyer may be subject to a fine.

Each buyers tag printed shall contain a unique sequential number printed on the front of the tag. The number assigned to a tag may not be used more than once by a dealer.

A dealer shall maintain a record in numerical order of all buyer tags printed by that dealer and as to each vehicle such record shall consist of:

(1) the assigned sequential number from the temporary tag;
(2) the make;
(3) the vehicle identification number;
(4) the date vehicle was sold; and
(5) the name of the buyer to whom the temporary tag was issued.

No homemade tags are permitted to be used under any circumstances. It is the dealer's responsibility to provide to the printer current information on file with the Motor Vehicle Division.

INSTRUCTIONS TO PRINTER

The supplemental buyer's temporary cardboard tag shall be cut 6'' X 11' in size. The tag shown in Figure 1, Appendix B-3 shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 7 inch centers and vertically punched on 4-1/2 inch centers. The letters in the words "UNREGISTERED VEHICLE" shall not be less than 3/4 inches high. These tags are to be printed with blue letters and numerals on a white background. Each tag must contain a unique sequential number printed on the front side of the tag. Subsequent orders of tags must continue the sequential numbering from previous orders. Printed matter on the tag must be between the top and bottom margins which shall be one inch and must appear exactly as shown in figure 1, Appendix B-3 except that the dealer's number, name and city shall be the same as that shown on the General Distinguishing Number License issued by the Motor Vehicle Division. All printed matter on a buyer's temporary cardboard tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

Motorcycle buyer's tags shall contain the same printed information and format but shall be cut 4" x 7" in size and shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 5 3/4-inch centers and vertically punched on 2 3/4-inch centers and the letters in the words "UNREGISTERED VEHICLE" shall not be less than 1/2 inch high. All printed matter on a motorcycle buyer's temporary cardboard tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

Texas Department of Transportation - Motor Vehicle Division - Austin, Texas

Figure 1: 43 TAC §8.138(b)(4)

Appendix C-1

ORANGE CONVERTER'S TAG
MOTOR VEHICLE

0 0

TEXAS CONVERTER

UNREGISTERED

VEHICLE 0098765

OWNED BY:

JOHN DOE CONVERSIONS C12345

USE ON CONVERTED MOTOR VEHICLE ONLY AUSTIN

FOR INTRANSIT, ROAD TESTING AND DEMONSTRATION

0 0

(COLOR: ORANGE # 165)

Figure 2: 43 TAC §8.138(b)(4)

Appendix C -2

TEMPORARY CARDBOARD TAG FOR CONVERTED MOTOR VEHICLE

INSTRUCTIONS TO CONVERTER

This converter's temporary cardboard tag may be used on an unregistered vehicle by the converter or the converter's employees to demonstrate or cause to be demonstrated the vehicle to a prospective buyer who is an employee of a franchised motor vehicle dealer. A converter may permit a prospective buyer who is an employee of a franchised motor vehicle dealer to operate a vehicle while the vehicle is being demonstrated.

This tag may also be used to convey or cause to be conveyed an unregistered vehicle from one of the converter's places of business in this state to another of the converter's places of business in this state, or from the converter's place of business to a place the vehicle is to be assembled, repaired, reconditioned, modified, or serviced, or from the state line or a location in this state where the vehicle is unloaded to the converter's place of business, from the converter's place of business to a place of business of a franchised motor vehicle dealer, or to road test the vehicle.

A vehicle being conveyed while displaying a converter's temporary cardboard tag is exempt from the inspection requirements of Chapter 548.

A converter or employee of a converter may not use a converter's temporary cardboard tag to operate a vehicle for the converter's or the employee's personal use.

Each printed converter tag shall contain a unique sequential number printed on the front of the tag.

A converter shall maintain a record of all converter tags printed by that converter and as to each vehicle such record shall consist of:

(1) the assigned sequential number from the temporary tag;
(2) the date the tag was issued;
(3) the purpose for issuing the tag;
(4) the name of the person in control of the vehicle on which the tag was placed; and
(5) the vehicle identification number of the vehicle.

No homemade tags are permitted to be used under any circumstances. It is the converter's responsibility to provide to the printer current information on file with the Motor Vehicle Division.

INSTRUCTIONS TO PRINTER

The converter's orange temporary cardboard tags are to be cut 6"X11". The tag shown in Figure 1 of Appendix C-1 shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 7 inch centers and vertically punched on 4-1/2 inch centers. The letters in the words "UNREGISTERED VEHICLE" shall not be less than 3/4 inches high. These tags are to be printed with orange #165 letters and numerals on a white background. Each tag must contain a unique sequential number printed on the front side of the tag. Subsequent orders of tags must continue the sequential numbering from previous orders. Printed matter on the tag must be between the top and bottom margins which shall be one inch and must appear exactly as shown in Figure 1 of Appendix C-1 except that the converter's number, name, and city shall be the same as that shown on the Converter license issued by the Motor Vehicle Division. All printed matter on a converter's temporary tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

The motorcycle converter's temporary cardboard tags shall contain the same printed information and format but shall be printed on not less than 24 Point Poly Coated C2S Board with bolt holes to be horizontally punched on 5 3/4-inch centers and vertically punched on 2 3/4-inch centers and the letters in the words "UNREGISTERED VEHICLE" shall not be less than 1/2 inch high. All printed matter on a motorcycle converter's temporary cardboard tag shall be positioned so that it cannot be covered or obstructed by a plate holder.

Texas Department of Transportation - Motor Vehicle Division - Austin, Texas

Figure: 43 TAC §8.250(c)(1)

MSRP	$20,000
Less Dealer Discount	1,000
Sale Price	$19,000

Figure: 43 TAC §8.250(c)(2)

Advertised Price	$18,000
Less Rebate	500
Sale Price	$17,500

Figure: 43 TAC §8.250(c)(3)

MSRP	$20,000
Less Rebate	500
Less Dealer Discount	500
Sale Price	$19,000

Figure: 43 TAC §8.250(d)

Total Vehicle Plus Options	$10,995.00
Option Package Discount	1,000.00
MSRP	9,995.00
Less Rebate	500.00
Less Dealer Discount	500.00
Sale Price	$8,995.00

Figure: 43 TAC §8.250(e)

MSRP	$9,995.00
Less Rebate	500.00
Less Dealer Discount	500.00
Sale Price	$8,995.00

FIRST TIME BUYERS RECEIVE ADDITIONAL $500.00 OFF

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 Building and Procurement Commission

Request for Proposal

The Texas Building and Procurement Commission (TBPC), on behalf of the Office of the Attorney General (OAG) and the Comptroller of Public Accounts (CPA), announces the issuance of **Request for Proposals (RFP) #303-6-10289.** TBPC seeks a 5 year lease of approximately 7,840 square feet of office space in the Brownsville area, Cameron County, Texas. The deadline for questions is October 24, 2005, and the deadline for proposals is October 31, 2005 at 3:00 P.M. The award date is December 1, 2005. TBPC reserves the right to accept or reject any or all proposals submitted. TBPC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TBPC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TBPC Purchaser Myra Beer at (512) 463-5773. A copy of the revised RFP may be downloaded from the *Electronic State Business Daily* at http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=61396.

TRD-200504476
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Filed: October 4, 2005

♦ ♦ ♦

Central Texas Council of Governments

Invitation for Bids

The Central Texas Council of Governments (CTCOG) is soliciting bids for a General Contractor for a Renovation and Construction project. CTCOG serves the following counties: Bell, Coryell, Lampasas, Milam, Mills, Hamilton, and San Saba. CTCOG implements various programs under federal, state and local funding.

Bid/proposal specifications may be obtained from the offices of CTCOG by contacting (254) 933-6026 or at 100 S. Davis, P. O. Box 729, Belton, TX 76513.

Questions regarding the Invitation for Bids (IFB) may be e-mailed to jreed@ctcog.org. A bidder's conference will be held at 10:00 a.m. on October 24, 2005 at the CTCOG building located in the Oak Village Shopping Center at 2180 North Main, Belton, TX. Questions regarding the IFB must be received by the end of the bidder's conference. One original response to the IFB must be received by CTCOG at 100 S. Davis, Belton, TX 76513 by 3:00 p.m. CST on November 4, 2005.

CTCOG reserves the right to accept or reject any or all bids/proposals received as a result of this request, or to negotiate with all qualified vendors, or to cancel in part or in its entirety this IFB if it is in the best interest of CTCOG.

CTCOG encourages historically underutilized businesses to request and respond to all IFBs.

TRD-200504443
R. Michael Irvine
Director of Administration
Central Texas Council of Governments
Filed: September 30, 2005

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Contract Award

Pursuant to Chapter 403, Chapter 2254, Subchapter A, Texas Government Code, and Chapter 111, Texas Tax Code, the Comptroller of Public Accounts (Comptroller) announces this notice of contract awards.

The Comptroller's Request for Qualifications 172k (RFQ) related to these contract awards was published in the July 1, 2005, *Texas Register* (30 TexReg 3897-3900).

The contractors will provide Professional Contract Auditing Services as authorized by Subchapter A, Chapter 111, §111.0045 of the Texas Tax Code as described in the Comptroller's RFQ.

The Comptroller announces that eight (8) additional contracts were awarded as of September 30, 2005 as follows:

A contract is awarded to Tax Smith Consulting, 7603 Hollow Glen, Houston, Texas 77072. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 27, 2005 through August 31, 2006.

A contract is awarded to Mouton Tax Consulting, 20,000 Saums Rd., No. 7105, Katy, Texas 77449. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 27, 2005 through August 31, 2006.

A contract is awarded to Derrick Kwan Corp., 2846 River Birch Dr., Sugar Land, Texas 77479. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 29, 2005 through August 31, 2006.

A contract is awarded to Morgan, Spencer & Co., 1301 Stapleton St., Flower Mound, Texas 75028. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 28, 2005 through August 31, 2006.

A contract is awarded to WMH Consulting, 6748 Cedar Forest Trail, Dallas, Texas 75236. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner

shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 28, 2005 through August 31, 2006.

A contract is awarded to H. R. Shaikh, Seyar LLP, 9888 Bissonnet St., Suite 300, Houston, Texas 77036. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 28, 2005 through August 31, 2006.

A contract is awarded to Bailey Management Service, 1515A West Braker Ln., Austin, Texas 78758. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 29, 2005 through August 31, 2006.

A contract is awarded to Ashley & Williams International LLC d/b/a Tax Advisors Group, 2898 Holly Hall, Houston, Texas 77054. Examinations will be assigned in $22,500, $60,000 or $75,000 increments or packages; but no contract examiner shall have examination packages totaling more than $150,000 in fees during any one state fiscal year during the contract term or any extension thereof. The term of the contract is September 29, 2005 through August 31, 2006.

TRD-200504444
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 30, 2005

Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, and §403.011, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the issuance of a Request for Proposals (RFP #175a) from qualified, independent firms to provide consulting services to Comptroller on a "pooled contract" basis, to assist Comptroller in conducting Local Government Management Reviews (LGMR or Reviews) of selected cities and counties statewide. The successful respondents will assist Comptroller in conducting the Reviews under master or pooled contracts, on an as-assigned basis throughout the state. Comptroller reserves the right to select multiple contractors to participate in conducting the Reviews, as set forth in the RFP. The successful respondent(s) will be expected to begin performance of the contract or contracts, if any, on or about December 1, 2005, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 East 17th Street, ROOM G-24, Austin, Texas 78774 (Issuing Office), telephone number: (512) 305-8673, to obtain a copy of the RFP. Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, October 14, 2005, after 10:00 a.m., Central Zone Time (CZT), and during normal business hours thereafter. Comptroller also made the complete RFP available electronically on the Texas Marketplace at: http://esbd.tbpc.state.tx.us after 10:00 a.m. (CZT) on Friday, October 14, 2005.

Non-Mandatory Letters of Intent and Questions: All Non-Mandatory Letters of Intent and questions regarding the RFP must be sent via facsimile to Mr. Harris at: (512) 475-0973, not later than 2:00 p.m. (CZT), on Friday, October 28, 2005. Official responses to questions received by the foregoing deadline will be posted electronically on the Texas Marketplace no later than Friday, November 4, 2005, or as soon thereafter as practical. Non-Mandatory Letters of Intent or Questions received after the deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be received in the Assistant General Counsel's Office at the address specified above (ROOM G-24) no later than 2:00 p.m. (CZT), on Tuesday, November 15, 2005. Proposals received after this time and date will not be considered. Proposals will not be accepted from respondents that do not submit proposals by the foregoing deadline. Respondents shall be solely responsible for confirming the timely receipt of proposals in the Issuing Office.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. Comptroller will make the final decision regarding the award of master contracts for assignments from the pool selected, if any. Comptroller reserves the right to award one or more contracts under this RFP. Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows:

Issuance of RFP--October 14, 2005, after 10:00 a.m. CZT;

All Non-Mandatory Letters of Intent and Questions Due--October 28, 2005, 2:00 p.m. CZT;

Official Responses to Questions Posted--November 4, 2005, or as soon thereafter as practical;

Proposals Due--November 15, 2005, 2:00 p.m. CZT;

Contract Execution--December 1, 2005, or as soon thereafter as practical;

Commencement of Project Activities--December 1, 2005, or as soon thereafter as practical.

TRD-200504482
Pamela Smith
Deputy General Counsel, Contracts
Comptroller of Public Accounts
Filed: October 4, 2005

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of October 10, 2005 - October 16, 2005 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of October 10, 2005 - October 16, 2005 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200504472
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 4, 2005

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Texas Education Agency

Request for Applications Concerning Supplemental Funding for Public Charter Schools, 2005 - 2006

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications from the following charter schools that have experienced an increase in student enrollment and/or sustained damage to school property due to Hurricane Katrina and/or Hurricane Rita: campus charter schools as defined in Texas Education Code (TEC), Chapter 12, Subchapter C; open-enrollment charter schools as defined in TEC, Chapter 12, Subchapter D; and college or university charter schools as described in TEC, Chapter 12, Subchapter E. In order to assist schools in need that have exceeded the number of years of eligibility for Public Charter School Start-Up Grant funds, the TEA has submitted a request for a waiver to the United States Department of Education to waive the number of years for which a public charter school is eligible to receive Public Charter School Start-Up Grant funding. Approval of grant applications from schools that are no longer eligible for start-up grant funding is contingent upon approval of the waiver. Schools requesting funds must be financially viable as determined by a review of documents on file with the TEA, including audit reports, information from the Teacher Retirement System, information from the Internal Revenue Service, and any other pertinent information. Additional eligibility requirements may be outlined in the Request for Applications (RFA).

Description. The purpose of this grant program is to provide supplemental funding to public charter schools to (1) assist with the cost of educating students who have been displaced by Hurricane Katrina or Rita and have temporarily relocated to Texas; and/or (2) assist charter schools that sustained damage or losses to school property that would effect the education of their students.

Dates of Project. The Supplemental Funding for Public Charter Schools Grant will be implemented during the 2005 - 2006 school year. Applicants should plan for a starting date of no earlier than the date the grant application is received by the TEA and an ending date of no later than August 31, 2006.

Project Amount. The maximum amount of funding available for each eligible grantee will be based upon need and the extent of damage as described in the RFA and approved by TEA. This project is funded 100 percent from Public Law 107-110, Title V, Part B, federal funds ($5,825,146).

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-06-002 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the Texas Education Agency website at http://www.tea.state.tx.us/grant/announcements/grants2.cgi for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Kirsten Moody, Public Charter School Division, Texas Education Agency, (512) 463-9575.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the Texas Education Agency no later than 5:00 p.m. (Central Time), Friday, November 4, 2005, to be considered for funding.

TRD-200504501
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: October 5, 2005

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Request for eGrant Applications Concerning Investment Capital Fund Grant Program: Improving Student Achievement Through Staff Development and Parent Training for Campus Deregulation and Restructuring, Cycle 15, School Years 2005 - 2006 and 2006 - 2007

Eligible Applicants. The Texas Education Agency (TEA) is requesting eGrant applications under Standard Application System (SAS) #ICFGAA07 from school districts and open-enrollment charter schools on behalf of an individual campus. A multi-campus school district or open-enrollment charter school may submit more than one application; however, each application must address strategies and activities for a single campus and its community. The school must have demonstrated a commitment to campus deregulation and to restructuring educational practices and conditions at the school by entering into a partnership with school staff; parents of students at the school; community and business leaders; school district officers; and a nonprofit community-based organization that has a demonstrated capacity to train, develop, and organize parents and community leaders into a large, nonpartisan constituency that will hold the school and the school district accountable for achieving high academic standards. Campuses currently participating in the 2004 - 2005 Investment Capital Fund Grant Program, Cycle 14 (SAS #ICFGAA06), are not eligible to participate in this project.

Description. The primary objective of this grant program is to improve student achievement through deregulation and restructuring that includes staff development and parent and community training, and may also include strategies designed to enrich or extend student learning experiences outside the regular school day. The applicant must identify local needs and provide strategies and activities designed to address those needs by meeting all of the program goals, which include training school staff, parents, and community leaders to understand academic standards; developing effective strategies to improve student performance; and organizing a large constituency of parents and community leaders that will hold the school and the school district accountable for achieving high academic standards.

Dates of Project. The Investment Capital Fund Grant will be implemented during the 2005 - 2006 and 2006 - 2007 school years. Applicants should plan for a starting date of no earlier than April 1, 2006, and an ending date of no later than August 31, 2007.

Project Amount. Funding will be provided for approximately 89 projects. Each project will receive a maximum of $50,000 for the grant period.

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the SAS. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the SAS to be considered for funding. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the SAS and that are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this SAS. This SAS does not commit TEA to pay any costs before an application is approved. The issuance of this SAS does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Obtaining Access to TEA's eGrants. The Investment Capital Fund Grant is available only through TEA's eGrants and may not be obtained or submitted by any other means. The eGrant application will be available in eGrants beginning October 14, 2005. To apply for access to eGrants, go to http://www.tea.state.tx.us/opge/egrant/index.html. Under the "eGrants Toolbox," select "Apply for eGrants Logon." Complete the form as instructed, obtain the required signatures, and send it to the TEA contact listed on the form.

Further Information. For clarifying information about the eGrant SAS, contact Greg Travillion, Division of High School Completion and Student Support Programs, Texas Education Agency, (512) 463-9322.

Request for Volunteer Reviewers. TEA is requesting individuals, including educators, parents, the business community, and education stakeholders from across the state, to volunteer to serve on the competitive review panel to review and score the grant applications submitted. Grant writers and applicants who serve on the review panel can gain valuable insight into the quality of a variety of grant applications, and all members of the review panel can contribute toward ensuring the success of the schoolchildren in Texas by volunteering time for this critical effort. Individuals desiring to volunteer to review applications must have access to a personal computer and to the Internet and can register online at http://bass.tea.state.tx.us/RS/ReaderSolicitation.asp.

Deadline for Receipt of eGrant Applications. Applications must be received by the Texas Education Agency by 5:00 p.m. (Central Time), Thursday, December 1, 2005, to be considered for funding.

TRD-200504502
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: October 5, 2005

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Texas Commission on Environmental Quality

Enforcement Orders

An agreed order was entered regarding Pete Gallegos Paving, Inc., Docket No. 2003-0515-LII-E on September 20, 2005 assessing $625 in administrative penalties with $125 deferred.

Information concerning any aspect of this order may be obtained by contacting Joseph Daley, Enforcement Coordinator at (512) 239-3308, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Boling Municipal Water District, Docket No. 2003-0339- MWD-E on September 20, 2005 assessing $26,581 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kimberly McGuire, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Quality Electric Steel Castings LP, Docket No. 2002- 1393-AIR-E on September 20, 2005 assessing $9,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Colonial Distribution, Inc. dba Wez Mart 1, Docket No. 2003-0388-PST-E on September 20, 2005 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sarah Utley, Staff Attorney at (512) 239-0575, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Best Enterprises, Inc. dba Best Food Store, Docket No. 2003-0956-PST-E on September 20, 2005 assessing $3,510 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Burnet County, Docket No. 2003-1190-PST-E on September 20, 2005 assessing $4,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gulf Coast Waste Disposal Authority, Docket No. 2004- 0378-MLM-E on September 20, 2005 assessing $41,000 in administrative penalties with $8,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Lawrence King, Enforcement Coordinator at (512) 239-7037, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Frankie Mae Hamilton, Docket No. 2004-0622-MSW-E on September 20, 2005 assessing $7,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jeffrey Huhn, Staff Attorney at (512) 239-5111, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Norma Garza & Julian Hinojosa dba Garza Trucking, Docket No. 2004-0678-MSW-E on September 19, 2005 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 490-3096, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Alkusari Texas Limestone Corporation, Docket No. 2004-0719-WQ-E on September 20, 2005 assessing $4,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 490-3096, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cahill Country Water Supply Corporation, Docket No. 2004-0809-PWS-E on September 20, 2005 assessing $2,900 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joseph Daley, Enforcement Coordinator at (512) 239-3308, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Antonio Morales dba Tony's Gas For Less, Docket No. 2004-0852-PST-E on September 20, 2005 assessing $18,500 in administrative penalties with $14,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Cari Bing, Enforcement Coordinator at (512) 239-1445, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Gabriel Vigil dba Mr. Press, Docket No. 2004-0906-IHW- E on September 23, 2005 assessing $4,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Galena Park, Docket No. 2004-0963-MWD-E on September 19, 2005 assessing $2,040 in administrative penalties with $408 deferred.

Information concerning any aspect of this order may be obtained by contacting Brian Lehmkuhle, Enforcement Coordinator at (512) 239-4482, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding J. H. Strain & Sons, Inc. dba JH Strain & Sons Bean Pit, Docket No. 2004-1037-WQ-E on September 20, 2005 assessing $8,100 in administrative penalties with $1,620 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding General Electric Railcar Repair Services Corporation, Docket No. 2004-1468-IHW-E on September 20, 2005 assessing $22,950 in administrative penalties with $4,590 deferred.

Information concerning any aspect of this order may be obtained by contacting Mac Vilas, Enforcement Coordinator at (512) 239-2557, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sarabecca, GP LLC, Docket No. 2004-1481-MWD-E on September 20, 2005 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Lawrence King, Enforcement Coordinator at (512) 239-7037, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Carlisle Independent School District, Docket No. 2004- 1523-MWD-E on September 20, 2005 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903) 535-5145, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Pearland, Docket No. 2004-1526-MWD-E on September 20, 2005 assessing $5,250 in administrative penalties with $1,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ConocoPhillips Company, Docket No. 2004-1617-AIR-E on September 20, 2005 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ronnie Kramer, Enforcement Coordinator at (806) 468-0512, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Rodney Fincher, Docket No. 2004-1633-MSW-E on September 20, 2005 assessing $2,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jeffrey Huhn, Staff Attorney at (512) 239-5111, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Naeemuddin Mohammad dba Big Deli Food Mart, Docket No. 2004-1704-PST-E on September 20, 2005 assessing $4,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ruben Soto, Enforcement Coordinator at (512) 239-4571, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Love's Travel Stops & Country Stores, Inc. dba Loves Country Store 270, Docket No. 2004-1772-IHW-E on September 20, 2005 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Mac Vilas, Enforcement Coordinator at (512) 239-2557, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding B-5 Bar, Inc. dba The Store Exxon, Docket No. 2004- 1783-PST-E on September 20, 2005 assessing $1,540 in administrative penalties with $308 deferred.

Information concerning any aspect of this order may be obtained by contacting David Flores, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jerry Bell dba Crossroads Country Store, Docket No. 2004-1794-PST-E on September 20, 2005 assessing $4,280 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chapman's Grocery, Inc. dba Jiffy Mart #7, Docket No. 2004-1820-PST-E on September 20, 2005 assessing $1,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Flores, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ubuck, LLC dba Sage Foods, Docket No. 2004-1833- PST-E on September 20, 2005 assessing $3,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Enforcement Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Energy Services, L.P., Docket No. 2004-1844- WQ-E on September 20, 2005 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sandra Hun dba Sunshine Grocery, Docket No. 2004- 1852-PST-E on September 20, 2005 assessing $6,750 in administrative penalties with $1,350 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lisa Motor Lines, Inc., Docket No. 2004-1855-PST-E on September 20, 2005 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Howard Willoughby, Enforcement Coordinator at (361) 825-3140, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 217, Docket No. 2004-1859-MWD-E on September 20, 2005 assessing $4,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PNI Distribution Incorporated, Docket No. 2004-1861- PST-E on September 20, 2005 assessing $7,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding West Texas Gas, Inc., Docket No. 2004-1870-PST-E on September 20, 2005 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Penske Truck Leasing Co., L.P., Docket No. 2004-1905- AIR-E on September 20, 2005 assessing $1,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Conner Steel Products, Ltd., Docket No. 2004-1935-AIR- E on September 20, 2005 assessing $12,200 in administrative penalties with $2,440 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DGPS Enterprises, Inc. dba Kountry Kwik, Docket No. 2004-2027-PST-E on September 20, 2005 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting Chad Blevins, Enforcement Coordinator at (512) 239-6017, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BMC Holdings Inc., Docket No. 2004-2054-AIR-E on September 20, 2005 assessing $4,600 in administrative penalties with $920 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Baptist Hospitals of Southeast Texas dba Memorial Hermann Baptist Beaumont Hospital, Docket No. 2004-2111-PST-E on September 20, 2005 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mark A. Mouton, Docket No. 2005-0022-OSI-E on September 20, 2005 assessing $510 in administrative penalties with $102 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Pearsall, Docket No. 2005-0093-PST-E on September 20, 2005 assessing $2,140 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding M.A.D. Property Mgt., L.P. dba J&H Stop & Shop, Docket No. 2005-0119-PST-E on September 19, 2005 assessing $2,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jill McNew, Enforcement Coordinator at (512) 239-0560, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HJG Trucking Company, Docket No. 2005-0128-WQ-E on September 20, 2005 assessing $5,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ofelia Bosquez dba Wencho's Gas & Food Mart, Docket No. 2005-0132-AIR-E on September 20, 2005 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903) 535-5145, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Total Petrochemicals USA, Inc., Docket No. 2005-0146- AIR-E on September 20, 2005 assessing $13,900 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Orlando Cavazos dba Bryan Park Exxon, Docket No. 2005-0156-PST-E on September 20, 2005 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Moore Wallace North America, Inc. dba Wetmore & Company, Docket No. 2005-0170-AIR-E on September 20, 2005 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Total Petrochemicals USA, Inc., Docket No. 2005-0171- AIR-E on September 20, 2005 assessing $3,550 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michael Limos, Enforcement Coordinator at (512) 239-5839, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FFP Operating Partners, L.P. dba On The Go Fuel, Docket No. 2005-0175-AIR-E on September 20, 2005 assessing $1,400 in administrative penalties with $280 deferred.

Information concerning any aspect of this order may be obtained by contacting Chad Blevins, Enforcement Coordinator at (512) 239-6017, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hixson Lumber Sales of Texas, Inc., Docket No. 2005- 0206-PST-E on September 20, 2005 assessing $800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Arechiga Petroleum, Inc. dba Arechiga Shell, Docket No. 2005-0207-PST-E on September 20, 2005 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Joesingh, Inc. dba J & S All Season, Docket No. 2005- 0219-PST-E on September 20, 2005 assessing $2,140 in administrative penalties with $428 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mazen, Inc. dba Truck N Travel, Docket No. 2005-0232- PST-E on September 23, 2005 assessing $3,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Yousef Hakemy dba One Stop Food Store, Docket No. 2005-0241-PST-E on September 20, 2005 assessing $3,280 in administrative penalties with $656 deferred.

Information concerning any aspect of this order may be obtained by contacting Jill McNew, Enforcement Coordinator at (512) 239-0560, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Juan R. Trevino dba Rangerville Drive In, Docket No. 2005-0245-PST-E on September 20, 2005 assessing $1,900 in administrative penalties with $380 deferred.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Enforcement Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Milton Galoob Company dba Tiger Grocery, Docket No. 2005-0246-PST-E on September 20, 2005 assessing $2,400 in administrative penalties with $480 deferred.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, Enforcement Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Granite Construction Company, Docket No. 2005-0249- PST-E on September 20, 2005 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Avis Rent A Car System, Inc., Docket No. 2005-0299- PST-E on September 20, 2005 assessing $800 in administrative penalties with $160 deferred.

Information concerning any aspect of this order may be obtained by contacting Jill McNew, Enforcement Coordinator at (512) 239-0560, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Grecoair, Inc., Docket No. 2005-0303-PST-E on September 20, 2005 assessing $1,270 in administrative penalties with $254 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tuan Tran dba Crabb River Exxon, Docket No. 2005- 0305-PST-E on September 20, 2005 assessing $1,600 in administrative penalties with $320 deferred.

Information concerning any aspect of this order may be obtained by contacting John Barry, Enforcement Coordinator at (409) 899-8781, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Stephens Fuel Company dba Dwaynes Auto Center, Docket No. 2005-0333-PST-E on September 20, 2005 assessing $3,200 in administrative penalties with $640 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Richard Deckelman, Docket No. 2005-0385-LII-E on September 23, 2005 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting Chad Blevins, Enforcement Coordinator at (512) 239-6017, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jefferson County, Docket No. 2005-0429-PST-E on September 20, 2005 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Chad Blevins, Enforcement Coordinator at (512) 239-6017, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nancy Carter dba Crockett Conoco, Docket No. 2005- 0455-PST-E on September 20, 2005 assessing $3,150 in administrative penalties with $630 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Imad Abdelgader dba Express Lane Grocery, Docket No. 2005-0532-PST-E on September 20, 2005 assessing $800 in administrative penalties with $160 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dupre' Transport, Inc., Docket No. 2005-0565-PST-E on September 20, 2005 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Petroleum Transport, Inc., Docket No. 2005-0615-PST-E on September 20, 2005 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Crockett Farm & Fuel Center, Inc., Docket No. 2005- 0619-PST-E on September 20, 2005 assessing $1,220 in administrative penalties with $244 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Himaloy, Inc. dba Papa Keith's Market & Deli, Docket No. 2005-0662-PST-E on September 19, 2005 assessing $4,200 in administrative penalties with $840 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandra Anaya, Enforcement Coordinator at (512) 239-0572, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jivanji Burhani dba Corner Spot, Docket No. 2005-0696- PST-E on September 20, 2005 assessing $1,600 in administrative penalties with $320 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nga Hong and Tien Tu dba Sunmart 151, Docket No. 2005-0698-PST-E on September 20, 2005 assessing $3,200 in administrative penalties with $640 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Davidson Oil Company dba Flying Star Transport LLC, Docket No. 2005-0761-PST-E on September 20, 2005 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087.

TRD-200504490
LaDonna Castanuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 5, 2005

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Notice of Costs to Administer the Voluntary Cleanup Program

In accordance with Solid Waste Disposal Act, §361.613, Subchapter S, the executive director of the Texas Commission on Environmental Quality (TCEQ or commission) shall calculate and publish annually the commission's costs to administer the Voluntary Cleanup Program. The Innocent Owner/Operator Program, based on authority from Solid

Waste Disposal Act, §361.752(b), shall also calculate and publish annually a rate established for the purposes of identifying the costs recoverable by the commission. The TCEQ is publishing the hourly billing rate of $107 for both the Voluntary Cleanup Program and the Innocent Owner/Operator Program for Fiscal Year 2006.

The Voluntary Cleanup Law was effective September 1, 1995, and as such, this will be the 11th year of operation for the program. The commission is able to use data from the previous ten years to calculate the rate for Fiscal Year 2006. The Innocent Owner/Operator Program Law was effective September 1, 1997, and this will be the ninth year of operation for the program. Therefore, the commission will be able to use data from the previous eight years to calculate the rate for Fiscal Year 2006. A single hourly billing rate for both programs was derived from current projections for salaries plus the fringe benefit rate and the indirect cost rate, less federal funding divided by the estimated billable salary hours. The hourly rate for the two programs was calculated and then rounded to a whole dollar amount. Billable salary hours were derived by subtracting the release time hours from the total available hours and a further reduction of 34% to account for non-site specific hours. The release time includes sick leave, jury duty, holidays, etc., and is set at 19.54% (actual rate for Fiscal Year 2004). The current fringe benefit rate is 25.30%. Fringe benefits include retirement, social security, and insurance expenses and are calculated at a rate that applies to the agency as a whole. The proposed indirect cost rate is 33%. Indirect costs include allowable overhead expenses and are also calculated at a rate that applies to the whole agency. The billings processed for Fiscal Year 2006 will use the hourly billing rate of $107 for both the Voluntary Cleanup Program and the Innocent Owner/Operator Program and will not be adjusted. All travel-related expenses will be billed as a separate expense. After an applicant's initial $1,000 application fee has been expended by the Innocent Owner/Operator Program or the Voluntary Cleanup Program review and oversight, invoices will be sent to the applicant on a monthly basis for payment of additional program expenses.

The commission anticipates receiving federal funding during Fiscal Year 2006 for the continued development and enhancement of the Voluntary Cleanup Program and the Innocent Owner/Operator Program. If the federal funding anticipated for Fiscal Year 2006 does not become available, the commission may publish a new rate. Federal funding of the Voluntary Cleanup Program and the Innocent Owner/Operator Program should occur prior to October 1, 2005.

For more information, please contact Jay Carsten, P.G., Voluntary Cleanup Program, Remediation Division, Texas Commission on Environmental Quality, MC 221, 12100 Park 35 Circle, Austin, Texas 78753 or call (512) 239-5873.

TRD-200504484
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2005

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 14, 2005**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 14, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the commission in **writing**.

(1) COMPANY: City of Texline; DOCKET NUMBER: 2003-1242-MWD-E; TCEQ ID NUMBERS: 11029-004 and RN102844073; LOCATION: Farm-to-Market Road 296, north of Texline city limits, Dallam County, Texas; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: 30 TAC §305.125(1) and Water Quality Permit Number 11029-001, Section IV, A, by failing to meet the limit of 100 milligram per liter (mg/L) for five-day Biochemical Oxygen Demand (BOD5); 30 TAC §305.125(1) and Water Quality Permit Number 11029-001, Section IV, Special Provision 3, by failing to operate and maintain the Imhoff tank for optimum wastewater treatment; 30 TAC §305.125(1) and Water Quality Permit Number 11029-001, Section VII, Standard Provisions 2.c., by failing to notify the executive director in writing of the 40% or greater exceedances of BOD5 for the months of February 2002, June 2002, October 2002, and December 2002; and 30 TAC §305.125(1) and Water Quality Permit Number 11029-001, Section VI, Special Provision 8, by failing to take and submit soil sample results for the years 2000, 2001, and 2002 in September of each year; PENALTY: $10,500; STAFF ATTORNEY: Alfred Okpohworho, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(2) COMPANY: Elhamad Enterprises, Inc. dba JR Mini Mart; DOCKET NUMBER: 2005-0677- PST-E; TCEQ ID NUMBERS: 34001 and RN101383230; LOCATION: 2600 East Belknap Street, Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(4)(C) and TWC, §26.3475(d), by failing to inspect and test corrosion protection systems within three to six months after installation and once every three years thereafter; 30 TAC §334.50(d)(1)(B)(iii)(I) and TWC, §26.3475(c), by failing to properly conduct inventory control for all underground storage tanks (USTs) involved in the retail sale of petroleum substances used as motor fuel; 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c), by failing to have release detection for the USTs; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a

regulated substance into the USTs; and 30 TAC §334.8(c)(5)(B)(ii), by failing to renew a delivery certificate by timely and properly submitting a new UST Registration and Self-Certification Form; PENALTY: $9,000; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Khail Enterprises, Inc. dba Spin-N-Market 5; DOCKET NUMBER: 2003-0983- PST-E; TCEQ ID NUMBERS: 42171 and RN101433340; LOCATION: 5304 Highway 3, Dickinson, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(1), (3) - (6), and (7)(A) and THSC, §382.085(b), by failing to maintain and make available the following: (1) a copy of the California Air Resources Board Executive Order; (2) a record of any maintenance conducted on Stage II equipment; (3) proof of attendance and completion of Stage II training for all employees; (4) a record of the results of testing conducted at the station; and (5) a record of the results of daily inspections conducted at the station; PENALTY: $1,100; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(4) COMPANY: Niranjan Patel dba Columbus Mini Mart; DOCKET NUMBER: 2005-0154-PST- E; TCEQ ID NUMBERS: 43548 and RN103045084; LOCATION: 2560 Highway 71 South, Columbus, Colorado County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of three petroleum USTs; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated late fees for TCEQ Account Numbers 0046833U and 0060918U for Fiscal Year 2005; PENALTY: $3,150; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: SRS Investments, L.L.C. dba McCloud Grocery; DOCKET NUMBER: 2004- 0951-PST-E; TCEQ ID NUMBERS: 7469 and RN101562411; LOCATION: 928 West Main Street, Crowley, Tarrant County, Texas; TYPE OF FACILITY: business with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of three petroleum USTs; PENALTY: $3,210; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200504481
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2005

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. 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 opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 14, 2005**. 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 the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 14, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: Bishop Bailey; DOCKET NUMBER: 2004-0552-MSW-E; TCEQ ID NUMBER: RN103007217; LOCATION: 201 South First Street East, Marathon, Brewster County, Texas; TYPE OF FACILITY: private lot; RULES VIOLATED: 30 TAC §324.1 and 40 Code of Federal Regulations (CFR) §279.22(d), by failing to clean up an unauthorized discharge of used oil; PENALTY: $6,300; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(2) Company: David A. Fenoglio dba Sunset Water System; DOCKET NUMBER: 2003-0037- PWS-E; TCEQ ID NUMBERS: 1690007 and RN10269379; LOCATION: corner of West Front Street and Cottage Grove Avenue, near the railroad tracks, Sunset, Montague County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.46(f)(2) and (3)(A)(iv), by failing to maintain and keep available for review records related to the flushing of dead end mains; 30 TAC §290.46(f)(2) and (3)(A)(v), by failing to maintain and keep available for review records related to the disinfection of new or repaired lines; 30 TAC §290.46(f)(2), by failing to maintain and keep available for review records related to the annual tank inspections for the three ground storage and pressure tanks; 30 TAC §290.41(c)(3)(C) and §290.46(n)(3), by failing to maintain and keep available for review records related to sealing information, including for pressure cementing, or a cement bonding log, or other documentation to assure complete sealing of the annular space between the casing and the drill hole of wells number 1 and number 3; 30 TAC §290.46(i), by failing to maintain and keep available for review records related to an adequate plumbing ordinance, regulations or service agreements with provisions for proper enforcement to ensure that neither cross-connections nor other unacceptable plumbing practices are permitted; 30 TAC §290.46(n)(2), by failing to maintain and keep available an accurate and up-to-date distribution map; 30 TAC §290.121(a), by failing to maintain and keep available for review an up-to-date chemical and

bacteriological monitoring plan; 30 TAC §290.46(f)(3)(A)(vi), by failing to maintain and keep available for review the maintenance records of the water system equipment and facilities; 30 TAC §290.42(i) (now 30 TAC §290.42(j)), by failing to ensure that all chemicals used in the treatment of the water supplied by the facility conformed to American National Standards Institute/National Science Foundation (ANSI/NSF) Standard 60 for direct additives and ANSI/NSF Standard 61 for indirect additives; 30 TAC §290.46(d)(2)(A), by failing to maintain a chlorine residual of 0.2 milligram per liter in the distribution system; 30 TAC §290.46(h), by failing to keep a supply of calcium hypochlorite on hand at the facility for use in making repairs, setting meters, and disinfecting new mains prior to placing them in service; 30 TAC §290.46(t), by failing to post a legible sign at the pump station with the name of the public water supply system and required contact information; 30 TAC §290.43(c)(2), by failing to maintain a lockable cover on each ground storage tank roof hatch that is locked but capable of being opened for maintenance and inspections; 30 TAC §290.43(c), by failing to provide an overflow on the middle ground storage tank; 30 TAC §290.43(c), by failing to provide access ladders for each of the three ground storage tanks; Agreed Order Number 2000-0031-PWS-E, Ordering Provision 2.c., by failing to provide an intruder- resistant fence with lockable gate around the potable water tanks by October 15, 2000; Agreed Order Number 2000-0031-PWS-E, Ordering Provision 2.e.ii, by failing to provide 2.0 gallons per minute (gpm) per connection for service pump capacity by December 29, 2000; Agreed Order Number 2000-0031- PWS-E, Ordering Provision 2.e.i, by failing to provide a total storage capacity of 200 gallons per connection by December 29, 2000; 30 TAC §290.43(e) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to provide an intruder-resistant fence with a lockable gate around the potable water tanks; 30 TAC §290.46(u), by failing to plug abandoned wells number 2 and number 3 or to provide test results proving the wells were in a non-deteriorated condition; 30 TAC §290.45(b)(1)(C)(i) and THSC, §341.0315(c), by failing to provide a well capacity of 0.6 gpm per connection; 30 TAC §290.45(b)(1)(C)(iii) and THSC, §341.0315(c), by failing to provide 2.0 gpm per connection for service pump capacity; 30 TAC §290.41(c)(3)(B), by failing to provide well number 1 with casing extending a minimum of 18 inches above ground level; 30 TAC §290.14(c)(3)(J), by failing to provide a concrete sealing block around the well casing of well number 1 and a concrete sealing block for well number 3 that covers a 3-foot radius in all directions; 30 TAC §290.41(c)(3)(K), by failing to provide a seal on the wellhead and a well casing vent on well number 1; 30 TAC §290.41(c)(3)(O), by failing to provide a locked, intruder-resistant fence or a locked, ventilated well house, enclosing well number 1; 30 TAC §290.11(c)(5)(B) (now 30 TAC §290.110(c)(5)(A)), by failing to test the chlorine residual in the distribution system at least once every seven days; 30 TAC §290.46(v), by failing to install electrical wiring on well number 1 secured in a mounted conduit in compliance with local or national electrical codes for wells; 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary easement from such property owners covering that portion of the land within 150 feet of the wells; 30 TAC §290.45(b)(1)(C)(ii) and THSC, §341.0315(c), by failing to provide a total storage capacity of 200 gallons per connection; 30 TAC §290.109(c)(2) and (g)(4) and §290.122(c) and THSC, §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis and failing to provide public notice of the failure sample for the months of May and August 2002; and 30 TAC §290.109(b)(2), (f)(3), and (g)(3) and §290.122(b) and THSC, §341.031(a), by failing to prevent the facility from exceeding the maximum contaminant level (MCL) for total coliform bacteria and failing to provide public notification of the MCL violation for the month of June 2002; PENALTY: $4,725; STAFF ATTORNEY: Deborah A. Bynum, Litigation Division, MC 175, (512) 239-1976; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(3) COMPANY: El Paso Merchant Energy-Petroleum Company, formerly known as Coastal Refining Company and Marketing, Inc; DOCKET NUMBER: 2001-1023-AIR-E; TCEQ ID NUMBERS: NE-0043-A, RN10211663; LOCATION: 1300 Cantwell Lane, Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petroleum refinery; RULES VIOLATED: 30 TAC §101.6(a) (now 30 TAC §101.201(a)) and THSC, §382.085(b), by failing to meet the 24-hour reporting requirement for a continual emissions event; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 6797, Special Condition 1, by failing to obtain regulatory authority or to meet the demonstration requirements from the crude and vacuum unit resulting from a continuous emissions event; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 275, Special Condition 1, by failing to obtain regulatory authority or to meet the demonstration requirements in 30 TAC §101.11 (now 30 TAC §101.22) for emissions that resulted from an emissions event; 30 TAC §116.115(c), THSC, §382.0885(b), and TCEQ Permit Number 6797, Special Condition 1, by failing to obtain regulatory authority or to meet the demonstration requirements in 30 TAC §101.11 (now 30 TAC §101.22) for emissions resulting from an emissions event; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 6797, Special Condition 1, by failing to obtain a regulatory authority or to meet the demonstration requirements in 30 TAC §101.11 (now 30 TAC §101.22) for 20 emissions events; 30 TAC §101.10(a), and THSC, §382.085(b), by failing to include emissions from the carbon monoxide (CO) boiler and the collapse of the roof of storage vessel number 352 in the emissions inventory update for calendar year 1999; 30 TAC §111.111(a)(4)(A)(ii) and THSC, §382.085(b), by failing to produce flare observation logs for four flares; 30 TAC §115.114(b)(2) - (4) and THSC, §382.085(b), by failing to visually inspect or physically measure the secondary seal gaps of tanks at least once every 12 months; 30 TAC §115.322(5) and THSC, §382.085(b), by failing to mark applicable pipeline valves and pressure relief valves in gaseous volatile organic compound (VOC) service in a manner readily obvious to monitoring personnel; 30 TAC §115.324(1)(C) and §115.326(2), and THSC, §382.085(b), by failing to measure and record the emissions from all affected process drains on a yearly basis during calendar years 1999 and 2000; 30 TAC §§101.20(1) and (2), 113.130, 115.325(1), 116.115(c), 40 CFR §§60.485(b), 61.355(h), and 63.180(b), TCEQ Permit Number 275, Special Condition 4, TCEQ Permit Number 3477A, Special Conditions 5F, 5G, and 6, TCEQ Permit Number 3506A, Special Conditions 11 and 12, TCEQ Permit Number 3783A, Special Conditions 5 and 6, TCEQ Permit Number 3784A, Special Condition 6, TCEQ Permit Number 4699A, Special Conditions 1F and 1G, TCEQ Permit Number 5487, Special Conditions 3F and 3G, TCEQ Permit Number 6797, Special Condition 13F, TCEQ Permit Number 23523, Special Conditions 16F and 16G, by failing to properly conduct Test Method 21; 30 TAC §115.326(1) and THSC, §382.085(b), by failing to submit a monitoring program plan with a list of the refinery units and the quarter in which they would be monitored, a copy of the log book format, and the make and model of the monitoring equipment to be used for calendar years 1999 and 2000; 30 TAC §115.327(4) and THSC, §382.085(b), by failing to submit the required compliance plan and start-up notification before the Number 2 Reformer at the Quintana Plant was restarted in January 2000; 30 TAC §116.115(c), THSC, §382.085(b), TCEQ Permit Number 275, Special Condition 4F, TCEQ Permit Number 3477A, Special Condition 6F, TCEQ Permit Number 3506A, Special Condition 11F, TCEQ Permit Number 3783A, Special Condition 5F, TCEQ Permit Number 3784A, Special Condition 6F, and TCEQ Permit Number 23523, Special Condition 16F, by failing to utilize a

directed maintenance program to monitor accessible valves for calendar years 1999 and 2000; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 2937, Special Provisions 8D, 8E, and 8F, by failing to maintain a record of semiannual and year-to-date emissions and VOC throughput for storage vessels 85 - 100 and 110, and by failing to provide emission calculations for the annual and short-term emissions from these vessels for calendar years 1999 and 2000; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 3477A, Special Condition 8, by failing to maintain records of throughput and service and emission control tank repairs/replacements for tanks 310 - 312, 320 - 336, 350 - 360, 370, 371, and 5507 on a rolling 24-month basis; 30 TAC §116.115(b)(2), THSC, §382.085(b), and TCEQ Permit Number 3783A, Special Condition 1, by failing to provide proper records to demonstrate that emissions of CO were at or below the allowable emissions limits, and by failing to provide proper records to demonstrate that emissions were at or below the allowable emissions limits of CO, VOC, particulate matter (PM), and sulphur dioxide (SO2); 30 TAC §116.115(b)(2) and THSC, §382.085(b), and TCEQ Permit Number 3783A, Special Condition 3, by failing to comply with the permitted feed rate limit (74,000 standard cubic feet per hour (sc/h) or 55,000 standard cubic feet (MSCF) per month); 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 3783A, Special Condition 8A, by failing to properly maintain records of fuel throughput; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 3784A, Special Condition 7, by failing to report the results of the annual test runs to confirm the accuracy of weekly sampling procedures within 30 days of completion; 30 TAC §116.115(c) and §116.116(b)(1), THSC, §382.085(b), and TCEQ Permit Number 4243A, Special Provision 1, by failing to maintain emissions of VOC, nitrogen oxides (NOx) and CO at permitted levels for the Number 2 Reformer Flare (REF2FL1); 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 4698A, Special Condition 5, by failing to produce, upon request, records of the daily average fuel gas usage; 30 TAC §116.115(b), THSC, §382.085(b), and TCEQ Permit Number 4699A, General Condition 8, by failing to maintain CO emission for the Heater Stack QH-125 at or below the permitted emission limit of 2.37 tons per year (TPY); 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 5285, Special Condition 1, by failing to maintain VOC emissions for Heater Q10-H-1 at or below the permitted emission level of 1.87 TPY; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 5285, Special Condition 6, by failing to comply with the permitted fuel feed rate limit of 7.318 million standard cubic feet per day (mmscfd) for Heater Q10-H-1; 30 TAC §116.115(b), THSC, §382.085(b), and TCEQ Permit Number 5487, General Condition 8, by failing to produce, upon request, proper records of CO emissions; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 6797, Special Condition 1, by failing to produce, upon request, proper records of CO emission levels; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 6797, Special Condition 4, by failing to comply with the hourly firing rate limit (less than 181.8 million British thermal units (MMBtu)/hr); 30 TAC §101.20(3) and §116.115(c), THSC, §382.085(b), and TCEQ Permit 9344, Special Condition 11E, failing to manually switch the continuous emissions monitoring system monitor between stacks COGEN-1 and COGEN-2 every three months; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 21655, Special Condition 10, by failing to maintain SO2 concentration at or below the allowable concentration limit of 250 parts per million (ppm); 30 TAC §116.115(b)(2)(F)(iii), THSC, §382.085(b), and TCEQ Permit Number 23523, Special Condition 1, by failing to produce, upon request, proper records of emission levels of VOCs for Coker Heater 7-H-2 for calendar year 1999 and for emission levels of VOCs, CO, and PM for calendar year 2000; 30 TAC §116.116(b)(1), THSC, §382.085(b), and TCEQ Permit Number 23523, by misrepresenting the West Plant Flare (WP-FLARE-1) as an emergency flare instead of a process unit flare in the September 28, 1993, permit application; and 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Permit Number 23523, Special Condition 18, by failing to conduct the required cooling water VOC leak detection sampling between the Delayed Coker Unit (DCU) and the DCU Cooling Tower 1; PENALTY: $272,097; STAFF ATTORNEY: Gitanjali Yadav, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(4) COMPANY: Frank Chmielowski dba Panchos Country Store; DOCKET NUMBER: 2003-1041- PST-E; TCEQ ID NUMBERS: 39301 and RN101432060; LOCATION: three miles north of Highway 107 in Edinburgh, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of three petroleum underground storage tanks (USTs); PENALTY: $3,150; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239-0972; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(5) COMPANY: Jackie W. Davis, Individually, and Jackie W. Davis, Executor, Estate of Ola Faye Davis, Deceased; DOCKET NUMBER: 2004-1291-MSW-E; TCEQ ID NUMBERS: RN104619101, RN104256136, CN60260858, and CN602843450; LOCATION: United States (US) Highway 377 and south of US Highway 377, Denton, Denton County, Texas; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §330.5(c) and §328.23(b), by failing to prevent the unauthorized disposal of waste and failing to prevent the disposal of used oil filters at the site; 30 TAC §335.62 and 40 CFR §262.11(c), by failing to perform a hazardous waste determination on solid waste generated; and 30 TAC §324.6, 40 CFR §279.22(d)(3), and THSC, §371.041, by failing to clean up used oil upon detection of a release to the environment; PENALTY: $13,625; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Western States Realty L.L.C.; DOCKET NUMBER: 2003-1496-MSW-E; TCEQ ID NUMBERS: RN102865227; LOCATION: approximately four miles east of Hawley on Farm-to- Market Road 1226, Jones County, Texas; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §330.4 and §330.5(c), by causing, suffering, allowing, or permitting the dumping or disposal of municipal solid waste at the site without written authorization of the commission; PENALTY: $4,650; STAFF ATTORNEY: Alfred Okpohworho, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

TRD-200504480
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2005

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 337

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning revisions to 30 TAC Chapter 337, Dry Cleaner Environmental Response, under the requirements of Texas Health and Safety Code, §382.017 and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would comply with House Bill 2376 and Senate Bill 444, 79th Legislature, 2005, relating to the environmental regulation and remediation of dry cleaning facilities. The proposed rules amend annual registration fees assessment calculations; establish new compliance deadlines for performance standards for dry cleaning facilities; require the commission to request the Comptroller of Public Accounts to verify that the owner is in good standing with the state and is reporting gross receipts accurately; clarify the designation of a nonparticipating status and establish new deadlines and fee credits for nonparticipating sites; and clarify and establish procedures to administer and enforce the program.

A public hearing on this proposal will be held in Austin on November 8, 2005 at 10:00 a.m. at the Texas Commission on Environmental Quality in Building F, Room 2210, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Holly Vierk, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

Comments may be submitted to Holly Vierk, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-043-337-PR. Comments must be received by 5:00 p.m., November 14, 2005. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Don Kennedy, Registration, Review and Reporting Division, at (512) 239-2154.

TRD-200504395
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 30, 2005

Notice of Water Rights Application

Notices mailed September 29, 2005 through October 5, 2005:

PROPOSED TEMPORARY PERMIT NO. TP-5895; Duininck Bros., Inc., P. O. Box 735, Roanoke, Texas, 76262, Applicant, seeks a Temporary Water Use Permit pursuant to Texas Water Code, §11.138 and Texas Commission on Environmental Quality (TECQ or Commission) Rules, 30 Texas Administrative Code (TAC) §295.1, et seq. Duininck Bros., Inc., applicant, seeks a Temporary Water Use Permit to divert and use not to exceed 10 acre-feet of water at a maximum diversion rate of 1.114 cfs (500 gpm) within a two-year period from Big Sandy Creek, tributary of the West Fork Trinity River, tributary of the Trinity River, Trinity River Basin, for industrial (road construction and dust control) purposes. The diversion point will be located at Latitude 33.251 N and Longitude 97.667 W, approximately 4 miles WNW of Decatur and 7 miles east of Chico, Wise County. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. The application was received on April 6, 2005, and additional information and fees were received on May 13, 2005. The application was declared administratively complete and filed with the Office of the Chief Clerk on May 23, 2005. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by October 19, 2005.

APPLICATION NO. 5873; The Red River Redevelopment Authority, 107 Chapel Lane, New Boston, Texas 75570, applicant, seeks a Water Use Permit pursuant to Texas Water Code, §11.121 and §11.085(v), and Commission Rules, 30 TAC §295.1, et seq. The Red River Redevelopment Authority ("the Authority") has entered into a contractual agreement with the United States of America (Red River Army Depot) for the diversion and use of water for municipal purposes from two existing reservoirs, Reservoir No. 1 on Caney Creek, tributary of Big Creek, tributary of the Sulphur River, and Reservoir No. 2 on Elliot Creek, tributary of the Sulphur River, Sulphur River Basin, which are owned by the United States of America and operated by the U. S. Army Corps of Engineers in Bowie County. The Authority indicates that Reservoirs Nos. 1 and 2 will be operated as an interconnected system with the Authority having unlimited access to Reservoir No. 1 and bilateral access to Reservoir No. 2 in conjunction with the Army and only upon approval from the Army. Reservoir No. 1 has a capacity of 1,340 acre-feet of water, surface area of 206 acres, and is located in the John Collom Headright Survey, Abstract No. A-110, the Robert M. Lindsay Headright Survey Abstract No. A-349, and the Durant H. White Headright Survey Abstract No. A-639, approximately 1.3 miles north-northwest from Redwater, Texas. Station 25 + 00 on the centerline of the dam is located bearing N83.754 E, 622.87 feet from the northeast corner of the Durant H. White Headright Survey No. A-639, Bowie County, also being Latitude 33.404 N and Longitude 94.319 W. Reservoir No. 2 has a capacity of 2,734 acre-feet of water, surface area of 260 acres, and is located in the John S. Herring Headright Survey Abstract No. A-264 and the H. P. Benningfield Headright Survey, Abstract No. A-16, approximately 4.4 miles northwest from Redwater, Texas. Station 10 + 00 on the centerline of the dam is bearing S74.325 W, 6,344.40 feet from the northeast corner of the John Herring Headright Survey, Bowie County, also being Latitude 33.381 N and Longitude 94.262 W. Applicant seeks to divert and use a maximum of 1,562 acre-feet of water per year from Reservoir No. 1 at a maximum diversion rate of 2,100 gpm (4.679 cfs) from a diversion point located at the above-mentioned dam, and 1,928 acre-feet of water per year from Reservoir No. 2 at a maximum diversion rate of 2,100 gpm (4.679 cfs) from a diversion point located on the perimeter of the reservoir at Latitude 33.387 N and Longitude 94.266 W for municipal use within the Red River Redevelopment Authority's service area in Bowie County. An exempt interbasin transfer authorization pursuant to Texas Water Code, §11.085(v) is requested as a small portion of the Red River Redevelopment Authority's service area is located in the Red River Basin. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. The application and fees were received on November 23, 2004. Additional information and fees were received on April 8 and 12, and May 6, 17, and 26, 2005. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on June 16, 2005. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 5899; The City of Meridian (Meridian), applicant, P. O. Box 306, Meridian, TX 76665, seeks a permit pursuant to

Texas Water Code, §11.121, and Commission Rules, 30 TAC §295.1, et seq. The applicant has applied for a water use permit to divert and use 1,336 acre-feet of water per year from the North Bosque River, tributary of the Brazos River, Brazos River Basin, for municipal and domestic purposes within Meridian's service area in Bosque County. This application is based on a Windup Agreement with the Brazos River Authority and several cities. The Brazos River Authority and the City of Waco agreed to subordinate their rights authorized in Certificate of Adjudication No. 12- 2315 and Permit No. 5094 up to 3,340 acre-feet of water per year as part of the Windup Agreement. The requested diversion is from a point on the reservoir authorized by Certificate of Adjudication No. 12-2291, owned by the City of Clifton (Clifton), and is located on the southwest bank of the North Bosque River at Latitude 31.7956 N, Longitude 97.5867 W, bearing 90 east, 3,000 feet from the northwest corner of the William. H. King Original Survey, Abstract 439. Meridian is requesting an additional 8 cfs for a maximum combined diversion rate of 20 cfs (8,976 gpm) in combination with Clifton's diversions from Certificate of Adjudication No. 12-2291 and Water Use Permit No. 5551. Raw water will be diverted from this location and delivered to a reservoir on an unnamed tributary of the North Bosque River, authorized by Water Use Permit No. 5551, also owned by Clifton. Water will be held in the second reservoir until it flows by gravity to Clifton's water treatment plant for treatment and subsequently delivered to Meridian through a proposed pipeline owned by Meridian. Meridian and Clifton have entered into an Interlocal Agreement Regarding Diversion Facility Use for Meridian to utilize Clifton's diversion facilities as part of this application. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. The application was received on May 10, 2005. Additional information and fees were received on July 28, August 15, and August 30, 2005. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on September 8, 2005. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing"; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P. O. Box 13087, Austin, 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 Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200504489
LaDonna Castanuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 5, 2005

Proposed Enforcement 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, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 14, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 14, 2005**. 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 should be submitted to the commission in **writing**.

(1) COMPANY: ANR Investments, Inc. dba ANR Grocery; DOCKET NUMBER: 2005-0671-PST-E; IDENTIFIER: Regulated Entity Number (RN) 102901675; LOCATION: Spring, Montgomery County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(2)(C) and (4) and the Code, §26.3475(d), by failing to have a regularly inspected cathodic protection system and keep a log of inspections to ensure that the rectifier is operating properly, and by failing to inspect and test the cathodic protection systems; 30 TAC §334.50(b)(1)(A) and (2)(A)(i)(III) and the Code, §26.3475(a) and (c)(1), by failing to provide proper release detection, by failing to test the line leak detectors, and by failing to perform a piping tightness test for the pressurized line; and 30 TAC §334.48(c), by failing to conduct inventory control for all underground storage tanks (USTs); PENALTY: $5,400; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: BP Products North America Inc.; DOCKET NUMBER: 2005-0818-AIR-E; IDENTIFIER: RN102535077; LOCATION:

Texas City, Galveston County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c), New Source Review Permit Number 18706, and THSC, §382.085(b), by failing to comply with permitted emissions limits; and 30 TAC §101.211(a) and THSC, §382.085(b), by failing to report an emission event; PENALTY: $24,650; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: City of Decatur; DOCKET NUMBER: 2005-0996-PWS-E; IDENTIFIER: RN101391019; LOCATION: Decatur, Wise County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and (5) and THSC, §341.0315(c), by exceeding the maximum contaminant level (MCL) for trihalomethanes (TTHM) and haloacetic acid; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: David Delgado; DOCKET NUMBER: 2005-0776-LII-E; IDENTIFIER: RN104552765; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: landscape irrigation; RULE VIOLATED: 30 TAC §30.5(a) and §344.4(a), the Code, §37.003, and Texas Occupations Code, §1903.251, by failing to obtain a license issued by the commission before representing to the public that the individual could perform services for which a license is required; and 30 TAC §344.73, by failing to properly connect an irrigation system to a public or potable water supply through an approved backflow prevention method; PENALTY: $500; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(5) COMPANY: Duke Energy Field Services L.P. dba Waha Gas Plant; DOCKET NUMBER: 2005-0035-AIR-E; IDENTIFIER: Air Account Number PE0024Q, RN100211408; LOCATION: near Waha, Pecos County, Texas; TYPE OF FACILITY: oil and gas plant; RULE VIOLATED: 30 TAC §116.160(a) and THSC, §382.085(b), by failing to obtain a prevention of significant deterioration permit; PENALTY: $150,150; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(6) COMPANY: Eastland County Water Supply District; DOCKET NUMBER: 2005-1147-PWS-E; IDENTIFIER: RN101250868; LOCATION: Ranger, Eastland County Texas; TYPE OF FACILITY: wholesale water supply system; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the MCL for TTHM; PENALTY: $695; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(7) COMPANY: John T. Phillips dba J & S Quick Stop and Stephan Wright dba J & S Quick Stop; DOCKET NUMBER: 2004-1465-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 67890, RN100825173; LOCATION: Tow, Llano County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(c), by failing to conduct inventory control procedures; and 30 TAC §334.8(c)(5)(A)(i) and (B)(ii) and the Code, §26.3467(a), by accepting delivery of a regulated substance into a UST system without a current delivery certificate and by failing to ensure that an application for renewal of a delivery certificate had been properly and timely submitted; PENALTY: $2,880; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(8) COMPANY: Jung Oil, Inc.; DOCKET NUMBER: 2005-1001-PST-E; IDENTIFIER: RN104608922; LOCATION: Seguin, Guadalupe County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Howard Willoughby, (361) 825-3100; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(9) COMPANY: Magellan Terminals Holdings, L.P.; DOCKET NUMBER: 2004-1409-AIR-E; IDENTIFIER: Air Account Number NE0003M, RN102536836; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petroleum storage terminal; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), Federal Operating Permit (FOP) Number O-01255, and THSC, §382.085(b), by failing to submit a permit compliance certification; and 30 TAC §122.143(4) and §122.145(2)(A) and (c), FOP Permit Number O-01255, and THSC, §382.085(b), by failing to submit a deviation report and by failing to include all instances of deviation, the probable cause of each deviation, and any corrective actions or preventative measures taken; PENALTY: $15,200; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(10) COMPANY: Mayfield 5 Water Company; DOCKET NUMBER: 2005-1076-PWS-E; IDENTIFIER: RN101457182; LOCATION: Canutillo, El Paso County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and (F), (3)(A)(ii) and THSC, §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis, by failing to collect at least five routine samples following a total coliform-positive sample result, and by failing to collect a set of repeat samples for bacteriological analysis; and 30 TAC §290.122(c)(2)(A), by failing to provide public notification for failing to collect routine and repeat water samples; PENALTY: $2,643; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(11) COMPANY: City of Mercedes; DOCKET NUMBER: 2005-1170-PWS-E; IDENTIFIER: RN101385938; LOCATION: Mercedes, Hidalgo County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the MCL for TTHM; PENALTY: $655; ENFORCEMENT COORDINATOR: Brent Hurta, (512) 239-6589; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(12) COMPANY: Montgomery County Municipal Utility District Number 24; DOCKET NUMBER: 2005-1142-MWD-E; IDENTIFIER: RN103124236; LOCATION: Houston, Montgomery County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number 0014116001, and the Code, §26.121(a), by failing to comply with permit effluent limits for ammonia nitrogen (NH_3-N); PENALTY: $2,224; ENFORCEMENT COORDINATOR: John Muennink, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Muenster Telephone Corporation of Texas; DOCKET NUMBER: 2005-1190-PST-E; IDENTIFIER: RN101834083; LOCATION: Muenster, Cooke County, Texas; TYPE OF FACILITY: emergency generator; RULE VIOLATED: 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to provide corrosion protection; and 30 TAC §334.8(c)(4)(A)(vi) and (B) and (5)(A)(i), and

the Code, §26.3467(a), by failing to submit a completed registration and self-certification form and by failing to make available to a common carrier a valid, current delivery certificate; PENALTY: $2,880; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Olmito Water Supply Corporation; DOCKET NUMBER: 2005-0853-MWD-E; IDENTIFIER: RN103888004; LOCATION: Olmito, Cameron County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (17), TPDES Permit Number 0013817001, and the Code, §26.121(a), by failing to comply with permitted effluent limits for NH_3-N and carbonaceous biochemical oxygen demand (CBOD), by failing to collect and submit monitoring results for NH_3-N, CBOD, pH, total suspended solids, and dissolved oxygen, and by failing to submit annual sludge reports; PENALTY: $7,040; ENFORCEMENT COORDINATOR: John Muennink, (713) 767-3500; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(15) COMPANY: Royal Price Corporation dba Rocking H Grocery & Feed; DOCKET NUMBER: 2005-0319-PST-E; IDENTIFIER: RN101699460; LOCATION: Del Valle, Travis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; 30 TAC §334.7(a)(1) and §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.3467(a), by failing to ensure that the UST registration and self-certification forms are submitted accurately and in a timely manner, and by failing to make available a valid, current delivery certificate; 30 TAC §334.48(c), by failing to conduct monthly inventory control; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; PENALTY: $10,080; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(16) COMPANY: Sampri Investments, LLC dba Sammys 4; DOCKET NUMBER: 2005-1323-PST-E; IDENTIFIER: RN102248127; LOCATION: La Porte, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,520; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: San-Coat, Inc. dba Sandblasting & Coating FA; DOCKET NUMBER: 2005-1372-AIR-E; IDENTIFIER: RN102326527; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: abrasive blasting and painting operation; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(b), by failing to prevent a nuisance condition; 30 TAC §106.452(2)(A) and 116.110(a)(4) and THSC, §382.085(b), by failing to operate within the permitted limits in the permit; and 30 TAC §106.433(8) and §116.110(a)(4) and THSC, §382.085(b), by failing to keep records of volatile organic compound emissions; PENALTY: $3,024; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(18) COMPANY: Shelbyville Independent School District; DOCKET NUMBER: 2005-0923-MWD-E; IDENTIFIER: RN101527224; LOCATION: Shelbyville, Shelby County, Texas; TYPE OF FACILITY: abrasive blasting and painting operation; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 13370001, and the Code, §26.121(a), by failing to comply with the permit effluent limit for five-day biochemical oxygen demand and total suspended solids, and by failing to submit the sludge report; PENALTY: $3,024; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(19) COMPANY: Valley Proteins, Inc.; DOCKET NUMBER: 2005-0389-AIR-E; IDENTIFIER: RN101834224; LOCATION: Amarillo, Potter County, Texas; TYPE OF FACILITY: beef byproducts; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 1494C, and THSC, §382.085(b), by failing to ensure that the doors remain closed to maintain a negative pressure on the air scrubber system; PENALTY: $456; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(20) COMPANY: Walnut Creek Special Utility District; DOCKET NUMBER: 2005-0904-PWS-E; IDENTIFIER: RN101190056; LOCATION: Springtown, Parker County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the MCL for TTHM; PENALTY: $1,845; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200504470
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2005

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Department of Family and Protective Services

Notice of Public Meeting - Minimum Standards for Residential Child-Care Facilities and Child-Placing Agencies

The Texas Department of Family and Protective Services (DFPS) will conduct a public meeting on Monday, October 24, 2005, from 1:00 p.m. until 5:00 p.m., at the John H. Winters Building, Public Hearing Room 125 E, 701 West 51st Street, Austin, Texas, on proposed changes to minimum standards for residential child-care facilities and child-placing agencies.

In lieu of or in addition to oral comments, members of the public may comment in writing via e-mail at RCCLStandards@dfps.state.tx.us or mail to Child Care Licensing, DFPS, Attn: E-550 Working Draft Standards, P.O. Box 149030; Austin, TX 78714-9030.

Meeting contact person: Michele Adams, MC E-550, P.O. Box 149030, Austin, Texas 78714-9030, (512) 438-3262.

Persons with disabilities planning to attend this meeting who may need auxiliary aids or services are asked to contact Michele Adams, (512) 438-3262 or Crystal Harris, (512) 438-3267, by October 20, 2005, so that appropriate arrangements can be made.

TRD-200504494
Gerry Williams
General Counsel
Department of Family and Protective Services
Filed: October 5, 2005

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Texas Health and Human Services Commission

Notice of Hearing on Proposed Provider Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 3, 2005, to receive public

comment on the proposed Medicaid payment rate for state-operated Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) large facilities. This program is operated by the Texas Department of Aging and Disability Services (DADS). This payment rate is proposed to be effective September 1, 2005. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.105(g), which requires public hearings on proposed payment rates. The public hearing will be held on November 3, 2005, at 1:00 p.m. in the Lone Star Conference Room of the Braker Center Building H, at 11209 Metric Boulevard, Austin, Texas 78758-4021. Written comments regarding the payment rate may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Tony Arreola, HHSC Rate Analysis, MC H-400, 1100 West 49th Street, Austin, Texas 78756-3101. Express mail can be sent, or written comments can be hand delivered, to Mr. Arreola, HHSC Rate Analysis, MC H-400, Braker Center Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021. Alternatively, written comments may be sent via facsimile to Mr. Arreola at (512) 491-1998. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rate by contacting Tony Arreola, HHSC Rate Analysis, MC H-400, 1100 West 49th Street, Austin, Texas 78756-3101, telephone number (512) 491-1358.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Tony Arreola, HHSC Rate Analysis, MC H-400, 1100 West 49th Street, Austin, Texas 78756-3101, telephone number (512) 491-1358, by October 27, 2005, so that appropriate arrangements can be made.

Proposal. As the single state agency for the state Medicaid program, HHSC proposes the new rate for the State-Operated ICF/MR Program operated by DADS. Payment rate effective for September 1, 2005 is proposed as follows:

State-Operated ICF/MRs Large Facilities

Current Rate--$294.72

Proposed Rate--$308.75

Methodology and justification. The proposed rate was determined in accordance with the rate setting methodology codified as 1 TAC Chapter 355, relating to Reimbursement Rates, Subchapter D, §355.456(f).

TRD-200504474
Wendy Pellow
Assistant General Counsel
Texas Health and Human Services Commission
Filed: October 4, 2005

Notice of Public Meeting

The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on October 26, 2005, to receive public comment regarding the proposed repeal of 1 TAC §§355.8441, 355.8443, and 355.8445 and the proposed addition of new 1 TAC §355.8441 regarding reimbursement methodologies for Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program services, also known as Texas Health Steps-CCP (THSteps-CCP). The proposed revisions will transfer the reimbursement methodology for dental services from 1 TAC §355.8443 and §355.8445 to new 1 TAC §355.8441. Other proposed revisions to the new 1 TAC §355.8441 include the change in reimbursement methodology for Medicare-certified outpatient facilities known as comprehensive outpatient rehabilitation facilities and outpatient rehabilitation facilities from a methodology based on reasonable costs, cost settlements, and interim payment percentages to a methodology based on prospective payment system (PPS) fees; the change in reimbursement methodology for THSteps-CCP therapies delivered by home health agencies (HHAs) from one based on statewide visit rates to one based on PPS fees and actual time spent with the client; and revisions to the reimbursement methodology for private duty nursing (PDN) services to add a provision for the reimbursement of PDN services delegated by a registered nurse (RN) in accordance with licensure standards promulgated by the Texas Board of Nurse Examiners, to add a provision for the reimbursement of assessment services provided by RNs that have not previously been reimbursed, and to allow for different rates to be paid to HHAs for PDN services delivered by RNs from those delivered by licensed vocational nurses/licensed practical nurses. The public hearing will be held on October 26, 2005, at 1:30 p.m., in the LoneStar Conference Room, HHSC, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021. Entry is through Security at the building entrance facing Metric Boulevard. Written comments regarding the proposed revisions to the reimbursement methodologies for THSteps-CCP services may be submitted until 5:00 p.m. the day of the meeting. Written comments may be sent by U.S. mail to the attention of Nancy Kimble, HHSC Rate Analysis for Acute Care Services, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200. Overnight or special delivery mail may be sent, or written comments may be hand delivered, to Ms. Kimble, HHSC Rate Analysis for Acute Care Services, Mail Code H-400, Building H of the Braker Center, 11209 Metric Boulevard, Austin, Texas 78758-4021. Alternatively, written comments may be sent via facsimile to Ms. Kimble at (512) 491-1983 or via e-mail: nancy.kimble@hhsc.state.tx.us.

Persons with disabilities who wish to attend the meeting and require auxiliary aids or services should contact Ms. Kimble by October 24, 2005, so that appropriate arrangements can be made.

TRD-200504483
Lee Dickinson
Assistant General Counsel
Texas Health and Human Services Commission
Filed: October 4, 2005

Notification of Consulting Procurement

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Health and Human Services Commission (HHSC) announces the release of its Request for Proposals for consultant services to assist in the development of an Integrated Care Management (ICM) Healthcare Delivery System (RFP #529-06-0255). HHSC seeks to contract with a single qualified vendor to fulfill the requirements pursuant to this RFP.

The primary objective for this procurement is to seek the assistance of a consultant with certain expertise to help HHSC develop the ICM Healthcare Delivery Model as recommended by the ICM Advisory Committee and approved by the HHSC Executive Commissioner.

The RFP is located in full on HHSC's Business Opportunities Page under "Contracting Opportunities" link at http://www.hhsc.state.tx.us/about_hhsc/BusOpp/BO_opportunities.html. HHSC also posted notice of the procurement on the Texas Marketplace on October 14, 2005.

The successful contractor will assist in the design and development of the ICM Healthcare Delivery Model. This assistance may include, but is not limited to:

* Draft and/or review sections of the draft Request for Proposal (RFP) that pertain to the health care delivery model;

* Assist in the development of the final RFP;

* Facilitate discussions with HHSC, other state agencies, providers, advocates and the ICM Advisory Committee to determine solutions to operational issues, including coordination of services and service planning;

* Respond to numerous vendor questions on the draft and final RFP, including assisting in determining solutions to issues brought up in vendor questions;

* Develop and draft a Medicaid waiver to implement the health care delivery model; and

* Assist in the development and drafting of Texas Medicaid Rules.

The Health and Human Services Commission's Sole Point-Of-Contact for this procurement is:

Shirley Hays, Procurement Project Manager

Texas Health and Human Services Commission

P.O. Box 85200-5200

Austin, Texas 78708-5200 (512) 491-1328

shirley.hays@hhsc.state.tx.us

All questions regarding the RFP must be sent in writing to the above-referenced contact by 5:00 PM Central Time on October 21, 2005. HHSC will post all written questions received with HHSC's responses on its website on November 4, 2005, or as they become available. All proposals must be received at the above-referenced address on or before 3:00 PM Central Time on November 18, 2005. Proposals received after this time and date will not be considered.

All proposals will be subject to evaluation based on the criteria and procedures set forth in the RFP. HHSC reserves the right to accept or reject any or all proposals submitted. HHSC is under no legal or other obligation to execute any contracts on the basis of this notice. HHSC will not pay for costs incurred by any entity in responding to this RFP.

TRD-200504477
Elizabeth LaMair
Assistant General Counsel
Texas Health and Human Services Commission
Filed: October 4, 2005

Public Notice--STAR+PLUS Waiver Renewal

The Texas Health and Human Services Commission announces its intent to submit a waiver renewal application for the STAR+PLUS Program under §1915(c) of the Social Security Act. The waiver renewal is necessary to ensure that members in STAR+PLUS continue to have access to the full range of community-based long-term care services. The State is requesting that this 1915(c) waiver renewal application (waiver number 0325) be approved for a five-year period beginning January 30, 2006, through January 30, 2011.

For additional information, interested parties may contact Arnulfo Gomez, Policy Development Support Policy Analyst in the Medicaid/CHIP Division, by telephone at (512) 491-1166 or by e-mail at arnulfo.gomez@hhsc.state.tx.us.

TRD-200504473
Wendy Pellow
Assistant General Counsel
Texas Health and Human Services Commission
Filed: October 4, 2005

Department of State Health Services

Extension of the Public Comment Period for the Speech-Language Pathology and Audiology Rules

The State Board of Examiners for Speech-Language Pathology and Audiology is extending the public comment period for the proposed rules located in 22 Texas Administrative Code, Chapter 741, concerning the licensure and regulation of speech-language pathologists and audiologists that were published in the Proposed Rules Section of the September 2, 2005, issue of the *Texas Register* (30 TexReg 5247). The new deadline for submission of comments is extended for another 30 days through November 1, 2005, due to the disastrous effects of the hurricanes, which prevented stakeholders in some areas of the state from participating in the review and comment process.

Comments on the proposal may be submitted to Joyce Parsons, Executive Director, State Board of Examiners for Speech-Language Pathology and Audiology, 1100 West 49th Street, Austin, Texas 78756-3183, (512) 834-6627, fax (512) 834-6677.

TRD-200504496
Lisa Hernandez
Deputy General Counsel
Department of State Health Services
Filed: October 5, 2005

Notice of Intent to Revoke a Radioactive Material License

Pursuant to 25 Texas Administrative Code, §289.205, the Department of State Health Services (department), filed a complaint against the following licensee: ADJ Services, Longview, L04142.

The complaint alleges that the licensee has failed to pay required annual fees. The department intends to revoke the radioactive material license; order the licensee to cease and desist use of such radioactive material; order the licensee to divest himself of the radioactive material; and order the licensee to present evidence satisfactory to the department that he has complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of the complaint, the department will not issue an order.

This notice affords the opportunity to the licensee for a hearing to show cause why the radioactive material license should not be revoked. A written request for a hearing must be received by the department within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Radiation Program Officer, 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the radioactive material license will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200504492
Lisa Hernandez
Deputy General Counsel
Department of State Health Services
Filed: October 5, 2005

Notice of Intent to Revoke Certificates of Registration

Pursuant to 25 Texas Administrative Code, §289.205, the Department of State Health Services (department), filed complaints against the following x-ray machine or laser registrants: Donald Scott Daugherty, D.D.S., Houston, R05586; Padre Animal Hospital, P.C., Corpus Christi, R05436; Charles P. McGuire, D.D.S., Houston, R07995; Valley View Dental, Dallas, R14560; Harris Chiropractic Group, San Antonio, R14598; David J. Schmoll, D.D.S., Houston, R15705; Dan O. Waldon, D.C., Pearland, R19434; Augusta Family Medicine Associates, P.A., Houston, R20151; Redding Chiropractic, Friendswood, R21642; CCA Bartlett State Jail, Bartlett, R22484; Olivia E. Morris, D.O., Amarillo, R23021; El Paso Occupational Health Clinic, El Paso, R23824; Coit Chiropractic & Carpal Tunnel Center, Richardson, R25269; American Orthopedic, Dallas, R25578; Front Line Technologies, Inc., Pasadena, R26219; Lubbock Injury Rehabilitation, Lubbock, R26541; Jagruti Bhakta, D.M.D., San Antonio, R27980.

The complaints allege that these registrants have failed to pay required annual fees. The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the department that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the department within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Radiation Program Officer, 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200504491
Lisa Hernandez
Deputy General Counsel
Department of State Health Services
Filed: October 5, 2005

♦ ♦ ♦

Texas Department of Housing and Community Affairs

HOME Investment Partnerships Program Notice of Funding Availability

PY 2005 Colonia Model Subdivision Funding Cycle

The Texas Department of Housing and Community Affairs (Department) announces the availability of approximately $4,000,000 for the 2005 Colonia Model Subdivision Community Housing Development Organization (CHDO) Set Aside funding cycle. The availability and use of these funds is subject to the State HOME Investment Partnerships Program (HOME). Rules (10 TAC Chapter 53) and the Federal HOME regulations governing the HOME Program (24 CFR Part 92).

ALLOCATION OF HOME COLONIA MODEL SUBDIVISION FUNDS (CMSD)

The HOME Program provides state and local government with choices in respect to the allocation of HOME funds. Pursuant to the Colonia Model Subdivision Program, the Texas Department of Housing and Community Affairs is establishing a program to fund the development of housing that provides alternatives to existing substandard colonias. This program is designed to create housing options affordable to individuals and families of extremely low and very low income that would otherwise move into substandard colonia housing.

PROPOSED PROGRAM:

Up to one and a half ($1.5) million dollars per applicant in CHDO set aside funds will be made available on a first come, first serve basis. A Single Family CHDO Development Activity can fund land acquisition, lot development, construction costs, as well as, down payment assistance for qualified homebuyers.

The project must be located in a non-participating jurisdiction (non-PJ) area and in a Colonia as defined in §2306.581, Texas Government Code. A Colonia is defined as a geographic area located in a county some part of which is within 150 miles of the international border of this state that 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 has the physical and economic characteristics of a Colonia, as determined by the Texas Water Development Board. Colonias that have been assisted by the Texas Community Development Program (TCDP) or an equivalent program will be targeted.

Each funded CHDO must own, sponsor or develop housing that will be sold to qualified homebuyers. All newly constructed housing must meet minimum standards regarding accessibility, energy efficiency and, at a minimum, must meet or exceed the International Residential Code (IRC).

Homebuyers will be qualified based on gross household income (very low and extremely low), verification of full time employment, and satisfactory completion of homebuyer counseling. The Colonia Model Subdivision Program will require an acceptable credit review of the potential homebuyer.

The Department will require the qualified homebuyer to share financial responsibility of up to 30% of adjusted income as a monthly house payment. This requires the creation of two loans, the first being a repayable loan, and the second being a deferred forgivable loan.

First Lien Loan- Zero Percent (0%), 30 year amortization loan. Loan payment is based on income sliding scale

Second Lien Loan- 15 year deferred forgivable loan

The United States Department of Housing and Urban Development (HUD) 221(d)3 low cost area limits (HOME limits) will be used to define affordability. The Department will be the first and second lien holder. The homeowner's mortgage loan (0% for 30 years) will be calculated based on adjusted income, allowing minor adjustments for family size and other factors that are used to calculate affordability.

ELIGIBLE ACTIVITIES

The Colonia Model Subdivision CHDO Set aside funds will be awarded to fund the following activities:

land acquisition

lot development

construction, and

down payment assistance

ELIGIBLE APPLICANTS

The Department provides HOME funds for the Colonia Model Subdivision CHDO Set Aside to the following eligible entities:

State supported Colonia Self-Help Centers, and

Nonprofit Organizations

Entities must meet the definitions and requirements of becoming a State approved CHDO as defined in 10 TAC §53.63, concurrent with approval of funding.

DESCRIPTION OF ACTIVITY

Under the HOME Colonia Model Subdivision Set Aside, the Department will provide loans and grant funds to eligible recipients for the provision of housing to extremely low, and very low colonia individuals and families.

Approximately $4,000,000 of HOME Colonia Model Subdivision CHDO Set Aside funds is available. Colonia Model Subdivision CHDO Set Aside funds are not subject to the Regional Allocation Formula.

REVIEW OF APPLICATIONS

Applications will be accepted from 8 a.m. to 5 p.m., Monday through Friday excluding federal and state holidays, on an on-going basis until such time as all funding has been committed, or Thursday, August 31, 2006, the end of the 2006 State fiscal year. Applications will be accepted, reviewed, and recommended to the Department's Governing Board in accordance with the Department's process for handling open cycle applications located at 10 TAC §53.58(b) of the HOME rules.

The application must be submitted and all documentation provided as described in this NOFA, 10 TAC §53.58 of the HOME rules, and as further detailed in the appropriate HOME application including all attachments and appendices.

Applications will be required to adhere to the HOME rules and threshold requirements in effect at the time of the application submission. Applications must be provided on the forms supplied by the Department and cannot be altered or modified and must be in the final form before being submitted to the Department.

Parties interested in submitting an application are encouraged to arrange a pre-application meeting with the Department staff before submitting an application. To arrange a meeting for Single Family Development activities contact Skip Beaird at (512) 475-0908.

APPLICATION PROCEDURE, FINAL FILING

The HOME Application Guide will be available on the Department's website at www.tdhca.state.tx.us under *What's New* or you may call (512) 475-3993 to request an application.

There is no deadline for submitting a COMPLETED application. Incomplete applications will not be reviewed. A complete application should be submitted when the Applicant is ready to administer a program.

Applications mailed via the U.S. Postal Service *must* be mailed to:

Texas Department of Housing & Community Affairs

Single Family Finance Production Division

P.O. Box 13941

Austin, Texas 78711-3941

Applications mailed by private carrier or hand-delivered will be received at the physical address of:

Texas Department of Housing & Community Affairs

Single Family Finance Production Division

507 Sabine, Suite 700

Austin, Texas 78701

Applications will not be accepted through facsimile.

No application fee will be required for the Colonia Model Subdivision Program.

If an application contains deficiencies which, in the determination of Department staff, require clarification or correction of information submitted at the time of application, staff may request clarification or correction of such deficiencies. The Department may request clarification or correction in a deficiency notice in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. Deficiencies will be carried out as stated at 10 TAC §53.58(c).

An Applicant may appeal decisions made by the Department in accordance with 10 TAC Sections 1.7-1.8.

This NOFA does not include text of the various applicable regulatory provisions that may be important to the HOME Colonia Model Subdivision Program. For proper completion of the application, the Department strongly encourages potential Applicants to review the State and Federal regulations and to attend application training workshops.

Application Workshops

The Department will present one-day HOME Program Application Workshops that will provide an overview of the HOME Program and exclusively address the Colonia Model Subdivision Program Set Aside, application preparation and submission, evaluation criteria and information about the major Federal and State requirements that may affect a HOME project. The HOME Colonia Model Subdivision Program Workshop schedule and registration will be posted on the Department's website at www.tdhca.state.tx.us

CHDO Certification

Certification will be awarded in accordance with the rules and procedures as set forth in the HOME Investment Partnerships Program Final Rule, and as set forth at 10 TAC §53.63, Community Housing Development Organization (CHDO) Certification. If all requirements under this section are met, the applicant will be certified upon the award of the HOME funds by the Department. Applicants must recertify annually. Failure to complete certification or recertification may require the Department to suspend or terminate funding.

CHDO certification must be submitted to the Department with each application for HOME funds under the CHDO set-aside. For additional information regarding CHDO certification contact Jorge Reyes at (512) 475-3865.

Resolution Requirements

The Department requires that all applications submitted must include a resolution from the Applicant's direct governing body authorizing the submission of the application.

Audit Requirements

An Applicant is not eligible to apply for funds or any other assistance from the Department unless past audit or Audit Certification Form has been submitted to the Department per 10 TAC §1.3(b). This is a threshold requirement outlined in the application; therefore applications that have outstanding past audits will be disqualified. Staff will not recommend applications for funding to the Department's Governing Board unless all unresolved audit findings, questions or disallowed costs are resolved per 10 TAC §1.3(c).

Individuals who require auxiliary aids or services should contact Gina Esteves, ADA Responsible Employee, at least two days before the scheduled workshop, at (512) 475-3943, or Relay Texas at 1-800-735-2989, so that appropriate arrangements can be made.

TRD-200504499
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 5, 2005

Notice of Request for Proposals

The Texas Department of Housing and Community Affairs ("TDHCA/The Department") seeks proposals in response to this Request for Proposals from architectural and/or engineering individuals/firms knowledgeable about Uniform Physical Condition Standards (UPCS). The purpose is to inspect developments funded through the Housing Tax Credit program to ensure that they comply with the requirements of the uniform physical condition standards for public housing established by U.S. Department of Housing and Urban Development (HUD) (24 CFR §5.703).

The TDHCA reserves the right to accept or reject all or any part of any kind, waive minor technicalities and award the bid to serve the best interest of the State. One or multiple awards may be made to satisfy the needs of the Department in all regions statewide. The required experience, knowledge, skills and abilities are as follows:

Thorough knowledge of Uniform Physical Condition Standards for public housing established by HUD (24 CFR §5.703);

Skill in interpreting and explaining complex rules and regulations;

Skill in identifying the dimensions of a problem, determining potential causes and identifying and recommending appropriate remedies;

Ability to understand and apply laws, regulations and agency policy;

Ability to prepare detailed, concise written recommendations and reports; and

Ability to maintain detailed documentation in an orderly, accurate and complete format.

The successful individual(s)/firm(s) will be inspecting specific projects for compliance and submitting all working papers, reports and recommendations to TDHCA.

Any questions regarding this notice, please contact Wendy Quackenbush, Team Leader of Compliance Monitoring, at Texas Department of Housing and Community, 507 Sabine Street, Suite 300, Austin, Texas 78701, or (512) 305-8860.

TRD-200504508
Edwina Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 5, 2005

Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by ABA SEGUROS S. A. DE C.V., a Mexican casualty company. The home office is in Nuevo Leon, Mexico C. P.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200504500
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: October 5, 2005

Notice of Application by a Small Employer Health Benefit Issuer to be a Risk-Assuming Health Benefit Plan Issuer

Notice is given to the public of the application of the listed small employer health benefit plan issuer to be a risk-assuming health benefit plan issuer under §1501.312, Texas Insurance Code. A small employer health benefit plan issuer is defined by §1501.002(16), Texas Insurance Code, as a health benefit plan issuer offering, delivering, issuing for delivery, or renewing health benefit plans subject to Subchapters C - H of Chapter 1501, Texas Insurance Code. A risk-assuming health benefit plan issuer is defined by §1501.301(4), Texas Insurance Code, as a small employer health benefit plan issuer that does not participate in the Texas Health Reinsurance System. The following small employer health benefit plan issuer has applied to be a risk-assuming health benefit plan issuer:

John Alden Life Insurance Company

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal & Compliance Division - Archie Clayton, 333 Guadalupe, Tower I, Room 860, Austin, Texas.

If you wish to comment on the application of John Alden Life Insurance Company to be a risk-assuming health benefit plan issuer, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-91204. Upon consideration of the application and comments, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the applicant to be a risk-assuming health benefit plan issuer.

TRD-200504466
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: October 3, 2005

Notice of Filing

Two petitions have been filed with the Texas Department of Insurance proposing amendments to the Plan of Operation (Plan) of the Texas Automobile Insurance Plan Association (TAIPA) for consideration by the Commissioner of Insurance. These petitions contain amendments to the Plan of Operation that have been approved by the TAIPA Governing Committee.

The requested approval of the amendments is pursuant to Article 21.81, Insurance Code, which provides in §3(c) that subject to the approval of the Commissioner, the TAIPA Governing Committee may make and amend the plan of operation.

Reference Number A-0505-04. This petition contains amendments to establish guidelines addressing consecutive absences of a Governing Committee member from scheduled Governing Committee meetings.

Reference Number A-0805-10. This petition contains amendments to the Plan concerning territorial credits, electronic application submission interface, and changes relating to the optional Mexico coverage endorsements. TAIPA's petition in this instance seeks to amend the Plan of Operation to eliminate a provision allowing the sale of territorial credits between member companies, and to eliminate the requirement that applications be submitted to TAIPA in duplicate when the electronic application submission interface (EASi) system is used. TAIPA is also requesting to eliminate the option for an insurer to offer the Limited Mexico Coverage.

These filings are subject to the Commissioner's approval without a hearing. Any comments may be filed with the Office of the Chief Clerk, Texas Department of Insurance, MC 113-2A, P.O. Box 149104, Austin, Texas 78714-9104, within 15 days after publication of this notice. An additional copy is to be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, Texas Department of Insurance, Mail Code 104-PC, P.O. Box 149104, Austin, Texas 78714-9104.

For further information or to request a copy of the petitions or proposed amendments, please contact Sylvia Gutierrez at (512) 463-6327 and provide the reference number of the petition that is the subject of inquiry.

TRD-200504505
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: October 5, 2005

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of CORE V SOLUTIONS, INC., a domestic third party administrator. The home offfice is FRISCO, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200504497
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: October 5, 2005

Texas Lottery Commission

Instant Game Number 642 "$25,000 Money Machine"

1.0. Name and Style of Game.

A. The name of Instant Game Number 642 is "$25,000 MONEY MACHINE." The play style is "key symbol match with autowin."

1.1. Price of Instant Ticket.

A. Tickets for Instant Game Number 642 shall be $2.00 per ticket.

1.2. Definitions in Instant Game Number 642.

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: 7 SYMBOL, DOLLAR SIGN SYMBOL, HORSESHOE SYMBOL, LEMON SYMBOL, BANANA SYMBOL, POT OF GOLD SYMBOL, MELON SYMBOL, CHERRIES SYMBOL, APPLE SYMBOL, GRAPE SYMBOL, BELL SYMBOL, CROWN SYMBOL, DIAMOND SYMBOL, STAR SYMBOL, COIN SYMBOL, STACK OF BILLS SYMBOL, BAR SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $200, $1,000 and $25,000.

D. Play Symbol Caption--The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 642 - 1.2D

PLAY SYMBOL	CAPTION
7 SYMBOL	SEVN
DOLLAR SIGN SYMBOL	MONY
HORSESHOE SYMBOL	SHOE
LEMON SYMBOL	LEMN
BANANA SYMBOL	BNNA
POT OF GOLD SYMBOL	GOLD
MELON SYMBOL	MELN
CHERRIES SYMBOL	CHRY
APPLE SYMBOL	APPL
GRAPE SYMBOL	GRPE
BELL SYMBOL	BELL
CROWN SYMBOL	CRWN
DIAMOND SYMBOL	DMND
STAR SYMBOL	STAR
COIN SYMBOL	COIN
STACK OF BILLS SYMBOL	DLRS
BAR SYMBOL	WIN$50
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$1,000	ONE THOU
$25,000	25 THOU

E. Retailer Validation Code--Three letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 642 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
FIV	$5.00
EGT	$8.00
TEN	$10.00
TWL	$12.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four digit Security Number placed randomly within the Serial Number. The remaining nine 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: 0000000000000.

G. Low-Tier Prize--A prize of $2.00, $4.00, $5.00, $8.00, $10.00, $12.00 or $20.00.

H. Mid-Tier Prize--A prize of $50.00 or $200.

I. High-Tier Prize--A prize of $1,000 or $25,000.

J. Bar Code--A 22 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 digit number consisting of the three digit game number (642), a seven digit pack number, and a three digit ticket number. Ticket numbers start with 001 and end with 250 within each pack. The format will be: 642-0000001-001.

L. Pack--A pack of "$25,000 MONEY MACHINE" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five. Tickets 001 to 005 will be on the top page; tickets 006 and 010 on the next page; etc.; and tickets 246 and 250 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

M. 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.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "$25,000 MONEY MACHINE" Instant Game Number 642 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 "$25,000 MONEY MACHINE" Instant Game is determined once the latex on the ticket is scratched off to expose 32 Play Symbols. If a player reveals three matching play symbols in the same spin the player wins prize shown for that spin. If a player reveals a BAR play symbol in any spin the player wins $50 automatically. 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 32 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 32 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 32 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 32 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 will not have identical play data, spot for spot.

B. No three or more like non-winning prize symbols on a ticket.

C. No duplicate non-winning spins in the exact same order will be adjacent to each other on a ticket.

D. Non-winning prize symbols will not match a winning prize symbol on a ticket.

E. No adjacent spins will contain three like non-winning play symbols.

F. When the auto win symbol appears, there will be no duplicate non-winning play symbols within that spin.

G. The auto win play symbol will only appear as dictated by the prize structure.

2.3. Procedure for Claiming Prizes.

A. To claim a "$25,000 MONEY MACHINE" Instant Game prize of $2.00, $4.00, $5.00, $8.00, $10.00, $12.00, $20.00, $50.00 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, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 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 "$25,000 MONEY MACHINE" Instant Game prize of $1,000 or $25,000, 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 "$25,000 MONEY MACHINE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4. Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5. Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "$25,000 MONEY MACHINE" 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 "$25,000 MONEY MACHINE" 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 9,000,000 tickets in the Instant Game Number 642. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 642 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	972,000	9.26
$4	540,000	16.67
$5	144,000	62.50
$8	36,000	250.00
$10	72,000	125.00
$12	54,000	166.67
$20	36,000	250.00
$50	36,000	250.00
$200	10,875	827.59
$1,000	250	36,000.00
$25,000	11	818,181.82

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.73. 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 Number 642 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 Number 642, 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-200504475
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 4, 2005

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Texas Department of Public Safety

Request for Proposal - Consultant Services

1. SUBJECT.

The Texas Department of Public Safety (TXDPS) is seeking to enter into a contract with a Consultant with the expertise, qualifications, and resources necessary to conduct a study of the current Active Countermeasures Training program utilized by the Department to train our Trooper-Trainees in the Training Academy on Arrest and Control tactics and advise the agency on new or alternative training programs, methodologies, techniques, equipment or other related factors that could improve and/or enhance the safety and overall effectiveness of the program.

2. PURPOSE.

The Consultant will be required to conduct an evaluation of the Department's Active Countermeasures Training program in relationship with the current theories and methodologies, and training techniques used by law enforcement training agencies of similar size and responsibilities throughout the nation. The scope of the project will include, as a minimum:

A. An evaluation of the training theory which serves as the basis of the current Active Countermeasures program used by the Department as a practical tool for the preparation of our recruits to perform the duties of Troopers.

B. An evaluation of the training methodology of the current Active Countermeasures program used by the Department as a practical tool for the preparation of our recruits to perform the duties of Troopers.

C. An inspection of the current training venues and equipment used by the Department for the preparation of our recruits to perform the duties of Troopers.

D. An evaluation of the qualifications and expertise of current Department instructors who provide instructions in Active Countermeasures theories and training in the actual techniques and control mechanisms needed to prepare our recruits to perform the duties of Troopers.

E. An evaluation of the agency's medical pre-employment screening requirements for applicants to the recruit school to determine if the use of these requirements are sufficient to identify those applicants with pre-existing medical conditions who would be considered susceptible to a high risk of further injury by participating in the rigors of the Active Countermeasures training program.

F. An evaluation of the Physical Training (PT) program as it relates to its safety and effectiveness in preparing the recruits mentally and physically to participate in the Active Countermeasures training program.

G. An evaluation of the procedures used by the Training Academy staff to monitor the welfare of the recruits participating in the Physical Training (PT) and the Active Countermeasures programs to determine if the proper safeguards for identifying, evaluating, and responding to injuries are in place.

3. NOTICE.

The Contract for these services will be awarded to a single Respondent capable of conducting the evaluation of the Active Countermeasures Training program based upon the criteria listed in the Request for Proposal (RFP). To qualify for evaluation, the Respondent's proposal must demonstrate organizational experience, education, training, and comprehensive understanding of the critical nature of law enforcement training.

If subcontractors are used, all terms and conditions that apply to the Respondent will apply equally to the subcontractor, if applicable.

Respondents must provide information to confirm that all involved business entities have the experience and stability necessary to provide successful program administration requested by this RFP.

Any costs incurred by a Respondent in association with any aspect of attempting to secure this contract will be the sole responsibility of the Respondent.

The Contractor/subcontractor(s) will not be allowed to make any news releases, public announcements, or public disclosures, nor will it have any conversations with representatives of the news media, pertaining to this contract, without the express prior written approval of TXDPS, and then only in accordance with explicit written instructions from TXDPS.

All information collected by Contractor from the Department is confidential and cannot be used by Contractor or disclosed to any person, unless such use or disclosure is required for Contractor to perform work under this contract. Confidential information includes the training tapes and documents, injury reports, medical records, financial reports, etc.

At the conclusion of the contract, any research, reports, studies, data, photographs, negatives or other information, documents, drawings or materials prepared by Contractor in the performance of its obligations under this contract shall be the exclusive property of the State of Texas and all such materials shall be delivered to the Texas Department of Public Safety by the Contractor upon completion, termination or cancellation of this contract. The ownership rights herein shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use the works.

4. SUBMISSION OF PROPOSAL.

The deadline for submitting a response for this procurement is **November 15, 2005 at 2:00 pm CDT**. Proposals received after this deadline will not be accepted and will be returned to the originating source.

5. PROCUREMENT AND CONTRACT DOCUMENTS.

This procurement shall be conducted in accordance with Texas Government Code, Chapter 2254.

Respondents shall supply one (1) original and three (3) copies of their proposals for evaluation purposes to the address shown in the "POINT OF CONTACT" section below. Proposals must be submitted in a sealed package to TXDPS on or before **November 15, 2005 at 2:00 pm CDT**. The sealed proposal should be clearly marked with the proposal number and the proposal due date. It is the sole responsibility of the Respondent to allow for sufficient delivery time by the specified deadline. Any bids not received on or before **November 15, 2005 at 2:00 pm CDT** will not be accepted and will be returned to the originating source.

This is not a complete bid package. For a complete copy of the package, including specifications, terms and conditions, go to the Electronic State Business Daily (ESBD) at http://esbd.tbpc.state.tx.us/1380/sagency.cfm. When contacting the ESBD Respondents must search under RFP # 405-HQ6-9022.

6. POINT OF CONTACT.

Alfred Ramos, CTPM Purchaser IV

Accounting and Budget Control, Purchasing Section

Texas Department of Public Safety

5805 North Lamar Blvd., Building A

Austin, Texas 78752

(512) 424-2870

7. INQUIRES.

All inquiries shall be directed to the contact individual. Specific questions regarding the RFP shall be submitted in writing via email and must clearly identify which section and paragraph of the RFP is being referenced. Questions and answers will be posted on the Texas Marketplace, Electronic State Business Daily (ESBD) website http://esbd.tbpc.state.tx.us/1380/sagency.cfm as time permits, but no later than **November 3, 2005 at 5:00 pm**. When contacting the ESBD Respondents must search under RFP # 405- HQ6-9022.

8. ADDENDA TO THE RFP.

TXDPS reserves the right in its sole discretion to amend this RFP to clarify, revise, supplement or delete any provision or to add new provisions. In the event that a revision of the RFP becomes necessary, addenda will be posted: on the Texas Marketplace, Electronic State Business Daily website http://esbd.tbpc.state.tx.us/1380/sagency.cfm. It is the responsibility of Respondents to check this site frequently for amendments and/or addenda to the RFP.

9. TXDPS RIGHTS.

The rights reserved by TXDPS include, but are not limited to:

The right to terminate this RFP without awarding a contract;

The right to reject any and all proposals received in response to this Request for Proposal which do not conform to the preparation, content, or submission guidelines outlined herein; or, if it is in the best interest of the State of Texas to do so;

The right to consider all factors it believes to be relevant in the selection of the most comprehensive proposal that provides the state with the best

value. This includes, but is not limited to, the Respondent's ability to perform the agreement;

The right to waive minor proposal provisions received, after prior notice, coordination, and concurrence with Respondents;

The right to reject any exceptions to the terms and conditions specified in Section 6 of the RFP, and any additional terms and conditions provided by Respondent, unless expressly stated otherwise by TXDPS in the final contract;

The right to satisfy itself that the Respondent will be able to perform under the contract and may request any information which the Department deems necessary to determine the qualifications and acceptable responsibility from the Respondent;

The right, in its sole discretion, to amend this Request for Proposal so as to clarify, revise, supplement, or delete any provision hereof or to add any new provisions hereto;

The right to enter, and to be granted entry by the Consultant to, the Consultant's fixed and mobile facilities at any time and without delay to inspect and test all services called for by the Contract;

The right to audit the Consultant's records and documents regarding the terms and conditions of this Contract; and,

The right to exclusive ownership, and possession on demand or contract termination, of all files, records, and data collected, stored, generated, maintained, or transmitted in the performance of the Contract.

10. EVALUATION CRITERIA FOR AWARD.

Evaluation of proposals will be based on both technical merit and cost considerations. The evaluation committee is tasked with determining the most cost-effective solution that thoroughly covers the scope of this RFP. The evaluation committee will use a weighted scoring system to achieve a fair and objective assessment of the bids received. The following criteria and scoring will comprise the total score:

Respondent Qualifications, References, and Disclosure of Litigation 60%

Cost 35%

Technical Requirements 5%

11. CONTRACT TERMS.

The contract shall be for a term for a period of ninety (90) days beginning on the date the purchase order is issued. The contract may be extended beyond its initial term for up to three (3) months in one (1) month increments, under the same terms, conditions and price as needed to complete this project due to unanticipated delays properly communicated in writing by the Respondent to TXDPS within seven (7) days of the time Respondent first becomes aware of a potential delay. Any extension will only become effective after both parties mutually agree to the renewal.

12. EXPERTISE REQUIRED.

Due to the extreme importance of this project to the Department's ability to continue to provide the proper training needed by our recruits in order to perform as Troopers, it is critical that the Respondent to this RFP possess the qualifications and expertise to conduct a thorough evaluation of the current Active Countermeasures training program and provide recommendations that can improve and/or enhance the program. As a minimum, the Respondent must:

A. Possess ten (10) years of experience working with law enforcement agencies with the most recent work history occurring in the last five (5) year period. Work experience must involve the training, evaluation, and/or legal defense of training programs used by law enforcement agencies.

B. Possess a broad working knowledge of law enforcement missions, practices, responsibilities, training initiatives, and applicable court decisions that affect current law enforcement programs.

C. Possess a broad working knowledge of current Arrest and Control training initiatives that include Active Countermeasures, Martial Arts, or other tactical training techniques used in law enforcement programs in the last five (5) years.

D. Possess the knowledge and skills of an "expert" in law enforcement training standards by providing evidence of:

1) Relevant training the Respondent has developed, instructed, and/or evaluated in the last five (5) years that are germane to this RFP; and/or,

2) Published reports, documentaries, and/or books the Respondent has authored, co-authored, or collaborated on in the last five (5) years that are germane to this RFP.

13. DELIVERABLES.

The Consultant shall provide the following services and items as required by the Contract:

A. An evaluation of the training theory which serves as the basis of the current Active Countermeasures program used by the Department as a practical tool for the preparation of our recruits to perform the duties of Troopers.

B. An evaluation of the training methodology of the current Active Countermeasures program used by the Department as a practical tool for the preparation of our recruits to perform the duties of Troopers.

C. An inspection of the current training venues and equipment used by the Department for the preparation of our recruits to perform the duties of Troopers.

D. An evaluation of the qualifications and expertise of current Department instructors who provide instructions in Active Countermeasures theories and training in the actual techniques and control mechanisms needed to prepare our recruits to perform the duties of Troopers.

E. An evaluation of the agency's medical pre-employment screening requirements for applicants to the recruit school to determine if the use of these requirements are sufficient to identify those applicants with pre-existing medical conditions who would be considered susceptible to a high risk of further injury by participating in the rigors of the Active Countermeasures training program.

F. An evaluation of the Physical Training (PT) program as it relates to its safety and effectiveness in preparing the recruits mentally and physically to participate in the Active Countermeasures training program.

G. An evaluation of the procedures used by the Training Academy staff to monitor the welfare of the recruits participating in the Physical Training (PT) and the Active Countermeasures programs to determine if the proper safeguards for identifying, evaluating, and responding to injuries are in place.

H. A written report documenting information and data generated in the evaluation of the above items. The written report shall consist of an "INTERM REPORT" to the TXDPS Project Leader and a "FINAL REPORT" to the Public Safety Commission.

I. The submission of the Final Report shall include seven (7) printed copies and one (1) electronic version either submitted via email or hard copies to a compact disk (CD) or other suitable data storage media as agreed to by the TXDPS Project Leader.

J. Make a formal presentation of the evaluation and recommendations contained in the Final Report to the Public Safety Commission at the Headquarters in Austin, Texas on a date and time to be set by the Commission.

14. INSTRUCTIONS TO RESPONDENTS.

TXDPS requires complete and concise proposals. Care must be taken to ensure that no critical piece of information is omitted. Superfluous information, press releases, and marketing brochures are not necessary.

Each bid component must be typewritten in black ink, Times New Roman, Font 12 and submitted on paper that is 8.5" x 11", bound appropriately. Pages shall be numbered consecutively and reflect the total number of pages in the bid.

Prospective Respondents must submit proposals by the identified deadline time and date in the following manner:

1. Respondents must supply one (1) original and three (3) copies.

2. Respondent must have an identifying cover sheet that includes the primary point of contact, business address, Respondent identification number, and the Agency RFP Number.

3. The proposal must include itemized costs for providing consultant services including any costs for travel and per diem associated with providing the requested service. Vendor must comply with the State of Texas Schedule for Travel and Per Diem. Respondent must provide an estimate of the number of hours and corresponding hourly rate (if applicable) needed to complete the project requirements contained in Appendix A.

4. The bid must address all requirements of this RFP regarding the evaluation of the TXDPS Active Countermeasures training program, including the requirements contained in Appendix A.

TRD-200504503
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: October 5, 2005

Public Utility Commission of Texas

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 30, 2005, for a state-issued certificate of franchise authority (CFA), pursuant to Public Utility Regulatory Act (PURA) §§66.001 - 66.016. A summary of the application follows.

Project Title and Number: Application of GTE Southwest, Incorporated, doing business as Verizon Southwest, for a State-Issued Certificate of Franchise Authority, Project Number 31817 before the Public Utility Commission of Texas.

Applicant intends to provide cable service. The requested CFA service includes area all or portion of the following 21 municipalities: Allen, Carrolton, Colleyville, Coppell, Denton, Double Oak, Flower Mound, Ft. Worth, Garland, Grapevine, Hebron, Highland Village, Irving, Lewisville, Lucas, Murphy, Parker, Plano, Rowlett, Southlake, and St. Paul.

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 31817.

TRD-200504487
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2005

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 4, 2005, for a state-issued certificate of franchise authority (CFA), pursuant to Public Utility Regulatory Act (PURA) §§66.001 - 66.016. A summary of the application follows.

Project Title and Number: Application of Grande Communications Networks, Incorporated for a State-Issued Certificate of Franchise Authority, Project Number 31829 before the Public Utility Commission of Texas.

Applicant intends to provide cable and video service. The requested CFA service includes the municipal boundaries of the State of Texas cities and/or towns of Alamo Heights, Allen, Austin, Balcones Heights, Beverly Hills, Carrollton, Castle Hills, Corinth, Corpus Christi, Denton, Fairview, Flower Mound, Frisco, Hewitt, Kirby, Little Elm, McKinney, Midland, Odessa, Olmos Park, Pflugerville, Round Rock, San Antonio, San Marcos, Terrell Hills, Waco, and Woodway.

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 31829.

TRD-200504488
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2005

Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on September 23, 2005, with the Public Utility Commission of Texas (commission), for an amendment to a certificated service area boundary.

Docket Style and Number: Application of Taylor Telephone Cooperative, Incorporated to Amend Certificate of Convenience and Necessity Service Area Boundaries within Taylor County, Texas. Docket Number 31733.

The Application: This minor boundary amendment is being requested to realign the boundary between Taylor Telephone Cooperative Incorporated's Buffalo Gap exchange and the Abilene exchange of Southwestern Bell Telephone, L.P., doing business as SBC Texas, to allow Taylor to provide telecommunications services to a business customer who is running a wind turbine farm in the area. SBC Texas has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by October 24, 2005,

by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 31733.

TRD-200504441
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 30, 2005

Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of an application filed with the Public Utility Commission of Texas on September 23, 2005, for designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Texas RSA 1 Limited Partnership, doing business as XIT Wireless, for Designation as an Eligible Telecommunications Carrier (ETC). Docket Number 31738.

The Application: The company is requesting ETC designation in the study area of rural incumbent local exchange carrier XIT Rural Telephone Cooperative, Incorporated, and the exchanges of Boys Ranch, Cactus, Channing, Dalhart, Dumas, Hartley, Stratford, Sunray, and Vega in which Valor Telecommunications of Texas, LP is the incumbent provider.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than November 3, 2005. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 31738.

TRD-200504358
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 28, 2005

Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On September 30, 2005, Vectren Communications Services, Inc. filed an application with the Public Utility Commission of Texas (Commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60434. Applicant intends to relinquish its certificate.

The Application: Application of Vectren Communications Services, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 31816.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 19, 2005. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 31816.

TRD-200504486
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2005

Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing on September 28, 2005, with the Public Utility Commission of Texas (Commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215. The Applicant will file the LRIC study on October 7, 2005.

Docket Title and Number: Application of Southwestern Bell Telephone Company, L.P., doing business as SBC Texas, for Approval of LRIC Study For PLEXAR Digital Direct Termination Pursuant to P.U.C. Substantive Rule §26.215, Docket Number 31801.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 31801. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P. O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 31801.

TRD-200504442
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 30, 2005

Notice of Submission of Texas Nodal Protocols

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) a Submission of Texas Nodal Protocols on September 23, 2005, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.151 (Vernon 1998 & Supp. 2005) and P.U.C. Substantive Rule §25.501(m).

Docket Style and Number: Proceeding to Consider Protocols to Implement A Nodal Market in the Electric Reliability Council of Texas Pursuant to P.U.C. Substantive Rule §25.501. Docket Number 31540.

The Application: The Electric Reliability Council of Texas (ERCOT) filed with the commission a submission of Texas Nodal Protocols for a wholesale market design. At the commission's direction ERCOT used a stakeholder process to develop a wholesale market design that complies with the market elements set forth by commission Substantive Rule §25.501. ERCOT sponsored a stakeholder process by establishing the Texas Nodal Team (TNT) which provided independent facilitation to participating stakeholders. The TNT has developed a market design and draft Protocols intended to comply with the commission's rule.

The submission consists of fifteen sections titled as follows: Table of Contents, Overview, Definitions and Acronyms, Management Activities for the ERCOT System, Day-Ahead Operations, Transmission Security Analysis and Reliability Unit Commitment, Adjustment Period and Real-Time Operations, Congestion Revenue Rights,

Performance Monitoring and Compliance, Settlement and Billing, Market Information System, Registration and Qualification of Market Participants, Market Monitoring and Data Collection, Standard Form Reliability Must-Run Agreement, and Standard Form Market Participant Agreement. The full text of the Texas Nodal Protocols can be found on ERCOT's website at: http://www.ercot.com/TNT/default.cfm?func=documents&intGroupID=115&b, or by accessing PUC Docket Number 31540 through the PUC Interchange website at: http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch.asp.

The intervention deadline in this proceeding is Friday, October 21, 2005. Persons who wish to intervene or comment on the Texas Nodal Protocols 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 filings should reference Docket Number 31540.

TRD-200504485
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2005

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Supreme Court of Texas

Emergency Order on Enlargement of Time

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 05-9168

EMERGENCY ORDER ON ENLARGEMENT OF TIME

ORDERED that:

1. For reasons explained below, the closure of a court clerk's office is "good cause" for enlarging the time for filing any document within the meaning of Rule 5 of the Texas Rules of Civil Procedure and any other provisions of the Rules of Civil Procedure and the Rules of Appellate Procedure that permit an enlargement of time on a showing of good cause, or a similar showing.

2. In calculating the time for filing a motion for new trial, any day that the clerk's office of the court in which the case is pending is closed or inaccessible during regular hours is not to be included. The closing or inaccessibility of the clerk's office may be proved by a certificate of the clerk or counsel, by a party's affidavit, or by any other satisfactory proof, and may be controverted in the same manner.

3. This Order will expire on October 31, 2005, unless extended by further Order of the Court.

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 member of the Legislature;

d. submit a copy of the Order for publication in the *Texas Register*; and

e. publish a copy of the Order on the Court's website.

SIGNED AND ENTERED this 26th day of September, 2005.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

PER CURIAM

This past weekend Texas was struck by Hurricane Rita, resulting in the closure of court clerk's offices in affected areas. It cannot be determined at this time when these offices can reopen. Office closings or inaccessibility should not affect deadlines under the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure.

In addition, the storm has resulted in lawyers' offices being closed or inaccessible in many areas. Of course, the inability of lawyers to respond to procedural deadlines because of the storm should also be considered in determining whether time periods should be enlarged.

Rule 4.1(b) of the Rules of Appellate Procedure provides for the extension of time for filing a document when "the clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing the document". Rule 4 of the Rules of Civil Procedure provides for the extension of any time period when the last day is a "legal holiday", and for the calculation of other periods that include "legal holidays". A "legal holiday" includes a day "on which the clerk's office for the court in which the case is pending is officially closed." *Miller Brewing Co. v. Villarreal*, 829 S.W.2d 770, 772 (Tex. 1992) (per curiam). Section 16.072 of the Texas Civil Practice and Remedies Code extends limitation periods when the last day falls on a holiday. The word "holiday" in the statute has the same meaning as "legal holiday" in Rule 4 of the Texas Rules of Civil Procedure. *Martinez v. Windsor Park Development Co.*, 833 S.W.2d 950, 951 (Tex. 1992) (per curiam). The Court has expressed no view on the application of section 16.072 to other statutes of limitations and does not do so here. *Cf. Simmons v. Healthcare Centers of Texas, Inc.*, 55 S.W.3d 674, 681 n.5 (Tex. App. - Texarkana 2001, no pet.) (health care liability claims); *Morin v. Helfrick*, 930 S.W.2d 733, 737 n.1 (Tex. App. - Houston [1st Dist.] 1996, no writ) (health care liability claims); *Green v. Texas Employment Commission*, 675 S.W.2d 809 (Tex. App. - El Paso 1984, writ ref'd n.r.e.) (workers' compensation claims).

Rule 5 of the Rules of Civil Procedure allows the court on motion to enlarge a time period after it has expired for "good cause". Several provisions of the Texas Rules of Appellate Procedure allow an appellate court to enlarge time periods. To provide clarity to the judiciary and to the bar in this difficult period in the aftermath of a natural disaster, the Court orders that the closure of a court clerk's office is "good cause" for enlarging the time for filing any document within the meaning of Rule 5 of the Texas Rules of Civil Procedure and any other provisions of the Rules of Civil Procedure and the Rules of Appellate Procedure that permit an enlargement of time on a showing of good cause, or a similar showing. Of course, there may be other good cause for an enlargement of time, including the dislocation of counsel. The Court further orders a change in the manner of calculating the period of time for filing a motion for new trial.

This Order is issued in response to a natural disaster and is temporary. It expires October 31, 2005, unless extended by further Order of the Court.

TRD-200504360
Andrew Weber
Clerk
Supreme Court of Texas
Filed: September 29, 2005

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Texas A&M University, Board of Regents

Notice of Sale of Oil, Gas, and Sulphur Lease

The Board of Regents of The Texas A&M University System, pursuant to provisions of V.T.C.A., Education Code, Chapter 85, as amended, and subject to all rules and regulations promulgated by the Board of Regents, offers for sale at public auction in Suite 1151, System Real Estate Office, The Texas A&M University System, A&M System Building, 200 Technology Way, College Station, Texas, at 10:00 a.m., Wednesday, November 9, 2005, an oil, gas and sulphur lease on the following described land in Denton County, Texas. The property offered for lease contains 62.963 mineral acres, more or less, and more particularly described as follows:

Being 62.963 acres, more or less, out of the Robert Whitlock Survey, Abstract No. 1403, Denton County, Texas.

The minimum lease terms, which applies to this tract, are as follows:

(1) Bonus: $155 per net mineral acre

(2) Royalty: 25%

(3) Delay Rental: $10.00 per net mineral acre

(4) Primary term: Three (3) years

(5) Net Mineral Acres: 62.963 (More or Less)

Highest bidder shall pay to the Board of Regents on the day of the sale 25% of the bonus bid, and the balance of the bid shall be paid to the Board within twenty-four (24) hours after notification that the bid has been accepted. All payments shall be in cashier's check as the Board may direct. Failure to pay the balance of the amount bid will result in forfeiture to the Board of the 25% paid. The Board of Regents of The Texas A&M University System, **RESERVES THE RIGHT TO REJECT ANY AND ALL BIDS**. The successful bidder will be required to pay all advertising expenses and administrative costs.

Further inquiries concerning oil, gas and sulphur leases on System land should be directed to:

Dan K. Buchly Associate

Vice Chancellor for Real Estate

The Texas A&M University System

System Real Estate Office

200 Technology Way, Suite 1151

College Station, Texas 77845-3424

(979) 458-6350

TRD-200504506
Vickie Burt Spillers
Executive Secretary to the Board
Texas A&M University, Board of Regents
Filed: October 5, 2005

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

Cottle County and the City of Paducah, through their agent the Texas Department of Transportation (TxDOT), intend to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: Cottle County and the City of Paducah, Dan E. Richards Municipal Airport. TxDOT CSJ No.:0625PADUC. Scope: Provide engineering/design services to rehabilitate and mark runway 17-35; rehabilitate and mark stub taxiway; reconstruct apron; replace low intensity runway lights with medium intensity runway lights runway 17-35; replace lighted windcone and segmented circle; and replace rotating beacon and tower.

The HUB goal is set at 6%. TxDOT Project Manager is Bijan Jamalabad, PE.

To assist in your proposal preparation the most recent Airport Layout Plan, 5010 drawing, and project narrative are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "Dan E. Richards Municipal Airport".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be e-mailed by request or downloaded from the TxDOT web site, URL address **http://www.dot.state.tx.us/avn/avn550.doc**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT. ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is an MS Word Template.

Four completed, unfolded copies of Form AVN-550 must be postmarked by U. S. Mail by midnight Friday, November 4, 2005. Mailing address: TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483. Overnight delivery must be received by 4:00 p.m. on Monday, November 7, 2005. Overnight address: TxDOT Aviation Division, 200 E. Riverside Drive, Austin, Texas 78704. Hand delivery must be received by 4:00 p.m. Monday, November 7, 2005. Hand delivery address: 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704. Electronic facsimiles or forms sent by e-mail will not be accepted. Please mark the envelope of the forms to the attention of Amy Slaughter.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at **www.dot.state.tx.us/business/avnconsultinfo.htm**. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems

it necessary. If interviews are conducted, selection will be made following the interviews.

If there are any procedural questions, please contact Amy Slaughter, Grant Manager, or Bijan Jamalabad, PE, Project Manager, for technical questions at 1-800-68-PILOT (74568).

TRD-200504467
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: October 3, 2005

Public Hearing - Amendments to §27.40, Purpose, and Repeal of §27.43, Transfer of Existing Public Highways.

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed amendments to §27.40 and repeal of §27.43, as published October 14, 2005 in the *Texas Register*. Due to oversight, this public hearing notice was not added to the Preamble for §27.40 and §27.43 pertaining to regional tollway authorities. As announced in associated preambles, this public hearing also addresses §§26.41 - 26.43, 26.45, 26.46, 27.11 - 27.16, 27.70, and 27.72 - 27.75. The public hearing will be held at 8:30 a.m. on Wednesday, November 9, 2005, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:00 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 Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

TRD-200504471
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: October 4, 2005

Public Notice--Public Hearings Regarding Proposed Rules

In this issue of the *Texas Register*, the Texas Department of Transportation proposes the repeal of 16 Texas Administrative Code (TAC) Part 6, concerning the Texas Motor Vehicle Board, and proposes new 43 TAC Chapter 8, concerning motor vehicle distribution.

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct public hearings to receive comments concerning the proposed repeals and new rules. The public hearing will be held at the following times and locations and will be conducted in accordance with the procedures specified in 43 TAC §1.5.

November 2, 2005, 10:00 a.m.: San Antonio District Office, Building 2 Conference Room, 4615 NW Loop 410, San Antonio, Texas 78229

November 10, 2005, 9:00 a.m.: El Paso District Office, District Office Conference Center, 13301 Gateway West, El Paso, Texas 79928

November 17, 2005, 9:00 a.m.: Pharr District Office, Conference Center, 600 West U.S. Expressway 83, Pharr, Texas 78577

November 30, 2005, 9:00 a.m.: North Central Texas Council of Governments Transportation Department, Transportation Board Room, 616 Six Flags Drive, Suite 200, Arlington, Texas 76005-5888

December 6, 2005, 10:00 a.m.: Houston District Office, Main Conference Room, 7721 Washington Avenue, Houston, Texas 77007

Those desiring to make comments or presentations may register starting 30 minutes prior to the scheduled start time. 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 the contact person listed for each hearing, at least two working days prior to the hearing so that appropriate services can be provided.

Contact Persons for persons requiring auxiliary aids or services:

San Antonio Hearing--Dolly Garcia, P.O. Box 29928, San Antonio, Texas 78229, (210) 615-5803

El Paso Hearing--Carmen Sifuentes, 13301 Gateway Boulevard West, El Paso, Texas 79928, (915) 790-4200

Pharr Hearing--Amy Rodriguez, Public Information Officer, P.O. Box 1717, Pharr, Texas 78577, (956) 702-6100 or (956) 702-6102

Arlington Hearing--Lara Rodriguez, Public Involvement Coordinator, North Central Texas Council of Governments, 616 Six Flags Drive, Suite 200, Arlington, Texas 76005-5888, (817) 695-9247

Houston Hearing--Karen Othon, P.O. Box 1386, Houston, Texas 77251-1386, (713) 802-5002

TRD-200504498

Richard D. Monroe
General Counsel
Texas Department of Transportation
Filed: October 5, 2005

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, §6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

Trinity Rural Water Supply Corporation, P.O. Box 709, Trinity, Texas 75862, received August 26, 2005, application for financial assistance in the amount of $5,770,000 from the Rural Water Assistance Fund.

Panhandle Groundwater Conservation District, P.O. Box 637, White Deer, Texas 79097, received September 13, 2005, application for financial assistance in the amount of $500,000 from the Agricultural Water Conservation Loan Program.

Greater Texoma Utility Authority, on behalf of the City of Anna, Texas, 5100 Airport Drive, Denison, Texas 75020, received July 29, 2005, application for financial assistance in the amount of $5,000,000 from the Texas Water Development Funds.

City of Lorena, 3947 Lincoln Avenue, Groves, Texas 77619, received May 31, 2005, application for financial assistance in the amount of $2,260,000 from the Clean Water State Revolving Fund.

Batesville Water Supply Corporation, P.O. Box 187, Batesville, Texas 78829, received September 7, 2005, application for additional financial assistance in the amount of $1,676,570 grant/loan from the Economically Distressed Areas Program.

TRD-200504507
Jonathan Steinberg
Deputy Counsel
Texas Water Development Board
Filed: October 5, 2005

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 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 "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 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 (800) 226-7199.

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 (1-800-356-6548), and West Publishing Company (1-800-328-9352).

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*** (January 21, April 15, July 8, and October 7, 2005). 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).