TEXAS REGISTER

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Harmony Dement
3rd Grade

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(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
subadmin@sos.state.tx.us

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A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

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

THE GOVERNOR

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

Appointments

Appointments for January 13, 2004

Appointed to the Texas Ethics Commission for a term to expire November 19, 2007, Raymond R. "Tripp" Davenport, III of Dallas (replacing Mickey Jo Lawrence of Houston whose term expired).

Appointments for January 14, 2004

Appointed as State Commissioner of Education for a term commensurate with the term of the Governor, Shirley J. Neeley, Ed.D. of Houston. Dr. Neeley is replacing Felipe Alanis who resigned his position.

Appointed to the Texas Alcohol Beverage Commission for a term to expire November 15, 2007, John Thomas Steen, Jr. of San Antonio (replacing Kelton Seliger of Amarillo who resigned).

Rick Perry, Governor

TRD-200400242

♦ ♦ ♦

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 Opinions

RQ-0159-GA

Requestor:

The Honorable Frank Madla

Chair, Intergovernmental Relations Committee

Texas State Senate

P.O. Box 12068

Austin, Texas 78711

Re: Discretion of local election officials in the acceptance of local option election petitions under the Alcoholic Beverage Code (Request No. 0159-GA)

Briefs requested by February 16, 2004

RQ-0160-GA

Requestor:

The Honorable Mark E. Price

Criminal District Attorney, San Jacinto County

1 State Highway 150, Room 21

Coldspring, Texas 77331

Re: Whether certain county officials are entitled to full salary and a car allowance while temporarily suspended from duty (Request No. 0160-GA)

Briefs requested by February 16, 2004

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

TRD-200400413
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: January 21, 2004

♦ ♦ ♦

EMERGENCY RULES

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 20. COTTON PEST CONTROL

SUBCHAPTER C. STALK DESTRUCTION PROGRAM

4 TAC §20.22

The Texas Department of Agriculture (the department) adopts on an emergency basis, amendments to §20.22, concerning the authorized cotton destruction dates for Pest Management Zone 9 (Zone 9).

The department is acting on behalf of cotton farmers in Zone 9. Zone 9 includes Reeves, Pecos, and Ward counties. Currently Zone 9 has no date for cotton stalk destruction. The present emergency rule amendment will establish a cotton stalk destruction deadline of February 1. The department believes that establishing a cotton destruction date is both necessary and appropriate. The emergency amendments are effective only for the 2004 crop year.

After greater than expected insect problems resulted in the zone during the 2003 crop year, the Zone 9 Cotton Producers' Advisory Committee (CPAC) has requested that the department institute a February 1 deadline for crop destruction by shredding in order to avoid significant problems in the 2004 crop year and to further the goal of eradicating the boll weevil and the pink bollworm. As a result, these emergency amendments are necessary for the 2004 crop year. A separate proposal will be published that will effect the same changes on a permanent basis for following years. A failure to enact this cotton destruction deadline could create a significant economic loss both to Texas cotton producers in these areas and to the state's economy.

The emergency amendments to §20.22(a) establish the date for cotton stalk destruction for Zone 9 as February 1, for the 2004 crop season only and provide that the destruction of plants in Zone 9 shall be by shredding. Language referencing tilling requirements for Zone 9 are deleted. While the requirement of tilling to a depth of 2 or more inches has been removed, this does not prevent a producer from tilling the field after shredding has been completed. The department intends to adopt the amendments to 20.22(a) on a permanent basis.

The amendments are adopted on an emergency basis under the Texas Agriculture Code, §74.006, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74, Subchapter A; §74.004, which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other parts, and products of host plants for cotton pests and provides the department with the authority to consider a request for a cotton destruction extension due to adverse weather conditions; and the Government Code, §2001.34, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§20.22. Stalk Destruction Requirements.

(a) Deadlines and methods. All cotton plants in pest management zones 1-8 shall be rendered non-hostable by the stalk destruction dates indicated for the zone. Destruction shall periodically be performed to prevent the presence of fruiting structures. Destruction of all cotton plants in Zone [~~Zones~~] 9 by shredding and in Zone 10 shall be accomplished by shredding and plowing and completely burying the stalk. Soil should be tilled to a depth of [~~2 or more inches in Zone 9 and to a depth of~~] 6 or more inches in Zone 10.
Figure: 4 TAC §20.22(a)

(b) - (d) (No change.)

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

Filed with the Office of the Secretary of State on January 16, 2004.

TRD-200400316
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective Date: January 16, 2004
Expiration Date: March 30, 2004
For further information, please call: (512) 463-4075

♦ ♦ ♦

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 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 30. DISEASE MANAGEMENT

1 TAC §354.1391

The Texas Health and Human Services Commission (HHSC) proposes to amend Chapter 354, Medicaid Health Services by adding a new division to the existing subchapters. HHSC adds Division 30, Disease Management §354.1391, concerning Conditions for Participation. Chapter 354 describes the benefits and provider requirements of the Texas medical assistance (Medicaid) program. The new division added at §354.1391, Conditions for Participation, outlines the requirements for entities that wish to contract with HHSC to provide disease management services to recipients of Medicaid. The proposed section is required to satisfy the requirements of House Bill 727, 78th Legislature, regular session (2003), which mandates that HHSC, by rule, shall prescribe the minimum requirements that a provider of a disease management program must meet to be eligible to receive a contract.

Tom Suehs, Deputy Commissioner for Financial Services, has determined that during the first 5-year period the proposed rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Mr. Suehs has also determined that there will be no effect on small businesses or micro businesses to comply with the new rule as proposed 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.

Dena Stoner, Associate Medicaid and CHIP director for Program Innovation, has determined that for each year of the first five years the section is in effect, the public will benefit from the adoption of the section. The anticipated public benefit, as a result of enforcing the section, will be the establishment of minimum program requirements for providers of disease management services, and to ensure Medicaid recipients obtain consistent, quality health service interventions.

HHSC has determined that the proposed rule is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environment 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. The proposed rule is not specifically intended to protect the environment or reduce risks to human health from environment exposure.

HHSC has determined that the proposed rule 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.

Written comments on the proposal may be submitted to Geri Willems, Program Analyst, at P.O. Box 13247 Mail Code H-100, Austin, Texas 78711-3247, by fax to 512-424-6665, or by e-mail to geri.willems@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*. A public hearing is scheduled for February 17, 2004 from 9:00 a.m. to 11:00 a.m. (central time) in the Public Hearing Room of the Brown Heatly State Office Building, 4900 North Lamar, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Linda Williams at (512) 424-6646.

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

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

§354.1391. Conditions for Participation.

In addition to the general requirements for contractors listed in Chapter 391, Purchase of Goods and Services by Health and Human Services Agencies and Chapter 392, Procurements by the Health and Human Services Commission, disease management companies must meet all of the following program requirements to be considered for a contract with the state. Entities who wish to contract with the Health and Human Services Commission (HHSC) to provide disease management services must meet the following conditions:

(1) Have an appropriate method for using HHSC healthcare data to identify targeted disease populations;

(2) Have an evidence-based healthcare practice guideline with minimum standards of care and clinical outcomes for each targeted disease;

(3) Have collaborative healthcare practice models in place to include HHSC's contracted physicians, support service providers, and existing community resources;

(4) Ensure that a recipient's primary care physician (PCP) and other appropriate specialty physicians, or registered nurses, advance practice nurses, or physician assistants become directly involved in the disease management program through which the recipient receives services;

(5) Have patient self-care management education materials and methods appropriate to each targeted disease population that demonstrate cultural competency;

(6) Have service provider education materials and methods appropriate to each targeted disease population;

(7) Have process and outcome measurements, evaluations, and management systems based on standardized best practice guidelines;

(8) Have routine reporting processes that are proven to properly support disease management goals;

(9) Have demonstrable, measurable, and successful experience in disease management for the targeted disease populations;

(10) Provide access to 24 hour-a-day, seven days-per-week nurse call center;

(11) Have the ability to guarantee program savings; and

(12) Meet applicable federal and state laws and regulations governing the participation of providers in the Medicaid program.

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

Filed with the Office of the Secretary of State on January 16, 2004.

TRD-200400357
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 424-6576

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CHAPTER 355. MEDICAID REIMBURSEMENT RATES
SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8069

The Health and Human Services Commission (HHSC) proposes to amend §355.8069, concerning the reimbursement methodology for supplemental payments to certain rural public hospitals.

The proposed amendment eliminates the aggregate limit on supplemental inpatient payments to non-state government owned or operated rural public hospitals. The purpose of the supplemental payment is to recognize the unique role that rural public hospitals play in the Texas healthcare delivery system for the Medicaid population. As a result, the proposed amendment will implement changes to ensure that Medicaid payments are commensurate with Medicare payments and/or payment principles.

Tom Suehs, Chief Financial Officer, has determined that for the first five years the proposed rules are in effect, there will be fiscal implications to state and local governments as a result of enforcing or administering the proposed amendment. The fiscal implications to state health and human services agencies will be negligible as a result of enforcing or administering this amendment. Local governments will incur additional cost to administer this section, however, additional revenues will offset any such costs which are estimated to be minimal. Additional revenues to local governments are estimated to be $8,743,960 in State Fiscal Year 2004; $9,972,960 in State Fiscal Year 2005; $9,468,000 in State Fiscal Year 2006; $9,468,000 in State Fiscal Year 2007; and $9,468,000.

David Palmer, Director of Ratesetting and Actuarial Services, has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing the proposed sections will be to provide HHSC with greater flexibility in allocating supplemental payments to rural public hospitals within appropriated funds for the 2004-2005 biennium. There is no anticipated impact on small businesses and micro-businesses to comply with the sections as proposed as they will not be required to alter their business practices as a result of the sections. There are no anticipated economic costs to persons who are required to comply with the proposed sections. There is no anticipated impact on local employment.

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

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

Written comments on the proposal may be submitted to Mr. Scott Reasonover, Rate Analysis Department, Texas Health and Human Services Commission, 1100 W. 49th Street, Austin, Texas 78756, within 30 days of publication of this proposal in the *Texas Register*. In addition, a public hearing concerning the proposed rules will be held Thursday, February 19, 2004 at 10:00 a.m. in the public hearing room at the Texas Health and Human Services Commission, 11209 Metric Blvd., Building H, Austin, Texas 78758. To comply with federal regulations, a copy of the proposed rule is being sent to each Texas Department of Human Services (DHS) office where it will be available for public review upon request.

The amendment is proposed under the Texas Government Code, §531.033, which provides the commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

The proposed rule affects the Human Resources Code, Chapter 32 and the Texas Government Code, Chapter 531.

§355.8069. Supplemental Payments to Certain Rural Public Hospitals.

Notwithstanding other provisions of this subchapter and subject to the availability of funds, supplemental payments are available under this section for inpatient hospital services provided by certain rural public hospitals.

(1) For purposes of this section, "rural public hospital" means a public hospital affiliated with a city, county, hospital authority, or hospital district located in a county of less than 100,000 population based on the most recent federal decennial census.

(2) State funding for supplemental payments authorized under this section is limited to and obtained through intergovernmental transfers of city, county, hospital authority, or hospital district funds. Inpatient [~~The~~] supplemental payments described in this section are made in accordance with the applicable regulations regarding the Medicaid upper limit provisions codified at 42 C.F.R. §447.272. [~~and do not exceed $35,000,000 per state fiscal year.~~]

(3) The amount of supplemental payments and fee-for-service Medicaid inpatient payments (including DRG and TEFRA inpatient cost settlements) the hospital receives in a state fiscal year may not exceed Medicaid inpatient billed charges for inpatient services provided by the hospital to fee-for-service Medicaid recipients in accordance with 42 C.F.R. §447.271.

(4) Supplemental payments are made to two groups of rural public hospitals:

(A) Rural public hospitals that have a deficit between fee-for-service Medicaid billed charges and fee-for-service Medicaid payments (including supplemental payments) which is greater than one percent of the total deficit between fee-for-service Medicaid billed charges and fee-for-service Medicaid payments (including supplemental payments) for all rural public hospitals. Medicaid billed charges and payments are based on a 12-consecutive-month period of fee-for-service claims data selected by HHSC.

(B) All other rural public hospitals that have a deficit between fee-for-service Medicaid billed charges and fee-for-service Medicaid payments (including supplemental payments). Medicaid billed charges and payments are based on a 12-consecutive-month period of fee-for-service claims data selected by HHSC.

(5) Supplemental payments are made quarterly to eligible rural public hospitals.

(A) For hospitals eligible for payments according to paragraph (4)(A) of this section, the amount of the quarterly supplemental payments is one-fourth of:

(i) The amount determined by multiplying the current state fiscal year Federal Medical Assistance Percentage (FMAP) by the deficit between fee-for-service Medicaid billed charges and fee-for-service Medicaid payments (including supplemental payments); and

(ii) The hospital's pro rata share of the amount available to be distributed after subtracting payments to hospitals according to clause (i) of this subparagraph.

(B) For hospitals eligible for payments according to paragraph (4)(B) of this section, the amount of the quarterly supplemental payments is one-fourth of the hospital's pro rata share of the amount available to be distributed after subtracting payments to hospitals according to subparagraph (A)(i) of this paragraph.

This 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 January 16, 2004.

TRD-200400358
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 424-6576

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CHAPTER 371. MEDICAID FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER C. UTILIZATION REVIEW

1 TAC §371.206

The Health and Human Services Commission (HHSC) proposes to amend Chapter 371, concerning Medicaid Fraud and Abuse Program Integrity, Subchapter C, concerning Utilization Review, §371.206, concerning Denials and Recoupments for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contracted Hospitals.

The proposed amendment is to revise the time limit for a hospital to rebill a claim, as an outpatient claim, from the current 180 days to 95 days. The proposed amendment is prompted by the Texas Medicaid program transition from a health insuring agent arrangement to a fiscal agent arrangement and the differences in the federal claims payment guidelines associated with each. Compliance with claim filing deadlines associated with the fiscal agent arrangement necessitates a change in this rule.

Tom Suehs, Deputy Commissioner for Financial Services, has determined that for the first five year period the proposed amendment is in effect, there are no foreseeable implications relating to costs or revenues of state or local governments as a result of enforcing or administering the amended rule.

Mr. Suehs has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefit anticipated as a result of enforcing the amended rule will be that HHSC's rules are consistent with the claims filing deadlines associated with the fiscal agent arrangement.

The proposed amendment will not result in additional costs to persons required to comply with the rule. The rule amendment does not have any anticipated adverse effect on small or micro-businesses. The rule amendment will not negatively affect local employment.

The HHSC has determined that the proposed rule amendment is not a "major environmental rule" as defined by §2001.0225, 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 the state or a sector of the state. The proposed rule amendment is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

HHSC has determined that the proposed amendment does not restrict or limit owners' rights to their property that would otherwise exist in the absence of governmental action and, therefore, does not constitute a taking as defined in §2007.043, Government Code. The proposed rule amendment is administrative and does not impose any new regulatory requirements. The proposed rule amendment is reasonably taken to fulfill requirements of state law.

Comments on the proposed amendment may be submitted in writing to Dan McCullough, Hospital Utilization Review Manager, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas, 78711-3247, or by e-mail to dan.mccullough@hhsc.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment is proposed under authority granted to HHSC by §531.033 Government Code, which authorizes the Executive Commissioner of Health and Human Services to adopt rules necessary to implement HHSC's duties, and under §531.021(a), Government Code, which authorizes HHSC to administer federal medical assistance (Medicaid) program funds.

The proposed amendment affects Chapter 32 of the Human Resources Code.

§371.206. Denials and Recoupments for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contracted Hospitals.

(a) Reviews conducted under the Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contracting programs may result in denials of claims. The Texas Health and Human Services Commission (Commission) will notify the hospital in writing of the denial decision, and instruct the claims administrator to recoup payment. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, the Commission will consider for denial physician claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. Types of denials are:

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

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

(A) For on-site reviews, if the complete medical record is not made available during the on-site review, the Commission will issue a preliminary technical denial at that time. The hospital is allowed sixty calendar days from the date of the exit conference to provide the complete medical record to the Commission. If the complete medical record is not received by the Commission within this time frame, the Commission will issue a final technical denial. If the Commission requests a copy of the medical record in writing, and the copy is not received within the specified time frame, the Commission will issue a preliminary technical denial by certified mail or fax machine. The hospital has sixty calendar days from the date of the notice to submit the complete medical record. If the complete medical record is not received by the Commission within this time frame, the Commission will issue a final technical denial.

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

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

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

(5) Cost outlier denial. If it is determined that services delivered were not medically necessary, not ordered by a physician, not rendered or billed appropriately, or not substantiated in the medical record, the Commission will deny those services.

(b) When an admission denial or day of stay denial is issued, the Commission will direct the claims administrator to recoup payment. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, the Commission will consider for denial physician claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. The Commission will make an exception in the case of TMRP hospitals if the patient was originally placed in observation, and the hospital has been notified by the Commission that they may submit a revised outpatient claim solely for medically necessary outpatient services provided during the observation period. A physician's order for observation must be present in the physician's orders to document that the patient was originally placed in outpatient observation. The hospital must submit the revised outpatient claim and a copy of the Commission's notification letter to the claims administrator at the address indicated in the notification letter. The claims administrator must receive the outpatient claim and copy of the notification letter within ninety-five [~~one hundred eighty~~] calendar days of the date of the notification letter. The claims administrator may consider payment for the medically necessary services provided during the twenty-four hour observation period. The hospital may provide observation services in any part of the hospital where a patient can be assessed, monitored and treated.

This 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
General Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

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1 TAC §§371.212 - 371.214

The Health and Human Services Commission (HHSC) proposes to amend Chapter 371, Medicaid Fraud and Abuse Program Integrity, Subchapter C, Utilization Review, §371.212, Case Mix Classification System, §371.213, Utilization Review and Control Activities Performed by Texas Department of Human Services, concerning the authority for on-site utilization review activities, and §371.214, Texas Index for Level of Effort (TILE) Assessments.

The 75th Legislature, Regular Session, 1997, through Senate Bill 30, directed the transfer of Utilization Assessment and Review and all its powers, duties, functions, and programs from the Texas Department of Human Services (TDHS) to HHSC, effective September 1, 1997. Rules were officially transferred in March 2000, without language change, from Title 40 of this code to Title 1. One of the functions transferred was the case mix review of nursing facilities. "Case mix" refers to a method of classifying recipients based on their resource and service needs and determining a payment rate based on that classification.

HHSC's Utilization Review (UR) staff has been evaluating the current process since the transfer of the case mix review function to HHSC in 1997. UR staff has determined that these proposed rule amendments are needed to increase the UR staff's effectiveness in the identification, prevention, and elimination of fraud, abuse, waste, and neglect, as well as the enforcement of applicable laws and rules. In addition, the proposed rule amendments add or delete language in order to clarify requirements, correct grammar and spelling, eliminate outdated terms, and reflect current terminology.

These proposed amendments to the case mix rules were developed in conjunction with a work group consisting of representatives from the Texas Health Care Association, the Texas Association of Homes and Services for the Aging, the Texas-New Mexico Hospice Association, New Bell General Services, National Heritage Insurance Company, and state health and human services agencies.

Proposed §371.212 generally describes the case mix classification system and facility documentation requirements, gives direction on completing the Client Assessment Review and Evaluation (CARE) form, and gives definitions of the various clinical categories necessary to establish a Texas Index for Level of Effort (TILE) assessment. Under the proposed rules, there are changes in the Rehabilitation/Restorative requirements, oxygen administration requirements, respiratory therapy requirements, wound dressing requirements, training in reference to feeding, signature requirements, and the word "permanent" was replaced with "significant", including the definition of that term.

Proposed §371.213 deletes specific language in regard to the quality of care review of children. HHSC staff determined that there is no longer a need to conduct quality of care reviews on children in nursing facilities, because there are multiple agencies currently conducting these reviews, i.e., DHS, PASSAR, MHMR, etc.

Proposed §371.214 generally describes and provides direction for the completion of the TILE assessment. Under the proposed rules, there are changes in the process for conducting routine TILE reviews, the reconsideration process, the TILE training requirements for providers, and the corrective action process. Also, language in reference to the Default TILE 212 is deleted.

Tom Suehs, Deputy Commissioner for Financial Services, has determined that for each year of the first five years the proposed rules are in effect, the public will benefit from adoption of the rules by the resulting clarification of the criteria that govern the routine case mix review process.

Tom Suehs, Deputy Commissioner for Financial Services, has also determined that for each year of the first five years the proposed rules are in effect the proposed rules will have a positive fiscal impact to on state government. The estimated cost savings to the state agency will be approximately $56,000.00 due to the shifting of the financial responsibility for TILE training from the state to the Nursing Facility Providers. Enforcing or administering the amended rules does not have foreseeable implications relating to costs or revenues of state or local governments, other than the cost savings to the state noted above Small and Micro-business Impact Analysis

The proposed rules may result in additional costs to persons required to comply with the rules. The rules may have an adverse effect on small or micro-businesses. That adverse effect would be a result of shifting the financial responsibility for TILE training from the state to the Nursing Facility Providers, including those Providers that are small and micro businesses. Pursuant to Section 2006.002 of the Government Code, HHSC considered the measures that could be taken to reduce the adverse impact on micro or small businesses. It is not feasible for HHSC to exempt micro or small businesses from all or part of the rules or to establish separate compliance or reporting requirements for small or micro businesses. However, to reduce the anticipated adverse effect, HHSC eliminated the requirement that nursing facility staff take the TILE training during the corrective action process and, in practical effect, reduced the number of nursing facility staff required to take the TILE training. The proposed rules could result in only slightly increased cost or even a cost neutral situation for the providers who are small or micro businesses in that fewer staff have to take TILE training and have to take it less frequently than under the previous rules. The cost of compliance for small or micro businesses per each employee would be roughly the same as the cost of compliance for the largest Nursing Facility Providers affected by the proposed rules. It is not anticipated that the proposed rules will have a negative effect on local employment.

The Commission has determined that none of the proposed rules is a "major environmental rule," as defined by §2001.0225, 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 the state or a sector of the state. None of the proposed rules is specifically intended to protect the environment or reduce risks to human health from environmental exposure.

HHSC has determined that the proposed rules do not restrict or limit an owner's right to their property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking as defined in Texas Government Code

§2007.002. The majority of the proposed rules are administrative and do not impose any new regulatory requirements. The proposed rules are reasonably taken to fulfill requirements of state law.

Comments on the proposed rules may be submitted in writing to Sandra Brown, Nursing Facility Manager, Utilization Review, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711-3247, or by e-mail to Sandra.Brown@hhsc.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendments are proposed under authority granted to HHSC by §531.033, Government Code, which authorizes the Commissioner of Health and Human Services to adopt rules necessary to implement HHSC's duties, and under section 531.021(a), Government Code, which authorizes HHSC to administer federal medical assistance (Medicaid) program funds.

The proposed rules affect Chapter 32 of the Human Resources Code.

§371.212. Case Mix Classification System.

The case mix classification system is defined in terms of the recipient's [~~recipient~~] condition, functional performance in activities of daily living (ADL), and level of staff intervention. The classification system is divided into four clinical categories, which are further subdivided based on ADL scores that measure functional performance for eating, transferring, and toileting. The combination of clinical categories and ADL measurements yields an array of 11 Texas Index for Level of Effort (TILE) case-mix classifications.

(1) Assessment period. The information on the Client Assessment Review and Evaluation (CARE) form for assignment of a clinical category or ADL score must be based on the recipient's status in the facility during the four weeks immediately preceding the assessment date. The [~~,except in any of the~~] following instances are exceptions to the four week assessment period:

(A) If the recipient has experienced what appears to be a significant [~~permanent~~] change in clinical or functional status within the past four weeks, the nursing facility or the hospice provider can choose to complete a new assessment. "Significant change" as used here means a major decline or improvement in the resident's status that will not normally resolve itself without further intervention by staff or by implementing standard disease related clinical interventions, and requires review of the plan of care. Information in the new assessment shall be based on the recipient's current status.

(B) If the recipient has been admitted or readmitted to a facility during the past four weeks, the assessment is based on the status since the date of admission or readmission to the nursing facility, until the date the assessment is completed.

(C) The condition or event that precipitates the need for rehabilitative therapy/restorative nursing may have occurred no more than six months prior to the assessment period. [~~An admission or transfer into a facility could qualify as an event.~~]

(2) Documentation. The documentation in the clinical record must be descriptive and quantitative to allow the accurate completion of the CARE form items relating to the recipient's condition(s), treatment(s), and the ADLs of eating, transferring, and toileting.

(A) In the absence of required facility documentation, the Texas Health and Human Services Commission (Commission or HHSC) nurse reviewers may [~~will~~] use available data, staff interviews, and nursing observation to assign ADL scores.

(B) The required documentation must appear in the clinical record during the assessment period to qualify for a clinical category. Lack of documentation will result in a change to an assessment item for a clinical category.

(C) Lack of, conflicting, or altered documentation may [~~could~~] be the basis for an adjustment in TILE. The adjustment would be made based on a review of the available clinical record documentation, and, if necessary, staff interviews and observation of the recipient.

(D) Suspected fraudulent documentation, such as [~~falsified or fabricated~~] medical records that appear to have been altered, falsified, or fabricated, will [~~, may~~] result in a referral for investigation to the Office of Inspector General's (OIG) Medicaid Program Integrity (MPI) Division Health and Human Services Commission. This referral will be made [~~of the Commission, as required~~] as part of the state's methods for identification, investigation and referral for fraud under the Texas Administrative Code, Title 40, Part 1, Chapter 79, Subchapter V (relating to Fraud or Abuse Involving Medical Providers) and Code of Federal Regulations, Title 42, Chapter IV, Part 455 (concerning Program Integrity: Medicaid).

(3) Clinical categories. Each recipient is assigned to one of the following four clinical categories based on qualifying conditions or treatments.

(A) The heavy-care group. To qualify for the heavy-care clinical group, a recipient must have at least one of the following conditions or be receiving at least one of the following treatments, with supporting documentation in the clinical record, and the recipient must have a total ADL score of at least six out of a possible nine.

(i) Coma. Persistent unconsciousness and unresponsiveness from which a recipient [~~resident~~] cannot be aroused; must be documented in the assessment period.

(ii) Quadriplegia. Neurologic disorder causing paralysis of the four extremities, excluding loss of movement caused solely by contractures. Paralysis is defined as loss of power of voluntary movement in a muscle through injury or disease of its nerve supply. A description of the recipient's functional abilities and limitations must be documented in the clinical record in the assessment period.

(iii) Stage III or IV decubitus with physician-ordered decubitus care and/or wound dressings twice a day. Decubitus covered by eschar is considered Stage IV. Decubitus must be described and care/dressings must be documented in the assessment period.

(iv) Non-oral administration of 60% or more of the recipient's nourishment. Times, amount, and types of feeding must be documented in the assessment period.

(v) Daily oral or nasal suctioning, which must be documented daily in the assessment period.

(vi) Daily tracheotomy care or suctioning, excluding self-care, which must be documented daily in the assessment period.

(B) The rehabilitation/restorative group. To qualify for the rehabilitation/restorative clinical group, a recipient must receive TILE 202 restorative nursing care as follow-up to rehabilitation therapy. The TILE 202 restorative nursing and rehabilitation therapy must meet the following criteria with supporting documentation in the clinical record. For hospice recipients residing in nursing facilities, rehabilitation or restorative nursing care is only applicable for conditions unrelated to the terminal illness. A recipient who receives rehabilitation and restorative care must be able to participate and/or follow instructions from the therapist and/or nursing staff, in order to maintain or improve on goals achieved during PT or OT.

(i) The rehabilitation therapy must be:

(I) physical or occupational therapy, ordered by a physician, and provided by a licensed therapist or by certified or licensed occupational or physical therapy assistants (COTA/LPTA) under the supervision of a licensed therapist. Positioning, splinting, decubitus ulcer care, and training nursing staff (as in a functional maintenance program) are excluded from the TILE 202, even if provided by an occupational therapist or physical therapist;

(II) initiated due to a [~~an identifiable,~~] documented event, i.e., an illness, traumatic injury or [~~physical change or~~] an exacerbation/significant improvement of a chronic medical condition [~~illness~~] in the past six months, which resulted in a visible change in the individual's ability to physically perform ADLs. The event and change in ADL functioning must be documented in the clinical record [~~with an associated change in ADL functioning An admission or transfer into a facility could qualify as an event. The functional change must be documented through one of the following:~~]

[~~(-a-) a description of the event or illness and the recipient's functional status before and after the event must be documented~~] by nursing staff, and/or other healthcare professionals in addition to the therapist, before the rehab services are initiated [~~in the individual's clinical record or care plan; or~~]

[~~(-b-) completion of a Minimum Data Set 2.0 Significant Change with an updated care plan~~];

(III) expected to result in the recipient's making significant, measurable, functional progress, and this [~~which~~] must be documented in the therapy goals;

(IV) provided on a one-to-one basis three times per [~~therapy~~] week for at least two therapy weeks (therapy week: a seven-day period beginning the day of the first therapy treatment); and

(V) reimbursable [~~reimbursed~~] by Medicare, Medicaid rehabilitative services, or another third party payer.

(ii) The TILE 202 restorative nursing must:

(I) be provided as part of a restorative care plan, based upon the therapist's written plan of care at discharge from skilled therapy, must be [~~and~~] developed by the restorative team, and [~~, which must include and be~~] signed by the therapist and a registered nurse;

(II) begin during the assessment period; the restorative care sessions provided under Medicare will not count towards the required restorative care sessions for Medicaid;

(III) begin within 14 days of the therapist's written restorative plan of care, which must be provided to the commission nurse reviewer(s) upon request;

(IV) be provided for a minimum of 24 sessions within eight therapy weeks, which can be provided no more than two sessions per day, no less than four weeks, and must continue as long as clinically indicated; and

(V) be supported by a Restorative Nursing Care Program form, or similar form containing the same elements, which must document each restorative session and the recipient's response to the restorative plan through:

(-a-) a weekly note by the nursing or therapy staff (as appropriate); and

(-b-) a written monthly review by the licensed nursing staff or, if services are [~~were~~] supervised or delivered by a licensed therapist, by the licensed therapist.

(iii) A recipient will be considered to be properly classified in this clinical group if all criteria in clauses (i) and (ii) of this subparagraph [~~paragraph~~] are met except clause (ii) [~~(i)~~](IV) and (V) of this subparagraph, which must be met within three months of the date of assessment;

(C) The clinically unstable group. To qualify for the clinically unstable group, a recipient must have at least one of the following conditions or receive one of the following treatments during the assessment period.

(i) Amputation [~~Recent amputation~~] of arm(s), leg(s), [~~arms, legs,~~] or parts thereof in the six months preceding the assessment date. Date and site of amputation must be documented in the clinical record.

(ii) Seizures, which occurred in the facility, during [~~in~~] the assessment period. A description of the seizures [~~seizure~~] and nursing interventions must be documented in the clinical record.

(iii) Dehydration with documented intake/output monitoring (including frequency and amounts of output) on at least two shifts per day. Dehydration that was diagnosed, treated, and resolved outside the facility and is no longer symptomatic is excluded. The signs, symptoms and [,] interventions[~~, and measures taken to prevent recurrence~~] must be documented in the assessment period.

(iv) Acute, symptomatic urinary tract infection (UTI) with a documented intake and output (including frequency and amounts of output) on three shifts a day. UTIs that were diagnosed and[,] treated [~~and resolved~~] outside the facility and are no longer symptomatic or [~~and~~] UTIs identified by routine urinalysis or urinalysis for culture and sensitivity alone are excluded. The signs, symptoms and [,] interventions [~~and measures taken to prevent recurrence~~] must be documented in the assessment period.

(v) Incontinence or a Foley catheter, with an individualized bowel or bladder rehabilitation program requiring staff intervention at least three times per day. The program must state [~~assess~~] the cause of the incontinence and the rehabilitative potential, and document the interventions and outcomes. The care plan must include the individualized goals and approaches that reflect both the recipient's [~~resident~~] and nursing participation in the process. Frequency of staff intervention must be documented.

(vi) Oxygen administration, [~~which~~] must be documented every day for a minimum of two weeks, including the method of administration, [~~on a daily basis~~] during the assessment period. [~~One day of oxygen use is excluded from reimbursement as a daily oxygen charge.~~]

(vii) Respiratory therapy, ordered by a physician, performed by licensed nursing staff or a respiratory therapist, received at least three times per day for a minimum of two weeks, and documented in the assessment period. Respiratory therapy includes nebulizers, percussion, cupping, postural drainage, updrafts, and intermittent positive pressure breathing (IPPB) treatments, but excludes inhalers.

(viii) Wound dressing applied by nursing to an open wound at least two times per day for a minimum of two weeks, excluding simple skin tears and closed abrasions. A description of the wound and the treatment, including frequency, must be documented in the assessment period.

(D) The clinically stable group. This clinical group includes all recipients who do not qualify clinically for the heavy-care, rehabilitation/restorative, or clinically unstable group, and who have an ADL score between 3 and 9. The clinically stable group includes a mental/behavioral condition subgroup. Recipients qualify [~~A recipient qualifies~~] for this subgroup if:

(i) they have an ADL score of [~~exactly~~] three; and

(ii) they have at least one of the following cognitive or behavioral characteristics:

(I) incoherent/frequent disorientation requiring daily staff intervention. Orientation problems must be described in the clinical record in the assessment period, including the staff intervention required and its frequency; or

(II) disruptive or aggressive behavior, requiring immediate staff intervention on a daily basis. The behaviors must be described in the clinical record, in the assessment period, including the frequency and the required staff intervention.

(4) Computation of the ADL scale. The ADL scale is used to assess recipients' daily functional abilities in eating, transferring and toileting. The facility nurse assessors rate these activities with a value of one to five on the CARE form. The CARE form values are recoded by DHS into a three-point system. The recoding results in points that range from one to three for each item and totals from three to nine for all three items. A recipient's total points for all three ADLs are used to determine case-mix classifications within the clinical categories. The ADLs and their corresponding points on the TILE nine-point scale are:

(A) Transferring, or the process of moving between positions, such as to or from a bed, a chair, or a standing position, but excluding to and from the toilet.

(i) One TILE point is given for recipients rated as:

(I) Independent; no staff assistance required, but recipient may use equipment such as railings, trapeze, etc.

(II) Pro re nata (PRN); recipient requires PRN assistance for transfers.

(ii) Two TILE points are given for recipients rated as "one to transfer"; requires one person continuously for physical or verbal assistance [~~assist~~] on 60% or more of the transfers. When assistance is required and for what reason must be documented in the assessment period.

(iii) Three TILE points are given for recipients rated as:

(I) Two to transfer; requires assistance of two or more staff during the entire activity on 60% or more of the transfers. When assistance is required and for what reason must be documented in the assessment period.

(II) Not Transferred; may be transferred to a stretcher or chair once a week or less, excluding transfers to bath or toilet.

(B) Eating, including the use of an enteral or parenteral tube, but excluding tray set up and food preparation.

(i) One TILE point is given for recipients rated as:

(I) Independent or recipient has chosen not to receive nutrition.

(II) Intermittent assistance; requires verbal or physical assistance less than 60% of the time.

(ii) Two TILE points are given for recipients rated as:

(I) Being trained to feed themselves. An assessment of the retraining potential and a description of the training program must be documented in the clinical record in the assessment period. Documentation must support that facility staff provided retraining 60% or more of the time to facilitate the recipients' involvement in self performance of eating. The retraining program must include a minimum of training at two meals per day.

(II) Requiring assistance to syringe or spoon-feed for 60% or more of the time. The type of assistance, when the assistance is required, and for what reason must be documented in the clinical record.

(iii) Three TILE points are given for recipients rated as receiving non-oral feedings for 60% or more of the recipient's nutrition using a tube such as a naso-gastric tube, gastrostomy [~~gastrostromy~~] tube, percutaneous endoscopic gastrostomy [~~gastrostromy~~] tube, or administration of total parenteral nutrition via a central line. The frequency, amounts, routes, and times the non-oral feedings were administered must be documented in the clinical record.

(C) Toileting, or the process of elimination including the use of a bedpan, urinal, bedside commode, or toilet, or ostomy or incontinent care.

(i) One TILE point is given for recipients rated as:

(I) Independent, including the use of special equipment or performing of own incontinent care, self-catheterization, ostomy care.

(II) Requires assistance but can be left alone for privacy. Assistance may include transferring on and off the commode, cleansing after elimination, adjusting clothing, or washing hands.

(ii) Two TILE points are given for recipients rated as incontinent or having an indwelling catheter, including staff-administered ostomy care, incontinence care using protective padding, incontinence briefs, changing clothes, or a propped urinal. A description of what staff is [~~are~~] required to do 60% or more of the time must be documented in the clinical record.

(iii) Three TILE points will be given for recipients rated as:

(I) Requiring physical or verbal assist or supervision during entire toileting process, excluding incontinent care, and cannot be left alone. The functional, medical, or behavioral reason the recipient cannot be left alone must be documented in the clinical record in the assessment period.

(II) Receiving scheduled toileting by the staff every two hours during waking hours, or more often if needed by the recipient [~~resident~~], as incontinence management. Recipient does not initiate process and stays dry 60% or more of the time as the result of staff-initiated scheduled toileting. A description of staff actions and whether the recipient [~~resident~~] was wet or dry each time he/she was taken to the toilet must be documented in the clinical record in the assessment period. Recipients who receive in and out catheterization by the staff two or more times each day are included in this category.

(5) Special cases. A recipient who qualifies for more than one of the 11 TILE case-mix groups is classified in the group with the highest case-mix index and associated per diem rate. If a provider incorrectly or incompletely reports data necessary for TILE determination, the recipient is temporarily classified in the Default TILE 212 group until the data are corrected as provided by §371.214 of this title.

(6) Case-mix classifications. Case-mix classifications are determined by the clinical group in combination with the ADL score as follows:

(A) TILE 201; heavy care and an ADL score of 8-9;

(B) TILE 203; heavy care and an ADL score of 6-7;

(C) TILE 202; rehabilitation and an ADL score of at least 3;

(D) TILE 204; clinically unstable and an ADL score of 7-9;

(E) TILE 205; clinically stable and an ADL score of 7-9;

(F) TILE 206; clinically unstable and an ADL score of 4-6;

(G) TILE 207; clinically stable and an ADL score of 5-6;

(H) TILE 208; clinically unstable and an ADL score of 3;

(I) TILE 209; clinically stable and an ADL score of 4;

(J) TILE 210; clinically stable, an ADL score of [~~exactly~~] 3, and includes a mental/behavioral subcategory;

(K) TILE 211; clinically stable and an ADL score of 3;

(L) Default TILE 212 ; provider incorrectly or incompletely reports data necessary for TILE determination or if the facility fails to cooperate fully with nurse reviewers as provided by §371.214 of this title.

(7) Required signatures. The [~~Texas Nursing Facility~~] CARE form must be signed by the director of nurses or the acting director of nurses and the facility nurse assessor, one of whom must be certified as having received, and passed, Commission-approved [~~has received~~] TILE training, as required by §371.214 of this title (relating to Texas Index for Level of Effort (TILE) Assessments). [~~If the form is completed for a hospice recipient residing in the nursing facility, the form must also be signed by a hospice nurse assessor.~~] These signatures certify the information claimed is accurate and complete and subject to penalties for falsification, as provided in 42 Code of Federal Regulations, Part 1003. A copy of the electronically transmitted form with the required signatures must be maintained by the nursing facility. Physicians' signatures must be present on all required Purpose Codes. A physician may delegate task(s) to a physician assistant, nurse practitioner, or clinical nurse specialist who is not an employee of the facility but who is working in collaboration with a physician. Services must be provided in the context of applicable state laws, rules, and regulations governing the practice of physician assistants, nurse practitioners, and clinical nurse specialists.

(A) If the form is completed for a hospice recipient residing in the nursing facility, the form must also be signed by a hospice nurse assessor.

(B) CARE forms that do not have the required signatures on the copies maintained in the facility or that cannot be located will be considered to be invalid assessments. The first time a facility is found to be out of compliance with this requirement, the recipient's TILE for the assessment period covered at the time of the review, will count towards the overall error rate for the onsite review. Subsequent findings of non-compliance with these requirements during the next review may result in a default 212 for the effective period of the invalid assessment. If the default 212 is implemented, the facility will be able to submit a reconsideration for the default 212.

(C) CARE forms submitted with the license number of a former employee or an expired nursing license number may result in the implementation of a default 212 for the effective period of the invalid assessment. If the default 212 is implemented, the facility will be able to submit a reconsideration for the default 212. The provider(s) and employee(s) involved may be referred to the Commission' s Office of Inspector General with a recommendation for an investigation of the facility, and a referral of the nurses to the Board of Nurse Examiners.

§371.213. Utilization Review and Control Activities Performed by Texas Health and Human Services Commission (Commission).

(a) According to state law and the state plan requirements, the Texas Health and Human Services Commission (Commission) staff conducts required on-site activities related to utilization review. [~~These activities include the review of all children residing in nursing facilities for quality of care regardless of payment source.~~]

(b) Facility staff must cooperate with and fully support the Commission staff during on-site reviews and facilitate [~~personal contact with and~~] observation and/or interview of each resident, and the review of each resident's clinical records.

§371.214. Texas Index for Level of Effort (TILE) Assessments.

(a) Texas Index for Level of Effort (TILE) Assessment and Client Assessment Review and Evaluation (CARE) form completion. TILE assessments are primarily based on the nursing facility nurse assessor's (FNA) evaluation of the recipient. This evaluation may also be supplemented by staff interviews and documentation in the medical record. TILE assessments are documented on the CARE form, and must be signed by the FNA that completed the assessment. [~~Nursing facility nurse assessors assess recipients for TILE determination by completing the Texas Nursing Facility Client Assessment, Review and Evaluation (CARE) forms. The nursing facility and hospice nurse assessors assess hospice patients who are residing in nursing facilities for TILE determination by completing the Texas Nursing Facility CARE forms. Hospice recipients residing in nursing facilities must have all eligibility forms submitted prior to Texas Department of Human Services (DHS) paying nursing facility room and board to the hospice provider.~~] These assessments establish TILE classifications as described in paragraphs (1)-(9) [~~(8)~~] of this subsection.[~~Nursing facility nurse assessors must complete and pass the Texas Health and Human Services Commission (Commission) TILE training course with a minimum score of 70%. The nurse's license number will be registered with the National Heritage Insurance Company (NHIC). Hospice nurse assessors may complete the Commission's Texas TILE training course.~~]

(1) If the nursing facility recipient is also a hospice recipient, the following must be completed before the Texas Department of Human Services (DHS) will reimburse nursing facility room and board to the hospice provider:

(A) The hospice nurse assessor must also evaluate the hospice recipient and either:

(i) sign the CARE form completed by the nursing facility assessor to indicate complete agreement with the assessment; or

(ii) request the nursing facility assessor to complete a new CARE form based on a joint assessment, and then sign to indicate complete agreement with the assessment..

(B) The hospice provider must submit the Texas Medicaid Hospice Program Recipient Election/Cancellation/Discharge Notice (Form 3071), and the TDHS Medicaid/Medicare Hospice Program Physician Certification of Terminal Illness (Form 3074) forms to the DHS, Provider Claims Services Department.

(2) [~~(1)~~] Preadmission assessments do not establish a TILE classification.

(3) [~~(2)~~] Admissions assessments establish TILE classifications as follows:

(A) If the nursing facility recipient [~~resident~~] has not previously attained [~~a~~] permanent medical necessity or if an individual

is simultaneously admitted to a nursing facility as a hospice recipient, the nurse assessor submits an admission assessment within 20 calendar days of admission, as provided in the Texas Administrative Code (TAC), Title 40, Part 1, Chapter 19, Subchapter Y, §19.2403 (relating to Utilization Review Process). The admission assessment begins the [establishes a] medical necessity (MN) process, and [a] TILE classification for 180 days.

(B) If the nursing facility recipient [resident] has previously attained [a] permanent MN, an [the admission] assessment with a purpose code 4 is completed [on an abbreviated form], which sets TILE only.

(4) [(3)] Medical [One medical] necessity review (MNR) is required 180 days after the effective date of the admission assessment. Nursing facilities can submit the renewal form up to 45 days prior to the expiration date of the current form. MN is established by completing an assessment with a purpose code 3. If the MNR indicates [an] MN for nursing facility care, DHS will notify the facility of the permanent MN. [This notification becomes a part of the resident's permanent medical record. A permanent MN will be lost only if a resident is discharged to home for over 30 days.] The MNR may also establish a new TILE classification. The permanent MN will be lost if a recipient is discharged to home over 30 days.

(5) [(4)] After the establishment of permanent MN, recipients with a 211 TILE require no further assessment unless there is a change in their condition. All other TILE levels require a review every 180 days.

(6) [(5)] If a recipient's medical condition changes to the extent that he qualifies for a different TILE, an off-cycle assessment may be submitted. If a nursing facility recipient [resident] becomes a hospice recipient or terminates hospice services, an off-cycle assessment must be submitted. Only two off-cycle assessments for any one nursing facility recipient [resident] or hospice recipient residing in a nursing facility are permitted per calendar year, one from January through June and one from July through December. The off-cycle assessment for a nursing facility recipient [resident] that becomes a hospice recipient or terminates hospice services is not included in the two allowable off-cycle assessments. The assessment sets a new schedule for submission of forms if permanent MN has been achieved. Before permanent MN, the assessment will not set a new schedule for submission of forms.

(7) [(6)] A new corrected CARE form and supportive documentation may be submitted for the purpose of correcting errors previously made in the assessment portion of the form (Items 30, 31, and 50-99). The submission of the correction does not change the schedule for submission of forms or necessarily change the TILE group. The new corrected CARE form and the supportive documentation [Corrections] must be submitted within 60 days from the date of the assessment that contained error(s) [on the incorrect form]. The Commission will not accept requests for changes submitted:

(A) over 60 days from the date of the assessment that contained the error(s) [on the incorrect form];or

(B) on previously submitted forms with the same assessment date [after notification of an on-site review date].

(8) [(7)] If a recipient experiences a significant change related to mental illness, mental retardation, and/or a related condition that indicates [that] the recipient might benefit from specialized services, a request for a recipient Preadmission Screening and Recipient [Resident] Review (PASARR) must be submitted to the local DHS' PASARR office using a CARE form.

(9) [(8)] A facility may submit a request for retroactive payment in the following instances:

(A) when a facility provides care for a recipient for a period of time not covered by an effective MN determination at admission or by assessment CARE forms as provided in TAC, Title 40, Part 1, Chapter 19, Subchapter Y, §19.2413 (relating to Reconsideration of Medical Necessity Determination and Effective Dates); or

(B) if a recipient is found to be otherwise eligible for Medicaid for the three months prior to the month of his date of application for Medicaid assistance as provided in TAC, Title 40, Part 1, Chapter 19, Subchapter Y, §19.2408 (relating to Retroactive Medical Necessity Determinations).

[(C) The effective date for a retroactive payment for a hospice recipient may not be prior to June 1, 2001.]

(b) TILE training. Nursing facility directors of nursing and nurse assessors must complete and pass the Texas Health and Human Services Commission (Commission) approved TILE training course with a minimum score of 70% in order for the nurse's license number to be registered with the Medicaid Claims Administrator (MCA). The TILE training certification will be effective for a two-year period. Currently certified TILE nurses will be granted a one year grace period from the effective date of the rule. Nursing facilities with new directors of nurses or [, nurse manager and] nurse assessors may request a one time 60-day waiver to complete the TILE assessments. At the end of the 60-day waiver period, the nursing facility director of nurses, or [, nurse manager and] nurse assessor must have completed and passed [complete and pass] the Commission's approved [Commission] TILE training course with a minimum score of 70%. The hospice nurse assessors may complete the Commission's approved TILE training course, either on-line or by correspondence. Providers are required to pay $30.00 each time they register to take the on-line TILE training course. The correspondence course will continue to be available for a $30.00 fee plus an additional $10.00 handling fee. [The Commission assumes cost for the initial TILE training course. The facility or individual shall assume the cost of any additional required training and testing for the same individual.]

(c) Review and appeal of case-mix assessments. Commission nurse reviewers conduct desk reviews and in-depth, on-site reviews of [Texas Nursing Facility] CARE forms completed by nursing facility and hospice staff to verify TILE and medical necessity information. [The assessment forms and the entire medical record of a minimum of ten Medicaid recipients, excluding TILE 211, will be reviewed. Forms expired over 12 months will not be reviewed.]

(1) Commission nurse reviewers will conduct unannounced [notify nursing facilities and hospice providers a minimum of two working days prior to routine] on-site visits. The decisions regarding the validation of a claimed TILE, will be based on documentation that is presented to the nurse reviewers during the on-site visit. Forms expired over 12 months will not be routinely reviewed. [They will be given information regarding the recipients whose medical records will be reviewed, the time period covered by the review, and the accommodations necessary for the review. No notice is required for facilities whose last two on-site visits resulted in corrective action; visits for investigation of TILE issues, including suspected fraud; or visits requested by another state agency.] For all on-site [routine onsite] visits, nurse reviewers must be given prompt access to information and resources necessary to conduct the TILE review. [Failure to do so may result in the nursing facility being classified in the Default TILE 212 until the visit can be conducted. Once the visit is conducted and the facility demonstrates the medical necessity of a higher TILE classification, the default TILE 212 will be released retroactive to the

date of the event that prompted the default. A default TILE will not be applied in the event of unforeseen environmental conditions.]

(2) When a Commission nurse reviewer determines that the TILE classification is not substantiated and/or does not accurately reflect the recipient's status, the reviewer will discuss the error and give the provider an opportunity to submit additional information for the assessment period [documentation] to support the item claimed. An exit conference is held with the nursing facility staff following the review. Hospice staff are encouraged to [may] attend if hospice recipients are reviewed. The nursing facility and hospice staff may submit for consideration, additional [Additional documentation, staff interviews and nursing observation to support nursing facility resident and hospice recipient assessments may be presented] information for the assessment period, at any time during the review process or the exit conference[, and adjustments may be made]. The Commission gives the nursing facility administrator and hospice provider [are given] formal written notification of all TILE changes within 15 [working] days of the exit conference.

(A) At the direction of the Commission, DHS recovers [recoups] funds [previously] paid to the nursing facility and/or hospice provider under incorrect TILE classification. At the direction of the Commission, DHS reimburses [pays] the nursing facility and/or the hospice provider any increase due to a change in TILE classification.

(B) The changes [change] in TILE classification and per diem rate are retroactive [is effective retroactively] to the "effective date" of the assessment reviewed.

(3) If the nursing facility and/or hospice provider disagrees with the Commission's TILE classification, [a Commission nurse reviewer and a facility or hospice nurse assessor are unable to agree about an assessment,] either, or both, provider(s) [provider] may submit a reconsideration request to the Commission [Commission's state office nurse specialist].

(A) The request for [the] reconsideration and all documentation supporting the requested changes must be received by the Commission [the state office nurse specialist] within 15 days of the facility's receipt of formal notification of TILE changes.

(B) Commission staff [The state office nurse] will review [all] material submitted by the provider [and all information collected during the utilization review].

(C) The TILE classification and associated per diem rate specified by the Commission nurse reviewer remains [remain] in effect during the reconsideration period.

(D) If the reconsideration establishes that the Commission has changed a TILE classification in error, the Commission will direct DHS to correct the error retroactively.

(4) If the provider disagrees with the reconsideration determination [findings of the state office nurse specialist], the provider may request [initiate] a formal appeal, as stated in Title 40, Chapter 79, Subchapter Q (relating to Contract Appeals Process) by submitting a request to the Director, Hearings Department, Mail Code W-613, Texas Department of Human Services, P.O. Box 149030, Austin, Texas 78714-9030 within 15 days of the facility's receipt of notification of the results of the reconsideration.

(A) The TILE classification and associated per diem rate specified in the reconsideration determination remains [by the state office nurse specialist remain] in effect during the formal [contract] appeal.

(B) If the formal [contract] appeal process establishes that the Commission has changed a TILE classification in error, the Commission will direct DHS to correct the error retroactively.

(d) Error rate. The error rate for a TILE review is determined by dividing the number of forms with an identified TILE decrease by the total number of forms reviewed.

(1) Frequency of on-site TILE reviews may be determined by the accuracy of the assessment and error rate history. Nursing facilities whose TILE error rates are below 25% may be visited less frequently, but within 16 month intervals. TILE error rates of 25% or higher, may require a return visit within 7 months [on the assessment forms reviewed which exceeds 20% may result in a facility's undergoing a monitoring period].

(2) If the TILE error rate is 20% or higher on the return visit, the Commission may direct DHS to hold vendor payment to the facility, including pass through funds to hospice providers until the facility's error rate is below 20%. During a vendor payment hold, facilities may not submit CARE forms to the MCA either electronically or by mail. All CARE forms and supportive documentation, which includes both NF recipients and hospice recipients, must be submitted to HHSC.

(3) Corrective action plan. For hospice providers, deficient practice in documentation may result in a corrective action plan.

[(1) During the monitoring period, nursing facilities may not submit Texas Nursing Facility CARE forms to NHIC either electronically or by mail. All Texas Nursing Facility CARE forms, which include both nursing facility residents and hospice recipients residing in nursing facilities, must be submitted to the Commission nurse reviewers.]

[(2) The length of the monitoring period is 60 days. If accuracy of forms is still at an unacceptable level at the end of 60 days, the Commission may give a one-time, 30-day extension , if the facility has shown an attempt to improve their accuracy. If forms are not accurate at the end of 90 days, the Commission places the facility on compliance.]

[(e) Compliance may result when a facility has a 20% or greater error rate on the current assessment forms reviewed and one of the following: a 20% or greater error rate by the end of a monitoring period; lack of documentation regarding key assessment items; a history of noncompliance; or medical records that contain alterations in areas designed to lower the TILE level and increase the payment.]

[(1) Within a 30 to 45-day compliance period, facilities must complete new Texas Nursing Facility CARE forms on all recipients not in the original review.]

[(2) During the compliance period, facilities may not submit Texas Nursing Facility CARE forms to NHIC either electronically or by mail. All Texas Nursing Facility CARE forms, which include both nursing facility residents and hospice recipients residing in nursing facilities, must be submitted to Commission nurse reviewers.]

[(f) If a facility has a 20% or greater error rate by the end of the compliance period, the Commission will direct DHS to hold vendor payments to the facility until the facility has less than a 20% error rate. A decision to place a facility on vendor hold will be made by UR staff in state office.]

[(g) The nursing facility nurse assessor and the director of nurses must complete and pass the Commission TILE training course with a minimum score of 70% within 60 days of the beginning of the compliance period or vendor hold. If a score of 70% or higher is not achieved by the director of nurses or facility nurse assessor, the

~~nursing facility will remain on corrective action until such time as the acceptable score of 70% is achieved.]~~

This 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 January 16, 2004.

TRD-200400360
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 424-6576

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 57. FOR-PROFIT LEGAL SERVICE CONTRACT COMPANIES

16 TAC §§57.1, 57.10, 57.21 - 57.23, 57.25, 57.70 - 57.72, 57.80, 57.90

The Texas Department of Licensing and Regulation ("Department") proposes new rules at 16 Texas Administrative Code ("TAC"), Chapter 57, §§57.1, 57.10, 57.21, 57.22, 57.23, 57.25, 57.70, 57.71, 57.72, 57.80 and 57.90 concerning regulation of certain for-profit legal service contract programs and registration of administrators, companies and sales representatives.

The proposed new rules define and set out registration and fee requirements, describe the responsibilities imposed upon all registrants, and specify available administrative penalties and sanctions.

The rules are necessary to implement Chapter 953, Texas Occupations Code, which became effective September 1, 2003, after the passage of Senate Bill 597 during the 78th regular session of the Texas Legislature.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed new rules are in effect there will be no significant cost to state or local government as a result of enforcing or administering the new rules.

Mr. Kuntz also has determined that for each year of the first five-year period the new rules are in effect, the public benefits will be the protection of the public who enter into legal service contracts under Chapter 953, Texas Occupations Code, including the possible investigation of companies, administrators, and sales representatives, and providing an avenue of regulation and relief for individuals involved with certain prepaid legal services.

There will be a minimal effect on large, small, or micro-businesses as well as minimal economic costs to persons who are required to comply with the proposed new rules due to the fee structure established for registering sales representatives, administrators, and companies as mandated by statute.

Comments on the proposal may be submitted to William H. Kuntz, Jr., Executive Director, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile 512/475-2872, or electronically: whkuntz@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The Texas Commission of Licensing and Regulation ("Commission") may consider the temporary adoption of these rules on an emergency basis at their next meeting scheduled on February 25, 2004, which would allow the Commission to comply with the timetable prescribed by Senate Bill 597 and set out in Chapter 953, Texas Occupations Code.

The new rules are proposed under Chapters 51 and 953, Texas Occupations Code, which authorize the Commission to adopt rules as necessary to implement Chapter 953 and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in the Chapters 51 and 953, Texas Occupations Code. No other statutes, articles, or codes are affected by the proposal.

§57.1. Authority.
These rules are promulgated under the authority of Title 5, Texas Occupations Code, Chapter 953, and Title 2, Texas Occupations Code, Chapter 51.

§57.10. Definitions.
The following words and terms, when used in this chapter, have the following meanings.

(1) Group legal service contract--A legal service contract that is entered into on behalf of a group by a group representative and provides legal services for members of the group that choose to purchase the service.

(2) Administrator--The person appointed by a company to be responsible for:

(A) all or any part of the administration of legal service contracts or group legal service contracts;

(B) the sale of legal service contracts or group legal service contracts; or

(C) compliance with Title 5, Texas Occupations Code, Chapter 953 and this chapter.

(3) Company--A person who:

(A) is contractually obligated to a legal service contract holder under the terms of a legal service contract;

(B) enters into a contract with a contracting attorney to provide or obtain covered legal services for a legal service contract holder; and

(C) operates as a for-profit legal service contract company.

(4) Sales Representative--A person who sells or solicits:

(A) legal service contracts; or

(B) group legal service contracts to a person on behalf of a legal service contract company.

§57.21. Registration Requirements--Company.
(a) No person may operate as a company without first registering with the department.

(b) Registration is valid for one year from the date issued and must be renewed annually.

(c) Original and renewal applications must be accompanied by:

(1) an audit report and audited financial statements for the company's most recent fiscal year;

(2) a certified statement, made by an actuary, describing the company's reserves, if any;

(3) the required fees; and

(4) proof of one of the following forms of financial security:

(A) a surety bond issued by an authorized surety;

(B) securities of the type eligible for deposit by an authorized insurer in Texas;

(C) a deposit of cash or cash equivalents as provided in Title 5, Texas Occupations Code, Chapter 953, Section 953.101;

(D) an irrevocable letter of credit issued by a qualified financial institution; or

(E) another form of security acceptable to the Executive Director.

(d) Falsification of information on an application is cause for denial of the application and revocation of the registration.

§57.22. Registration Requirements--Sales Representative.

(a) No person may sell or solicit legal service contracts to a person on behalf of a company without first registering with the department.

(b) Registration is valid for one year from the date issued and must be renewed annually.

(c) The required fee must accompany both original and renewal applications.

(d) Falsification of information on an application is cause for denial of the application or revocation of the registration.

§57.23. Registration Requirements--Administrator.

(a) No person may act as an administrator on behalf of a company without first registering with the department.

(b) Registration is valid for one year from the date issued and must be renewed annually.

(c) The required fee must accompany both original and renewal applications.

(d) Falsification of information on an application is cause for denial of the application or revocation of the registration.

§57.25. Registration Requirements--Renewal.

(a) A complete application for registration renewal must be submitted on an approved Department form with all required fees.

(b) Non-receipt of a registration renewal notice from the Department does not exempt a person from any requirements of this chapter.

(c) A person shall not perform work requiring registration under Title 5, Texas Occupations Code, Chapter 953 with an expired registration.

§57.70. Responsibilities of Registrants--General.

A registrant shall notify the Department in writing within thirty (30) days of any change in the information set forth in the registrant's most recent original and renewal application.

§57.71. Responsibilities of Registrants--Company.

(a) A company must provide a receipt for or other written evidence of the purchase of a legal service contract to a contract holder within 45 days.

(b) A company must provide a copy of the legal service contract to the contract holder within 45 days.

(c) A company must provide a copy of the terms of a group legal service contract including the obligations and benefits of each party as specified in Texas Occupations Code, Chapter 953, §953.156 within 45 days.

(d) A company must provide a receipt for or other written evidence of the purchase of a group legal service contract to a contract holder within 45 days.

(e) A company must include a statement substantially similar to, "Legal service contract companies and their sales representatives are regulated by the Texas Department of Licensing and Regulation. You may contact the Department at P.O. Box 12157, Austin, TX 78711, 512-463-6599, 800-803-9202, or at ." in each legal service contract sold or offered for sale in Texas.

§57.72. Responsibilities of Registrant--Sales Representative.

A sales representative may only sell legal service contracts regulated under Title 5, Texas Occupations Code, Chapter 953 and this Chapter on behalf of a registered company.

§57.80. Fees.

(a) All fees are non-refundable.

(b) The original and renewal registration fee for a company shall be:

(1) $500 for a company that sells 0 to 1,000 legal service contracts during the twelve (12) months preceding the date of the application;

(2) $750 for a company that sells 1,001 to 2,500 legal service contracts during the twelve (12) months preceding the date of the application; and

(3) $1,000 for company that sells 2,501 or more legal service contracts during the twelve (12) months preceding the date of the application.

(c) For purposes of subsection (b) if a company that sold no legal service contracts in this state in the preceding year previously sold prepaid legal service contracts under article 5.13-1, Texas Insurance Code, the company's registration fee shall be based on the number of prepaid legal service contracts sold under the Texas Insurance Code in the preceding year.

(d) Companies must also pay an annual premium tax replacement fee. The premium tax replacement fee is equal to the difference between an amount equal to 1.7% of the amount a company collects for legal service contracts sold by the company in Texas in the current year and the amount the company paid to the state in franchise taxes in the same year.

(e) The original and renewal registration fee for a sales representative is $50.

(f) The original and renewal registration fee for an administrator is $50.

(g) A $25 fee shall be charged for duplicate or amended registration certificates.

(h) Late renewal fees for registrations issued under this chapter are provided for in Title 16, section 60.83 of the Commission rules.

§57.90. Administrative Penalties and Sanctions.

If a person violates any provision of Title 5, Texas Occupations Code, Chapter 953, any provision of Title 16, Texas Administrative Code, Chapter 57, or any provision of an order of the Executive Director or Commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both administrative penalties and sanctions in accordance with the provisions of Title 5, Texas Occupations Code, Chapter 953; Title 2, Texas Occupations Code, Chapter 51; and Title 16, Texas Administrative Code, Chapter 60 (relating to the Texas Commission of Licensing and 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 January 15, 2004.

TRD-200400287
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 463-7348

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 102. EDUCATIONAL PROGRAMS SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING COORDINATED HEALTH PROGRAMS

19 TAC §102.1031

The Texas Education Agency (TEA) proposes new §102.1031, concerning coordinated health programs for elementary school students. The proposed new section would establish criteria for evaluating school health programs in accordance with the Texas Education Code, §38.013, as amended by Senate Bill (SB) 1357, 78th Texas Legislature, 2003.

SB 19, 77th Texas Legislature, 2001, requires school districts to implement coordinated school health programs by 2007. In 2002, the TEA organized a committee to develop criteria for evaluating programs that were submitted for approval. Two programs were approved for use in complying with SB 19.

SB 1357, 78th Texas Legislature, 2003, amended TEC, §38.013, to require the commissioner of education to include, in rule, the criteria for evaluating school health programs. In August 2003, a new committee was formed to review the criteria used in the 2002 evaluation and recommend modifications if needed. The revised criteria will be used to evaluate new programs that are submitted for use in the schools. In accordance with SB 1357, the criteria have been developed in consultation with the Texas Department of Health's School Health Advisory Committee.

Proposed new 19 TAC §102.1031 requires that the Texas Education Agency make available to each school one or more coordinated health programs; establishes the criteria for evaluating school health programs; and addresses health programs developed by schools, submission of programs for evaluation, and availability of programs.

Susan Barnes, associate commissioner for standards and programs, has determined that for the first five-year period the new section is in effect there will be no fiscal impact anticipated for state or local government as a result of enforcing or administering the new section. A fiscal note was developed for SB 1357. No fiscal implications were reported in the note. This rule is proposed to implement statute. There is no direct fiscal impact associated with adoption of this rule; however, school districts may need to expend funds to acquire approved school health programs. In some cases, school districts may use locally developed programs if the programs meet the established evaluation criteria.

Dr. Barnes has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be the increased opportunity for elementary school students to learn about the benefits of a lifestyle that includes a healthy diet and exercise. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new section.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Division of Policy Coordination, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed new section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The new section is proposed under the Texas Education Code, §38.013, as amended by SB 1357, 78th Texas Legislature, 2003, which authorizes the commissioner to by rule adopt criteria for evaluating a coordinated health program

The new section implements the Texas Education Code, §38.013 and §38.014.

§102.1031. Criteria for Evaluating Coordinated Health Programs for Elementary School Students.

(a) Program purpose. In accordance with Texas Education Code (TEC), §38.013, the Texas Education Agency (TEA) shall make available to each school district one or more coordinated school health programs designed to prevent obesity, cardiovascular disease, and Type 2 diabetes in elementary school students. Each program must provide for coordinating:

(1) health education;

(2) physical education and physical activity;

(3) nutrition services; and

(4) parental involvement.

(b) Evaluation criteria. The commissioner of education may make available under subsection (a) of this section only those coordinated school health programs that meet the following criteria.

(1) The program coordinates physical education/physical activity, classroom health education, nutrition/cafeteria services, and parental involvement.

(2) The program is implemented and coordinated within and across Kindergarten-Grade 5. A program may be submitted that also includes Prekindergarten and/or Grade 6.

(3) The program has a training component that includes physical education/physical activity, classroom health education, nutrition/cafeteria services, and parental involvement activities and coordinates the four components of subsection (a). The training component must include teaching staff and parents.

(4) The program curricular components (health education and physical education) are based on Chapter 115 of this title (relating to Texas Essential Knowledge and Skills for Health Education) and Chapter 116 of this title (relating to Texas Essential Knowledge and Skills for Physical Education).

(5) The program is supported by peer reviewed empirical evidence of effectiveness.

(6) The program includes assessment tools for schools to measure cognitive, behavioral, and attitudinal changes related to the four components.

(7) The program is based on health education theory and national standards for instructional and/or industry best practices in each of the four components described in subsection (a).

(8) The program allows for tailoring to schools' individual needs and can be adapted to a variety of specific situations: ethnic diversity, children with disabilities, school schedules, socioeconomic status, geographic locations, and gender differences.

(9) The program trains school district staff in the annual use of assessment and planning tools for school health programs and policies, such as the elementary school version of the School Health Index available at the National Centers for Disease Control and Prevention website.

(c) Health programs developed by school districts. Coordinated school health programs that are developed by school districts and that meet the criteria in subsection (b) of this section may be approved and made available as approved programs.

(d) Submission of programs for evaluation. Coordinated school health programs may be submitted annually for evaluation on a schedule to be determined by the commissioner. Programs will be approved for a period of three years.

(e) Availability of programs. The TEA shall notify each school district of the availability of each coordinated school health program approved by the commissioner.

This 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 January 14, 2004.

TRD-200400241
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 7. STATE COMMITTEE OF EXAMINERS IN THE FITTING AND DISPENSING OF HEARING INSTRUMENTS

CHAPTER 141. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §§141.2, 141.6, 141.8, 141.10, 141.13, 141.16, 141.20

The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (committee) proposes amendments to §§141.2, 141.6, 141.8, 141.10, 141.13, 141.16, and 141.20, concerning the licensure and regulation of fitters and dispensers of hearing instruments. Specifically, the amendments cover application procedures; increase in continuing education sponsor fee; amend language for obtaining an apprentice permit; add language for applicants applying for reciprocity; biannual renewals; amend language for a hearing test done in a stationary acoustical enclosure; delete the word "settlement" in an informal disposition; and replace "executive director" with "complaints subcommittee". The licensing fee amendments are required as a result of revisions to the Health and Safety Code, Chapter 12, §12.0111 and §12.0112, pursuant to House Bill 2292, 78th Legislature, 2003.

Pam K. Kaderka, Executive Director of the committee, has determined that for each of the first five year period the sections are in effect, there will be an impact on state government as a result of enforcing or administering the sections proposed. There will be an increase in general revenue to the state estimated to be $700.00 in Fiscal Year (FY) 2004, $1900 in FY 2005, $1900 in FY 2006, $1900 in FY 2007 and $1900 in FY 2008. There will be no fiscal implications for local government. Senate Bill 1152, 78th Legislature, Regular Session, directs all departments administered licensing programs to participate in Texas Online, an electronic fee payment system developed and maintained by the Texas Online Authority. Wording is added that authorizes the Committee to collect subscription and convenience fees, in amounts to be determined by the Texas Online Authority, to recover costs associated with application and renewal application processing.

Ms. Kaderka has also determined that for each year of the first five years the sections are in effect, the public benefit as a result of enforcing or administering the sections will be to insure the appropriate regulation of fitters and dispensers of hearing instruments. There is not anticipated cost to micro-business or small business, or persons who are required to comply with the sections as proposed. Continuing education sponsors will have to pay an extra $100 annually. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Pam K. Kaderka, Executive Director, State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments, 1100 West 49th Street, Austin, Texas 78756-3183, (512) 834-6784. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapter 402, which requires the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments to adopt rules, with the approval of the Texas Board of Health; and the Health and Safety Code, §12.001, that are reasonably necessary to properly perform its duties under this Act.

The amendments affect the Texas Occupations Code, Chapter 402.

§141.2. Definitions.

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

(1) - (25) (No change.)

(26) Supervisor--A supervisor is a person licensed by the committee as a licensed hearing instrument dispenser who:

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

(C) is responsible for direct and indirect supervision and available for consultation and education of a temporary training permit holder[;] and/or is responsible for indirect supervision and available for consultation of an apprentice permit holder.

~~[(D) is responsible for indirect supervision and available for consultation of an apprentice permit holder.]~~

(27) - (30) (No change.)

§141.6. Application Procedures.

(a) - (d) (No change.)

(e) For all applications and renewal applications, the committee is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(f) For all applications and renewal applications, the committee is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(g) [~~(e)~~] The fees for administering Texas Occupations Code, Chapter 402, (Act), and this chapter shall be as follows:

(1) temporary training permit--$200;

(2) examination fee--$250;

(3) apprentice permit--$200;

(4) licensure fee--$200;

(5) a license issued for a one-year term--$200;

(6) a license issued for a two-year term--$400;

~~[(5) licensure renewal fee--$200;]~~

(7) [~~(6)~~] duplicate document fee--$25;

(8) [~~(7)~~] continuing education sponsor fee--$600 [~~$500~~] annually;

(9) [~~(8)~~] reinstatement fee for a license that was suspended for failure to pay child support--$50; and

(10) [~~(9)~~] reinstatement fee for a license that was suspended for student loan default--$50.

§141.8. Issuance of Permits.

(a) (No change.)

(b) Apprentice permit.

(1) The [~~A temporary training permit~~] holder of a current or expired temporary training permit, who has completed the directly supervised practicum requirements, taken all parts of the examination given by the committee and has passed all parts of the examination within the previous twelve months with a score of 70% or greater shall be issued an apprentice permit to fit and dispense hearing instruments. An apprentice permit remains valid for one year unless it is extended by the committee for an additional period not to exceed six months.

(2) - (11) (No change.)

(c) Other conditions for supervised experience for temporary training permit or apprentice permit.

(1) (No change.)

(2) A supervisor may delegate training activities to another eligible licensee [~~supervisor~~] for the training [~~supervision~~] of a temporary training permit holder. The supervisor shall be responsible for the day-to-day supervision of a trainee. The supervisor shall also be ultimately responsible for services provided to a client by the temporary training permit holder. A supervisor shall not delegate the responsibility of supervision.

§141.10. Reciprocity.

(a) In determining whether the licensing requirements of another jurisdiction are equivalent to or higher than Texas, the following criteria shall be considered by the committee:

(1) written examination;

(2) practical examination;

(3) temporary training permit; and

(4) apprentice permit.

(b) If an applicant for reciprocity is currently licensed as a fitter and dispenser of hearing instruments in another state, has practiced in that state for two years or more, and is currently certified by the National Board for Certification in Hearing Instrument Sciences (NBC-HIS), the applicant may obtain an apprentice permit by submitting to examination and complying with the requirements and procedures for obtaining an apprentice permit set out in this chapter, excluding the temporary training permit requirements.

§141.13. Renewal of License.

(a) General.

(1) A regular license must be renewed annually or biannually, as determined by the committee.

(2) - (10) (No change.)

(b) (No change.)

(c) License renewal.

(1) - (11) (No change.)

(12) If a person's license has been expired for two years or more, the person may not renew the license. The person may obtain an apprentice permit [~~a new license~~] by submitting to re-examination and complying with the requirements and procedures for obtaining an apprentice permit [~~original license~~] set out in this chapter, excluding the temporary training permit requirements.

(13) - (16) (No change.)

§141.16. Conditions of Sale.

(a) - (f) (No change.)

(g) Audiometric testing not conducted in a stationary acoustical enclosure.

(1) (No change.)

(2) Ambient noise level of location audiometric testing, if not done in a stationary acoustical enclosure, shall include a notation on the hearing test of the following items:

(A) (No change.)

(B) model and serial number of equipment used to determine ambient noise level; and

(C) the ambient noise level of the test environment. [~~date of last calibration of equipment used to determine ambient noise level; and~~]

[~~(D) the ambient noise level of the test environment.~~]

(3) (No change.)

(h) (No change.)

§141.20. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a licensee or an applicant for licensure may be made through an informal [~~settlement~~] conference held to determine whether an agreed [~~settlement~~] order may be approved.

(b) If the [~~executive director or the~~] Complaints Subcommittee of the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (committee) determines that the public interest might be served by attempting to resolve a complaint or contested case with an agreed order in lieu of a formal hearing, the provisions of this chapter shall apply. A licensee or applicant may request an informal [~~settlement~~] conference; however, the decision to hold a conference shall be made by the [~~executive director or the~~] complaints subcommittee.

(c) An informal [~~settlement~~] conference shall be voluntary and shall not be a prerequisite to a formal hearing.

(d) The executive director shall decide upon the time, date and place of the informal [~~settlement~~] conference, and provide written notice to the licensee or applicant of the same. Notice shall be provided no less than 10 days prior to the date of the conference by certified mail, return receipt requested, to the last known address of the licensee or applicant or by personal delivery. The 10 days shall begin on the date of mailing or personal delivery. The licensee or applicant may waive the 10 day notice requirement.

(e) A copy of the committee's rules concerning informal disposition shall be enclosed with the notice of the informal [~~settlement~~] conference. The notice shall inform the licensee or applicant of the following:

(1) - (6) (No change.)

(7) that the complainant and any client involved in the alleged violations may be present. [~~; and~~]

[~~(8) that the settlement conference will be canceled if the licensee or applicant notifies the executive director that he or she or his or her legal counsel will not attend.~~]

(f) The notice of the informal [~~settlement~~] conference shall be sent by certified mail, return receipt requested, to the complainant at his or her last known address or personally delivered to the complainant. The complainant shall be informed that he or she may appear and testify or may submit a written statement for consideration at the informal [~~settlement~~] conference. The complainant shall be notified if the conference is canceled.

(g) Members [~~One member~~] of the complaints subcommittee may be present at an informal [~~a settlement~~] conference.

(h) The [~~settlement~~] conference shall be informal and shall not follow the procedures established in this section for contested cases and formal hearings.

(i) (No change.)

(j) The committee's legal counsel shall attend each informal [~~settlement~~] conference.

(k) - (l) (No change.)

(m) The complaints subcommittee [~~member or the executive director~~] shall exclude from the informal [~~settlement~~] conference all persons except witnesses during their testimony, the licensee or applicant, the licensee's or applicant's attorney, and the committee staff.

(n) The complainant shall not be considered a party in the informal [~~settlement~~] conference but shall be given the opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(o) At the conclusion of the informal [~~settlement~~] conference, the complaints subcommittee [~~member or executive director~~] may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments Act (Act). The committee [~~member~~] may also conclude that the committee lacks jurisdiction, conclude that a violation of the Act or this chapter has not been established, order that the investigation be closed, or refer the matter for further investigation.

(p) The licensee or applicant may either accept of reject the conference [~~settlement~~] recommendations at the conference. If the recommendations are accepted, an agreed [~~settlement~~] order shall be prepared by the committee office or the committee's legal counsel and forwarded to the licensee or applicant. The order shall contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the committee office within ten days of his or her receipt of the order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the settlement recommendations.

(q) If the licensee or applicant rejects the proposed recommendations [~~settlement~~], the matter shall be referred to the complaints subcommittee [~~executive director~~] for appropriate action.

(r) - (s) (No change.)

(t) Upon an affirmative majority vote, the committee shall enter an agreed order approving the accepted [~~settlement~~] recommendations. The committee may not change the terms of a proposed order and shall only approve or disapprove an agreed order if the licensee or applicant is present at the committee meeting and agrees to other terms proposed by the committee.

(u) If the committee does not approve a proposed agreed order, the licensee or applicant and the complainant shall be so informed. The matter shall be referred to the complaints subcommittee [~~executive director~~] for other appropriate action.

(v) - (w) (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 January 16, 2004.

TRD-200400326

Michael Shobe

Chairman

State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments

Earliest possible date of adoption: February 29, 2004

For further information, please call: (512) 458-7236

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §501.72

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.72 concerning Contingency Fees.

The amendment to §501.72 will bring the board's rule into conformity with the contingent fee arrangements that are allowed by the Securities and Exchange Commission's rules, clarifies contingent fees and tax returns.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be zero.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be zero because the amendment is very minor in substance.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment does not impact state revenue.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be that the board's rule will be in conformity with the SEC's rule.

The probable economic cost to persons required to comply with the amendment will be zero because the amendment is very minor in substance.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on February 27, 2004. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment is very minor in substance.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small business; if the amendment is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the amendment is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendment under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.72. Contingency Fees.

(a) A certificate or registration holder shall not perform for a contingent fee any professional services for, or receive such a fee from, a client for whom the certificate or registration holder performs services requiring independence under §501.70 of this chapter (relating to Independence).

(b) A certificate or registration holder shall not prepare an original or amended federal, state, local or other jurisdiction tax return [~~or claim for a tax refund or other similar tax services~~] for a contingent fee for any client during the period in which the licensee or the licensee's firm is engaged to perform any of the services referenced by subsection (a) of this section and the period covered by any historical or prospective financial statements involved in any of the referenced services. Fees are not contingent if they are fixed by courts or governmental entities acting in a judicial or regulatory capacity, or in tax matters if determined based on the results of judicial proceedings or the findings of governmental agencies acting in a judicial or regulatory capacity, or if there is a reasonable expectation of substantive review by a taxing authority.

(c) A certificate or registration holder shall not perform an engagement as a testifying accounting expert for a contingent fee.

(d) The prohibitions outlined in subsections (a) and (b) of this section apply during any period in which the certificate or registration holder is engaged to perform any of the services referenced by subsections (a) and (b) of this section, and the period covered by any historical or prospective financial statements involved in any of the referenced services.

(e) A certificate or registration holder shall otherwise comply with the provisions of §501.70 of this chapter (relating to Independence).

This 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 January 15, 2004.

TRD-200400277

Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 305-7848

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22 TAC §501.78

The Texas State Board of Public Accountancy (Board) proposes new rule §501.78 concerning Withdrawal or Resignation.

The new rule §501.78 will give licensees guidance as to when they must withdraw from an engagement or employment.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be zero because the rule provides guidance about when withdrawal is appropriate and it is conceivable that compliance with the rule might reduce enforcement efforts.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be zero for local government because the rule will not impact local government costs and might minimally reduce state costs.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be zero because the rule will not impact state revenue.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be that licensees will have guidance from the board as to when they must withdraw from an engagement or employment.

The probable economic cost to persons required to comply with the new rule will be zero because the rule does not require anyone to expend any funds or incur any costs.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on February 27, 2004. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because by providing guidance the rule might help licensees avoid problems with clients and regulators.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rule is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed new rule.

§501.78. Withdrawal or Resignation.

(a) If a certificate or registration holder cannot complete an engagement or employment assignment in a manner that complies with the requirements of this chapter, the certificate or registration holder shall withdraw from the engagement or resign from the employment assignment.

(b) If a certificate or registration holder withdraws from an engagement or resigns from an employment assignment pursuant to this section, the certificate or registration holder shall inform the client or employer of the withdrawal or resignation.

(c) Interpretive Comment: Any withdrawal or resignation shall preferably be in writing. A certificate or registration holder shall comply with the requirements of §501.75 of this title (relating to Confidential Client Communications) and §501.90(17) of this title (relating to Discreditable Acts) regarding confidential information of clients and employers during and after a withdrawal or resignation executed pursuant to this section. For purposes of this section, an engagement commences once an engagement letter is signed by the client, time is charged to the engagement, or compensation is received by a certificate or registration holder in connection with an engagement or employment assignment.

This 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 January 15, 2004.

TRD-200400278
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 305-7848

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CHAPTER 523. CONTINUING PROFESSIONAL EDUCATION

The Texas State Board of Public Accountancy (Board) proposes the repeal of Chapter 523, Subchapter A: §523.1 concerning CPE Purpose and Definitions; §523.2 concerning Standards for CPE Program Development; and §523.3 concerning Savings Provisions and Dispositions Table; Subchapter B: §523.21 concerning Establishment of Mandatory CPE Program; §523.22 concerning Mandatory CPE Reporting; §523.23 concerning Mandatory CPE Attendance; §523.24 concerning Denial of a License; §523.25 concerning Disciplinary Actions Relating to CPE; §523.26 concerning Credits for Instructors and Discussion Leaders; §523.27 concerning Credits for Published Articles

and Books; §523.28 concerning Minimum Hours Required per CPE Reporting Period as a Participant; §523.29 concerning Limitation for Non-Technical Courses; §523.30 concerning Alternative Sources of CPE; §523.31 concerning Standards for CPE Reporting; §523.32 concerning CPE for non-CPA Owners and §523.34 concerning Course Content and Board Approval after September 1, 2003; Subchapter C: §523.41 concerning Board Rules and Ethics Course and §523.43 concerning Course Content and Board Approval; Subchapter D: §523.51 concerning Program Standards; §523.52 concerning Evaluation; §523.53 concerning Program Time Credit Measurement; §523.54 concerning Sponsor's Record; §523.55 concerning Board Contracted CPE Sponsors; §523.56 concerning Obligations of the Sponsor; §523.57 concerning Registry of CPE Sponsors and §523.58 concerning Sponsor Review Oversight Program.

The proposed repeal of §§523.1-523.3, 523.21-523.32, 523.34, 523.41, 523.43 and 523.51-523.58 will remove these rules so they can be replaced with re-written rules.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed repeals will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the repeals will be zero because the repeals do not require anyone to do or not do anything new or additional.

B. the estimated reductions in costs to the state and to local governments as a result of enforcing or administering the repeals will be zero because the repeals do not require anyone to do or not do anything new or additional.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the repeals will be zero because the repeals do not require anyone to do or not do anything new or additional.

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of adoption of the proposed repeals will be that these outdated rules will be repealed.

The probable economic cost to persons required to comply with the repeals will be zero because the repeals do not require anyone to do or not do anything new or additional.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeals will not affect a local economy.

The Board requests comments on the substance and effect of the proposed repeal from any interested person. Comments must be received at the Board no later than noon on February 27, 2004. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed repeals will not have an adverse economic effect on small businesses because the repeals do not require anyone to do or not do anything new or additional.

The Board specifically invites comments from the public on the issues of whether or not the proposed repeals will have an adverse economic effect on small business; if the repeals are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the repeals are to be adopted; and if the repeals are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the repeal under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

SUBCHAPTER A. CONTINUING PROFESSIONAL EDUCATION PURPOSE AND DEFINITIONS

22 TAC §§523.1 - 523.3

(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 State Board of Public Accountancy or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to adopt rules regarding continuing professional education.

No other article, statute or code is affected by these proposed repeals.

§523.1. CPE Purpose and Definitions.

§523.2. Standards for CPE Program Development.

§523.3. Savings Provisions and Dispositions Table.

This 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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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SUBCHAPTER B. CONTINUING PROFESSIONAL EDUCATION RULES FOR INDIVIDUALS

22 TAC §§523.21 - 523.32, 523.34

(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 State Board of Public Accountancy or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and

§901.411 which authorizes the board to adopt rules regarding continuing professional education.

No other article, statute or code is affected by these proposed repeals.

§523.21. Establishment of Mandatory CPE Program.
§523.22. Mandatory CPE Reporting.
§523.23. Mandatory CPE Attendance.
§523.24. Denial of a License.
§523.25. Disciplinary Actions Relating to CPE.
§523.26. Credits for Instructors and Discussion Leaders
§523.27. Credits for Published Articles and Books.
§523.28. Minimum Hours Required Per CPE Reporting Period as a Participant.
§523.29. Limitation for Non-Technical Courses.
§523.30. Alternative Sources of CPE.
§523.31. Standards for CPE Reporting.
§523.32. CPE for non-CPA Owners.
§523.34. Course Content and Board Approval after September 1, 2003.

This 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. ETHICS RULES: INDIVIDUALS AND SPONSORS

22 TAC §523.41, §523.43

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

The repeals are proposed under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to adopt rules regarding continuing professional education.

No other article, statute or code is affected by these proposed repeals.

§523.41. Board Rules and Ethics Course.
§523.43. Course Content and Board Approval.

This 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. STANDARDS FOR CONTINUING PROFESSIONAL EDUCATION PROGRAMS AND RULES FOR SPONSORS

22 TAC §§523.51 - 523.58

(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 State Board of Public Accountancy or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to adopt rules regarding continuing professional education.

No other article, statute or code is affected by these proposed repeals.

§523.51. Program Standards.
§523.52. Evaluation.
§523.53. Program Time Credit Measurement.
§523.54. Sponsor's Record.
§523.55. Board Contracted CPE Sponsors.
§523.56. Obligations of the Sponsor.
§523.57. Registry of CPE Sponsors.
§523.58. Sponsor Review Oversight Program.

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

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Texas State Board of Public Accountancy
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SUBCHAPTER A. CONTINUING PROFESSIONAL EDUCATION PURPOSE AND DEFINITIONS

22 TAC §§523.101 - 523.103

The Texas State Board of Public Accountancy (Board) proposes new rules §§523.101 concerning Savings Provisions and Dispositions Table, 523.102 concerning CPE Purpose and Definitions and 523.103 concerning Standards for CPE Program Development in Chapter 523, Subchapter A.

Sections 523.101, 523.102 and 523.103 are proposed for renumbering purposes and, because the CPE rules are being repealed and renumbered, to correct references to section numbers. Proposed new §523.101 contains a chart showing the disposition of the rules under the new numbering system. Proposed new §523.102 corrects one typographical error from the original rule, by changing the word "reasonable" to "reasonably".

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rules will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rules will be zero because the new rules only renumber the rules and change one typographical error.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rules will be zero because the new rules only renumber the rules and change one typographical error.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rules will be zero because the new rules only renumber the rules and change one typographical error.

Mr. Treacy has determined that for the first five-year period the new rules are in effect the public benefits expected as a result of adoption of the proposed new rules will be that the rules will have correct numbers.

The probable economic cost to persons required to comply with the new rules will be zero because the new rules only renumber the rules and change one typographical error from the original rule.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rules will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rules from any interested person. Comments must be received at the Board no later than noon on February 27, 2004. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rules will not have an adverse economic effect on small businesses because the new rules only renumber the rules and change one typographical error.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rules will have an adverse economic effect on small business; if the new rules are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rules are to be adopted; and if the new rules are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rules under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rules are proposed under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to promulgate rules regarding continuing professional education.

No other article, statute or code is affected by these proposed new rules.

§523.101. Savings Provisions and Dispositions Table.

(a) Repeal or amendment of Chapter 523 shall not abate any pending CPE complaints.

(b) The following table shows the disposition of board rules in Chapter 523:
Figure: 22 TAC §523.101(b)

§523.102. CPE Purpose and Definitions.

(a) Continuing Professional Education will be referred to herein as CPE.

(b) The purpose of CPE is to help ensure that licensees are able to serve the public in a competent manner.

(c) The following terms when used in this section, shall have the meanings, given below, unless the context clearly indicates otherwise:

(1) A "program" is designed to permit a participant to use a given body of knowledge at specified level of skill.

(2) A "formal group program" is a program that complies with the standards in the board's Rules.

(3) A "self-study program" is a program designed to permit a participant to learn a given subject without major interaction with an instructor.

(4) A "formal self-study program" is one for which the sponsor:

(A) requires and evaluates evidence (such as a workbook or examination paper) the participant has completed the course satisfactorily;

(B) provides a certificate based upon evidence of satisfactory completion; and

(C) complies with the standards in the board's Rules.

(5) A "computer-based interactive format program" is one designed to simulate a classroom learning process by employing structured software or technology-based systems that provide significant ongoing interactive feedback for the participant regarding the learning process. This type of program clearly defines lesson objectives and manages the participant through the learning process by:

(A) requiring frequent response to questions that test for understanding of the material presented;

(B) providing evaluative feedback to incorrectly-answered questions; and

(C) providing reinforcement feedback to correctly-answered questions.

(d) Sponsors are responsible for ensuring that their programs:

(1) use appropriate delivery methodology;

(2) deliver what participants may reasonably expect based on the program description; and

(3) comply with all the standards in the board's Rules.

§523.103. Standards for CPE Program Development.

(a) The fundamental purpose of CPE is to increase the licensee's professional competence that benefits the public.

(b) Courses the board regards as increasing the licensee's professional competence include:

(1) technical courses in areas such as accounting, audit, tax, management advisory services, and other technical areas of benefit to a licensee and a licensee's employer(s); and

(2) non-technical courses such as communications, ethics, behavioral science, practice management and advanced courses in foreign languages relating to accounting, which are of benefit to a licensee or a licensee's employer(s). Refer to §523.118 of this title (relating to Limitation for Non-Technical Courses).

This 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 January 15, 2004.

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Rande Herrell
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Texas State Board of Public Accountancy
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SUBCHAPTER B. CONTINUING PROFESSIONAL EDUCATION RULES FOR INDIVIDUALS

22 TAC §§523.110 - 523.121

The Texas State Board of Public Accountancy (Board) proposes new rules, §523.110 concerning Establishment of Mandatory CPE Program; §523.111 concerning Mandatory CPE Reporting; §523.112 concerning Mandatory CPE Attendance; §523.113 concerning Denial of a License; §523.114 concerning Disciplinary Actions Relating to CPE; §523.115 concerning Credits for Instructors and Discussion Leaders; §523.116 concerning Credits for Published Articles and Books; §523.117 concerning Minimum Hours Required Per CPE Reporting Period as a Participant; §523.118 concerning Limitation for Non-Technical Courses; §523.119 concerning Alternative Sources of CPE; §523.120 concerning Standards for CPE Reporting and §523.121 concerning CPE for non-CPA Owners in Chapter 523, Subchapter B.

Sections 523.110 through 523.121 are proposed new rules for renumbering purposes and, because the CPE rules are being repealed and renumbered, to correct references to section numbers. Proposed new §523.101 contains a chart showing the disposition of the rules under the new numbering system. In addition, the effective date of §523.112 is changed to December 31, 2005.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rules will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rules will be zero because the new rules renumber the rules and §523.112 extends the effective date of the rule.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rules will be zero because the new rules renumber the rules and §523.112 extends the effective date of the rule.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rules will be zero because the new rules renumber the rules and §523.112 extends the effective date of the rule.

Mr. Treacy has determined that for the first five-year period the new rules are in effect the public benefits expected as a result of adoption of the proposed new rules will be that the rules will have correct numbers and §523.112 will have an implementation date that allows adequate time for preparation.

The probable economic cost to persons required to comply with the new rules will be zero because the new rules renumber the rules and the changes to §523.112 from the original rule does not have an economic cost.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rules will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rules from any interested person. Comments must be received at the Board no later than noon on February 27, 2004. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rules will not have an adverse economic effect on small businesses because the new rules renumber the rules and the changes to §523.112 from the original rule does not have an economic effect.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rules will have an adverse economic effect on small business; if the new rules are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rules are to be adopted; and if the new rules are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rules under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rules are proposed under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to promulgate rules regarding continuing professional education.

No other article, statute or code is affected by these proposed new rules.

§523.110. Establishment of Mandatory CPE Program.

A licensee shall be responsible for ensuring that CPE credit hours claimed conform to the board's standards as outlined in:

(1) §523.115 regarding Credits for Instructors and Discussion Leaders;

(2) §523.116 regarding Credits for Published Articles and Books;

(3) §523.117 regarding Minimum Hours Required Per CPE Reporting Period as a Participant;

(4) §523.118 regarding Limitation for Non-Technical Courses;

(5) §523.119 regarding Alternative Sources of CPE;

(6) §523.130 regarding Board Rules and Ethics Course.

(7) §523.140 regarding Program Standards;

(8) §523.141 regarding Evaluation;

(9) §523.142 regarding Program Time Credit Measurement;

§523.111. Mandatory CPE Reporting.

(a) To receive a license, a licensee shall earn and report at least the minimum mandatory CPE credit hours required for the reporting period under §523.112 and §523.130 of this title (relating to Mandatory CPE Attendance and Board Rules and Ethics Course).

(b) A licensee shall report CPE credit hours accrued during the reporting period on the license renewal form. Appropriate instructions shall accompany the license renewal form.

(c) The board may not grant exemptions from the requirement to report CPE credit hours accrued. A licensee must report CPE credit hours on the license renewal form, even if the number reported is zero.

(d) A licensee who fails to report the minimum mandatory CPE credit hours accrued during the reporting period will be subject to disciplinary action under §523.114 of this title (relating to Disciplinary Actions Relating to CPE).

§523.112. Mandatory CPE Attendance.

A licensee shall complete at least 120 hours of CPE in each three-year period, and a minimum of 20 hours in each one-year period. For all CPE completed after December 31, 2005, except as provided by board rule, this CPE shall be offered by board contracted CPE sponsors. The exception to this requirement is an initial licensee, one who has been certified or registered for less than 12 months.

(1) The exception to the requirement of 120 hours of CPE is an initial licensee, one who is paying the license fee for the first time.

(A) To be issued a license that is less than twelve months from the date of certification or registration, the licensee does not have a CPE hour requirement. The first twelve-month period begins on the date of certification and ends with the last day of the licensee's birth month.

(B) To be issued a license for the first full twelve-month license period, the licensee does not have a CPE accrual requirement and can report zero hours.

(C) To be issued a license for the second full twelve-month period, the licensee must report a minimum of 20 CPE hours. The hours must be accrued in the 12 months preceding the license period.

(D) To be issued a license for the third full twelve-month license period, the licensee must report a total of at least 60 CPE hours that were accrued in the 24 months preceding the license period. At least 20 hours of the requirement must be accrued in the 12 months preceding the license period.

(E) To be issued a license for the fourth full twelve-month period, the licensee must report 100 CPE hours that were accrued in the 36 months preceding the license period. At least 20 hours of the requirement must be accrued in the 12 months preceding the license period.

(F) To be issued a license for the fifth and subsequent license periods, the licensee must report a total of at least 120 CPE hours that were accrued in the 36 months preceding the license period, and at least 20 hours of the requirement must be accrued in the 12 months preceding the license period.

(2) A former licensee whose certificate or registration has been revoked for failure to pay the license fee and who makes application for reinstatement, must pay the required fees and penalties and must accrue the minimum CPE credit hours missed.

(3) The board may consider granting an exemption from the CPE requirement on a case-by-case basis if:

(A) a licensee completes and forwards to the board a sworn affidavit indicating that the licensee will not be employed during the period for which the exemption is requested. A licensee who has been granted this exemption and who re-enters the work force shall be required to report CPE hours missed as a result of the exemption subject to a maximum of 200 hours. Such CPE hours shall be accrued from the technical area as described in §523.103 and §523.130 of this title (relating to Standards for CPE Program Development and Board Rules and Ethics Course);

(B) a licensee completes and forwards to the board a sworn affidavit indicating no association with accounting work. The affidavit shall include, as a minimum, a brief description of the duties performed, job title, and verification by the licensee's immediate supervisor;

(i) For purposes of this section, the term "association with accounting work" shall include the following:

(I) working or supervising work performed in the areas of financial accounting and reporting; tax compliance, planning or advice; management advisory services; data processing; treasury, finance, or audit; or

(II) representing to the public, including an employer, that the licensee is a CPA or public accountant in connection with the sale of any services or products, including such designation on a business card, letterhead, promotional brochure, advertisement, or office; or

(III) offering testimony in a court of law purporting to have expertise in accounting and reporting, auditing, tax, or management services; or

(IV) for purposes of making a determination as to whether the licensee fits one of the categories listed in this subclause and subclauses (I)-(III) of this clause, the questions shall be resolved in favor of inclusion of the work as "association with accounting work."

(ii) A licensee who has been granted this exemption and who loses the exemption shall accrue CPE hours missed as a result of the exemption subject to a maximum of 200 hours. Such CPE hours shall be earned in the technical area as described in §523.103 and §523.130 of this title (relating to Standards for CPE Program Development and Board Rules and Ethics Course).

(C) a licensee not residing in Texas, who submits a sworn statement to the board that the licensee does not serve Texas clients from out of state;

(D) a licensee shows reasons of health, certified by a medical doctor, that prevent compliance with the CPE requirement. A licensee must petition the board for the exemption and provide documentation that clearly establishes the period of disability and the resulting physical limitations;

(E) a licensee is on extended active military duty during the period for which the exemption is requested, and files a copy of orders to active military duty with the board; or

(F) a licensee shows reason which prevents compliance, that is acceptable to the board.

(4) A licensee who has been granted the retired or disabled status under §515.8 of this title (relating to Retirement Status or Permanent Disability) is not required to report any CPE hours.

§523.113. Denial of a License.

The board shall not issue or renew a license to an individual who has not earned the required CPE credit hours unless an exemption has been granted by the board.

§523.114. Disciplinary Actions Relating to CPE.

(a) A licensee who fails to comply with the provisions of §523.130 of this title (relating to Board Rules and Ethics Course), §523.111 of this title (relating to Mandatory CPE Reporting) and §523.112 of this title (relating to Mandatory CPE Attendance) may be subject to disciplinary action under the Act, for violation of the Rules of Professional Conduct, §501.94 of this title (relating to Mandatory CPE), which requires compliance with §523.130 of this title, §523.111 of this title and §523.112 of this title.

(b) A licensee shall retain documents or other evidence supporting CPE credit hours claimed for the three most recent full reporting periods to the date the credit hours are reported to the board, and shall submit the supporting evidence to the board if such data is specifically requested.

(c) The board may, as deemed appropriate, audit CPE supplied by a licensee and request that all documentation be provided to the board within a reasonable period of time.

(d) Evidence of falsification, fraud, or deceit in the CPE documentation may necessitate disciplinary action as authorized in the Public Accountancy Act.

§523.115. Credits for Instructors and Discussion Leaders.

When an instructor or discussion leader serves at a program for which participants receive credit and at a level that contributes to the instructor's or discussion leader's professional competence, credit may be given for preparation and presentation time measured in terms of credit hours. For the first time a program is presented, instructors may receive up to three times the number of credit hours approved for the program. For repetitious presentations, the instructor may receive credit only if it can be demonstrated that the subject matter involved was changed sufficiently to require significant additional study or research. The maximum credit for preparation and presentation cannot exceed 20 hours in the reporting period.

§523.116. Credits for Published Articles and Books.

CPE credit hours may be claimed for published articles and books provided they contribute to the professional competence of the licensee. Credit hours for preparation of such publications may be claimed up to 10 hours in any CPE reporting period. In exceptional circumstances, a licensee may submit a request to the board for additional credit, not to exceed a total of 20 credit hours in the reporting period. The request should be accompanied by a copy of the article(s) or book(s) and an explanation justifying the request for additional CPE hours.

§523.117. Minimum Hours Required Per CPE Reporting Period as a Participant.

A minimum of 20 credit hours per CPE reporting period must be as a participant in a qualified CPE in a live classroom instruction and/or self-study if the licensee is claiming credit of the requirement as provided for in §§523.115 and 523.116 of this title (relating to Credits for Instructors and Discussion Leaders and Credits for Published Articles and Books).

§523.118. Limitation for Non-Technical Courses.

CPE credit hours may be claimed for non-technical courses limited to not more than 20 credit hours in the reporting period.

§523.119. Alternative Sources of CPE.

(a) Credit hours may be claimed from other organizations not recognized as formal CPE sponsors. Credit from membership in the committees listed can be claimed using 50 minutes per contact hour at meetings to equal one credit hour:

(1) Financial Accounting Standards Board (FASB);

(2) Governmental Accounting Standards Board (GASB);

(3) FASB's Emerging Issues Task Force (EITF);

(4) AICPA's Auditing Standards Board and Accounting Standards Executive Committee;

(5) Financial Executives Institute's Committee on Corporate Reporting (FEI/CCR);

(6) National Association of Accountants' Management Accounting Practices Committee;

(7) AICPA's Accounting and Review Services Committee (ARSC); and

(8) The AICPA's Private Companies Section on Technical Issues Committee.

(b) Credit hours earned from sources other than registered sponsors, or membership on designated committees, must receive prior approval before credit may be claimed.

§523.120. Standards for CPE Reporting.

(a) Participants in group or self-study programs must document their participation, including:

(1) sponsor;

(2) title or description of content, or both;

(3) date(s);

(4) location; and

(5) number of credit hours.

(b) These standards are designed to encourage participants to document their attendance at group programs or participation in self-study programs. Evidence of completion would normally be the certificate supplied by the sponsor. Documentation by the licensee must be retained for the three most recent full reporting periods.

§523.121. CPE for non-CPA Owners.

(a) Each non-CPA owner of a licensed CPA firm shall complete an average of 120 hours of CPE in each three-year period and have a minimum of 20 hours per year. These hours shall be reported on the required board forms. The failure of any non-CPA owner of a licensed CPA firm to complete and report such CPE shall be grounds for revoking the firm's license on the grounds that the owner is not qualified.

(b) The board will accept any CPE that is offered or accepted by organizations or regulatory bodies issuing any professional designation used by the non-CPA owner. All other CPE must be provided by board-accepted CPE sponsors or be otherwise approved by the board, provided however, that the board reserves the right to reject any claimed CPE.

(c) Every non-CPA owner of a licensed CPA firm shall complete a board-approved rules and ethics course in accordance with §523.130 of this title (relating to Board Rules and Ethics Course).

(d) The board has the right to audit any CPE hours claimed. A firm shall provide the board all information required for this audit in accordance with §501.93 of this title (relating to Responses) and the firm shall be responsible for its non-CPA owner's cooperation with the audit.

This 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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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SUBCHAPTER C. ETHICS RULES: INDIVIDUALS AND SPONSORS

22 TAC §§523.130 - 523.133

The Texas State Board of Public Accountancy (Board) proposes new rules §523.130 concerning Board Rules and Ethics Course, §523.131 concerning Board Approval of Ethics Course Content after January 1, 2005, §523.132 concerning Contracted Ethics Instructors after January 1, 2005 and §523.133 concerning Course Content and Board Approval in Subchapter C.

The new rules §§523.130, 523.131, 523.132 and 523.133 are proposed new for renumbering purposes and, because the CPE rules are being repealed and renumbered, to correct references to section numbers. Proposed new §523.101 contains a chart showing the disposition of the rules under the new numbering system. In addition, these rules will re-create and continue the board rules and ethics course program. Rule 523.130 continues the requirement of a two-hour ethics course every three years until December 31, 2004, with changes to the previous rule. After January 1, 2005, licenses must complete a board-approved four hour ethics course every two years. Ethics by self-study is no longer an option. Out-of-state licensees must complete their ethics course by live-instructor format or by computer-based interactive format, or request an exemption. After January 1, 2005, licensees who take ethics courses that are either not board-approved or taught by instructors not under contract with the board will not receive ethics course credit and will instead receive non-technical CPE credit. Retired, disabled or otherwise exempt licensees who change their exempt status must complete a board-approved ethics course. The rule provides for transition to the new 4 hour course and 2 year requirements as follows:

Figure: 22 TAC Chapter 523--Preamble

Rule 523.131 is a new rule creating a requirement that ethics course contents must be board approved. The new rule contains the procedure and criteria for applying for initial approval and renewed approval of course content. Rule 523.132 creates the requirement that, starting January 1, 2005, ethics course instructors must be board approved. The rule contains the procedure and criteria for applying for instructor approval, with an interpretive comment at the end. Rule 523.133 is simply being re-numbered.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rules will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rules will be minimal as to §523.130 because an ethics requirement already exists and this would be an incrementally small increase. As to §§523.131 and 523.132, some costs would be incurred by board staff and a board committee reviewing the applications for approval of course content and instructor. The cost to enforce §523.133 will be zero.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rules will be zero because these rules do not address cost reduction.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rules will be zero because these rules do not address revenue.

Mr. Treacy has determined that for the first five-year period the new rules are in effect the public benefits expected as a result of adoption of the proposed new rules will be that CPAs will be taking more hours of board-approved ethics courses that are being taught by board-approved instructors.

The probable economic cost to persons required to comply with the new rules will be as to §523.130, one cost would be for those persons who must replace self-study with live instruction or interactive computer-based format. As of December 16, 2003, the TSCPA offered a two-hour ethics course in Ft. Worth for $70, which works out to be $35 per hour. The board believes that self-study ethics courses also cost about $35 per hour. Another cost is the incremental cost of a four hour ethics course every two years instead of a two hour course every three years, which is an increase of 1/2 hour of ethics per year at an estimated annual increased cost of $17.50. As to §523.131, there should be no additional costs since there are already costs being incurred to design and prepare an ethics course to satisfy the current requirements and there should be no incremental costs. As to §523.132, there are too many variables involved for the board to be able to estimate the cost to secure the minimum required college-level education. Also, acquiring the college level teaching experience and performing the accounting-related activities should result in compensation not expenses. There are no costs associated with §523.133.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rules will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rules from any interested person. Comments must be received at the Board no later than noon on February 27, 2004. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333

Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rules will not have an adverse economic effect on small businesses because the only costs incurred will be in the increased ethics courses requirement and that amount is too small to constitute adverse economic effect.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rules will have an adverse economic effect on small business; if the new rules are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rules are to be adopted; and if the new rules are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rules under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rules are proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to promulgate rules regarding continuing professional education.

No other article, statute or code is affected by this proposed new rules.

§523.130. Board Rules and Ethics Course.

(a) An individual applying for certification or registration must complete a board-approved four hour ethics course designed to thoroughly familiarize the applicant with the board's Rules of Professional Conduct no more than six months prior to submission of the application. Proof of completion of this course must be submitted with the application.

(b) Prior to January 1, 2005, every licensee must take a board approved two hour ethics course on the board's Rules of Professional Conduct every three years. Licensees shall report completion of the course on the annual license renewal notice at least every third year.

(c) Beginning on January 1, 2005, every licensee must take a four hour ethics course that has been approved by the board pursuant to §523.131 of this title (relating to Board Approval of Ethics Course Content after January 1, 2005) every two years. Licensees shall report completion of the course on the annual license renewal notice at least every second year and have until their first license renewal date after January 1, 2007 in which to report completion of the four hour course.

(d) A licensee granted retired, permanent disability, or other exempt status is not required to complete the ethics course during the licensee's exempt status. When the exempt status is no longer applicable, the individual must complete an ethics course approved by the board and report it on the license renewal notice if due.

(e) A certificate or registration holder who resides in the state of Texas must take the ethics course in a live instructor format or in an interactive computer-based format as defined in §523.102(b)(5) of this title (relating to CPE Purpose and Definitions).

(f) A certificate or registration holder who does not reside in the state of Texas must take the course in either a live instructor format or a computer-based interactive format as defined in §523.102(b)(5) of this title (relating to CPE Purpose and Definitions) or obtain a written exemption from the board.

§523.131. Board Approval of Ethics Course Content after January 1, 2005.

(a) Effective January 1, 2005 the content of an ethics course designed to satisfy the ethics CPE requirements of §523.130 of this title (relating to Board Rules and Ethics Course) must be submitted to and approved by the board. Course content shall be approved only after the developer of the course demonstrates that the course meets the following objectives:

(1) the course shall be designed to teach CPAs to achieve and maintain the highest standards of ethical conduct through ethical reasoning;

(2) the course shall be designed to teach the core values of the profession: integrity, objectivity and independence, as ethical principles in addition to rules of conduct;

(3) the course shall be designed to teach compliance with the spirit and intent of the board's Rules of Professional Conduct, in addition to technical compliance with the Rules; and

(4) the course shall address ethical considerations and the application of the board's Rules of Professional Conduct to all aspects of professional accounting work whether performed by CPAs in client practice or CPAs who are not in client practice.

(b) To meet the objectives of subsection (a) of this section, a course must include components that cover:

(1) ethical principles and values;

(2) ethical reasoning and dilemmas;

(3) the board's Rules of Professional Conduct with special focus on recent changes in those rules; and

(4) case studies that require application of ethical principles, values, and ethical reasoning within the context of the board's Rules of Professional Conduct.

(c) To be approved, the course must be taught in either a live instructor format or a computer-based interactive format, as defined in §523.101(b)(5) of this title (relating to CPE Purpose and Definitions).

(d) Each ethics course approved pursuant to this section will be reevaluated at least every three years or earlier as required by the board.

(e) As a part of each course, the sponsor shall administer a test to determine whether the program participants have obtained a basic understanding of the course content, including the need for a high level of ethical standards in the accounting profession.

(f) A sponsor of an ethics course approved by the board pursuant to this section shall comply with the board's rules concerning sponsors of CPE and shall provide its advertising materials to the board's CPE committee for approval. Such advertisements shall:

(1) avoid commercial exploitation;

(2) identify the primary focus of the course; and

(3) be professionally presented and consistent with the intent of §501.82 of this title (relating to Advertising).

§523.132 Board Contracted Ethics Instructors after January 1, 2005.

(a) Effective January 1, 2005, the board may contract with any instructor wishing to offer an ethics course approved by the board pursuant to §523.131 of this title (relating to Board Approval of Ethics Course Content after January 1, 2005) who can demonstrate that:

(1) the instructor is a certified public accountant licensed in Texas and has completed the board's ethics training program within the last three years or as required by the board;

(2) the instructor has never been disciplined for a violation of the board's Rules of Professional Conduct; and

(3) the instructor is qualified to teach ethical reasoning because he has:

(A) experience in the study and teaching of ethical reasoning; and

(B) formal training in organizational or ethical behavior instruction.

(b) An instructor demonstrates that he is qualified to teach ethical reasoning upon proof that he has:

(1) at the time of application or by June 30, 2005, whichever is later, obtained a minimum of 6 hours of credit in an ethics course from an accredited University, College or Community College, of which at least three hours must be in organizational ethics, or substantially equivalent educational experience;

(2) two or more full time semesters teaching experience at an accredited University, College or Community College, or substantially equivalent teaching experience;

(3) spent at least ten years performing accountancy related activities as a licensed CPA;

(4) no record of a violation of the rules of professional conduct of the American Institute of Certified Public Accountants, the Texas Society of Certified Public Accountants or other national or state accountancy organization recognized by the board; and

(5) goals and interests consistent with the board's purpose of protecting the public interest pursuant to the provisions of the Public Accountancy Act.

(c) An Instructor who can demonstrate substantially equivalent qualifications or who conducts training solely in-house for a governmental entity may request an exemption from the qualifications for teaching ethical reasoning set forth in subsection (b) of this section.

(d) The board may refuse to contract, refuse to renew a contract or cancel the contract of any instructor who has engaged in conduct rendering that instructor unsuitable for teaching ethics.

(e) Interpretive comments: To have goals and interests consistent with the board's purpose of protecting the public interest pursuant to the provisions of the Public Accountancy Act an instructor must refrain from using the instruction of an ethics course as a marketing tool for other products and services offered by the instructor. An instructor must be free from conflicts of interest with the board in both fact and appearance. Representation of a respondent or a complainant in a disciplinary proceeding pending before the board creates the appearance of a conflict of interest.

§523.133. Course Content and Board Approval.

(a) Before a provider of CPE can offer the Board Rules and Ethics Course, the content of the course must be submitted to and approved by the CPE committee of the board for initial approval and every three years thereafter. Course content shall be approved only after demonstrating, either in a live instructor format or a computer-based interactive format, as defined in §523.102(c)(5) of this title (relating to CPE Purpose and Definitions), that the course contains the underlying intent established in the following criteria.

(1) The course shall encourage the certificate or registration holder to educate himself or herself in the ethics of the profession, specifically the Rules of Professional Conduct of the board.

(2) The course shall convey the intent of the board's Rules of Professional Conduct in the certificate or registration holder's performance of professional services, and not mere technical compliance. A certificate or registration holder is expected to apply ethical judgment in interpreting the rules and determining the public interest. The public interest should be placed ahead of self-interest, even if it means a loss of job or client.

(3) The primary objectives of the Board Rules and Ethics Course shall be to:

(A) emphasize the ethical standards of the profession, as described in this section; and

(B) review and discuss the board's Rules of Professional Conduct and their implications for certificate or registration holders in a variety of practices, including:

(i) a certificate or registration holder engaged in the client practice of public accountancy who performs attest and non-attest services, as defined in §501.52 of this title (relating to Definitions);

(ii) a certificate or registration holder employed in industry who provides internal accounting and auditing services; and

(iii) a certificate or registration holder working in education or in government accounting or auditing.

(4) The Board Rules and Ethics Course shall meet the requirements of the board's CPE rules as described in this chapter (relating to CPE). Prior to offering and scheduling an approved Board Rules and Ethics Course, a sponsor shall:

(A) ensure that the instructor is a certified public accountant licensed in Texas or that the instructor is team teaching with a certified public accountant licensed in Texas and that both have completed the board's ethics training program at least every three years or as required by the board. This subsection is prospective only;

(B) ensure that the instructor's certificate or license has never been suspended or revoked for violation of the Rules of Professional Conduct; and

(C) provide its advertising materials to the board's CPE Committee for approval. Such advertisements shall:

(i) avoid commercial exploitation;

(ii) identify the primary focus of the course; and

(iii) be professionally presented and consistent with the intent of §501.82 of this title (relating to Advertising).

(b) Board Rules and Ethics Courses will be reevaluated every three years or as required by the board.

(c) At the conclusion of each course, the sponsor shall administer a test to determine whether the program participants have obtained a basic understanding of the course content, including the need for a high level of ethical standards in the accounting profession.

This 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 January 15, 2004.

TRD-200400285

Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 305-7848

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SUBCHAPTER D. STANDARDS FOR CONTINUING PROFESSIONAL EDUCATION PROGRAMS AND RULES FOR SPONSORS

22 TAC §§523.140 - 523.147

The Texas State Board of Public Accountancy (Board) proposes new rules §523.140 concerning Program Standards; §523.141 concerning Evaluation; §523.142 concerning Program Time Credit Measurement; §523.143 concerning Sponsor's Record; §523.144 concerning Board Contracted CPE Sponsors after December 31, 2005; §523.145 concerning Obligations of the Sponsor; §523.146 concerning Registry of National Association of State Boards of Accountancy (NASBA) CPE Sponsors and §523.147 concerning Sponsor Review Oversight Program in Chapter 523, Subchapter D.

The new rules §§523.140 through 523.147 are proposed new for renumbering purposes and, because the CPE rules are being repealed and renumbered, to correct references to section numbers. Proposed new §523.101 contains a chart showing the disposition of the rules under the new numbering system. In addition, these rules will re-create and continue the board's continuing professional education program. Rule 523.140 contains standards for the program developers, course materials, participants, facilities, general course instructors, ethics instructors and sponsors. Rule 523.144 is being re-numbered, references to other rules are also being re-numbered and the caption of the rule has been changed. Rule 523.146 is being re-numbered, the rule caption is being changed, and a new subsection exempts sponsors registered under this Rule from entering into the contract required by Rule 523.144. Rules 523.141-523.143, 523.145 and 523.147 are only being re-numbered.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rules will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rules will be zero because the substance of these rules are already in existence.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rules will be zero because the rules do not address costs and do not impact on local governments.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rules will be that there will be no increase in revenues from the increased fees because the number of sponsors is expected to decrease.

Mr. Treacy has determined that for the first five-year period the new rules are in effect the public benefits expected as a result of adoption of the proposed new rules will be that the continuing professional education program will be continued with re-written clearer rules.

The probable economic cost to persons required to comply with the new rules will be zero for most rules because the rules are only being re-created.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rules will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rules from any interested person. Comments must be received at the Board no later than noon on February 27, 2004. Comments should be addressed to Rande Herrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed new rules will not have an adverse economic effect on small businesses because the rules are only being re-created.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rules will have an adverse economic effect on small business; if the new rules are believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rules are to be adopted; and if the new rules are believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rules under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rules are proposed under the Public Accountancy Act, Texas Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to promulgate rules regarding continuing professional education.

No other article, statute or code is affected by these proposed new rules.

§523.140. Program Standards.

(a) The stated program objectives should clearly communicate the specific concepts and skills the program will transfer to persons completing it.

(b) All programs must clearly identify what prerequisites are necessary for enrollment, so a potential participant can determine whether they are qualified to participate in and benefit from the program. If no prerequisite is necessary, a statement to this effect should be made.

(c) A program developer must be prepared to demonstrate satisfactorily their competence to design the program at a high quality level.

(d) The program developer must review the course materials periodically to assure that they are accurate and consistent with currently accepted standards relating to the program's subject matter. Between these reviews, errata sheets should be issued where appropriate and obsolete materials should be deleted. Between the time a new pronouncement is issued and the issuance of errata sheets or removal of obsolete materials, the instructor is responsible for informing participants of changes.

(e) Course material should be reviewed by a qualified person(s) other than the preparer(s) to ensure compliance with the provisions of these sections and with high standards of content and instructional design. In the case of short or once only programs, more reliance may be placed on the competence of the presenter.

(f) Participants should be informed in advance of objectives, prerequisites, experience level, content, advance preparation, teaching method(s), and recommended credit hours. After January 1, 2005, an ethics course not approved by the board under §523.131 of this title (relating to Board Approval of Ethics Course Content after January 1, 2005) must clearly state in the course materials, registration materials and any advertisements related to the course that it is not approved for ethics credit pursuant to §523.131 of this title and the course will not satisfy the ethics course requirements of §523.130 of this title (relating to Board Rules and Ethics Course). Sponsors are responsible for distributing accurate information about their programs.

(g) Instructors must be qualified both with respect to program content and teaching methods used. Sponsors should evaluate the performance of instructors at the conclusion of each program to determine their suitability for continuing to serve as instructors. After January 1, 2005, the sponsor of an ethics course taught by an instructor who is not under contract with the board pursuant to §523.132 of this title (relating to Board Contracted Ethics Instructors after January 1, 2005) must clearly state in the course materials, registration materials and any advertisements related to the course that the instructor is not a board contracted ethics instructor under §523.132 of this title and the course will not satisfy the ethics course requirements of §523.130 of this title (relating to Board Rules and Ethics Course).

(h) Sponsors should comply with the standard by encouraging:

(1) enrollment only by eligible participants;

(2) timely distribution of materials;

(3) completion of any advance preparation; and

(4) assigning the appropriate number of credit hours for participants who arrive late or leave before a program is completed.

(i) The number of participants and physical facilities should be consistent with the teaching method(s) specified. The learning environment is affected by the number of participants and by the quality of the physical facilities. Sponsors have an obligation to pay serious attention to these two factors. The maximum number of participants for a case-oriented discussion program should be considerably less than for a lecture program. Class size, quality of facilities, and seating arrangements are integral and important aspects of the educational environment and should be carefully controlled.

§523.141. Evaluation.

(a) All programs should include some means for evaluating quality by both participants and instructors to determine whether:

(1) objectives have been met;

(2) prerequisites were necessary or desirable;

(3) facilities were satisfactory;

(4) the instructor was effective;

(5) advance preparation materials, if any, were satisfactory; and

(6) the program content was timely and effective.

(b) Evaluations should take the form of:

(1) pretests for advance preparation; and/or

(2) post-tests for effectiveness of the program; and/or

(3) other evaluation forms or questionnaires completed at the end of the program or later.

(c) Instructors should be informed of their performance, and sponsors should systematically review the evaluation process to ensure its effectiveness.

§523.142. Program Time Credit Measurement.

(a) All programs should be measured in terms of 50-minute contact hours. The shortest recognized program should consist of one contact hour. A contact hour is 50 minutes of continuous participation in a group program. Under this standard, a credit hour is granted only for each contact hour.

(b) For continuous conferences and conventions, when individual segments are less than 50 minutes, the sum of the segments should be considered one total program. For example, five 30-minute presentations would equal 150 minutes and should be counted as three contact hours.

(c) For university or college courses, each semester hour credit should equal 15 hours toward the requirement. A quarter hour credit should equal 10 hours.

(d) Self-study programs should be pre-tested to determine average completion time. If the self-study course has been approved by the Quality Assurance Service (QAS) of the National Association of State Boards of Accountancy (NASBA), the credit allowed shall be hour-for-hour credit. Otherwise, one half of the average completion time is the maximum credit to be allowed.

§523.143. Sponsor's Record.

(a) In order to support the reports required of participants, the sponsor of group or self-study programs must retain for an appropriate period:

(1) record of participation;

(2) outline of the course (or equivalent);

(3) date(s);

(4) location;

(5) instructor(s);

(6) number of credit hours; and

(7) evaluation of program as directed in §523.141 of this title (relating to Evaluation).

(b) To satisfy the detailed requirements of all jurisdictions, a retention period of three years from the date the program is completed is appropriate. The record of attendance should reflect the credit hours earned by each participant, including those who arrive late or leave early.

§523.144. Board Contracted CPE Sponsors after December 31, 2005.

(a) The board may contract with any sponsor of CPE programs to become a board contracted CPE sponsor where the sponsor, in the opinion of the board, demonstrates that it will comply with its contractual obligations to the board and that its programs will conform to the board's standards as outlined in:

(1) §523.115 of this title (relating to Credits for Instructors and Discussion Leaders);

(2) §523.130 of this title (relating to Board Rules and Ethics Course), (if applicable);

(3) §523.140 of this title (relating to Program Standards);

(4) §523.141 of this title (relating to Evaluation); and

(5) §523.142 of this title (relating to Program Time Credit Measurement).

(b) The board will also require that each organization applying to become a board contracted CPE sponsor agree that in the conduct of its business it will:

(1) Not commit fraud, deceit or engage in fiscal dishonesty of any kind;

(2) Not misrepresent facts or make false or misleading statements;

(3) Not make false statements to the board or to the board's agents; and

(4) Comply with the laws of the United States and the State of Texas.

(c) Each organization applying to become a board contracted CPE sponsor must submit an application on contract forms provided by the board. The application must be complete in all respects and shall include the contract payment of $120 for each twelve month period of the contract.

(d) To implement the program initially, sponsors previously registered with the board will be assigned an initial contract term based on the month of their current registration. The board will not prorate the contract payment for an organization for less than one year. Upon renewal in the second and succeeding years, the contract amount may be increased to cover the costs of review of individual courses.

(e) Board staff will review each application and notify the applicant of its acceptance or rejection. Accepted applicants will be assigned a sponsor number and can represent that they are a board contracted CPE sponsor. An acceptance in any given year shall not bind the board to accept a sponsor in any future year.

(f) After the contract has been accepted, the board, in its sole and exclusive discretion, may determine that a contracted sponsor is not in compliance with the contract. The board will provide the contracted sponsor reasonable notice it may make such a determination and shall provide the contracted sponsor a reasonable opportunity to respond to the facts which lead to the board determination. When the board has made a determination that a contracted sponsor is not in compliance with the contract, the board may request that the CPE sponsor make changes to meet board rules or the contract or the board may also terminate the contract. The contract amount shall not be prorated or refunded if the contract is terminated.

(g) All contracts with board contracted CPE sponsors may be renewable not less than annually by completion of a form provided by the board. At least 30 days before the expiration of the contract, the board will send notice of the impending expiration of the contract as a CPE sponsor.

§523.145. Obligations of the Sponsor.

(a) In consideration for the contract as a board contracted CPE sponsor every organization shall agree, in writing, to the following:

(1) "We understand that after acceptance of the application or reapplication for a contract by the board we may advise prospective attendees of the program sponsor agreement, our sponsor number, and the number of credit hours recommended. We further agree that if we notify licensees of this agreement we shall do so by use of the following language. "We have entered into an agreement with the Texas State Board of Public Accountancy to meet the requirements of CPE rules covering maintenance of attendance records, retention of program outlines, qualifications of instructors, program content, physical facilities, and length of class hours. This agreement does not constitute an endorsement by the board as to the quality of the program or its contribution to the professional competence of the licensee."

(2) "We understand that our advertising shall not be false or misleading, nor contain words such as "accredited" or "approved" or any terms which may imply that a determination has been made by the board regarding the merits or quality of the program."

(3) "We agree that board members, board staff, or its official designees may inspect our facilities, examine our records, attend our courses or seminars at no charge, and audit our program to determine compliance with the sponsor agreement and the CPE standards of the board."

(4) "We understand and agree that if we fail to comply with this agreement or fail to meet acceptable standards in our programs, our sponsor agreement may be terminated at any time by the board, our sponsor agreement renewal application denied, and notice of such termination or denial may be provided to licensees by the board."

(b) Every board contracted CPE sponsor shall cooperate fully with the board's sponsor review oversight program. This cooperation shall include, but not be limited to providing information, records and access to programs and instructors as requested. Failure to cooperate with the program shall be grounds for terminating the contract.

§523.146. Registry of National Association of State Boards of Accountancy (NASBA) CPE Sponsors.

(a) The board shall accept courses offered by sponsors shown as being in good standing on the National Association of State Boards of Accountancy's National Registry of CPE Sponsors; however, organizations are not required to register with the National Association of State Boards of Accountancy (NASBA).

(b) The board shall accept courses offered by NASBA CPE sponsors that have registered with the board.

(c) NASBA CPE sponsors registered with the board shall:

(1) comply with all board standards for CPE sponsors; and

(2) cooperate with the board's sponsor review oversight program, including but not limited to providing information, records and access to programs and instructors as requested.

(d) Sponsors registered under this section need not enter into a contract with the board under §523.144 of this title (relating to Board Contracted CPE Sponsors).

(e) The board may revoke the registration of any NASBA CPE sponsor registered under this section for failure to comply with board standards or board rules.

§523.147. Sponsor Review Oversight Program.

(a) A sponsor review oversight program is hereby established for the purpose of monitoring the compliance by board contracted CPE sponsors and the courses they offer with board contracts, standards and board rules. The program shall emphasize high quality education and compliance with professional standards. In the event a sponsor does not comply with board rules, or instruction or materials are inadequate, the board shall take appropriate action.

(b) The board shall contract with a sponsor review oversight board (SROB) composed of five (5) persons designated by the CPE Committee. The board shall set compensation of SROB members from revenue received from sponsors requesting review.

(1) Each member of the SROB must be a CPA in good standing with the board.

(2) An SROB member must recuse himself or herself from service if the member has an interest in the sponsoring organization under review or if the member believes he/she cannot be impartial or objective.

(3) An SROB member may not concurrently serve as a member of the Texas State Board of Public Accountancy or its committees, or of any CPA society's ethics committee or CPE committee.

(c) The SROB shall:

(1) monitor board-contracted sponsors of CPE to provide reasonable assurance that quality CPE is being offered in accordance with board contracts, standards and rules;

(2) review the policies and procedures of board-contracted CPE sponsors as to their conformity with the rules;

(3) when necessary, prescribe actions designed to assure correction of the deficiencies in the curriculum or CPE;

(4) report to the CPE committee as required;

(5) communicate to the CPE committee on a recurring basis:

(A) problems experienced with sponsor compliance;

(B) problems experienced in the implementation of the review program; and

(C) a summary of the historical results of the SROB.

(d) The procedures used by the SROB in monitoring of sponsors of CPE may include, but not be limited to:

(1) random visits of sponsors as deemed appropriate, and review of course materials;

(2) meetings with the sponsor to review educational materials and other record keeping documents;

(3) reviewing the sponsor's educational philosophy;

(4) reviewing, on the basis of a random selection, the course evaluations from licensees to determine whether the materials have received adverse comments;

(5) expanding the review of records if significant deficiencies, problems, or inconsistencies are encountered during the review of the materials;

(6) reviewing the applications submitted by the board-contracted CPE sponsors to determine that they will provide reasonable assurance of conforming to the minimum standards for offering high quality CPE; and

(7) determining that courses offered by board-contracted CPE sponsors provide that:

(A) education meets the needs of the licensees;

(B) course material is up-to-date and relevant; and

(C) adequate record keeping procedures are in place and specified occurrences requiring consultation are outlined.

This 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 January 15, 2004.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER F. HEMOPHILIA ASSISTANCE PROGRAM

The Texas Department of Health (department) proposes the repeal of §§37.111 - 37.125 and new §§37.111 - 37.119, concerning the hemophilia assistance program. The repeal and new sections provide for clarity and consistency of language and facilitate compliance with and administration of the rules.

In accordance with the requirements of the Government Code, §2001.039, the sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. However, the sections require revision as described in the preamble.

The department published a Notice of Intention to Review for §§37.111 - 37.125 in the *Texas Register* on April 28, 2000 (25 TexReg 2799). No comments were received due to publication of this notice.

Specifically, the sections cover general requirements; recipient eligibility requirements; residency and residency documentation requirements; application and eligibility date; financial criteria; limitations and benefits provided; participating providers; forms; and confidentiality of information.

The new rules define medical, financial and residency requirements, benefits and limitations, and participation criteria for providers.

Phillip Walker, Chief, Bureau of Kidney Health Care, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the sections as proposed.

Mr. Walker 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 the sections is that program access and eligibility will be easier to comply with and understand. There will be no costs to small businesses or micro-businesses resulting from compliance with these sections as proposed because none of the entities or persons affected constitute micro-businesses or small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments may be submitted to Mr. Phillip Walker, Chief, Bureau of Kidney Health Care, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6770. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

25 TAC §§37.111 - 37.125

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

The repeals are proposed under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; and Health and Safety Code, Chapter 41, relating to hemophilia.

The repeals affect Health and Safety Code, Chapter 41. The review of the rules implements Government Code, §2001.039.

§37.111. Purpose.

§37.112. Definitions.

§37.113. Eligibility for Patient Services.

§37.114. Services Provided to Patients.

§37.115. Application Process.

§37.116. Authorization of Blood Product Purchases.

§37.117. Denial/Modification/Suspension/Termination of Program Benefits.

§37.118. Rights and Responsibilities of Parents/Guardian/Conservator or the Adult Patient.

§37.119. Providers.

§37.120. Contracts and Written Agreements.

§37.121. Payment of Services.

§37.122. Payment Suspension or Cancellation.

§37.123. Cooperation with Other Agencies.

§37.124. Appeals, Confidentiality, Gifts, and Nondiscrimination.

§37.125. Income Guidelines.

This 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 January 16, 2004.

TRD-200400324
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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25 TAC §§37.111 - 37.119

The new sections are proposed under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; and Health and Safety Code, Chapter 41, relating to hemophilia.

The new sections affect Health and Safety Code, Chapter 41. The review of the rules implements Government Code, §2001.039.

§37.111. General.

(a) Purpose. The purpose of this chapter is to establish rules for the Hemophilia Assistance Program (HAP). The authority for these rules is granted in the Texas Health and Safety Code, Chapter 41.

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

(1) Allowable product--Blood derivatives, blood concentrates, and manufactured pharmaceutical products indicated for the treatment of hemophilia and approved for payment by the Hemophilia Assistance Program.

(2) Applicant--An individual whose application has been submitted through a participating provider and has not received a final determination of eligibility. This includes an individual whose application is submitted by a representative or person with legal authority to act for the individual.

(3) Department--The Texas Department of Health.

(4) HAP--The Hemophilia Assistance Program.

(5) Hemophilia--A human physical condition, characterized by bleeding, resulting from a genetically determined deficiency of a blood coagulation factor or hereditarily resulting in an abnormal or deficient plasma procoagulant.

(6) Inhibitor--A type of antibody, more common in severe hemophilia A than hemophilia B, which requires the use of higher doses of blood factor to contain a bleeding episode. This is usually confirmed by the Bethesda inhibitor assay and reported as the Bethesda titer. The development of an inhibitor rarely occurs in those with mild hemophilia.

(7) Participating provider--Any individual or entity with HAP approval to provide allowable products to HAP recipients.

(8) Recipient--An individual who is eligible to receive HAP benefits.

§37.112. Recipient Requirements.

(a) A person shall meet all of the following requirements to be eligible for benefits from the Hemophilia Assistance Program (HAP):

(1) have a diagnosis of hemophilia certified by a licensed physician;

(2) be 21 years of age or older;

(3) be a resident of Texas as determined in §37.113 of this title (relating to Residency and Residency Documentation Requirements) and not be:

(A) incarcerated in a city, county, state, or federal jail, or prison; or

(B) a ward of the state.

(4) submit an application for benefits to the HAP;

(5) meet, or the person(s) who have a legal obligation to support the applicant meet, the financial guidelines as outlined in §37.115 of this title (relating to Financial Criteria). The person or persons who have a legal obligation to support the recipient will be determined by the applicable state law; and

(6) not be eligible for Medicare or Medicaid.

(b) A recipient may have all HAP benefits modified, suspended, or terminated for any of the following reasons:

(1) failure to maintain Texas residency or, upon demand, furnish evidence of such using the criteria in §37.113 of this title;

(2) failure to provide income data as requested to determine continued HAP eligibility;

(3) recipient is incarcerated in a city, county, state, or federal jail, or prison;

(4) recipient becomes a ward of the state;

(5) recipient makes a material misstatement or misrepresentation on their application or any document required to support their application;

(6) failure to continue premium payments on individual or group insurance, prepaid medical plan, and health insurance plans under the Social Security Act, Title XVIII, as amended, where such plans provide benefits for the care and treatment of persons who have hemophilia and the person's eligibility for benefits under the plan(s) was effective prior to eligibility for HAP, or provide a statement on the application form outlining the reason(s) why such insurance cannot be maintained; or

(7) failure to receive services through a participating provider.

(c) When eligibility for HAP benefits is terminated for any of the reasons outlined in subsection (b) of this section, an applicant shall reapply for HAP benefits.

(d) A recipient whose benefits are modified, suspended, or terminated may appeal the HAP decision under the procedure contained in §§1.51 - 1.55 of this title (relating to Fair Hearing Procedures).

§37.113. Residency and Residency Documentation Requirements.

(a) The following conditions shall be met by an applicant and maintained by a recipient to satisfy the residency requirements in this section:

(1) physically reside within the state; and

(2) maintain a home or abode within the state.

(b) If the applicant is a legal dependent of, and residing with, a resident (such as an adult child or spouse); or is a person under legal guardianship, then the resident providing support or the legal guardian of the applicant shall meet the requirements of subsection (a) of this section.

(c) If the applicant is a parent residing with their adult child who is a resident of Texas, residency may be determined through the adult child. If the applicant is a parent being supported by their adult child, whether or not the child is a resident of Texas, the residency may be determined by the adult child providing the required documents supporting the Texas residency of the parent. These provisions apply even if no legal guardianship has been established.

(d) All documents submitted to establish the residency of an applicant shall be in English or accompanied by an accurate English translation, if required by the Hemophilia Assistance Program (HAP).

(e) An applicant, or person establishing residency for the applicant under subsections (b) and (c) of this section, who is currently a Texas resident and has been currently approved to receive benefits from Texas Medicaid, Temporary Assistance for Needy Families (TANF), or Food Stamps, is not required to provide additional residency verification.

(f) An applicant, or person establishing residency for the applicant under subsections (b) and (c) of this section, may submit a copy of any one of the following documents as evidence of residency. All documents shall be in the applicant's name, or in the name of the person establishing residency for the applicant, and provide some verification of a Texas address or domicile:

(1) a valid Texas driver's license, or an identification card issued by the Texas Department of Public Safety;

(2) a valid Texas voter's registration card, or a copy of a validated (at the county clerk's office) application for a voter's registration card;

(3) a current Texas motor vehicle registration or automobile license plate registration renewal form;

(4) a mortgage payment receipt from any of the three months immediately preceding the date of the application;

(5) a rent payment receipt from any of the three months immediately preceding the date of the application;

(6) a statement reflecting that the applicant is currently receiving rent-free housing. The statement must be signed by the individual providing the rent-free housing and must include the address and phone number of the individual providing the rent-free housing;

(7) a utility payment receipt from any of the three months immediately preceding the date of the application;

(8) a Texas property tax receipt for the most recently completed tax year;

(9) a payroll or retirement check dated within the three months immediately preceding the date of the application;

(10) employment/unemployment records prepared within the three months immediately preceding the date of the application;

(11) a statement from a financial institution issued within the three months preceding the date of the application; or

(12) social security supplemental income or disability income records, or social security retirement benefit records issued within the three months immediately preceding the date of the application.

(g) Applications submitted under subsections (b) and (c) of this section shall also include evidence of the legal relationship between the applicant and the resident, such as:

(1) a marriage license or declaration of non-ceremonial marriage to document the marriage of the applicant and spouse;

(2) a birth certificate establishing the parent/child relationship between the applicant and the resident;

(3) a final order naming the applicant's managing conservator; or

(4) an income tax return showing name and relationship of the applicant to the resident.

(h) Any difference between the name of the applicant and the name on any document must be explained by additional documentation (Example: marriage license, divorce decree, or adoption decree).

§37.114. Applications and Eligibility Date.

Persons meeting the eligibility requirements set forth in §37.112(a)(1), (2), (3), (5) and (6) of this title (relating to Recipient Requirements) must make an application for benefits through the Hemophilia Assistance Program (HAP).

(1) Complete application. A complete application is required before any eligibility determination will be made. A complete application shall consist of all of the following:

(A) a complete Application for Benefits, with the applicant's, or the applicant's representative's, original signature or "mark";

(B) a diagnosis of hemophilia certified by a licensed physician;

(C) documentation of Texas residency as required by §37.113 of this title (relating to Residency and Residency Documentation Requirements);

(D) applicant financial data. Acceptable data to establish the applicant's financial qualifications shall be submitted with the application. If the applicant, or person(s) who has a legal obligation to support the applicant is currently approved to receive benefits from Texas Medicaid, Temporary Assistance for Needy Families (TANF), or Food Stamps, no verification of income is required. Changes in income or financial qualifications that would affect the applicant's eligibility shall be reported to the HAP.

(i) The applicant, or the person(s) who has a legal obligation to support the applicant, may submit any of the following documents to verify income:

(I) copy of the most recent paycheck;

(II) copy of the most recent paycheck stub or monthly employee earnings statement;

(III) employee's written verification of gross monthly income;

(IV) pension/allotment award letters;

(V) a copy of the IRS individual income tax return form and supporting schedules for the most recently completed tax year; or

(VI) any other documents considered valid by HAP.

(ii) If the applicant, or person(s) who has a legal obligation to support the applicant, is unemployed, a statement of termination from the employer, or other documentation acceptable to HAP, is required.

(2) Incomplete applications. Any application which does not meet all of the requirements of paragraph (1) of this subsection is incomplete. Incomplete applications may be returned to the submitting person for correction or completion.

(3) Eligibility date for HAP benefits. The HAP eligibility date will be either:

(A) the date HAP receives a completed application; or

(B) the date of conditional authorization for allowable products, if all written information to establish eligibility is received within 30 days of the date of conditional authorization.

(4) Eligibility date for reinstatement of HAP benefits. If HAP benefits are terminated, the eligibility date for any subsequent benefit period will be the date on which HAP receives a subsequent completed application for HAP benefits.

(5) An applicant whose eligibility for benefits is denied may appeal HAP's decision under the procedure contained in §§1.51 - 1.55 of this title (relating to Fair Hearing Procedures).

§37.115. Financial Criteria.

Financial need is established on the basis of income legally available to the applicant or the person(s) who have a legal obligation to support the applicant.

(1) The income used to determine eligibility is the combined gross income of the applicant and of all persons who have a legal obligation to support the applicant.

(2) Income includes earned wages, pensions or allotments, alimony, or any monies received on a regular basis for support purposes. Supplemental Security Income (SSI) for the disabled applicant is not included as income. Verification of income data will be required as set out in §37.114(1)(D) of this title (relating to Applications and Eligibility Date).

(3) The income level for eligibility is based on a percentage of the Federal Poverty Level Guidelines currently published by the U.S. Health and Human Services and adopted by the Texas Department of Health (department). Priority levels are based on available funds and may be adjusted by the department in order to meet budgetary limitations. Priority levels are as follows.

(A) Priority 1 - 100% or below;

(B) Priority 2 - 101% - 115%;

(C) Priority 3 - 116% - 130%;

(D) Priority 4 - 131% - 145%;

(E) Priority 5 - 146% - 160%;

(F) Priority 6 - 161% - 185%; or

(G) Priority 7 - 186% - 200%.

§37.116. Limitations and Benefits Provided.

(a) The Hemophilia Assistance Program (HAP) provides limited reimbursement to participating providers for blood derivatives, blood concentrates, and manufactured pharmaceutical products indicated for the treatment of hemophilia and prescribed to eligible recipients for use in medical or dental facilities or in the home.

(b) All HAP benefits are limited to those prescribed by a licensed physician and received in Texas from a participating provider.

(c) Depending on the recipient's eligibility status, HAP will pay for allowable products based upon:

(1) available funds;

(2) established limits for allowable products by type or category of product; and

(3) the reimbursement rates established by the Texas Department of Health (department).

(d) Recipients eligible for coverage of allowable products under a private/group health insurance plan are not eligible to receive HAP benefits. A recipient that has exhausted this coverage may be eligible to receive benefits from HAP.

(e) To meet budgetary limitations, the department may:

(1) adjust the priority level for receipt of benefits, as outlined in §37.115(3) of this title (relating to Financial Criteria);

(2) adjust the reimbursement rates established by the department;

(3) restrict the allowable products paid for under the HAP;

(4) adjust the established limits for allowable products;

(5) adjust the limits established based on the inhibitor status of the recipient or applicant;

(6) limit the number of providers approved to participate in the HAP; or

(7) establish a waiting list of persons eligible for HAP. Appropriate information will be collected from each applicant who is placed on a waiting list. The information will be used to facilitate contacting the applicant when benefits become available and to allow efficient enrollment of the applicant for those benefits.

§37.117. Participating Providers.
In order for a provider to qualify for participation in the Hemophilia Assistance Program (HAP), the provider shall meet the following criteria:

(1) enter into an agreement to participate in HAP;

(2) submit a completed HAP provider enrollment form to HAP;

(3) be a current Texas Medicaid provider;

(4) reimburse HAP for any overpayments made to the provider by HAP upon request; and

(5) not currently be on suspension as a HAP provider or a Texas Medicaid provider.

§37.118. Forms.
Forms which have been developed by the Texas Department of Health (department) for use in the Hemophilia Assistance Program (HAP) will be provided to applicants, recipients and providers, as necessary.

§37.119. Confidentiality of Information.
(a) All information required by this chapter to be submitted may be verified at the discretion of the Texas Department of Health (department) and without notice to the applicant or recipient of benefits of the Hemophilia Assistance Program (HAP), or to the providers of HAP services. This information is confidential to the extent authorized by law.

(b) Information may be disclosed in summary, statistical, or other forms which do not identify particular individuals.

This 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-200400325
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 61. CHRONIC DISEASES
SUBCHAPTER B. DIABETIC EYE DISEASE DETECTION INITIATIVE

25 TAC §§61.21 - 61.24

The Texas Department of Health, Diabetes Program/Council proposes amendments to §§61.21 - 61.24, concerning the Diabetic Eye Disease Program (DEDP). The amended sections update language, clarify eligibility requirements and procedures for eligible persons, and update program benefits.

The sections are being amended to comply with Government Code, §2001.039, that requires a state agency to review a rule not later than the fourth anniversary of the date on which the rule takes effect and every four years after that date. The department has reviewed the rules and has determined that revisions are necessary in order to reflect changes in program administration.

Health and Safety Code, Chapter 103, §103.013(a), "Texas Diabetes Council," requires the Texas Diabetes Council to "develop and implement a state plan for diabetes treatment." Health and Safety Code, Chapter 103, §103.013(c), states that "The council shall make written recommendations for performing its duties under this chapter to the (board) and the legislature. If the council considers a recommendation that will affect an agency not represented on the council, the council shall seek the advice and assistance of the agency before taking action on the recommendation. The council's recommendations shall be implemented by the agencies affected by the recommendations." Furthermore, Health and Safety Code, §103.014(e), states "the department shall accept funds appropriated for the purposes of this chapter and shall allocate those funds." The Diabetes Program budget has included funds for the DEDP since 1989, and the council at its October 2003, meeting approved of these changes to the rules.

A notice of intent to review for §§61.21 - 61.24 was published in the January 7, 2000, issue of the *Texas Register* (25 TexReg 218). No comments were received as a result of publication of the notice.

The proposed amendments to §61.21 update language, provide current contact information, and clarify the scope of coverage.

The proposed amendments to §61.22 clarify patient/client eligibility criteria and change the financial eligibility reference from the department's guidelines for clinical health services to the HHS-TDH poverty guidelines.

The proposed amendments to §61.23 include editorial changes and clarify that the reimbursement rate for funduscopic eye exams is up to $60 as recommended by the Texas Diabetes Council rather than the previously published $40.

The proposed amendments to §61.24 are editorial for consistent terminology and provide updated contact information.

At their public meeting in El Paso on October 16, 2003, the Texas Diabetes Council approved these proposed amendments to affirm previous recommendations on provider reimbursement and client financial eligibility and to update the language overall regarding diabetes and the use of TDH-HHS poverty guidelines.

Jan Ozias, Program Director, has determined that for each year of the first five years the sections are in effect, there are no foreseeable fiscal implications to state or local government as a result of enforcing or administering the sections as proposed. The program can increase payment rate to providers and limit the number of referral forms available annually statewide in order to not exceed the budget for this function within the Diabetes Program allocation.

Dr. Ozias, has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the sections will be a more effective and efficient provision of the Diabetic Eye Disease Program. Additionally, the proposed sections will provide more specific guidance to providers and recipients. The amendments will have no adverse economic effect on small businesses or micro-businesses

because the sections do not add any new or additional requirements on either eligible providers or recipients. There is no fee for eligible providers or recipients, thus there are no economic costs to persons who are required to comply with the sections as proposed, as the purpose of the amendments are to clarify and update current requirements. There is no anticipated effect on local employment.

Comments on the proposal may be submitted to Jan Ozias, Program Director, Texas Department of Health, Diabetes Program/Council, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7490. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendments are proposed under Health and Safety Code, §103.13, which requires affected state agencies to implement recommendations of the Texas Diabetes Council; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner.

The amendments affect the Health and Safety Code, Chapter 103.

§61.21. General Information.

(a) Background. Diabetes is a major cause of blindness in the United States and in Texas. It is estimated that up to 50% of blindness due to proliferative diabetic retinopathy could be prevented, or at least delayed, by prompt detection and treatment. Annual funduscopic examinations are recommended for nearly all people with diabetes [~~diabetics~~] to detect retinopathy before vision is compromised. Unfortunately, many people [~~persons~~] with diabetes are not presently being referred to ophthalmic specialists to receive these annual examinations. While several factors contribute to the problem, lack of resources is a significant factor. The [~~It also happens that the~~] prevalence of diabetes is greater among minority populations [~~who historically have been financially disadvantaged~~]. Specifically, the prevalence of diabetes is higher [~~three to five times greater~~] among Hispanics/Latinos American Indians, Asian Americans and African Americans [~~Mexican Americans~~] than non-Hispanic whites. [~~Blacks also have a 33% higher prevalence of diabetes than non-Hispanic whites.~~] Existing evidence also [~~There is also evidence which~~] indicates that minority populations suffer disproportionately higher rates of complications from diabetes. For these reasons, the Texas Department of Health (TDH), through Texas Diabetes Program/Council funds, supports [~~is supporting~~] diabetic eye disease screening activities. [~~The diabetic eye disease detection initiative is an attempt to provide needed eye examinations to many persons with diabetes who might otherwise not receive services because of a lack of resources.~~]

(b) Introduction. The purpose of the Diabetic Eye Disease Program [~~Detection Initiative~~] is to provide dilated funduscopic examinations to eligible persons with diabetes who might otherwise not receive services so that vision-threatening conditions, such as retinopathy, can be identified and treated. These [~~Diabetes Control Program (DCP)~~] services are provided to Texas residents who are at high risk for vision loss due to diabetes, and who meet the program's [~~TDH~~] income eligibility criteria for services.

(c) Participating providers. Health care professionals [~~Persons~~] providing DEDP services [~~under the DCP~~] must have a current Texas license to practice ophthalmology [~~medicine~~] or optometry and must be in good standing with the Texas Board of Medical Examiners or Texas Board of Optometry, whichever is applicable. Persons wishing to become [~~be~~] providers should complete [~~furnish~~] the information requested on the department's fee-for-service contract and return the completed contract to the Texas Diabetes [~~Chronic Disease Prevention~~] Program, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

[~~(d) Civil rights. Providers of services under the DCP are subject to the provisions of the Federal Civil Rights Act of 1964, Public Law 88-532, and Texas Civil Statutes, Article 6252-16, so that no person will be excluded from participation in the DCP or otherwise subjected to discrimination on the grounds of race, color, or national origin.~~]

(d) [~~(e)~~] Procedures for eligible persons receiving services from the DEDP [~~DCP~~]. Individuals must be referred by [~~to~~] the staff of TDH regions, local health departments, or others who have been approved as nominators by the program [~~DCP, TDH~~]. The nominator's responsibility is to assess whether a prospective client with diabetes meets DEDP [~~DCP~~] eligibility criteria, and to [~~obtain approval from the TDH regional dental office to~~] refer the client to a participating provider. Nominators should [~~may~~] also assist in follow-up with clients and providers regarding missed appointments and any need for subsequent treatment for eye disease. [~~The regional office will confirm (usually by phone) the client's eligibility and authorize the nominator to refer the client to the participating provider of the client's choice.~~] The nominator will then refer the client and send a tracking form to the provider. This form is the written authorization for the provider to perform services. Upon completion of the client's examination, the provider will forward a copy of the tracking form to the DEDP [~~appropriate regional~~] office and retain a copy for the provider's record. If treatment is recommended and the client is to be referred to another facility for treatment, then the provider will forward a copy [~~the remaining copies~~] of the tracking form to the treatment facility. If the provider is also performing treatment, the results of the treatment will be documented on the tracking form and sent to the Texas Diabetes Program [~~DCP~~] in Austin. However, the DEDP will pay only for the funduscopic eye exam and is not authorized to pay for eyeglasses, contact lenses, any additional examinations, or any indicated follow-up care.

§61.22. Client [~~Patient~~] Eligibility.

(a) Eligible persons[~~.~~]

[~~(1)~~] [~~Eligible persons~~] include individuals with diabetes who:

(1) [~~(A)~~] meet the DEDP [~~Diabetes Control Program (DCP)~~] criteria (i.e., [~~being~~] at high risk for developing diabetic eye disease);

(2) [~~(B)~~] are not covered for funduscopic examinations from any other third-party payer; [~~and~~]

(3) [~~(C)~~] have been certified by a program nominator to have a family income at or below 150% of the TDH-HHS poverty guidelines [~~the TDH regional office as meeting eligibility requirements for DCP~~]; and

(4) reside in the State of Texas.

[~~(2) To be eligible for services, the prospective patient must meet the basic income criteria established by the Texas Department of Health and participating local health departments as described in the department's guidelines for clinical health services in §1.91(b)(1) of this title (relating to Fees for Clinical Health Services).~~]

(b) People [~~Persons~~] at high risk for diabetic eye disease. People [~~Persons~~] considered to be at high risk for diabetic eye disease include:

(1) people with type 1 diabetes [~~Type I (insulin dependent) diabetics who are 18 years of age or older and~~] who have had the disease [~~diabetes~~] for five years or longer; and

(2) all people with type 2 diabetes, regardless of when they were diagnosed [~~Type II (non-insulin dependent) diabetics~~].

§61.23. Program Benefits.

(a) Scope of services.

(1) Reimbursement will be limited to a maximum of $60 [~~$40~~] per examination for a complete dilated funduscopic examination on both eyes.

(2) These examinations will also include acuity testing, tonometry, and assessment of lens opacity[~~, and blood pressure measurement~~].

(b) Maximum allowable benefits. Maximum allowable benefits per client [~~patient~~] per year are limited to one annual screening examination. In instances where eye disease (retinopathy, maculopathy) is detected in the initial exam, a maximum of two additional follow-up exams may be administered within any given twelve month period if needed. [~~Total benefits are not to exceed $120 per patient per year~~], unless written approval is obtained from the DEDP [~~Diabetes Control Program (DCP)~~].

(c) Funding limitations. Payment will not be made for any diagnostic test, corrective lenses, or [~~for~~] treatment of eye disease.

§61.24. Payment for Services.

(a) Payee identification number. Payment for services is made to providers who have a State of Texas payee identification number. To obtain a payee identification number, providers must complete the State of Texas Application For Payee Identification Number, Form AP-107, and return it to the Texas Diabetes [~~Control~~] Program [~~DCP~~] in Austin. A form may be obtained from the Chronic Disease and Tobacco Prevention Program, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(b) Conditions for payment. The DEDP [~~DCP~~] will pay providers only for approved services that [~~which~~] have been authorized by the nominator [~~TDH regional dental office~~] prior to the performance of such services. Payment for any service will be made only after the delivery of the service. Providers must agree to accept program fees as payment in full for service rendered, although such fee may be less than [~~below~~] usual and customary charges.

(c) Time limit. The eye examination must be completed within 60 days of the service approval date and the signed tracking forms described in §61.21(e) of this title (relating to General Information) must be received by the DEDP [~~DCP~~] within 75 days of the date service was authorized.

(d) Procedures for claims payment. The procedures for claims payment shall be in accordance with the DEDP [~~department~~]-developed publication titled Manual for Providers of Services.

(e) Claim denials. Payment for eye examinations will not be made if:

(1) the patient is ineligible;

(2) the services provided were not specifically covered by benefits of the DEDP [~~DCP~~];

(3) the patient failed to appear for treatment and no service was rendered (no-shows); or

(4) claims for the same eye examination were previously paid for by the DEDP [~~DCP~~] (duplicate claims).

(f) Reconsideration of denied claims. A claim that has been denied in error by the DEDP [~~DCP~~] will be reconsidered for payment if:

(1) the original claims with the error identified and corrected is returned to the DEDP [~~DCP~~] within 30 days from receipt of the notice of denial; and

(2) the claim is accompanied by a copy of the DEDP [~~DCP~~] notice of denial.

(g) Payment of claims that [~~which~~] exceed time limit. Eye examinations must be completed within 60 days from the date services were approved and the tracking form must be forwarded to the TDH Texas Diabetes Program [~~regional dental office~~] within 75 days of the date that service was authorized. If special or extenuating circumstances exist that [~~which~~] make it impossible or impractical for the provider to complete services within that time period, such claims will be evaluated by the [~~chief,~~] Bureau of [~~Dental and~~] Chronic Disease and Tobacco Prevention, Texas Department of Health, on an individual basis, with due consideration given to the circumstances.

(h) Due process hearing. In the event the provider contract is terminated or suspended, or any claim for payment is denied following reconsideration, the provider will be afforded an opportunity for a due process hearing. The provider must request such a hearing in writing to the Chief, Bureau of [~~Dental and~~] Chronic Disease and Tobacco Prevention, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, within 10 days from the provider's receipt of notice of termination, suspension, or denial of claim for payment.

This 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 January 15, 2004.

TRD-200400288
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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CHAPTER 100. IMMUNIZATION REGISTRY

The Texas Department of Health (department) proposes the repeal of §§100.1-100.11 and new §§100.1-100.8, concerning the immunization registry.

The immunization registry is a statewide repository for immunization information on Texas children. The information is available to public health districts, local health departments, physicians, schools, child-care facilities, and parents when record request criteria are met. The proposed rules are necessary to simplify reporting immunization histories to the department and to enhance the effectiveness of the immunization registry under its current authorized legislation. As mandated by House Bill 1921, 78th Legislature, Regular Session (2003), amended Health and Safety Code, §161.007, the proposed rules will help populate the registry by relieving payors and providers of the responsibility for maintaining consent for the registry; will allow parents to submit immunization histories directly to the department; will require healthcare providers to send immunization records directly to the department; will require the department to verify parental consent for each record submitted; and will expand data access to any provider authorized to administer vaccines, payors, and state agencies with legal custody of a child.

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). The department has reviewed §§100.1-100.11 and has determined that reasons for adopting the sections continue to exist; however, a repeal of the current rules and the proposal of new rules are necessary to simplify the rules and implement House Bill 1921.

The department published a Notice of Intention to Review for §§100.1-100.11 in the *Texas Register* on May 31, 2002 (27 TexReg 4745).

Casey S. Blass, Chief, Bureau of Immunization and Pharmacy Support, has determined that for each year of the first five years the sections are in effect there will be no fiscal implications to state government as a result of enforcing and administering the sections as proposed. Additional immunization histories submitted by providers and parents will be processed using existing resources. There will be no fiscal impact on local government, because the immunization registry is a state registry maintained by the department.

Mr. Blass has also determined that for each year of the first five years the sections are in effect the public benefit anticipated through enforcement and administration of the sections as proposed will be to enhance the effectiveness of the registry by providing parents with more complete and accurate immunization histories for their children. The proposed changes will benefit small and micro- businesses such as clinics and physicians' offices by reducing confusion regarding parental consent and eliminating the responsibility for providers to maintain evidence of consent. Providers and payors will benefit from expanded access to more complete immunization histories. Providers who currently report immunization records to payors are not required to report those records to the registry. Under House Bill 1921, as reflected in the proposed rules, these providers will be required to report to the registry. There will be no impact on local employment.

Comments on the proposal may be submitted to Janie Garcia, Immunization Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7284, extension 6430, or (800) 252-9152. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

25 TAC §§100.1 - 100.11

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

The repeals are proposed under the authority of Health and Safety Code, §161.007, which gives the Texas Board of Health (board) the right to develop rules to implement the immunization registry; and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapters 12 and 161. The review of the rules implements Government Code, §2001.039.

§100.1. Definitions.
§100.2. Inclusion of Information and Confidentiality.
§100.3. Providers and Health Plans.
§100.4. Withdrawal of Consent.
§100.5. Reportable Information.
§100.6. Information Included in the Immunization Registry Prior to September 1, 1997.
§100.7. Data Quality Assurance.
§100.8. Health Plans Shall Provide Immunization History to the Department.
§100.9. Reports.
§100.10. Acceptability As An Immunization Record.
§100.11. Confidentiality.

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

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Susan K. Steeg
General Counsel
Texas Department of Health
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25 TAC §§100.1 - 100.8

The new sections are proposed under the authority of Health and Safety Code, §161.007, which gives the Texas Board of Health (board) the right to develop rules to implement the immunization registry; and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect the Health and Safety Code, Chapters 12 and 161. The review of the rules implements Government Code, §2001.039.

§100.1. Definitions.

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

(1) Child--The person or individual younger than 18 years of age to whom a vaccine has been administered.

(2) Consent--A statement signed by a parent agreeing that the child's immunization history can be included in the registry and that the child's immunization record may be released from the registry.

(3) Data elements--Consistent with 42 U.S.C. §300aa-25, as amended, data elements are defined as the information a provider who administers a vaccine is required to record in a medical record, including:

(A) the date the vaccine is administered;

(B) the type of vaccine administered, vaccine manufacturer and lot number; and

(C) the name, address, and, if appropriate, the title of the provider administering the vaccine.

(4) Department--The Texas Department of Health.

(5) Immunization history--An accounting of all vaccines that a child has received, or evidence of immunity, and other identifying information.

(6) Immunization record--An immunization record contains the name and date of birth of the person to whom a vaccine was administered; dates of vaccine administration; types of vaccine administered; and name and address of the provider that administered the vaccines; or other evidence of immunity to a vaccine-preventable disease. The report generated from the immunization registry is considered an official immunization record.

(7) Immunization registry--The database or single repository that contains immunization histories, which include necessary personal data for identification. This database is confidential, and access to content is limited to authorized users.

(8) Parent--A parent, managing conservator, or legal guardian.

(9) Payor--An insurance company, a health maintenance organization, or another organization that pays a health care provider to provide health care benefits, including the administration of vaccines to a person younger than 18 years of age.

(10) Provider--Any physician, health care professional, or facility personnel duly licensed or authorized to administer vaccines.

(11) User--An entity or individual authorized by the department to access immunization registry data.

(12) Vaccine--Includes toxoids and other immunologic agents which are administered to children to elicit an immune response and thus protect against infectious diseases.

§100.2. Confidentiality.

(a) Information that individually identifies a child, and is received by the department for the immunization registry, is confidential and may be used by the department for registry purposes only. Unless specifically authorized by Health and Safety Code, Chapter 161, Subchapter A, the department may not release registry information to any individual or entity without the written consent of the person or, if a minor, the parent.

(b) A written confidentiality statement shall be signed by an authorized representative of the user. Any user of the registry shall protect the confidentiality of all immunization histories, records, and reports. A person required to report information to the department for registry purposes or authorized to receive information from the registry may not disclose individually identifiable information to any individual or entity without the written consent of the person or, if a minor, the parent, or except as provided by the Occupations Code, Chapter 159, or the Insurance Code, Article 28B.04.

(c) Registry information is not subject to discovery, subpoena, or other means of legal compulsion for release to any person or entity, except as provided by Health and Safety Code, Chapter 161, Subchapter A. Registry information is not admissible in any civil, administrative, or criminal proceeding.

§100.3. Informing Parent, Managing Conservator, or Guardian.

(a) A parent shall be informed that the department has established and maintains a single repository of immunization records to be used in aiding, coordinating, and promoting efficient and cost-effective childhood communicable disease prevention and control efforts.

(b) The department shall provide written materials and forms to providers for the purpose of informing a parent about the immunization registry and specific information collected in that registry.

(c) The department and providers may use the registry to provide notices by mail, telephone, personal contact, or other means to a parent regarding his or her child who may be due or overdue for a particular type of immunization according to the department's immunization schedule.

(d) The first time the department receives registry data, from a person other than the child's parent, for a child for whom the department has received consent to be included in the registry, the department shall send a written notice to the parent disclosing:

(1) that providers and payors may be sending the child's immunization information to the department;

(2) the information that is included in the registry;

(3) the persons to whom the information may be released;

(4) the purpose of the registry;

(5) the procedure to exclude a child from the registry; and

(6) the procedure to report a violation if a parent discovers a child is included in the registry after exclusion has been requested.

§100.4. Registry Consent and Withdrawal.

(a) A parent may consent to the inclusion of the child's immunization history in the immunization registry by doing one of the following:

(1) indicating consent at birth certificate registration, including by electronic signature;

(2) submitting written notification to the department in a format prescribed by the department or substantially similar and mailed to the Texas Department of Health, Immunization Division, 1100 West 49th Street, Austin, Texas 78756, or by calling the Immunization Division at (800) 252-9152 to request a consent form; or

(3) completing written consent to be submitted to the department by a provider or payor.

(b) Consent is required to be obtained only one time, and is valid until the child becomes 18 years of age, unless the consent is withdrawn in writing.

(c) A parent may withdraw consent for the child to be included in the registry at any time by submitting written notification to the department in a format prescribed by the department or substantially similar and mailed to the Texas Department of Health, Immunization Division, 1100 West 49th Street, Austin, Texas 78756, or by calling the Immunization Division at (800) 252-9152 to request a consent withdrawal form. The department shall remove information from the immunization registry for any person for whom consent has been withdrawn, and the department shall send the parent a written confirmation of the removal of the information. The department may not retain individually identifiable information about any person for whom consent has been withdrawn.

(d) A parent may request exclusion of the child's immunization history from the immunization registry by doing one of the following:

(1) indicating the request for exclusion at birth certificate registration, including by electronic signature; or

(2) submitting written notification to the department in a format prescribed by the department or substantially similar and mailed to the Texas Department of Health, Immunization Division, 1100 West 49th Street, Austin, Texas 78756, or by calling the Immunization Division at (800) 252-9152 to request an exclusion form. On receipt of a written request to exclude a child's immunization records from the registry, the department shall send the parent a written confirmation of

receipt of the request, and shall exclude the child's records from the registry. The department may not retain individually identifiable information about any person for whom an exclusion has been requested.

§100.5. Receipt and Release of Registry Data.

(a) The department may obtain the data constituting an immunization record for a child from a public health district, a local health department, the child's parent, a physician to the child, a payor, or any health care provider licensed or otherwise authorized to administer vaccines.

(b) Effective January 1, 2005, the department shall verify consent before including information received from a person other than the child's parent in the immunization registry. Effective January 1, 2005, the department may not retain individually identifiable information about a person for whom consent cannot be verified.

(c) The department may release the data constituting an immunization record for a child to any entity that is described by subsection (a) of this section to a school or child care facility in which the child is enrolled, or to a state agency having legal custody of the child.

(d) A person, including a provider, a payor, or an employee of the department, that submits in good faith an immunization history or data to or obtains in good faith an immunization history or data from the department in compliance with this section is not liable for any civil damages.

(e) The department may release nonidentifying summary statistics related to the registry that do not individually identify a child.

§100.6. Reporting to the Registry.

(a) Data elements regarding an immunization record provided to the department, whether electronically or by other means, shall be submitted in a format prescribed by the department.

(b) Effective January 1, 2005, a health care provider who administers an immunization to a person younger than 18 years of age shall provide data elements regarding an immunization to the department within 30 days of administration of the vaccine. Effective January 1, 2005, the department shall verify consent before including the reported information in the immunization registry, and the department may not retain individually identifiable information about a person for whom consent cannot be verified. For immunizations administered prior to January 1, 2005, providers shall provide an immunization history for persons for whom consent to participate in the registry has been obtained unless the immunization history is submitted to a payor.

(c) Effective January 1, 2005, a payor that receives data elements from a provider who administers an immunization to a person younger than 18 years of age shall provide the data elements to the department within 30 days of receipt of the data elements from a provider. Effective January 1, 2005, the department shall verify consent before including the reported information in the immunization registry, and the department may not retain individually identifiable information about a person for whom consent cannot be verified. For immunizations administered prior to January 1, 2005, payors shall provide an immunization history for persons for whom consent to participate in the registry has been obtained.

(d) A parent may provide evidence of a child's immunization history, in a format provided by the department or one substantially similar, directly to the department for inclusion in the registry. The department shall ensure that the immunization history submitted by a parent is medically verified immunization information by requiring the parent to submit evidence that includes a copy of one or more of the following:

(1) the child's medical record indicating the immunization history and including a provider's signature and the name and address of the provider;

(2) A vaccine-specific invoice from a health care provider for the immunization;

(3) vaccine-specific documentation showing that a claim for the immunization was paid by a payor;

(4) an immunization record signed by a school official; or

(5) an immunization history provided by a local or state immunization registry.

(e) The department shall provide notice to a provider that submits an immunization history for a person for whom consent cannot be verified. The notice shall contain instructions for obtaining consent and resubmitting the immunization history to the department.

(f) A provider shall, upon request of the department, provide additional information to clarify an immunization history submitted to the department.

(g) The department shall provide instruction and education to providers about the immunization registry provider application and enrollment process and expedite processing of provider applications.

§100.7. Official Immunization Record.

An immunization record obtained from the immunization registry shall be accepted as an official immunization record of the child.

§100.8. Complaints.

(a) A person may file a complaint with the department related to the department's failure to comply with a request for exclusion of an individual from the registry by mailing written notification to: Director, Immunization Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756; or by e-mail to the attention of Director, Immunization Division at feedback.ImmDirector@tdh.state.tx.us. The department shall respond to the written complaint within 30 days of receipt of the complaint.

(b) A person may report an incident of discrimination for requesting exclusion of an individual from the registry, or for using an exemption for a required immunization, by mailing written notification to: Director, Immunization Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756; or by e-mail to the attention of Director, Immunization Division at feedback.ImmDirector@tdh.state.tx.us. The department shall respond to the written notification within 30 days of receipt of the notification.

(c) The department shall report to the Legislative Budget Board, the governor, the lieutenant governor, the speaker of the house of representatives, and appropriate committees of the legislature not later than September 30 of each even-numbered year. The report shall:

(1) include the number of complaints received by the department related to the department's failure to comply with requests for exclusion of individuals from the registry; and

(2) identify all reported incidents of discrimination for requesting exclusion of individuals from the registry or for using an exemption for a required immunization.

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

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Susan K. Steeg
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Texas Department of Health
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CHAPTER 117. END STAGE RENAL DISEASE FACILITIES

The Texas Department of Health (department) proposes the repeal of §§117.3, 117.11 - 117.14, new §§117.11 - 117.14, and amendments to §§117.15, 117.16 and 117.84, concerning the regulation of end stage renal disease facilities. The amendments and new sections are required as a result of the provisions of Senate Bill (SB) 1152, which amended Government Code, Chapter 2054, regarding the Texas Online Authority; the revisions to the Health and Safety Code (HSC), Chapter 251, required by Senate Bill 162, adding probation as a new penalty alternative; and House Bill 2292, 78th Legislature, 2003, which revised HSC, §12.0111 and §12.0112, regarding fees for two-year license cycles.

Specifically, the sections proposed for repeal address licensing fees, general requirements for a license, application and issuance of a temporary initial license and first annual license, application and issuance of annual renewal license, and change of ownership or services. The proposed new sections cover general requirements for a license, application and issuance of initial license, application and issuance of renewal license, and fees. The proposed repeal of existing rules and proposed new sections allows for the reorganization and renumbering of the sections for clarification, and for the inclusion of language to implement the provisions of the new legislation. New §117.13 addresses the conversion to two-year license cycles beginning January 1, 2005. New §117.14 includes fees for both 12-month and two-year license renewal cycles, and for the recovery of costs associated with application and renewal application processing through TexasOnline. The amendment to §117.15 updates references to other sections. Amendment to §117.16 eliminates unnecessary language and clarifies that inspections are conducted to determine compliance with HSC, Chapter 251, and this chapter. The amendment to §117.84 addresses the addition of probation and emergency suspension to the list of enforcement actions that can be taken against a facility.

Lisa Subia, Associateship for Consumer Health Protection, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications to state government as a result of the administering the sections as proposed. This impact is related to the conversion to the two-year license renewal cycle. For Fiscal Year (FY) 2005, which will be the first year in a two-year phase-in process for the two-year renewal cycle, there will be a temporary increase in revenue to approximately $1,082,242. This estimate is based on the fact that during FY 2005, one-half of the facilities will be renewing their licenses to be effective for two years, and will pay a corresponding fee to cover the two-year period (this amount will be double the amount collected during FY 2004 for this group of facilities). The remainder of the facilities will be renewing their licenses for a one-year period in FY 2005, which will result in the estimated additional revenue. This second group of facilities will renew their licenses for the two-year period in FY 2006, so the anticipated revenue will return to the FY 2004 level, and there will be no anticipated fiscal impact for Fiscal Years 2006 through 2009. There will be no fiscal impact for local government.

Ms. Subia has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to insure compliance by end stage renal disease (ESRD) facilities with new legislative mandates. There will be economic costs for micro-businesses, small businesses, and persons who are required to comply with the amended sections. These costs are related to the conversion to two-year license renewal cycles. The current license fees range from a minimum of $1,000 to a maximum of $2,500, based on the number of treatments for the preceding 12 months. Once conversion to the two-year license renewal cycle begins, an ESRD facility will be required to pay the license fee for the two-year period. The new two-year fee structure will require facilities to pay fees based on the number of treatments administered that will range from a minimum of $2,000 to a maximum of $5,000. Senate Bill 1152, 78th Legislature, Regular Session, 2003, directs all departments that administer licensing programs to participate in Texas Online, an electronic fee payment system developed and maintained by the Texas Online Authority. Wording is added that authorizes the department to collect subscription and convenience fees, in amounts to be determined by the Texas Online Authority, to recover costs associated with application and renewal application processing. There will be no anticipated impact on local employment.

Comments may be submitted to Cindy Bednar, Director of Licensing Programs, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6646. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §117.3

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

The repeal is proposed under Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each level of license; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and commissioner of health.

The repeal affects the Health and Safety Code, Chapters 251 and 12.

§117.3. Licensing Fees.

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

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Susan K. Steeg
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Texas Department of Health
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SUBCHAPTER B. APPLICATION AND ISSUANCE OF A LICENSE

25 TAC §§117.11 - 117.14

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

The repeals are proposed under Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each level of license; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and commissioner of health.

The repeals affect the Health and Safety Code, Chapters 251 and 12.

§117.11. General Requirements for a License.

§117.12. Application and Issuance of Temporary Initial License and First Annual License.

§117.13. Application and Issuance of Annual Renewal License

§117.14. Change of Ownership or 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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General Counsel
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SUBCHAPTER B. FACILITY LICENSING

25 TAC §§117.11 - 117.16

The amendments and new sections are proposed under Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each level of license; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and commissioner of health.

The amendments and new sections affect the Health and Safety Code, Chapters 251 and 12.

§117.11. General Requirements for a License.

(a) License required. A facility shall obtain a license prior to admitting patients.

(b) Display. A facility shall prominently and conspicuously display the license in a public area of the licensed premises that is readily visible to patients, employees, and visitors.

(c) Alteration. A facility license shall not be altered.

(d) Transfer or assignment prohibited. A facility license shall not be transferred or assigned. The facility shall comply with the provisions of §117.12(h) of this title (relating to Application and Issuance of Initial License) in the event of a change in the ownership.

(e) Changes which affect the license.

(1) A facility shall notify the department in writing prior to the occurrence of any of the following:

(A) any construction, renovation, or modification of the facility buildings;

(B) cessation of operation of the facility; or,

(C) change in facility name, telephone number or administrator.

(2) A facility shall obtain written approval from the department prior to the utilization of added services or an increased number of stations. The written request shall be submitted 30 calendar days prior to the planned change.

(A) For an additional service or increase in stations, the department may request that the facility provide evidence of appropriate staffing and policies and procedures which demonstrate the intent to comply with the applicable requirements, and any other documentation it determines is necessary to evaluate the request.

(B) For an increase in stations, the facility shall also be required to submit written evidence that the water treatment system is of sufficient size to accommodate the increase and maintain a safe water supply.

(C) The department may conduct on on-site inspection prior to taking action on the requested change.

(D) No later than three weeks after initiating the use of the new stations, the facility is required to complete chemical and bacteriological cultures of the product water to ensure they are in compliance with §4.2.1 (relating to Water Bacteriology) and §4.2.2 (relating to Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the Association for the Advancement of Medical Instrumentation, 1110 North Glebe Road, Suite 200, Arlington, Virginia 22201, 703-525-4890. Deviations from acceptable levels must be immediately reported to the department. The reports must be kept on file at the facility and made available to department staff during the next on-site inspection.

(3) The department shall send the facility written notice of the approval or disapproval of the requested change.

(f) Facility relocation.

(1) A facility planning to relocate shall notify the department a minimum of 60 days prior to the planned relocation. Relocations must be within the same geographical area, and services shall continue to be provided to the facility's existing patient population.

(2) The facility shall submit the following to the department:

(A) a copy of a current fire safety survey indicating approval by the local fire authority in whose jurisdiction the new location is based;

(B) results of chemical and bacteriological cultures of the product water at the new location to ensure they are in compliance with §§4.2.1 (relating to Water Bacteriology) and 4.2.2 (relating to Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the Association for the Advancement of Medical Instrumentation, 1110 North Glebe Road, Suite 200, Arlington, Virginia 22201, (703) 525-4890;

(C) documentation verifying compliance with paragraph (1) of this subsection; and

(D) a written plan for the orderly transition of all patient services to the new location.

(3) The department shall conduct the design and space inspection described in §117.16(b)(1)(A) of this title (relating to Inspections) prior to issuance of the initial license, unless the department waives the requirement.

(4) The department may conduct additional on-site inspections, or request additional information, before approving the relocation.

(5) The department will notify the facility in writing of the approval or disapproval of relocation. If approved, the license will be reissued for the new location effective on the day that patient services are transferred to the new location.

§117.12. Application and Issuance of Initial License.

(a) Application submittal. The applicant shall submit the following documents to the department no earlier than 60 calendar days prior to the projected opening date of the facility:

(1) an accurate and complete application form;

(2) an approved fire safety report from the local fire authority; and

(3) the appropriate license fee as required in §117.14 of this title (relating to Fees).

(b) Design and space inspection. The department shall conduct the design and space inspection described in §117.16(b)(1)(A) of this title (relating to Inspections) prior to issuance of the initial license, unless the department waives the requirement.

(c) Presurvey conference. The applicant or the applicant's representative shall attend a presurvey conference at the office designated by the department. The purpose of the presurvey conference, which is conducted by department staff, is to review facility staff qualifications, facility policies and procedures, results of water cultures and analysis of product water, survey documents and licensure rules, and to provide consultation prior to the on-site licensure survey. The department staff conducting the presurvey conference is responsible for making a recommendation regarding the issuance of the initial license. The department may waive the presurvey conference requirement.

(d) Issuance of license. When it is determined that the facility has complied with subsections (a)-(c) of this section, the department shall issue the license to the applicant.

(1) Effective date. The license shall be effective on the date the facility is determined to be in compliance with subsections (a)-(c) of this section.

(2) Expiration date.

(A) For initial licenses issued prior to January 1, 2005.

(i) If the effective date of the license is the first day of a month, the license expires on the last day of the 11th month after issuance.

(ii) If the effective date of the license is the second or any subsequent day of a month, the license expires on the last day of the 12th month after issuance.

(B) For initial licenses issued January 1, 2005, or after.

(i) If the effective date of the license is the first day of a month, the license expires on the last day of the 23rd month after issuance.

(ii) If the effective date of the license is the second or any subsequent day of a month, the license expires on the last day of the 24th month after issuance.

(e) Withdrawal of application. If an applicant decides not to continue the application process for a license or renewal of a license, the application may be withdrawn. The department shall acknowledge receipt of the request to withdraw.

(f) Denial of a license. Denial of a license shall be governed by §117.84 of this title (relating to Enforcement).

(g) Inspections. During the initial licensing period, the department shall conduct an inspection of the facility to ascertain compliance with the provisions of the Health and Safety Code, Chapter 251, and this chapter.

(1) A facility shall request an on-site inspection to be conducted after one inpatient has been admitted and provided services.

(2) A facility shall be providing services to at least one inpatient in the facility at the time of the inspection.

(h) Change of ownership. A change of ownership occurs when there is a change in the person legally responsible for the operation of the facility, whether by lease or by ownership. If a corporate licensee amends its articles of incorporation to revise its name and the tax identification number does not change, this subsection does not apply, except that the corporation must notify the department within 10 calendar days after the effective date of the name change. The sale of stock of a corporate licensee does not cause this subsection to apply. A change of ownership requires submission of an initial license application.

(1) The new owner shall submit an application for an initial license to the department prior to the date of the change of ownership or not later than 10 calendar days following the date of a change of ownership. The application shall be in accordance with subsections (a) - (c) of this section. The applicant shall include the effective date of the change of ownership.

(2) Inspections. The design and space and health inspections required by subsections (b) and (g) of this section may be waived by the department.

(3) Issuance of license. When the new owner has complied with the provisions of subsections (a) - (c) of this section, the department shall issue a license which shall be effective the date of the change of ownership.

(4) Expiration of license. The expiration date of the license shall be in accordance with subsection (d) of this section.

(5) License void. The previous owner's license shall be void on the effective date of the new owner's license.

(i) Temporary initial license. The department may issue a temporary initial license in lieu of the initial license.

§117.13. Application and Issuance of Renewal License.

(a) Renewal notice. The department may send a renewal notice to a facility up to 60 calendar days before the expiration date of a license.

(1) If the facility has not received the renewal notice from the department within 30 calendar days prior to the expiration date, it is the duty of the facility to notify the department and request a renewal application for a license.

(2) If the facility fails to submit the application and fee within 15 calendar days prior to the expiration date of the license, the department shall send to the facility a letter advising that unless the license is renewed, the facility must cease operations upon the expiration of the license.

(b) Renewal license. The department shall issue a renewal license to a facility that meets the minimum requirements for a license.

(1) The facility shall submit the following to the department prior to the expiration date of the license:

(A) a complete and accurate application form;

(B) a copy of a fire safety survey indicating approval by the local fire authority in whose jurisdiction the facility is based that is dated no earlier than one year prior to the application date;

(C) the renewal license fee; and

(D) verification that the facility submitted the annual reports required by §117.42 of this title (relating to Indicators of Quality of Care).

(2) The department may conduct an inspection prior to issuing a renewal license in accordance with §117.16 of this title (relating to Inspections).

(3) Renewal licenses issued prior to January 1, 2005, will be valid for 12 months.

(4) Renewal licenses issued January 1, 2005, through December 31, 2005, will be valid for either 12 or 24 months, to be determined by the department prior to the time of license renewal.

(5) Renewal licenses issued January 1, 2006, or after will be valid for 24 months.

(c) Notice to cease operation and return license. If a facility fails to submit the application, documents, and fee by the expiration date of the license, the department shall notify the facility that it must cease operation and immediately return the license by certified mail to the department. If the facility wishes to provide services after the expiration date of the license, it shall apply for a license under §117.12 of this title (relating to Application and Issuance of Initial License).

§117.14. Fees.

(a) General.

(1) All fees paid to the department are nonrefundable.

(2) All fees shall be paid to the department.

(b) License fees.

(1) The fee for an initial license is $2,000 per 12-month period.

(2) Renewal license fees.

(A) For renewal licenses issue prior to January 1, 2005, the license fee is determined by multiplying the number of treatments in the previous 12-month period by $.25, except that the minimum fee is $1,000 and the maximum fee is $2,500.

(B) For renewal licenses issued January 1, 2005 or later, the license fee will be determined as follows.

(i) For licenses that the department determines will be valid for 12 months, the license fee is the total number of treatments in the past 12-month period multiplied by $.25, except that the minimum fee is $1,000 and the maximum fee is $2,500.

(ii) For licenses that the department determines will be valid for 24 months, the license fee is the total number if treatments in the past 12-month period multiplied by $.50, except that the minimum fee is $2,000 and the maximum fee is $5,000.

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

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

(a) General.

(1) (No change.)

(2) An application for an [~~a temporary~~] initial license [~~and first annual license~~] is complete when the department has received, reviewed, and found acceptable the information described in §117.12 of this title (relating to Application and Issuance of [~~Temporary~~] Initial License [~~and First Annual License~~]).

(3) An application for an annual renewal license is complete when the department has received, reviewed and found acceptable the information described in §117.13 of this title (relating to Application and Issuance of [~~Annual~~] Renewal License).

[~~(4) An application for a change of ownership license is complete when the department has received, reviewed, and found acceptable the information described in §117.14 of this title (relating to Change of Ownership or Services).~~]

(b) Time Periods. An application from a facility for an [~~a temporary~~] initial license [~~and a first annual license~~] or a [~~an annual~~] renewal license shall be processed in accordance with the following time periods.

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

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

(e) Hearings. If a hearing is proposed during the processing of the application, the hearing shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the department's formal hearing procedures in Chapter 1 of the title (relating to the Texas Board of Health) [~~time periods in §1.34 of this title (relating to Time Periods for Conducting Contested Case Hearings) are applicable~~].

§117.16. Inspections.

(a) General. The Texas Department of Health (department) may conduct an inspection at any time to verify compliance with the statute or this chapter. By applying for or holding a license, the facility consents to entry and inspection of the facility by the department or representative of the department in accordance with the statute and this chapter.

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

[~~(3) An inspection conducted by the department shall be in accordance with the procedures set out in subsection (i) of this section.~~]

(b) Types of inspections.

(1) (No change.)

(2) Initial inspection for the issuance of the initial [~~first annual~~] license. A department surveyor may [~~shall~~] conduct an initial inspection after the date of issuance of the [~~temporary~~] initial license to determine if the facility meets the requirements of the statute and this chapter [~~for licensing~~]. The initial inspection is an evaluation of compliance with all requirements of the statute and this chapter.

(3)-(7) (No change.)

(c) Inspection procedures.

(1) (No change.)

(2) Evaluation of compliance. Except for the purposes of conducting an inspection under subsection (b)(1), (4), (6), or (7) of this section, an onsite inspection will include an evaluation to determine compliance with the statute and this chapter. [~~, at a minimum, each of the requirements in:~~]

[~~(A) §117.32 of this title (relating to Equipment);~~]

[~~(B) §117.33 of this title (relating to Water Treatment, Dialysate Concentrates and Reuse);~~]

[~~(C) §117.34 of this title (relating to Sanitary Conditions and Hygienic Practices);~~]

[~~(D) §117.41 of this title (relating to Quality Assurance for Patient Care);~~]

[~~(E) §117.43 of this title (relating to Provision and Coordination of Treatment and Services);~~]

[~~(F) §117.44 of this title (relating to Qualifications of Staff);~~]

[~~(G) §117.45 of this title (relating to Clinical Records);~~]

[~~(H) §117.46 of this title (relating to Reports to the Director);~~]

[~~(I) §117.61 of this title (relating to General Requirements);~~]

[~~(J) §117.62 of this title (relating to Training Curricula and Instructors);~~]

[~~(K) §117.63 of this title (relating to Competency Evaluation);~~]

[~~(L) §117.64 of this title (relating to Documentation of Competency); and~~]

[~~(M) §117.65 of this title (relating to Prohibited Acts).~~]

(3) (No change.)

(4) Written notice of findings.

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

(C) If the written notice of findings includes deficiencies, the department and the facility shall comply with the procedure set out in this subparagraph.

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

(vi) The facility may challenge any deficiency cited after receipt of the statement of deficiencies. A challenge to a deficiency(ies) shall be in accordance with this subparagraph.

(I)-(V) (No change.)

(VI) If the facility does not come into compliance by the required date of correction reflected on the corrective action plan(s), the department may:

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

(-c-) propose to deny, suspend, or revoke the license in accordance with §117.84 of this title (relating to Enforcement [~~Disciplinary Action~~]).

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

(VII)-(IX) (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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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER F. CORRECTIVE ACTION PLAN AND ENFORCEMENT

25 TAC §117.84

The amendment is proposed under Health and Safety Code, §251.003, concerning rules and minimum standards to protect and promote the public health and welfare by providing for the issuance, renewal, denial, suspension, and revocation of each level of license; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and commissioner of health.

The amendment affects the Health and Safety Code, Chapters 251 and 12.

§117.84. Enforcement [~~Disciplinary Action~~].

(a) The department may deny, suspend, or revoke a license if the applicant or facility:

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

(4) aids, abets, or permits the commission of an illegal act; [~~or~~]

(5) fails to comply with an order of the commissioner of health or another enforcement procedure under the statute; or [~~,~~]

(6) fails to comply with applicable requirements within a designated probation period.

(b) (No change.)

(c) The department may suspend or revoke an existing valid license or disqualify a person from receiving a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a licensed facility.

(1) In determining whether a criminal conviction directly relates, the department shall consider the provisions of Texas Occupations Code, §§53.022 and 53.023 [~~Civil Statutes, Article 6252-13c~~].

(2) The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or a tendency for the person to be unable to own or operate a facility:

(A)-(F) (No change.)

(G) other misdemeanors and felonies which indicate an inability or tendency for the person to be unable to own or operate a facility if action by the department will promote the intent of the statute, this chapter, or Texas Occupations Code, §§53.022 and 53.023 [~~Civil Statutes, Article 6252-13c~~].

(3) (No change.)

(d)-(g) (No change.)

(h) The department may issue an emergency order to suspend a license issued under this chapter if the department has reasonable cause to believe that the conduct of a license holder creates an immediate danger to the public health and safety.

(1) An emergency suspension is effective immediately without a hearing or notice to the license holder.

(2) On written request of the license holder, the department shall conduct a hearing not earlier than the 10th day or later than the 30th day after date the hearing request is received to determine if the emergency suspension is to be continued, modified, or rescinded. The hearing and any appeal are governed by the department's rules for a contested case hearing and Government Code, Chapter 2001.

(i) The department may schedule the facility for a probation period of not less than 30 days if the facility is found in repeated non-compliance, and the facility's non-compliance does not endanger the health and safety of the public.

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

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CHAPTER 157. EMERGENCY MEDICAL CARE

The Texas Department of Health (department) proposes amendments to §§157.1, 157.11, 157.14, 157.32-157.34, 157.38, 157.40, 157.43, 157.44, 157.49, 157.122, and 157.125, concerning regulation of EMS certificants, licensees, providers, training institutions, educators and EMS/Trauma systems, the repeal of §157.4, concerning request for EMS training at the local level, the repeal of §157.31, concerning automated external defibrillator training course, §157.123, concerning regional emergency medical services/trauma systems, and §157.129, concerning state trauma registry, new §157.4 concerning regulatory audit activities by the Bureau of Emergency Management and new §157.123, concerning regional emergency medical services/trauma systems. Specifically, the sections cover purpose; audits; provider licenses; disciplinary actions; training and course approval; personnel certification, Regional/EMS trauma systems, trauma facility designation and the trauma care system fund.

Rule amendments regarding licensing fees are required as a result of revisions to Chapter 12 of the Texas Health and Safety Code, §12.0111 and §12.0112, pursuant to House Bill (HB) 2292 of the 78th Regular Session of the Texas Legislature. Rule amendments for the clarification of standards for regional advisory councils are required as a result of revisions to Chapter 773 of the Texas Health and Safety Code, §773.113, pursuant to Senate Bill 530 of the 78th Regular Session of the Texas Legislature. Rule amendments for clarification of standards for emergency care attendants are required as a result of revisions to Chapter 773 of the Texas Health and Safety Code, §773.046, pursuant to HB 861 of the 78th Regular Session of the Texas Legislature.

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 Procedures Act). The sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist; however, revisions to the sections are necessary and described in this preamble. Authority for the board to propose and adopt rules in this section is found in the Health and Safety Code, Chapter 773.

The department published a Notice of Intention to review and consider for readoption, revision, or repeal Chapter 157, Emergency Medical Care, Subchapter A, Emergency Medical Services - Part A, §§157.1 - 157.4; Subchapter B, Emergency Medical Services Provider Licenses, §§157.11 - 157.14, 157.16, and 157.25; Subchapter C, Emergency Medical Services Training and Course Approval, §§157.31 - 157.34, 157.36 - 157.38, 157.40, and 157.41; Subchapter D, Emergency Medical Services Personnel Certification, §§157.43, 157.44, and 157.49; and Subchapter G, Emergency Medical Services Trauma Systems, §§157.122, 157.123, 157.125, and 157.128 - 157.130 in the September 12, 2003, issue of the *Texas Register* (28 TexReg 8013). There were no comments received due to the publication of the notice.

Kathryn C. Perkins, Bureau Chief of the Bureau of Emergency Management, has determined that for first five years the sections are in effect, there will be fiscal implications to state and local government as a result of administering the sections as proposed. The impact is related to proposed fee increases as authorized by HB 2292 in the 78th Regular Session of the Texas Legislature. Proposed fees represent a 20% increase which will result in an estimated increase of $280,000 per year in revenue.

Kathryn C. Perkins has also determined that for each year of the first five years the proposed sections are in effect the public health benefit anticipated as a result of these amendments and repeal will be increased standards for the certification or licensure of EMS personnel, providers, training institutions and educators. There is an anticipated cost to small businesses, micro-businesses and to persons who are required to comply with the sections as proposed, because the rules make additional requirements of providers, except those that are exempt under the given rules. There is an increase in the fee charged for a certification or license. One proposed section also authorizes an increase on administrative penalties that may be imposed on course coordinators for violations of the Health and Safety Code. There is no anticipated effect on local employment.

Comments on the proposal may be submitted to Kathryn C. Perkins, Chief, Bureau of Emergency Management, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 834-6700, or kathy.perkins@tdh.state.tx.us. Comments will be accepted for 30 days after publication of the proposal in the *Texas Register*.

SUBCHAPTER A. EMERGENCY MEDICAL SERVICES - PART A

25 TAC §157.1, §157.4

The amendment and new section are proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The amendment and new section affect the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.1. Purpose.

(a) (No change.)

(b) This chapter will provide minimum requirements for an emergency medical services (EMS) provider license; authorization [~~categorization~~] of EMS vehicles; emergency suspension, reprimand, suspension, probation, revocation, or denial of an EMS provider license; first responder organizations; EMS personnel certification and licensure; interstate reciprocity for EMS certification; EMS personnel recertification or relicensure; continuing education requirements; course coordinator and program instructor certification; disciplinary action for EMS personnel, course coordinators and program instructors; EMS training courses and course approval; Emergency Medical Information Operator training, instructor training, course approval and certification; certification or licensure of persons with criminal backgrounds; Out-of-Hospital Do-Not-Resuscitate orders; automated external defibrillators; requests for emergency care attendant training; fees; the establishment of trauma service areas; the establishment of regional EMS/trauma systems; requirements for trauma facility designation; and disciplinary actions for designated trauma facilities.

§157.4. Audits.

(a) The department may randomly and for cause audit the records relating to licensing or certification of individuals and/or entities which are currently certified or licensed by the department or which have applied for certification or licensure by the department.

(b) The department may automatically audit certified or licensed EMS personnel or entities shown to be non-compliant in an immediately preceding audit.

(c) Failure to notify the department of a current mailing address shall not absolve the certificant, licensee or entity from audit requirements.

(d) Within 20 business days following notification of audit, certified or licensed EMS personnel or licensed entities shall submit documentation as specified by the department to verify compliance with any requirement set forth in Chapter 773 of the Texas Health and Safety Code or of the rules in this title.

(e) Falsification of documentation shall be cause for reprimand, probation, suspension, or revocation of a certificate, license, provider license or EMS program/course approval in accordance with §157.16 of this title (relating to Emergency Suspension, Suspension, Probation, Revocation or Denial of a Provider License); and/or §157.32 of this title (relating to Emergency Medical Services Education Program and Course Approval); and/or §157.34 of this title (relating to Recertification); and/or §157.36 of this title (relating to Criteria for Denial and Disciplinary Actions for EMS Personnel and Voluntary Surrender of a Certificate or License); and/or §157.38 of this title (relating to Continuing Education); and/or §157.43 of this title (relating to Course Coordinator Certification); and/or §157.44 of this title (relating to Emergency Medical Service Instructor Certification).

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

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Susan K. Steeg
General Counsel
Texas Department of Health
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25 TAC §157.4

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

The repeal is proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.4. Request for EMS Training at the Local Level.

This 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. EMERGENCY MEDICAL SERVICES PROVIDER LICENSES

25 TAC §157.11, §157.14

The amendments are proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The amendments affect the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.11. Requirements for an EMS Provider License.

(a) Application requirements for an Emergency Medical Services (EMS) Provider License.

(1) Candidates for an EMS provider license shall submit a completed application (application, all other required information described in a provider licensing instruction document provided by the Texas Department of Health (department) and a nonrefundable [~~an~~] fee) to the department.

(2) A nonrefundable application fee of $500 plus $180 for each EMS vehicle to be operated under the license shall accompany the application. The department will implement the fee requirement for initial applicants 20 days following adoption of the rule and at the time of the next re-license period of currently certified licensed providers following adoption. [~~The nonrefundable fee shall be $150 for each EMS vehicle to be operated unless the license is issued for less than 12 months in which case the nonrefundable fee shall be $75 for each vehicle.~~]

(3) (No change.)

(4) A fixed-wing or rotor-wing air ambulance provider, appropriately licensed by the state governments of New Mexico, Oklahoma, Arkansas or Louisiana may apply for a reciprocal issuance of a provider license. A nonrefundable administrative fee of $500 shall accompany the application in addition to a nonrefundable fee of $180 for each EMS aircraft to be operated in Texas under the reciprocal license. [~~A rotor-wing air ambulance provider from New Mexico, Oklahoma, Arkansas, or Louisiana may apply for reciprocal issuance of a provider license. A nonrefundable administrative fee of $250 shall accompany the application in addition to the nonrefundable fee in subsection (a)(2) of this section.~~]

(5) (No change.)

(b) - (l) (No change.)

(m) License renewal process.

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

(3) If a provider has not met all requirements for a provider license, the provider may apply for a provisional license by submitting a request and, in addition to the regular nonrefundable licensure fee if applicable, a nonrefundable fee of $30 [~~$25~~]. One provisional license, valid for not more than 60 days, may be granted only to prevent probable adverse impact to the health and safety of the service community. Without a provisional license, a provider may not operate if there is a lapse in time between license expiration and license renewal.

(n) - (o) (No change.)

(p) Unannounced inspections. Randomly and/or in response to complaints, the department may conduct unannounced inspections to insure compliance of the provider license holder. Inspections may be conducted at any time, including nights or weekends. The department may review all components of provider licensure during an unannounced inspection. Violations or deficiencies may result in disciplinary action as authorized by §157.16 of this title (relating to Emergency Suspension, Suspension, Probation, Revocation or Denial of a Provider License). The department may grant a reasonable period of time for the provider to correct deficiencies. If the department must reinspect the provider because of noncompliance noted during a previous inspection, the provider shall pay a nonrefundable fee of $30 [~~$25~~], if applicable.

(q) (No change.)

(r) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§157.14. Requirements for First Responder Organization Registration.

(a) (No change.)

(b) Application requirements. The applicant shall submit a completed application to the department. A complete application consists of the following:

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

(5) a nonrefundable application fee, if applicable.

(A) Any FRO which is, or has a contract with, an entity such as a business, corporation or department and whose first responder employees or members are compensated by that entity for providing first responder service shall pay a nonrefundable $60 [~~$50~~] application fee. If the registration is issued for less than 12 months in which case the nonrefundable fee shall be $30 [~~$25~~]. The FRO's personnel are not exempt from the payment of certification application fees.

(B) (No change.)

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

(h) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

This 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. EMERGENCY MEDICAL SERVICES TRAINING AND COURSE APPROVAL

25 TAC §157.31

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

The repeal is proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.31. Automated External Defibrillator Training Course.

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

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25 TAC §§157.32 - 157.34, 157.38, 157.40

The amendments are proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The amendments affect the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.32. Emergency Medical Services Education Program and Course Approval.

(a) - (p) (No change.)

(q) Fees.

(1) The following nonrefundable fees shall apply:

(A) $30 [~~$25~~] for review of a basic self-study, except that this nonrefundable fee may be waived if the program receives no remuneration for providing training;

(B) $90 [~~$75~~] for conducting a basic site visit;

(C) $60 [~~$50~~] for review of an advanced self-study, except that this nonrefundable fee may be waived if the program receives no remuneration for providing training;

(D) $250 [~~$200~~] for conducting an advanced site visit;

(E) $30 [~~$25~~] for processing a basic course notification or approval application, except that this nonrefundable fee may be waived if the program receives no remuneration for providing training; and

(F) $60 [~~$50~~] for processing an advanced course notification or approval application, except that this nonrefundable fee may be waived if the program receives no remuneration for providing training.

(2) (No change.)

(r) Course Notification and Approval.

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

(3) A nonrefundable course fee, unless program is not remunerated for the course in any way, shall be submitted as follows:

(A) $30 [~~$25~~] for a Basic Course (ECA or EMT);

(B) $60 [~~$50~~] for an Advanced Course (EMT-Intermediate or Paramedic);

(C) $30 [~~$25~~] for an EMS Instructor Course; and

(D) $60 [~~$50~~] for an Emergency Medical Information Operator Instructor Course.

(4) (No change.)

(s) - (t) (No change.)

(u) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§157.33. Certification.

(a) Certification requirements. A candidate for emergency medical services (EMS) certification shall:

(1) (No change.)

(2) have a high school diploma or GED certificate: [;]

(A) the high school diploma must be from a school accredited by the Texas Education Agency (TEA) or a corresponding agency from another state. Candidates who received a high school education in another country must have their transcript evaluated by a foreign credentials evaluation service that attests to its equivalency. A home school diploma is acceptable if it is accompanied by a letter of acceptance into a regionally accredited college;

(B) an emergency care attendant (ECA) who provides emergency medical care exclusively as a volunteer for a licensed provider or registered FRO is exempt from paragraph (2) of this subsection.

(3) (No change.)

(4) submit an application and the following nonrefundable fees as applicable:

(A) $60 [~~$50~~] for emergency care attendant (ECA) or emergency medical technician (EMT);

(B) $90 [~~$75~~] for EMT-intermediate (EMT-I) or EMT-paramedic (EMT-P); and

(C) EMS volunteer - no fee. However, if such an individual receives compensation during the certification period, the exemption ceases and the individual shall pay a prorated fee to the department based on the number of years remaining in the certification

period when employment begins. The nonrefundable fee for ECA or EMT certification shall be $15 [~~$12.50~~] per each year remaining in the certification. The nonrefundable fee for EMT-I or EMT-P shall be $22.50 [~~$18.75~~] per each year remaining in the certification. Any portion of a year will count as a full year; and

(5) (No change.)

(b) - (d) (No change.)

(e) Retesting.

(1) A candidate who does not pass the department's written examination may retest after:

(A) (No change.)

(B) paying a nonrefundable fee of $30 [~~$25~~], if applicable.

(2) A candidate who does not pass a retest may request a second retest after:

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

(C) paying a nonrefundable fee of $30 [~~$25~~], if applicable.

(3) (No change.)

(f) (No change.)

(g) Non-transferability of certificate. A certificate is not transferable. A duplicate certificate may be issued if requested with a nonrefundable fee of $10 [~~$5~~].

(h) - (i) (No change.)

(j) Inactive status. A certified EMT, EMT-I, or EMT-P may make application to the department for inactive status at any time during or after the certification period so long as the certification can be verified by the department.

(1) The request for inactive status shall be accompanied by a nonrefundable fee of $30 [~~$25~~] in addition to the regular nonrefundable application fee.

(2) - (5) (No change.)

(k) Reciprocity. A person currently certified by the National Registry or in another state may be certified by submitting an application and a nonrefundable fee of $120 [~~$100~~].

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

(l) (No change.)

(m) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§157.34. Recertification.

(a) Recertification.

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

(4) The certificant shall submit an application and the following non-refundable fees as applicable:

(A) $60 [~~$50~~] for Emergency Care Attendant (ECA) or Emergency Medical Technician (EMT);

(B) $90 [~~$75~~] for EMT-Intermediate (EMT-I) or EMT-Paramedic (EMT-P); and

(C) EMS volunteer - no fee. However, if such an individual receives compensation during the certification period, the exemption ceases and the individual shall pay a prorated fee to the department based on the number of years remaining in the certification period when employment begins. The non-refundable fee for ECA or EMT certification shall be $15 [~~$12.50~~] per each year remaining in the certification. The non-refundable fee for EMT-I or EMT-P shall be $22.50 [~~$18.75~~] per each year remaining in the certification. Any portion of a year will count as a full year.

(5) - (7) (No change.)

(b) Recertification Options. Upon submission of a completed application for recertification, the applicant shall commit to, and recertify through, only one of the options described in paragraphs (1)-(5) of this subsection.

(1) Option 1 - Written Examination Recertification Process.

(A) (No change.)

(B) If the applicant fails the examination for recertification, the applicant may attempt two retests of the examination after:

(i) (No change.)

(ii) submitting a non-refundable retest fee of $30 [~~$25~~] for each attempt.

(C) - (F) (No change.)

(2) - (5) (No change.)

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

(g) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§157.38. Continuing Education.

(a) - (f) (No change.)

(g) Approval of Continuing Education Provider.

(1) (No change.)

(2) A person, agency, entity, or organization seeking approval as a continuing education provider shall file an application with the department along with a nonrefundable fee of $60 in accordance with the course approval process described in §157.32 of this title (relating to Emergency Medical Services Education Program and Course Approval).

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

(h) - (k) (No change.)

(l) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§157.40. Paramedic Licensure.

(a) Requirements for paramedic licensure.

(1) (No change.)

(2) Initial paramedic license. A candidate for initial paramedic licensure under this section shall:

(A) (No change.)

(B) submit an application and a nonrefundable fee, if applicable, of $120 [~~$100;~~]. EMS volunteer--no fee; however, if the applicant later receives compensation during the renewed licensure period, the exemption ceases and the individual shall pay a prorated fee to the department based upon the number of years remaining in the licensure period when employment begins. The non-refundable fee shall be $30 per each year remaining in the license. Any portion of a year that the licensed paramedic receives compensation for his or her paramedic service will count as a full year.

(C) - (G) (No change.)

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

(5) Duplicate copies of the [~~license and~~] wallet-sized license [~~copy~~] may be issued, by the department to replace lost credentials for a fee of $10 [~~$5.00~~].

(6) (No change.)

(b) Renewal of license.

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

(5) Licensure fee.

(A) The licensee shall submit a non-refundable fee of $120 [~~$100~~] with the application;

(B) EMS volunteer--no fee; [~~.~~] however [~~However~~], if the applicant later receives compensation during the renewed licensure period, the exemption ceases and the individual shall pay a prorated fee to the department based on the number of years remaining in the licensure period when employment begins. The non-refundable fee shall be $30 [~~$25~~] per each year remaining in the licensure. Any portion of a year that the licensed paramedic receives compensation for his paramedic service will count as a full year.

(6) - (7) (No change.)

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

(f) Inactive status. A licensed paramedic may make application to the department for inactive status at any time during the licensure period or months after the license expiration date, if the license can be verified by the department. The request for inactive status shall be accompanied by a nonrefundable fee of $30 in addition to the regular nonrefundable application fee in subsection (a)(2)(B) of this section.

(1) - (5) (No change.)

(g) (No change.)

[~~(h) Applying for inactive status after expiration of active or inactive licensure status. A candidate seeking to achieve inactive licensure after expiration of active or inactive licensure status shall apply within the department's record retention requirements for the prior license, which is no later than three years past the license expiration.~~]

(h) [~~(i)~~] Reciprocity. A person currently certified by the National Registry and/or certified or licensed as a paramedic in another state and who meets all the requirements of this section may apply for licensure by submitting an application along with a nonrefundable fee of $120 [~~$100~~] and meeting the requirements set forth in subsection (a)(1) and (a)(2)(B) of this section. After the department evaluates the application, verifies the licensure and assures that the requirements in subsection (a) of this section have been met, the candidate will be licensed in Texas for four years from the issuance date of the current Texas licensure.

(i) [~~(j)~~] Equivalency.

(1) A candidate for licensure who completed EMS training outside the United States or its possessions, or a candidate who is certified or licensed in another healthcare discipline may apply for licensure by meeting the requirements set forth in subsection (a)(1) of this section and the following additional requirements:

(A) be at least 18 years of age;

(B) submit a copy of the course completion certification from an accredited post secondary institution approved by the department to sponsor an EMS education program;

(C) submit an application and appropriate nonrefundable fee as follows:

(i) a candidate who completed EMS training outside the United States or its possessions--$180 [~~$150~~];

(ii) a candidate who is certified or licensed in another healthcare discipline--$120 [~~$100~~]; and

(D) achieve National Registry paramedic certification.

(2) Evaluations of curricula conducted by post secondary educational institutions under this subsection shall be consistent with the institution's established policies and procedures for awarding credit by transfer or advanced placement.

(j) [~~(k)~~] Military personnel. A licensee who fails to renew a license within three months of the expiration date because of active duty in the United States military outside the State of Texas shall have one year from the date of discharge or the date of reassignment to Texas (whichever is first) to complete all requirements for relicensure.

(k) [~~(l)~~] Conversion from inactive paramedic certification to inactive paramedic licensure. A certified paramedic currently on inactive status who meets all other criteria as defined in subsection (a)(1) of this section may apply for inactive licensure status.

(1) The inactive certificant shall:

(A) submit an application for inactive licensure to the department along with a nonrefundable fee of $120 [~~$100~~]; and

(B) submit evidence of the issuance of a degree from an accredited college or university as defined in subsection (a)(1) of this section.

(2) After verification by the department of the information submitted, the license will be issued in an inactive status for four years beginning on the day of issuance.

(l) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

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

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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SUBCHAPTER D. EMERGENCY MEDICAL SERVICES PERSONNEL CERTIFICATION

25 TAC §§157.43, 157.44, 157.49

The amendments are proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Heath (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The amendments affect the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.43. Course Coordinator Certification.

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

(d) Basic coordinator requirements. To be certified as a basic course coordinator, the candidate shall:

(1) submit an application for basic course coordinator certification along with the nonrefundable fee of $60 [~~$75~~] to the Texas Department of Health (department) except a fee shall not be required if compensation is not received for coordinating training courses or programs;

(2) - (7) (No change.)

(8) after completing all the above requirements, pass the EMS coordinator exam and retest, if necessary, no later than one year after course completion date. The nonrefundable retest fee is $30 [~~$25~~], except a fee shall not be required if compensation is not received for coordinating training courses or programs. If requirements are not completed within one year after course completion date, the candidate must meet the requirements of subsection (d) of this section including the completion of another initial course to be certified.

(e) Advanced coordinator requirements. To be certified as an advanced course coordinator, the candidate shall:

(1) submit an application for advanced course coordinator certification along with the nonrefundable fee of $60 [~~$75~~] to the department; except a fee shall not be required if compensation is not received for coordinating training courses or programs;

(2) - (8) (No change.)

(9) after completing all the above requirements, pass the EMS coordinator exam and retest, if necessary, no later than one year after course completion date. The nonrefundable retest fee is $30 [~~$25~~], except a fee shall not be required if compensation is not received for coordinating training courses or programs. If requirements are not completed within one year after course completion date, the candidate must meet the requirements of subsection (e) of this section including the completion of another initial course to be certified; and

(10) (No change.)

(f) - (l) (No change.)

(m) Disciplinary actions.

(1) Administrative penalty. The department may impose an administrative penalty on a course coordinator not to exceed $7,500 [~~$1,000~~] per day per violation of the Health and Safety Code or the rules adopted thereunder.

(2) - (6) (No change.)

(n) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§157.44. Emergency Medical Service Instructor Certification.

(a) (No change.)

(b) Certification. To obtain certification, a candidate shall:

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

(4) submit an application to the department with a nonrefundable fee of $30 [~~$50~~] to the department, except a fee shall not be required if compensation is not received for instructing training courses or programs; and a course completion document from a department-approved instructor course; and

(5) pass the instructor examination conducted by the department.

(c) The instructor candidate who does not pass the exam may have one opportunity to retest by submitting the retest application and $30 retest fee, if applicable. The retest must be completed no later than one year after the course completion date. The candidate who fails the retest must complete another instructor course to become eligible for instructor certification.

(d) [~~(c)~~] Currently certified instructors shall be considered to have met the qualifications in this section.

(e) [~~(d)~~] Period of certification. After verification by the department of the information submitted by the candidate, the candidate who meets the requirements of subsection (b) of this section shall be certified as an instructor for two years commencing on the date of issuance of the certificate.

(f) [~~(e)~~] Responsibilities. An instructor shall have the following responsibilities:

(1) conducting classroom and laboratory sessions in accordance with lesson objectives as assigned by the course coordinator;

(2) conducting skills proficiency verifications and other student evaluations as assigned by the course coordinator;

(3) assisting the course coordinator in preparing and maintaining records and performing other duties necessary to insure the integrity, efficiency and effectiveness of the course.

(g) [~~(f)~~] Recertification.

(1) Prior to the expiration of a certificate, the department shall send a notice of expiration to the certificant at the address shown in the current records of the department. It is the responsibility of EMS personnel to notify the department of any change of address.

(2) If a certificant has not received notice of expiration from the department 30 days prior to the expiration, the certificant shall request an application for recertification from the department or download an application from the Internet. Failure to apply for recertification shall result in expiration of the certificate.

(3) To be eligible for recertification, the instructor shall meet recertification requirements during the latest instructor certification period:

(A) maintain active status EMS certification; and

(B) submit the application for recertification and a nonrefundable fee of $30 [~~$50~~].

(4) After verification by the department of the information submitted, the candidate who meets the requirements of this section shall be recertified for two years commencing on the day following the expiration of the current certificate.

(h) [~~(g)~~] Late recertification.

(1) An application for renewal of a certificate shall be considered late if:

(A) the application and nonrefundable fee are received after the most recent certificate has expired or;

(B) all requirements for recertification are not met prior to the end of the most recent certification period.

(2) An instructor who has not recertified prior to the end of his most recent certification period is not certified.

(i) [~~(h)~~] Recertification. To be eligible for recertification, the candidate shall meet the following:

(1) A candidate whose certificate has been expired for 90 days or less may renew the certificate by submitting an application and paying a nonrefundable renewal fee that is equal to 1-1/2 times the normally required application renewal fee for that level as listed in subsection (b)(4) of this section;

(2) A candidate whose certificate has been expired for more than 90 days but less than one year may renew the certificate by submitting an application and paying a nonrefundable renewal fee that is equal to two times the normally required application renewal fee as listed in subsection (b)(4) of this section.

(3) A candidate must complete all the requirements for recertification no later than one year after the expiration of the most recent certificate.

(4) After verification by the department of the information submitted by the candidate, the candidate who meets the requirements of this subsection shall be recertified for two years commencing on the day of issuance of a certificate.

(5) A candidate whose certification is expired more than one year must meet the requirements of subsection (b) of this section including the completion of another initial course to be certified.

(j) [~~(i)~~] Disciplinary action.

(1) Emergency suspension. The bureau chief of the Bureau of Emergency Management may issue an emergency order to suspend an instructor if the bureau chief has reasonable cause to believe continued activity of the individual constitutes a threat to the public health or safety.

(A) An emergency suspension shall be effective immediately without a hearing or written notice to the certificate holder. Notice to the certificant shall be established on the date that a copy of the signed emergency suspension order is sent to the address shown in the current records of the department, or by return receipt. Notice shall also be sent to any sponsoring entity.

(B) If a written request for a hearing is received from the certificate holder within 15 days of the date of notice, the department shall conduct a hearing not later than the 30th day after the date on which a hearing request is received to determine if the emergency suspension is to be continued, modified, or rescinded. The hearing and appeal from a disciplinary action related to the hearing shall be in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(2) Suspension or revocation. An instructor's certification may be suspended or revoked for, but not limited to, the following reasons:

(A) failing to maintain active status EMS personnel certification at the appropriate level;

(B) failing to comply with the responsibilities of an instructor as in subsection (f) [~~(e)~~] of this section;

(C) falsifying an application for EMS certification;

(D) falsifying a program approval application, a self-study, a course approval application, or any supporting documentation;

(E) falsifying a course completion certificate or any other document that records or verifies course activity and/or is a part of the course record;

(F) compromising department or program standards for verification of skills proficiency or falsifying proficiency verification records;

(G) assisting another to obtain or to attempt to obtain personnel certification or recertification by fraud, forgery, deception or misrepresentation;

(H) failing to complete and submit student documents within the established time frames;

(I) compromising or failing to maintain the order, discipline and fairness of a department-approved course or program;

(J) delivering or allowing inadequate class presentations;

(K) compromising an examination or examination process administered or approved by the department;

(L) cheating or assisting another in cheating on an EMS examination, other evaluation or any other activity offered or conducted by the department, a training program approved by the department, or a provider licensed by the department;

(M) accepting any benefit to which there is no entitlement or benefits in any manner through fraud, deception, falsification, misrepresentation, theft, misappropriation or coercion;

(N) failing to maintain appropriate policies, procedures and safeguards to ensure the safety of students, fellow instructors or other class participants;

(O) allowing recurrent use of inadequate, inoperable, or malfunctioning equipment;

(P) issuing a check to the department which is returned unpaid;

(Q) failing to maintain education course records for initial or continuing education (CE) courses;

(R) demonstrating an unwillingness or inability to comply with the Health and Safety Code and rules adopted thereunder;

(S) failing to give the department true and complete information when asked regarding any alleged or actual violation of the Health and Safety Code, or the rules adopted thereunder, or failing to report a violation;

(T) committing any violation during a probationary period; and

(U) functioning or attempting to function as an instructor during a period of suspension shall be cause for revocation of the instructor certification.

(3) Notification. If the department proposes to take disciplinary action against an EMS instructor, the certificant shall be notified at the address shown in the current records of the department. The notice must state the alleged facts or conduct warranting the action and state that the certificant has an opportunity to request a hearing.

(A) The certificant may request a hearing within 15 days after the date of the notice. This request shall be in writing and submitted to the bureau chief. The hearing shall be conducted pursuant to the Administrative Procedure Act, Government Code, Chapter 2001.

(B) If the certificant does not request a hearing, after being sent the notice of opportunity, the certificant waives the opportunity for a hearing and the department shall implement its proposal.

(4) Probation. The department may probate any penalty assessed under this section and may specify terms and conditions of any probation issued.

(5) Reapplication.

(A) Two years after the revocation of an instructor certification an individual may petition the department, in writing, for the opportunity to reapply for certification.

(B) The department shall evaluate the petition and may allow or deny the opportunity to submit an application for recertification.

(C) In evaluating a petition for permission to reapply for certification the department shall consider, but is not limited to, the following issues:

(i) the likelihood of a repeat of the actions or inactions that led to revocation;

(ii) the petitioners overall record as an instructor;

(iii) letters of support or recommendation;

(iv) letters in protest or nonsupport of the petition; and

(v) the need for the services of an instructor in a given area.

(D) The petitioner shall be notified of the department's decision to allow or deny the submission of reapplication within 60 days of the request.

(E) An instructor whose certificate expires during a suspension or revocation period may not petition to reapply for certification until the end of the suspension or revocation period.

(k) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§157.49. Emergency Medical Services Operator and Operator Instructor Training and Certification.

(a) - (g) (No change.)

(h) Course approval.

(1) Prior to starting a course, an EMS information operator instructor shall:

(A) (No change.)

(B) submit a non-refundable course approval fee of $60 [~~$50~~], except a fee shall not be required if the EMS information operator instructor is not to be compensated for providing EMS information operator training;

(C) - (D) (No change.)

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

(i) (No change.)

(j) EMS information operator instructor certification.

(1) To become certified as an EMS information operator instructor, a person must:

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

(F) submit an application to the department with a nonrefundable fee of $60 [~~$50~~], except a fee shall not be required if the candidate is not to be compensated for providing EMS information operator training; and

(G) (No change.)

(2) (No change.)

(3) Persons holding EMS information operator instructor certification from any department-approved training program prior to the effective date of this rule are considered to have met the requirements as set forth in this section and may apply for certification by submitting to the department:

(A) a written application with a nonrefundable fee of $60 [~~$50~~], except a fee shall not be required if the candidate is not to be compensated for providing EMS information operator training; and

(B) (No change.)

(4) Retesting.

(A) A certificant who does not pass the department's written examination may retest after:

(i) (No change.)

(ii) paying a nonrefundable fee of $30 [~~$25~~], if applicable.

(B) (No change.)

(k) EMS information operator instructor recertification.

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

(3) To be eligible for recertification, the EMS information operator instructor shall:

(A) - (C) (No change.)

(D) submit an application for recertification with a nonrefundable fee of $60 [~~$50~~], except a fee shall not be required if the candidate is not to be compensated for providing EMS information operator instructor training; and

(E) (No change.)

(4) - (8) (No change.)

(l) - (n) (No change.)

(o) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

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

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Susan K. Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER G. EMERGENCY MEDICAL SERVICES TRAUMA SYSTEMS

25 TAC §§157.122, 157.123, 157.125

The amendments and new section are proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The amendments and new section affect the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.122. Trauma Service Areas.

(a) (No change.)

(b) The state has been geographically divided by counties into 22 TSAs; however:

(1) (No change.)

(2) each TSA shall have at least a lead general trauma facility within its boundaries [~~by December 31, 2000,~~] or the bureau may re-align the counties in that TSA to other TSAs which have such a facility;

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

(c) The counties included in the 22 TSAs are grouped as follows (updated lists will be maintained by the bureau):

(1) (No change.)

(2) Area B - Bailey, Borden, Castro, Cochran, Cottle, Crosby, Dawson, Dickens, Floyd, Gaines, Garza, Hale, Hockley, Kent, King, Lamb, Lubbock, Lynn, [~~Mitchell,~~] Motley, Scurry, Terry, Yoakum;

(3) (No change.)

(4) Area D - Brown, Callahan, Coleman, Comanche, Eastland, Fisher, Haskell, Jones, Knox, Mitchell, Nolan, Shackelford, Stephens, Stonewall, Taylor, Throckmorton;

(5) - (22) (No change.)

(d) (No change.)

§157.123. Regional Emergency Medical Services/Trauma Systems.

(a) The bureau of emergency management (bureau) shall recognize the establishment of a regional emergency medical services (EMS)/trauma system (system) within a trauma service area (TSA) as described in §157.122 of this title (relating to Trauma Service Areas).

(b) Establishment of a regional EMS/trauma system consists of three phases.

(1) The first phase begins with the establishment of a regional advisory council (RAC) and ends with recognition of the RAC by the bureau.

(A) All health care entities who care for trauma patients should be offered membership on the RAC. RACs shall:

(i) be operated in a manner that maximizes inclusion of their constituents and ensures membership approval of "participation requirements";

(ii) have documented evidence that participation guidelines have been discussed and affirmed by vote of the entire RAC voting membership;

(iii) have clear definitions of participation guidelines in the organization's by-laws and/or other official RAC files;

(iv) have documentation that participation guidelines have been communicated to EMS providers and hospitals, regardless of past participation history;

(v) have documented attendance records;

(vi) have consistency in the annual participation reporting period;

(vii) send participation "progress reports" to EMS providers and hospitals at some period during the reporting year;

(viii) send participation requirements "non-compliancy" letters to appropriate EMS providers and hospitals at end of reporting year;

(ix) be cognizant of the direct and indirect fiscal roles they play on behalf of their members; and

(x) be particularly cognizant of the logistical challenges faced by rural and volunteer agencies and open to considering viable alternatives to members' physical presence at all meetings.

(B) The bureau shall recognize only one official RAC for a TSA.

(C) At least quarterly, a RAC shall submit evidence of on-going activity, such as meeting notices and minutes, to the bureau.

(D) Annually, the RAC shall file a report with the bureau which describes progress toward system development, demonstrates on-going activity, and includes evidence that members of the RAC are currently involved in trauma care.

(E) The RAC functions without the expectation of comprehensive, permanent and/or unrestricted state funding.

(F) RACs may request technical assistance from the bureau at any time.

(2) The second phase begins with RAC recognition by the bureau and ends with approval of a complete EMS/trauma system plan (plan) by the bureau.

(A) The RAC shall develop a system plan based on standard guidelines for comprehensive system development. The system plan is subject to approval by the bureau.

(B) The bureau shall review the plan to assure that:

(i) all counties within the TSA have been included unless a specific county, or portion thereof, has been aligned within an adjacent system;

(ii) all health care entities and interested specialty centers have been given an opportunity to participate in the planning process; and

(iii) the following components have been addressed:

(I) injury prevention;

(II) access to the system;

(III) communications;

(IV) medical oversight;

(V) pre-hospital triage criteria;

(VI) diversion policies;

(VII) bypass protocols;

(VIII) regional medical control;

(IX) regional trauma treatment guidelines;

(-a-) Guidelines consistent with current Advanced Trauma Life Support (ATLS), Advanced Pediatric Life Support (APLS), Basic Trauma Life Support (BTLS), Pre-Hospital Trauma Life Support (PHTLS), Trauma Nurse Core Course (TNCC), Emergency Nurse Pediatric Course (ENPC), Pediatric Advanced Life Support (PALS) and Pediatric Education For Pre-Hospital Providers (PEPP) standards shall be developed, implemented, and evaluated.

(-b-) Individual agencies and medical directors may, and are encouraged, to exceed the minimum standards.

(-c-) Major/severe trauma patients will be cared for by health professionals with documented education and skill in the assessment and care of injuries throughout their pre-hospital and hospital course.

(-d-) Major/severe trauma patients will have their medical care, as documented by pre-hospital run forms and hospital charts, reviewed by the individual entity's medical director for appropriateness and quality of care.

(-e-) Major/severe trauma patients will have deviations from standard of care addressed through a documented trauma performance improvement process.

(X) facility triage criteria;

(XI) inter-hospital transfers;

(XII) planning for the designation of trauma facilities, including the identification of the lead facility(ies); and

(XIII) regional guidelines for disaster preparedness; and

(XIV) a performance improvement program that evaluates processes and outcomes from a system perspective.

(C) Bureau approval of the completed plan may qualify health care entities participating in the system to receive state funding for trauma care if funding is available.

(3) The third phase begins with approval of a complete plan by the bureau and ends with the regional EMS/trauma system being recognized by the bureau.

(A) Upon approval, a RAC implements the plan to include:

(i) education of all entities about the plan components;

(ii) on-going review of resource, process, and outcome data; and

(iii) if necessary, revision and re-approval of the plan or plan components by the bureau.

(B) Following implementation of the plan, the bureau shall recommend to the commissioner of health (commissioner) the designation of a regional EMS/trauma system if the applicant RAC meets or exceeds the current Texas EMS/trauma systems essential criteria; actively participates at the bureau's quarterly RAC Chairs meetings; and submits data as requested.

(C) The designation process shall consist of three phases:

(i) The first phase is the application phase which begins with completing and submitting to the bureau a complete application and non-refundable fee for designation as a regional EMS/trauma system and ends when the bureau approves a site survey (survey);

(ii) The second phase is the review phase which begins with the survey and ends with a bureau recommendation to the commissioner to designate a regional EMS/trauma system; and

(iii) The third phase is the final phase which begins with the commissioner reviewing the recommendations and ends with his/her final decision. This phase also includes an appeal procedure for the denial of a designation application in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(D) The bureau's analysis of submitted application materials, which may result in recommendations for corrective action when deficiencies are noted, shall include a review of:

(i) evidence of participation at the bureau's quarterly RAC Chairs meetings;

(ii) the completeness and appropriateness of the application materials submitted, including the non-refundable application fee.

(iii) the non-refundable application fee shall be based on the trauma service area's geographic size, population and trauma death rate.

(iv) a RAC's non-refundable application fee shall be no more than $10,000 and not less than $2500.

(E) When the application phase results in a bureau approval for survey, the bureau shall notify the regional EMS/trauma system's RAC that will then contract for the survey by a team of approved non-Texas Department of Health (department) surveyors.

(i) The bureau, at its discretion, may appoint an observer to accompany the survey team. In this event, the cost for the observer(s) shall be borne by the bureau. A RAC shall have the right to refuse to allow non-department observers to participate in a survey.

(ii) The survey shall be completed within one year of the date of the approval of the application.

(iii) At any time, a RAC may file a complaint with the bureau regarding the conduct of a surveyor. The bureau will investigate and notify the RAC of the outcome.

(F) The survey team composition shall consist of at minimum a physician; an EMS provider representative; a trauma nurse from a designated trauma facility; all of which shall have demonstrated knowledge and experience with system development. A fourth surveyor with experience in system management may be requested by the RAC or the bureau.

(G) Non-department surveyors must meet the following criteria:

(i) have at least three years experience in the care of trauma patients and active participation in a regional EMS/trauma system;

(ii) be currently employed in the coordination of care for trauma patients;

(iii) have direct experience in the preparation for and successful completion of regional EMS/trauma system designation;

(iv) have successfully completed the department Regional EMS/Trauma System Site Surveyor Course; and

(v) on-going bureau evaluation of survey reports for compliance with bureau reporting requirements.

(H) All members of the survey team, except department staff, should come from a non-adjacent public health region and/or trauma service area (TSA). There shall be no business or patient care relationship between the surveyor and/or the surveyor's place of employment and regional EMS/trauma system being surveyed.

(I) The survey team shall evaluate the regional EMS/trauma system by:

(i) attendance records, performance improvement committee meeting minutes and other documents specifically relevant to regional EMS/trauma system development;

(ii) visiting EMS provider stations and hospitals within the TSA; and

(iii) conducting interviews with RAC members and non-members.

(J) Findings of the survey team shall be forwarded to the RAC Executive Board within thirty calendar days of the date of the survey. If a RAC wants to continue the designation process, the complete survey report must be submitted to the bureau within three months after receipt of the survey or the application will expire. A request for an extension could be requested for extenuating circumstances.

(K) The bureau shall review the findings for compliance with the criteria. If a regional EMS/trauma system does not meet the criteria for designation, the bureau shall notify the RAC executive board of the requirements it must meet to achieve designation.

(L) A recommendation for designation shall be made to the commissioner based on compliance with the criteria.

(M) In the event there is a problem area in which a regional EMS/trauma system does not comply with the criteria, the bureau shall notify the applicant of deficiencies and recommend corrective action.

(N) The regional EMS/trauma system shall submit a report to the bureau which outlines the corrective action taken. The bureau may require a second survey to insure compliance with the criteria. If the regional EMS/trauma system and/or bureau report substantiates action that brings the regional EMS/trauma system into compliance with the criteria, the bureau shall recommend designation to the commissioner.

(O) If a regional EMS/trauma system disagrees with a bureau decision regarding its designation application or status, it may request a secondary review by a designation review committee. Membership on the designation review committee will:

(i) be voluntary;

(ii) be appointed by the bureau chief;

(iii) be representative of trauma care providers within a designated regional EMS/trauma system; and

(iv) include representation from the department and the Trauma Systems Committee of the Governor's EMS and Trauma Advisory Council (GETAC).

(P) If the designation review committee disagrees with the bureau recommendation for corrective action, the records shall be referred to the associate commissioner for consumer health protection for recommendation to the commissioner.

(Q) The bureau shall provide a copy of the survey report, for surveys conducted by or contracted for by the department and results to the applicant regional EMS/trauma system.

(R) At the end of the secondary review and final phases of the designation process, if a regional EMS/trauma system disagrees with the bureau recommendations, opportunity for an appeal in accordance with the Administrative Procedure Act, Government Code, Chapter 2001 shall be offered.

(S) The bureau may grant an exception to this section if it finds that compliance with this section would not be in the best interests of the persons served in the affected local system.

(T) The applicant regional EMS/trauma system shall have the right to withdraw its application at any time prior to the department making a final decision on the application for designation.

(U) If the commissioner concurs with the recommendation to designate, the RAC shall receive a letter of designation for two years. Site surveys will be required every six years, or more frequently at the bureau's discretion. Additional actions, such as a site review or submission of information, to maintain designation may be required by the department.

(V) It shall be necessary to repeat the designation process as described in this section prior to expiration of a regional EMS/trauma system designation or the designation will be considered expired.

(W) A designated regional EMS/trauma system shall:

(i) notify the bureau within five days if temporarily unable to comply with the essential trauma system criteria;

(ii) notify the bureau and RAC membership within five days if it is unable to provide the resources as required by its designation.

(I) If the resources are not critical, the bureau will determine a 30-day to 90-day period from onset date of deficiency for the RAC to achieve compliance.

(II) If the resources are critical, the bureau will determine a no greater than 30-day period from onset date of the deficiency for the RAC to achieve compliance.

(iii) notify the bureau if the RAC will no longer provide services commensurate with designation. If the regional EMS/trauma system chooses to permanently relinquish its designation, it shall provide at least 30 days notice to the bureau.

(iv) comply with the provisions within these sections, all current state and system standards as described in this chapter, and all policies, guidelines, and procedures as set forth in the system plan;

(v) continue its commitment to provide the resources as required by its designation; and

(vi) utilize the state trauma registry.

(X) A regional EMS/trauma system may not use the terms "regional trauma system", "trauma system", or similar terminology in its signs or advertisements or in the printed materials and information it provides to the public unless the regional EMS/trauma system has been designated as a regional EMS/trauma system according to the process described in this section. This subsection also applies to regional EMS/trauma systems whose designation has lapsed.

(Y) The bureau shall have the right to review, inspect, evaluate, and audit all RAC performance improvement committee minutes and other documents relevant to trauma care in any designated regional EMS/trauma system at any time to verify compliance with the statute and these rules, including the designation criteria. The bureau shall maintain confidentiality of such records to the extent authorized by the Public Information Act, (Government Code, Chapter 552), the Texas Health and Safety Code, Chapter 773 and/or any other relevant confidentiality law or regulation. Such inspections shall be scheduled by the bureau when appropriate.

(c) Regional EMS/trauma system criteria.
Figure: 25 TAC §157.123(c)

§157.125. Requirements for Trauma Facility Designation.

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

(c) The bureau's analysis of submitted application materials, which may result in recommendations for corrective action when deficiencies are noted, shall include a review of:

(1) (No change.)

(2) the completeness and appropriateness of the application materials submitted, including the non-refundable application fee as follows:

(A) for comprehensive and major trauma facility applicants, the fee will be no more than $10 [~~$3.00~~] per licensed bed with an upper limit of $5,000 [~~$3000~~] and a lower limit of $4,000 [~~$100~~];

(B) for general trauma facility applicants, the fee will be no more than $10 [~~$2.00~~] per licensed bed with an upper limit of $2,500 [~~$2000~~] and a lower limit of $1,500 [~~$100~~]; and

(C) for basic trauma facility applicants, the fee will be no more than $10 [~~$1.00~~] per licensed bed with an upper limit of $1,000 [~~$1000~~] and a lower limit of $500 [~~$100~~].

(d) - (t) (No change.)

(u) For all applications and renewal applications, the department (or the board) is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

This 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 January 16, 2004.

TRD-200400333
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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25 TAC §157.123, §157.129

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

The repeals are proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning certification and licensing of EMS certificants, providers, training institutions and educators; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department or the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 773. The review of the rules implements Government Code, §2001.039.

§157.123. Regional Emergency Medical Services/Trauma Systems.
§157.129. State Trauma Registry.
This 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 January 16, 2004.

TRD-200400334
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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CHAPTER 289. RADIATION CONTROL
SUBCHAPTER D. GENERAL

25 TAC §289.204

The Texas Department of Health (department) proposes an amendment to §289.204, concerning fees for certificates of registration, radioactive material licenses, emergency planning and implementation, and other regulatory services.

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 289.204 has been reviewed and the department has determined that the reasons for adopting the section continue to exist; however, revisions to the rule are necessary as outlined in this preamble.

The department published a Notice of Intention to Review for §289.204 regarding Government Code, §2001.039, in the *Texas Register* (28 TexReg 9549) on October 31, 2003. No comments were received by the department on this section following publication of the notice.

The proposed revision incorporates legislation passed by the 78th Legislature, Regular Session. House Bill 2292 requires two-year terms for radioactive material licenses and certificates of registration and requires recovery through fees of 100% of regulatory program costs for the two-year term of the licenses and

registrations. Therefore, references to annual fees are deleted throughout the section. The department is also simplifying its fee structure for certificates of registration. Registrants now have one specified fee, rather than a base fee plus machine fee. References to base fee and machine fee are deleted throughout the section. A definition of "processor of radioactive material" is added to clarify the meaning of the category listed in the fee schedule for radioactive material licenses. The current exemption that states no fee is required for a general license that does not require a general license acknowledgement is deleted because the general license category has never been listed in the fee schedule for radioactive material licenses. Specific exemption wording is unnecessary. References to application fees for mammography accreditation and industrial radiographer certification have been added. These application fees are also specified in other sections of this title that are specific to mammography and industrial radiography. However, the department is repeating the application fees for these categories in this section in order to represent the full scope of radiation fees. The fees for mammography accreditation are increased to reflect an increase in the amount the American College of Radiology charges the department to perform image reviews.

Health and Safety Code, §401.301, authorizes the department to collect an additional 5% charge from radioactive material licensees. The funds from the additional 5% charge are to be used to prevent or mitigate adverse effects of abandonment of radioactive materials, default on lawful obligation, insolvency, or other inability of licensees to meet the requirements in this title. House Bill 1678, 78th Legislature, Regular Session, provides the mechanism for the funds from the additional 5% charge to be deposited to the credit of the Radiation and Perpetual Care Account. The provisions of these two House Bills are added to this section.

Fee amounts in the fee schedules for radioactive materials licenses and certificates of registration are doubled to reflect the two-year term for licenses and registrations. Licensees and registrants will receive a fee bill from the department every two years rather than every year. In addition, the categories in the fee schedule for certificates of registration are changed. The Bureau of Radiation Control is reallocating x-ray and nonionizing resources based on prioritization of risk to public health and safety. Risk to public health and safety is primarily based on machine type and type of use rather than the category of facility in which they are used. Therefore, the categories in the fee schedule are changed to reflect machine type and type of use. Several of the categories are also clarified by referencing definitions of the categories in other sections of this title. The requirement for an annual late payment fee is deleted. The provisions of House Bill 2292 mandate a two-year term for the license or certificate of registration and corresponding 100% cost recovery through fees. Failure to pay the fee means the license or certificate of registration is expired and the licensee or registrant is subject to compliance procedures provided in §289.205 of this title (relating to Hearing and Enforcement Procedures). Senate Bill 1152, 78th Legislature, Regular Session, directs the department to participate in Texas Online, an electronic fee payment system developed and maintained by the Texas Online Authority. Wording is added that authorizes the department to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online. Other minor grammatical changes are made and reference citations are corrected for clarification.

This amendment is part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, or other factors.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section will be in effect, there will be fiscal implications for state or local government as a result of enforcing or administering the section as proposed. The department will receive an additional $65,000 in revenue for each year of the first five-year period from the additional 5% charge to licensees. Collection of this additional charge will continue until the fees collected reach $500,000 and the fees must be deposited to the credit of the Radiation and Perpetual Care Account. If the balance of fees collected from the 5% additional charge is reduced to $350,000 or less, the department must reinstitute assessment of the fee until the balance reaches $500,000. The fiscal impact to state or local government entities licensed to possess radioactive material will increase by an amount ranging from $5 to $764 per year. For those mammography registrants who choose accreditation by the department, the department will recover an additional $30 for the first mammography machine, for each additional mammography machine, and for reinstatement of a mammography machine. The department will recover an additional $20 for each re-evaluation of clinical images due to failure during the accreditation process and an additional $10 for re-evaluation of phantom images due to failure during the accreditation process. It is the mammography registrant's choice whether to seek accreditation from the department or from the American College of Radiology. When implemented, the subscription and convenience fees determined by Texas Online will be $10 for each registrant for payment by credit card. Licensees will only be allowed to use bank draft transactions on Texas Online and the fee of will be $10. The fees will be collected by the department and paid to the Texas Online Authority.

Mrs. McBurney has also determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring funds are available to fund the program and to prevent or mitigate adverse effects of abandonment of radioactive materials, default on a lawful obligation, insolvency, or other inability by a licensee to meet requirements. Licensees that are small businesses and micro-businesses and other persons required to comply with the section as proposed, excluding the diagnostic nuclear medicine licensees, will incur an additional cost equal to 5% of their respective fee, ranging from $14 to $18,090. Registrants that are small businesses and micro-businesses and other persons required to comply with the section as proposed will vary depending on the number of machines possessed and the type of machines or services authorized because the fees are changed from a base fee plus a machine fee to a single fee for each category of machine type or type of use. The range is from an average decrease of $858 to an average increase of $650. The cost recovery to the department from each category of registrant is approximately the same and the overall cost recovery to the department from registrants is approximately the same. For mammography registrants who apply for accreditation with the department, there will be an increase of $30 for the first mammography machine, for each additional mammography machine, and for reinstatement of a mammography machine. There will be an increase of $20 for each re-evaluation of clinical images due

to failure during the accreditation process and a $10 increase for re-evaluation of phantom images due to failure during the accreditation process. When implemented, the subscription and convenience fees determined by Texas Online will be $10 for credit card use by registrants and $10 for bank draft transactions by licensees. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 9:00 a.m., Wednesday, February 11, 2004, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The amendment affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.204. Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services.

(a) (No change.)

(b) Scope. Except as otherwise specifically provided, the requirements in this section apply to any person who is the following:

(1) (No change.)

(2) the holder of a fixed nuclear facility construction permit or operating license issued by the United States Nuclear Regulatory Commission (NRC) in accordance with Title 10, Code of Federal Regulations, Part 50; or

(3) (No change.)

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

(1)-(6) (No change.)

(7) Processor of Radioactive Material - A manufacturer/distributor who converts normal form radioactive material into special form or a manufacturer/distributor of radioactive sealed sources.

[~~(d) Exemptions. No application or annual fee shall be required for a general license issued in accordance with §289.251 of this title that does not require a general license acknowledgment.~~]

(d) [~~(e)~~] Payment of fees.

(1) Each application for a specific license, general license acknowledgement, or certificate of registration for which a fee is prescribed in subsections (e), (g), (j), or (m) [~~(f), (h), or (i)~~] of this section shall be accompanied by a nonrefundable fee equal to the appropriate [~~annual~~] fee. Each request for evaluation of a sealed source and/or device shall be accompanied by a nonrefundable fee [~~equal to the appropriate fee as~~] prescribed in subsection (f) [~~(g)~~] of this section. Each application for accreditation of a mammography facility shall be accompanied by a nonrefundable fee prescribed in subsection (h) of this section. Each application for an industrial radiographer certification and an industrial radiographer examination shall be accompanied by a nonrefundable fee prescribed in subsection (i) of this section.

(A) An application for a license covering more than one category of specific license [~~or general license category~~] shall be accompanied by the prescribed fee for the highest category and 25% of the applicable prescribed fee for each additional requested category.

(B) An application for a certificate of registration covering more than one category shall be accompanied by the prescribed [~~base~~] fee for the highest category [~~of use plus the prescribed machine or service fee for each category of use~~].

(C) No application will be accepted for filing or processed prior to payment of the full amount specified.

(2) A nonrefundable fee, in accordance with subsection (e) and (m) [~~(f)~~] of this section shall be paid [~~annually~~] for each radioactive material license and/or for each general license acknowledgement. The fee shall be for the two-year term of the license or general license acknowledgement. The fee shall be paid in full [~~each year~~] on or before the last day of the expiration month and year of the license or general license acknowledgement. [~~For example, if the license or general license acknowledgement expires May 31, 2010, annual fees are due on or before May 31 of each calendar year.~~] In the case of a single license that authorizes more than one category of use, the [~~annual~~] fee shall be the prescribed fee for the highest license category plus 25% of the applicable prescribed fee for each additional license category authorized.

(3) A nonrefundable fee, in accordance with subsection (j) [~~subsections (f) or (i)~~] of this section, shall be paid [~~annually~~] for each certificate of registration for radiation machines and/or services, or sources of laser radiation. The fee shall be for the two-year term of the certificate of registration. [~~The fee consists of a base fee for all registrants plus a fee where specified for each machine possessed or registrable service offered.~~]

(4) In the case of a single certificate of registration that authorizes more than one category of machine/type of use, the category listed in subsection (j) [~~(i)~~] of this section and assigned the higher [~~of the~~] fee [~~or base fee plus corresponding machine/service fee, as applicable,~~] will be used.

(5) An additional nonrefundable fee equal to five percent of the total fee for each specific license shall be paid with the specified fee by each holder of a specific license, excluding diagnostic nuclear medicine licensees.

(A) The fees collected by the agency in accordance with this paragraph shall be deposited to the credit of the Radiation and Perpetual Care Account, until the fees collectively total $500,000.

(B) If the balance of fees collected in accordance with this paragraph is subsequently reduced to $350,000 or less, the agency shall reinstitute assessment of the fee until the balance reaches $500,000.

(6) [~~(5)~~] Each application for reciprocal recognition of an out-of-state license in accordance with §289.252(s) of this title, an out-of-state registration in accordance with §289.226 of this title, or an out-of-state laser registration in accordance with §289.301 of this title, shall be accompanied by the applicable [~~annual~~] fee, provided that no

such fee has been submitted within 24 [~~12~~] months of the date of commencement of the proposed activity.

(7) [~~(6)~~] Each holder of a fixed nuclear facility construction permit or operating license or an operator of any other fixed nuclear facility shall submit an annual fee for services received. This fee shall recover for the State of Texas the actual expenses arising from environmental surveillance and emergency planning and implementation activities. Payment shall be made within 90 days following the date of invoice.

(8) [~~(7)~~] Fee payments shall be in cash or by check or money order made payable to the Texas Department of Health. The payments may be made by personal delivery to the central office, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas, or mailed to the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3189.

(9) [~~(8)~~] Any applicant requesting authorization for any of the categories in subsection (e) [~~(f)~~] of this section for veterinary use will be assessed the [~~annual~~] fee for the corresponding category.

(e) [~~(f)~~] Schedule of [~~annual~~] fees for radioactive material licenses. The following schedule contains the [~~annual~~] fees for radioactive material licenses:
Figure: 25 TAC §289.204(e)
[~~Figure: 25 TAC §289.204(f)~~]

(f) [~~(g)~~] Fee for evaluation [~~Evaluation~~] of a sealed source [~~Sealed Source~~] and/or device [~~Device~~].

(1) Each time a manufacturer submits a request for evaluation of a unique sealed source, one of the following fees shall be paid:

(A) for an initial evaluation, a fee of $3,614; or

(B) for an amendment requiring re-evaluation, a fee of $1,804.

(2) Each time a manufacturer submits a request for evaluation of a unique device, one of the following fees shall be paid:

(A) for an initial evaluation, a fee of $7,233; or

(B) for an amendment requiring re-evaluation, a fee of $3,619.

(3) No request for evaluation will be processed prior to payment of the full amount specified.

(g) [~~(h)~~] Fees for certification of mammography systems.

(1) An application for certification of mammography systems shall be accompanied by a fee of $422 for each unit.

(2) The annual fee for mammography systems is $422 for each unit.

(h) Fees for accreditation of mammography facilities.

(1) Each application for accreditation or re-accreditation of a mammography facility shall be accompanied by a nonrefundable fee. No application will be accepted for filing or processed prior to payment of the full amount specified in paragraph (2) of this subsection.

(2) Fees for accreditation of mammography facilities are as follows.

(A) The accreditation fee for the first mammography machine is $880.

(B) The accreditation fee for each additional mammography machine is $490.

(C) The fee for re-evaluation of clinical images due to failure during the accreditation process is $270 per mammography machine.

(D) The fee for re-evaluation of phantom images due to failure during the accreditation process is $210 per machine.

(E) The fee for an additional mammography review will be based on the number of clinical image sets reviewed and the type of review.

(F) The fee for reinstatement of a mammography machine is $610.

(G) The fee for replacement of thermoluminescent dosimeters (TLD) is $70.

(H) Each facility for which a targeted clinical image review is required will be charged for actual expenses to the agency arising from the visit.

(I) Each facility for which an on-site visit due to three denials of accreditation is required will be charged for actual expenses to the agency arising from such visit.

(J) Payment of the fees in subparagraphs (H) and (I) of this paragraph shall be made within 60 days following the date of invoice.

(i) Fees for industrial radiographer certification and for radiographer certification examinations.

(1) The nonrefundable application fee for examination shall be $25 and shall be submitted to the agency with the application for examination.

(2) The nonrefundable application fee for radiographer certification shall be $100 and shall be submitted to the agency with the application for radiographer certification.

(j) [~~(i)~~] Schedule of [~~annual~~] fees for certificates of registration for radiation machines, lasers, and services. The fee for certificates of registration for dental radiation machines is specified in §289.232 of this title. The fee for certificates of registration for radiation machines used in veterinary medicine is specified in §289.233 of this title. The following schedule contains the [~~annual~~] fees for certificates of registration for radiation machines, lasers, and services:
Figure: 25 TAC §289.204(j)
[~~Figure: 25 TAC §289.204(i)~~]

(k) [~~(j)~~] Annual fees for environmental surveillance and emergency planning and implementation. Fees shall be set annually by the agency for each facility. Fees for fixed nuclear facilities shall be the actual expenses for environmental surveillance and emergency planning and implementation activities. Costs of activities benefiting more than one facility shall be prorated.

(l) [~~(k)~~] Failure to pay prescribed fees.

(1) In any case where the agency finds that an applicant for a license or certificate of registration has failed to pay the fee prescribed in this section, the agency will not process that application until such fee is paid.

[~~(2) In any case where the agency finds that a licensee or registrant has failed to pay a fee prescribed by this section by the due date, the licensee or registrant shall pay an annual late payment fee of 20% of the annual fee prescribed in subsections (f), (h), (i) and (l) of this section, in addition to the annual license and registration fee. The annual late payment fee shall not exceed $10,000 for each licensee or registrant who fails to pay the fees prescribed by this section.~~]

(2) [~~(3)~~] In any case where the agency finds that a licensee or registrant has failed to pay a fee prescribed by this section by the due date, the license or certificate of registration expires and the agency may implement compliance procedures as provided in §289.205 of this title (relating to Hearing and Enforcement Procedures).

(3) [~~(4)~~] In any case where the agency finds that a fixed nuclear facility has failed to pay fees for environmental surveillance or emergency planning and implementation within 90 days following date of invoice, the agency may issue an order to show cause why those services should not be terminated.

(m) [~~(l)~~] Schedule of fees for uranium recovery and byproduct material disposal facility licenses. The following schedule contains the fees for uranium recovery and byproduct material disposal facility licenses:

Figure: 25 TAC §289.204(m)

[~~Figure: 25 TAC §289.204(l)~~]

(n) [~~(m)~~] Adjustments to [~~annual~~] fees for uranium recovery and byproduct material disposal facility licenses.

(1) If additional noncontiguous uranium recovery facility sites are authorized under the same license, the appropriate [~~annual~~] fee shall be increased by 25% for each additional site for an operational year and 50% for closure only.

(2) If an authorization for disposal of byproduct material is added to a license, the appropriate [~~annual~~] fee shall be increased by 25%.

(o) [~~(n)~~] One-time fee adjustments for uranium recovery and byproduct material disposal facility licenses. For the addition of the following items after an environmental assessment has been completed on a facility, a one-time fee corresponding to the item shall be paid:

(1) $22,389 for in situ wellfield on noncontiguous property;

(2) $55,977 for in situ satellite;

(3) $8,777 for wellfield on contiguous property;

(4) $39,653 for non-vacuum dryer; or

(5) $55,977 for disposal (including processing, if applicable) of byproduct material.

(p) Fees for Texas Online participation. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

This 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 January 15, 2004.

TRD-200400297
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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SUBCHAPTER E. REGISTRATION REGULATIONS

The Texas Department of Health (department) proposes the repeal of §289.226 and new §289.226, concerning registration of radiation machine use and services.

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 289.226 has been reviewed and the department has determined that the reasons for adopting the section continue to exist in that a rule on this subject is needed; however, the rule needs revisions as described in this preamble.

The department published a Notice of Intention to Review for §289.226 regarding Government Code, §2001.039, in the *Texas Register* (28 TexReg 6029) on August 1, 2003. No comments were received by the department on this section following publication of this notice.

The new section incorporates legislation passed by the 78th Legislature, Regular Session. House Bill 2292 requires two-year terms for certificates of registration. The department has historically required renewal of some certificates of registration that includes submission to the department of updated technical information regarding the radiation machines possessed by the registrant, operating and safety procedures, and personnel responsible for the security and safe use of the machines. In order to incorporate the provisions of HB 2292 concerning two-year terms and to continue requiring a renewal that includes pertinent technical information, the department is implementing an administrative renewal and a technical renewal. The registrant will be required to renew the certificate of registration every two years by paying the required fee and having a satisfactory compliance history. This administrative renewal will not involve review of technical information regarding the certificate of registration. At a longer interval, the registrant will be required to submit certain technical information for review. This technical renewal date will be specified in the certificate of registration and will be for an interval of an even number of years in order to eventually coincide with the administrative renewal. Maintaining the more resource-intensive technical renewal allows the department to ensure continued security and safe use of radiation machines.

House Bill 253, 78th Legislature, Regular Session, requires the department to deny a certificate of registration application, amendment or renewal if the applicant's compliance history reveals a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations of the Radiation Control Act or the department's radiation control rules. The department has defined "a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations..." by adding a requirement that states the department will deny an application if at least three department or judicial orders are issued that assess administrative or civil penalties against the registrant or if an order is issued to revoke or suspend the certificate of registration.

Requirements for registering veterinary facilities are deleted and incorporated in a separate new section, §289.233 (concerning Radiation Control Regulations for Radiation Machines used in Veterinary Medicine). Registration requirements for personnel monitoring device processors are likewise deleted from the rules.

Requirements for use of radiation machines in morgues are clarified as are types of services registered in accordance with this section. A requirement is added to allow the agency to request and the registrant to provide additional information after the certificate of registration has been issued in order to be consistent with other permitting sections of this title. The language that allowed the agency to accept an assembler's notification of installation in lieu of notification by the registrant of machine installation is deleted. Requirements for assembler's obligations in one subsection are deleted because they are repetitive of language in another subsection. A requirement for registrants to annually inventory their radiation machines is added. An inventory requirement is added to ensure registrants, especially those with multiple radiation machines, are aware of the location of machines and how many machines the registrant possesses. Receipt, transfer, and disposal requirements for radiation machines is moved to this section from another section of this title in order to more logically place it with inventory requirements. Notification requirements are clarified to state that the registrant must notify the department if the authorized type of machine or use changes or if the number of machines in any category of machine type or use changes. The requirements for radiation machines used for clinical trial evaluations and loaner or demonstration radiation machines are revised to reflect changes in the administrative and technical renewals and the notification requirements. In addition, revisions are made to the requirements for expiration of certificates of registration to correspond with the requirements for administrative and technical renewals. Language is also added to the expiration and termination subsections to clarify requirements for the disposition or transfer of radiation machines if a registrant terminates a certificate of registration or it expires.

The section was reformatted for better flow of language and easier readability. Other minor grammatical changes are made and reference citations are corrected for clarification.

This new section and repeal are part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, or other factors.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the proposed section will be in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that rules are clear and specific, that those persons regulated are informed of the appropriate registration procedures and that registrants are aware of the number and location of radiation machines for purposes of safety and security. There will be a slight increase in a registrant's time required to perform an annual inventory. Depending on the number and location of machines and locations of sub-sites, a facility could spend from 10 minutes to over eight hours in this endeavor. There will be no significant fiscal impact on applicants/registrants that are small businesses, micro-businesses, or other persons required to comply with the rule. No additional costs will be incurred because no additional requirements are added. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 9:00 a.m., Tuesday, February 10, 2004, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

25 TAC §289.226

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

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The repeal affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.226. Registration of Radiation Machine Use and 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 January 15, 2004.

TRD-200400291
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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25 TAC §289.226

The new section is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The new section affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.226. Registration of Radiation Machine Use and Services.

(a) Purpose. This section provides for the registration of persons using radiation machines and persons who are in the business of

providing radiation machine installation or radiation services. No person shall use radiation machines or perform radiation services except as authorized in a certificate of registration issued by the agency in accordance with the requirements of this section. A person who receives, possesses, uses, owns, or acquires radiation machines prior to receiving a certificate of registration is subject to the requirements of this chapter.

(b) Scope.

(1) In addition to the requirements of this section, all registrants are subject to the requirements of §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), and §289.231 of this title (relating to General Provisions and Standards for Protection Against Machine-Produced Radiation).

(2) Registrants using radiation machines in the healing arts are also subject to the requirements of §289.227 of this title (relating to Use of Radiation Machines in the Healing Arts). Morgues and educational facilities utilizing radiation machines for non-human use are subject to the specific requirements of §289.227 of this title.

(3) Registrants using analytical and other industrial radiation machines, such as x-ray equipment used for cathodoluminescence, ion implantation, gauging, or electron beam welding, are subject to the requirements of §289.228 of this title (relating to Radiation Safety Requirements for Analytical and Other Industrial Radiation Machines).

(4) Registrants using accelerators, therapeutic radiation machines, and simulators are also subject to the requirements of §289.229 of this title (relating to Radiation Safety Requirements for Accelerators, Therapeutic Radiation Machines, and Simulators).

(5) Registrants using mammography radiation machines are also subject to the requirements of §289.230 of this title (relating to Certification of Mammography Systems and Accreditation of Mammography Facilities).

(6) Registrants using radiation machines in industrial radiographic operations are also subject to the requirements of §289.255 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(7) Registrants using dental radiation machines are subject to the requirements of §289.232 of this title (relating to Radiation Control Regulations for Dental Radiation Machines).

(8) Registrants using veterinary radiation machines are subject to the requirements of §289.233 of this title (relating to Radiation Control Regulations for Veterinary Radiation Machines).

(9) For radiation machines for human use, performance of exposure rate or dose measurements to determine compliance with exposure rate or dose measurement requirements of diagnostic radiation machines in this chapter must be performed by a licensed medical physicist with a specialty in diagnostic radiological physics.

(10) For the purposes of this section, radiation services shall include, but may not be limited to the following:

(A) for radiation machines that are not for human use, performance of exposure rate or dose measurements;

(B) for radiation machines for human use, gathering of radiation machine output measurements under the direction of a licensed medical physicist;

(C) for radiation machines for human use, performance of services specified in paragraph (9) of this subsection or services required by a licensed medical physicist as specified in §289.229 of this title;

(D) presentation of agency-accepted training courses that are specifically required by this chapter;

(E) calibration of survey and radiation measurement instruments:

(F) demonstration and sales of radiation machines that require the individual to operate or cause a radiation machine to be operated in order to demonstrate or sell;

(G) assembly, installation or repair to ensure a radiation machine is operating according to manufacturer's specifications;

(H) completion of equipment performance evaluations on dental radiation machines;

(I) provision of radiation machines on a routine basis to a facility for limited time periods. For purposes of this section, a person providing the services described in this subparagraph is a provider of equipment. For healing arts facilities, the use of radiation machines shall be directed by a practitioner employed by the contracting facility.

(11) For purposes of this section, a practitioner of the healing arts is a person licensed to practice healing arts by either the Texas State Board of Medical Examiners as a physician, the Texas Board of Chiropractic Examiners, or the Texas State Board of Podiatry Examiners.

(c) Prohibition. Exposure of an individual for training, demonstration, or other non-healing arts purposes is prohibited.

(d) Exemptions.

(1) Electronic equipment that produces radiation incidental to its operation for other purposes is exempt from the registration and notification requirements of this section, provided that the dose equivalent rate averaged over an area of 10 square centimeters (cm^2) does not exceed 0.5 millirem per hour (mrem/hr) at 5 centimeters (cm) from any accessible surface of such equipment. The production, testing, or factory servicing of such equipment shall not be exempt.

(2) Radiation machines in transit or in storage incident to transit are exempt from the requirements of this section. This exemption does not apply to the providers of radiation machines for mobile services. Facilities that have placed all radiation machines in storage, including on-site storage, and have notified the agency in writing, are exempt from the requirements of this section. This exemption is void if any radiation machine is energized resulting in the production of radiation.

(3) Domestic television receivers, video display terminals, and electron microscopes, including the servicing of such devices, are exempt from the requirements of this section.

(4) Inoperable radiation machines are exempt from the requirements of this section. For the purposes of this section, an inoperable radiation machine means a radiation machine that cannot be energized when connected to a power supply without repair or modification.

(5) Financial institutions that take possession of radiation machines as the result of foreclosure, bankruptcy, or other default of payment are exempt from the requirements in this section to the extent that they demonstrate that the unit is operable for the sole purpose of selling, leasing, or transferring.

(6) Facilities, including academic institutions and research or development facilities, registered for the use of radiation machines are exempt from the registration requirements of subsection (j) of this

section to the extent that their personnel perform radiation services only for the registrant by whom they are employed.

(e) General requirements for application for registration.

(1) Application for registration shall be completed on forms prescribed by the agency and shall contain all the information required by the form and accompanying instructions.

(2) A radiation safety officer (RSO) shall be designated on each application form. The qualifications of that individual shall be submitted to the agency with the application. The RSO shall meet the applicable requirements of subsection (t)(1) of this section and carry out the responsibilities of subsection (t)(2) of this section.

(3) The agency may at any time after the filing of the original application, require further statements in order to enable the agency to determine whether the certificate of registration should be issued or denied.

(4) An application for a certificate of registration may include a request for a certificate of registration authorizing one or more activities. Applications for certification of mammography systems shall be made separately.

(5) Applications and documents submitted to the agency may be made available for public inspection except that the agency may withhold any document or part thereof from public inspection in accordance with §289.231(aa) of this title.

(6) Each application for a certificate of registration shall be accompanied by the fee prescribed in §289.204 of this title.

(7) Each application shall be accompanied by a completed BRC Form 226-1 (Business Information Form).

(f) Application for registration for human use of radiation machines. In addition to the requirements of subsection (e) of this section, each applicant shall comply with the following.

(1) Each person having a radiation machine used in the healing arts shall apply for registration with the agency within 30 days after beginning use of the radiation machine, except for mobile services that shall be registered in accordance with subsection (g) of this section, and healing arts screening and medical research programs that shall be approved in accordance with subsection (h) of this section.

(2) Each person having an accelerator or therapeutic radiation machine at or above 1 million electron volts (MeV) for human use shall apply for and receive a certificate of registration from the agency before energizing the accelerator, including performing acceptance testing.

(3) Each person having a simulator and/or therapeutic radiation machine below 1 MeV for human use shall apply for registration with the agency within 30 days of energizing the equipment.

(4) The applicant shall be qualified by reason of training and experience to use the radiation machine for the purpose requested in accordance with this section in such a manner as to minimize danger to occupational and public health and safety.

(5) The applicant's proposed equipment, facilities, and operating and safety procedures shall be adequate to minimize danger to occupational and public health and safety.

(6) An application for healing arts shall be signed by a licensed practitioner The signature of the administrator, president, or chief executive officer will be accepted in lieu of a licensed practitioner's signature if the facility has more than one licensed practitioner who may direct the operation of radiation machines. The application shall also be signed by the RSO if the RSO is someone other than the licensed practitioner.

(7) An application for accelerators or therapeutic radiation machines for human use shall be signed by a practitioner licensed by the Texas State Board of Medical Examiners. The signature of the administrator, president, or chief executive officer will be accepted in lieu of a licensed practitioner's signature if the facility has more than one licensed practitioner who may direct the operation of radiation machines. The application shall also be signed by the RSO if the RSO is someone other than the licensed practitioner. Each applicant shall submit operating and safety procedures as described in §289.229(h)(1)(D) of this title and a description of the proposed facilities in accordance with the following:

(A) §289.229(h)(2)(B) and (C) of this title for equipment with energies below 1 MeV; and

(B) §289.229(h)(3)(B) of this title for equipment with energies above 1 MeV.

(g) Application for registration of mobile service operation. In addition to the requirements of subsections (e) and (f) of this section or §289.230(t) of this title, as applicable, each applicant shall apply for and receive authorization for mobile service operation before beginning mobile service operation. The following shall be submitted:

(1) an established main location where the machine(s), records, etc. will be maintained for inspection. This shall be a street address, not a post office box number;

(2) a sketch or description of the normal configuration of each radiation machine's use, including the operator's position and any ancillary personnel's location during exposures. If a mobile van is used with a fixed unit inside, furnish the floor plan indicating protective shielding and the operator's location; and

(3) a current copy of the applicant's operating and safety procedures regarding radiological practices for protection of patients, operators, employees, and the general public.

(h) Application for registration of healing arts screening and medical research.

(1) In addition to the requirements of subsections (e) and (f) of this section, each applicant shall apply for and receive authorization for healing arts screening before initiating a screening program. The information and evaluation in subsection (t)(4) of this section shall be submitted with the application.

(2) In addition to the requirements of subsections (e) and (f) of this section, any research using radiation machines on humans shall be approved by an Institutional Review Board (IRB) as required by Title 45, CFR, Part 46 and Title 21, CFR, Part 56. The IRB shall include at least one practitioner of the healing arts to direct any use of radiation in accordance with §289.231(b)(1) of this title.

(i) Application for registration of radiation machines for non-human use, including use in morgues. In addition to the requirements of subsection (e) of this section, each applicant shall comply with the following.

(1) Each person having an accelerator for non-human use shall apply for and receive a certificate of registration from the agency before beginning use of the accelerator.

(2) Each person having an accelerator for non-human use shall submit the following:

(A) operating and safety procedures as described in §289.229(f)(3)(B) of this title; and

(B) a description of the applicant's proposed facilities in accordance with §289.229(f)(2) and (f)(3)(A), (D) and (E) of this title.

(3) Each person having a radiation machine for non-human use, other than those specified in paragraph (1) of this subsection and those used for industrial radiographic operations, shall apply for registration with the agency within 30 days after beginning use of the machine.

(4) Each applicant for use of radiation machines in industrial radiographic operations shall submit the information required in §289.255(u)(7) of this title before beginning use of the machine(s).

(5) An application for the uses specified in this subsection shall be signed by the applicant or registrant or a person duly authorized to act for and on the applicant's or registrant's behalf. The application shall also be signed by the RSO if the RSO is someone other than the applicant or registrant.

(j) Application for registration of radiation machine services. In addition to the requirements of subsection (e) of this section, each applicant shall comply with the following.

(1) Each person who intends to provide radiation services described in subsections (b)(10) of this section shall apply for and receive a certificate of registration from the agency before providing such service.

(2) An application for radiation services shall be signed by the applicant or registrant or a person duly authorized to act for and on the applicant's or registrant's behalf. The application shall also be signed by the RSO if the RSO is someone other than the applicant or registrant.

(3) The applicant shall submit written documentation to the agency of the specific training and experience that qualifies each individual to discharge the duties of this service. As a minimum, each applicant shall submit the following:

(A) for individuals performing assembly, installation, or repair of radiation machines in (b)(10)(G), the qualifications listed in subsection (t)(3) of this section;

(B) for individuals performing the services specified in subsection (b)(9) and (10)(C) of this section, a copy of the individual's license from the Texas Board of Licensure for Professional Medical Physicists;

(C) for all other services, the qualifications listed in subsection (t)(1)(A)(i)-(iii) of this section.

(4) No person shall perform services specified in subsection (b)(9) and (10) of this section that are not specifically authorized by the agency.

(5) No person shall perform radiation machine services, other than initial installation of the first machine(s) on the premises, for an individual who cannot produce evidence of registration with the agency authorizing the possession and use of the machines in question.

(6) Each applicant for providers of equipment shall also submit the following:

(A) an established main location where the machines, records, etc. will be maintained for inspection. This shall be a street address, not a post office box number;

(B) evidence that the healing arts facility responsible for administering or supervising the administering of radiation is registered in accordance with the requirements in this section; and

(C) a current copy of the applicant's operating and safety procedures. A current copy of the applicant's operating and safety procedures is required when personnel are provided in addition to equipment.

(7) Each applicant for calibration of survey and radiation measurement instruments shall also submit the following:

(A) procedures for calibration;

(B) qualifications of personnel performing the calibration;

(C) a copy of the calibration certificate to be used; and

(D) a copy of the expiration sticker to be used.

(8) Each applicant for agency-accepted training courses specifically required by §289.253 (relating to Radiation Safety Requirements for Well Logging Service Operation and Tracer Studies), and §289.255 of this title shall also submit the following:

(A) a course syllabus;

(B) the number of instructional hours for each subject;

(C) a list of training resources, for example, reference books, texts, workbooks, physical facilities, etc.;

(D) all test questions and corresponding answers; and

(E) the radiation safety training, education, and experience of each instructor.

(k) Issuance of certificate of registration.

(1) A certificate of registration application will be approved if the agency determines that an application meets the requirements of the Texas Radiation Control Act (Act) and the requirements of this chapter. The certificate of registration authorizes the proposed activity in such form and contains such conditions and limitations as the agency deems appropriate or necessary.

(2) The agency may incorporate in the certificate of registration at the time of issuance, or thereafter by amendment, such additional requirements and conditions with respect to the registrant's possession, use, and transfer of radiation machines subject to this chapter as it deems appropriate or necessary in order to:

(A) minimize danger to occupational and public health and safety;

(B) require additional reports and the keeping of additional records as may be appropriate or necessary; and

(C) prevent loss or theft of radiation machines subject to this section.

(3) The agency may request, and the registrant shall provide, additional information after the certificate of registration has been issued to enable the agency to determine whether the certificate of registration should be modified in accordance with subsection (r) of this section.

(l) Specific terms and conditions of certificates of registration.

(1) Each certificate of registration issued in accordance with this section shall be subject to the applicable provisions of the Act, now or hereafter in effect, and to the applicable rules and orders of the agency.

(2) No certificate of registration issued or granted under this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, to any person unless the agency authorizes the transfer in writing.

(3) Each person registered by the agency for radiation machine use in accordance with this section shall confine use and possession of the radiation machine registered to the locations and purposes authorized in the certificate of registration.

(4) In making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a certificate of registration, the agency may consider the technical competence and compliance history

of an applicant or holder of a certificate of registration. After an opportunity for a hearing, the agency shall deny an application for a certificate of registration, an amendment to a certificate of registration, or renewal of a certificate of registration if the applicant's compliance history reveals that at least three agency or judicial orders have been issued against the applicant that assess administrative or civil penalties against the applicant, or that revoke or suspend the certificate of registration.

(m) Responsibilities of registrant.

(1) The registrant shall notify the agency in writing of any changes that would render the information contained in the application for registration and/or the certificate of registration inaccurate.

(A) Notification is required within 30 days of the following changes:

(i) name and mailing address;

(ii) street address where machine will be used;

(iii) RSO; or

(iv) type of servicing and/or services provided;

(B) Each registrant shall inventory all radiation machines in its possession at an interval not to exceed one year. The inventory record shall be maintained for three years for inspection by the agency and shall include:

(i) manufacturer's name;

(ii) model and serial number of the control panel; and

(iii) location of radiation machine(s) (for example, room number).

(C) Notification to the agency concerning radiation machine inventory is required within 30 days of either of the following:

(i) any change in the category(ies) of machine type or type of use as specified in §289.231(ll) and as authorized in the certificate of registration, or;

(ii) any increase in the number of machines authorized by the certificate of registration in any machine type or type of use category.

(D) Each registrant shall maintain records of receipt, transfer, and disposal of radiation machines for inspection by the agency. The records shall include the following information and shall be kept until termination of the certificate of registration.

(i) manufacturer's name;

(ii) model and serial number from the control panel;

(iii) date of the receipt, transfer, and disposal;

(iv) name and address of person machine(s) received from, transferred to, or disposed of; and

(v) name of the individual recording the information.

(2) The following criteria applies to radiation machines used for clinical trial evaluations and loaner or demonstration radiation machines. For persons having a valid certificate of registration, radiation machines used for clinical trial evaluations and loaner or demonstration radiation machines may be used for up to 60 days. After 60 days, the registrant shall notify the agency of the following:

(A) a change in the category(ies) of machine type or type of use as specified in §289.231(ll) and as authorized in the certificate of registration, or:

(B) any increase in the number of machines authorized by the certificate of registration in any machine type or type of use category.

(3) No registrant shall engage any person for services described in subsection (j) of this section until such person provides to the registrant evidence of registration with the agency.

(4) Records of training and experience required by this section shall be maintained for inspection by the agency until disposal is authorized by the agency.

(5) The following applies to voluntary or involuntary petitions for bankruptcy.

(A) Each registrant shall notify the agency, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by the registrant or its parent company. This notification shall include:

(i) the bankruptcy court in which the petition for bankruptcy was filed; and

(ii) the date of the filing of the petition.

(B) A copy of the "petition for bankruptcy" shall be submitted to the agency along with the written notification.

(6) The registrant is responsible for complying with this chapter and the conditions of the certificate of registration.

(7) No person shall use radiation machines or perform services that are not authorized in the certificate of registration issued by the agency.

(8) Providers of equipment shall keep a log of radiation machines provided in Texas. The record shall be maintained for five years for inspection by the agency and shall list the following current information:

(A) date machine is provided; and

(B) name of customer and customer's certificate of registration number.

(n) Sale, lease, loan, installation, assembly, disposal, and transfer of radiation machines.

(1) No person shall transfer a radiation machine to or install for, other than initial installation of the first machine on the premises, any person who does not possess a current certificate of registration issued by the agency in accordance with this section.

(2) Any person who sells, leases, lends, disposes, assembles, installs, or otherwise transfers radiation machines in the state shall notify the agency of the following information within 30 days of such action:

(A) the name, address, and certificate of registration number, except in the case of initial machine installation, of persons who have received such machines;

(B) the type of radiation machine, the manufacturer's name, model number, and control panel serial number of each radiation machine; and

(C) the date of transfer or disposal of each radiation machine.

(3) No person shall make, sell, lease, transfer, lend, assemble, or install radiation machines or the components of such machines unless such machines and equipment, when properly placed in operation and used, meet the applicable requirements of this chapter.

(o) Expiration of certificates of registration and administrative renewal.

(1) Effective September 1, 2004, the term of the certificate of registration is two years. Except as provided by subsection (q) of this section, each certificate of registration expires at the end of the day, in the month and year stated in the certificate of registration. Upon payment of the fee required by §289.204 of this title and if the agency does not deny the renewal in accordance with subsection (l)(4) of this section, the certificate of registration will be administratively renewed.

(2) If the fee is not paid and the certificate of registration is not renewed in accordance with paragraph (1) of this subsection, the certificate of registration expires, and the registrant is in violation of the requirements in this chapter and is subject to administrative penalties in accordance with §289.205 of this title.

(A) If the registrant pays the fee required by §289.204 of this title within 30 days after expiration of the certificate of registration, the certificate of registration will be reinstated and the registrant will not be required to file an application in accordance with subsection (e) of this section.

(B) If the registrant fails to pay the fee within 30 days after expiration of the certificate of registration, the registrant shall file an application in accordance with subsection (e) of this section.

(3) If a registrant fails to pay the fee required by §289.204 of this title and the certificate of registration is not renewed, the registrant shall:

(A) terminate use of all radiation machines and/or terminate radiation machine servicing or radiation services; and

(B) submit to the agency a record of the disposition of the radiation machines, if applicable, and if transferred, to whom it was transferred within 30 days following the expiration date.

(4) Expiration of the certificate of registration does not relieve the registrant of the requirements of this chapter.

(p) Termination of certificates of registration. When a registrant decides to terminate all activities involving radiation machines or services authorized under the certificate of registration, the registrant shall immediately do the following:

(1) request termination of the certificate of registration in writing;

(2) submit to the agency a record of the disposition of the radiation machines, if applicable; and if transferred, to whom it was transferred; and

(3) pay any outstanding fees in accordance with §289.204 of this title.

(q) Technical renewal of certificate of registration.

(1) If required by the certificate of registration, an application for technical renewal of a certificate of registration shall be filed in accordance with subsection (e)(1)-(5) of this section and applicable paragraphs of subsections (f) - (j) of this section. An application for a technical renewal of a certificate of registration shall be submitted to the agency by the date specified in the existing certificate of registration. If the registrant fails to apply, or the agency does not approve the application in accordance with subsection (k)(1) of this section, the certificate of registration expires and the registrant is in violation of the requirements in this chapter and is subject to administrative penalties in accordance with §289.205 of this title. The registrant shall comply with the requirements of subsection (o)(3)(A)-(C) of this section.

(2) Expiration of the certificate of registration does not relieve the registrant of the requirements of this chapter.

(3) If a registrant files an application for a technical renewal in proper form before the existing certificate of registration expires, such existing certificate of registration shall not expire until the application status has been determined by the agency.

(r) Modification, suspension, and revocation of certificates of registration.

(1) The terms and conditions of all certificates of registration shall be subject to revision or modification. A certificate of registration may be suspended or revoked by reason of amendments to the Act, by reason of rules in this chapter or orders issued by the agency.

(2) Any certificate of registration may be revoked, suspended, or modified, in whole or in part, for any of the following:

(A) any material false statement in the application or any statement of fact required under provisions of the Act;

(B) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a certificate of registration on an original application;

(C) violation of, or failure to observe any of the terms and conditions of the Act, this chapter, the certificate of registration, or order of the agency; or

(D) existing conditions that constitute a substantial threat to the public health or safety or the environment.

(3) Each certificate of registration revoked by the agency ends at the end of the day on the date of the agency's final determination to revoke the certificate of registration, or on the revocation date stated in the determination, or as otherwise provided by the agency order.

(4) Except in cases in which the occupational and public health, interest or safety requires otherwise, no certificate of registration shall be suspended, or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the registrant in writing and the registrant shall have been afforded an opportunity to demonstrate compliance with all lawful requirements.

(s) Reciprocal recognition of out-of-state certificates of registration.

(1) Whenever any radiation machine is to be brought into the state for any temporary use, the person proposing to bring the machine into the state shall apply for and receive a notice from the agency granting reciprocal recognition prior to beginning operations. The request for reciprocity shall include the following:

(A) completed BRC Form 226-1 (Business Information Form);

(B) completed BRC Form 252-3 (Notice of Intent to Work in Texas Under Reciprocity);

(C) completed qualification forms (BRC Forms 255-E, 255-T and/or 255-OS) for each radiographer who will be working in Texas if the reciprocity request is for industrial radiography;

(D) name and Texas licensing board number of the practitioner if the machines are used to irradiate humans;

(E) copy of the applicant's current certificate of registration or equivalent document;

(F) copy of the applicant's current operating and safety procedures pertinent to the proposed use;

(G) fee as specified in §289.204(e) of this title; and

(H) qualifications of personnel who will be operating the machines.

(2) Upon a determination that the request for reciprocity meets the requirements of the agency, the agency may issue a notice granting reciprocal recognition authorizing the proposed use.

(3) Once reciprocity is granted, the out-of-state registrant shall file a BRC Form 252-3 with the agency prior to each entry into the state. This form shall be filed at least three working days before the radiation machine is to be used in the state. If, for a specific case, the three-day period would impose an undue hardship, the out-of-state registrant may, at the determination of the agency, obtain permission to proceed sooner.

(4) When radiation machines are used as authorized under reciprocity, the out-of-state registrant shall have the following in its possession at all times for inspection by the agency:

(A) completed BRC Form 252-3;

(B) copy of the notice from the agency granting reciprocity;

(C) copy of the out-of-state registrant's operating and safety procedures; and

(D) copy of the applicable rules as specified in the notice granting reciprocity.

(5) If the state from which the radiation machine is proposed to be brought does not issue certificates of registration or equivalent documents, a certificate of registration shall be obtained from the agency in accordance with the requirements of this section.

(6) The agency may withdraw, limit, or qualify its acceptance of any certificate of registration or equivalent document issued by another agency upon determining that such action is necessary in order to prevent undue hazard to occupational and public health and safety or property.

(7) Reciprocal recognition will expire one year from the date it is granted. A new request for reciprocity shall be submitted to the agency each year. Reciprocity requests made after the initial request shall include only the following:

(A) completed BRC Form 226-1 (Business Information Form);

(B) completed BRC Form 252-3 (Notice of Intent to Work in Texas Under Reciprocity);

(C) completed qualification forms (BRC Forms 255-E, 255-T and/or 255-OS) for each radiographer who will be working in Texas if the reciprocity request is for industrial radiography;

(D) name and Texas licensing board number of the practitioner if the machines are used to irradiate humans;

(E) copy of the applicant's current certificate of registration or equivalent document;

(F) copy of the applicant's current operating and safety procedures pertinent to the proposed use;

(G) fee as specified in §289.204(e) of this title; and

(H) qualifications of personnel who will be operating the machines.

(8) Radiation services provided by a person from out-of-state will not be granted reciprocity. Whenever radiation services are to be provided by a person from out-of-state, that person shall apply for and receive a certificate of registration from the agency before providing radiation services. The application shall be filed in accordance with subsections (e), (j), and (i) of this section, as applicable.

(t) Appendices.

(1) Requirements for RSOs for registrants.

(A) All RSOs shall meet the following general requirements in addition to requirements in specific categories, except for industrial radiography RSOs:

(i) knowledge of potential radiation hazards and emergency precautions; and

(ii) completed educational courses related to ionizing radiation safety or a radiation safety officer course; or

(iii) experience in the use and familiarity of the type of equipment used.

(B) Specific requirements for RSOs by facility are as follows.

(i) Healing arts facilities shall have:

(I) licensed practitioner RSOs with documentation of licensing board number; or

(II) non-practitioner RSOs with the following:

(-a-) evidence of a valid general certificate issued under the Medical Radiologic Technologist Certification Act, Texas Occupations Code, Chapter 601, and at least two years of supervised use of radiation machines;

(-b-) evidence of a valid limited general certificate issued under the Medical Radiologic Technologist Certification Act, Texas Occupations Code, Chapter 601, and at least four years of supervised use of radiation machines;

(-c-) evidence of registry by the American Registry of Radiologic Technologists (ARRT) or the American Registry of Clinical Radiologic Technologists (ARCRT) and at least two years of supervised use of radiation machines;

(-d-) evidence of associate degree in radiologic technology, health physics, or nuclear technology, and at least two years of supervised use of radiation machines;

(-e-) evidence of registration with the Board of Nurse Examiners as a Registered Nurse or a Registered Nurse with an extended scope of practice (Nurse Practitioner) performing radiologic procedures, and at least two years of supervised use of radiation machines in the respective practitioners' specialty;

(-f-) evidence of registration with the Texas State Board of Physician Assistant Examiners, and at least two years of supervised use of radiation machines in the respective practitioners' specialty;

(-g-) evidence of:

(-1-) registration with the Texas State Board of Medical Examiners performing radiologic procedures under a physician's instruction and direction;

(-2-) registration with the Texas State Board of Chiropractic Examiners performing radiologic procedures under a chiropractor's instruction and direction; or

(-3-) registration with the Texas State Board of Podiatry Examiners performing radiologic procedures under a podiatrist's instruction and direction; and

(-4-) at least four years of supervised use of radiation machines in the respective practitioners' specialty;

(-h-) for radiotherapy facilities, evidence of registry by the ARRT or ARCRT and at least four years of supervised experience in radiotherapy;

(-i-) evidence of bachelor's (or higher) degree in a natural or physical science, health physics, radiological science, nuclear medicine, or nuclear engineering; or

(-j-) evidence of a current Texas license under the Medical Physics Practice Act, Texas Occupations Code, Chapter 602, in one or more of the following appropriate specialties:

(-1-) medical health physics, diagnostic radiological physics, or medical nuclear physics for diagnostic x-ray facilities; or

(-2-) medical health physics or therapeutic radiological physics for radiotherapy facilities.

(ii) Academic institutions and/or research and development facilities shall have RSOs who are faculty or staff members in radiation protection, radiation engineering, or related disciplines. (This individual may also serve as the RSO over the healing arts section of the facility.)

(iii) Industrial radiography operations shall have RSOs who meet the requirements of §289.255(m)(4)(B) of this title.

(C) Exemptions. The RSO identified on a certificate of registration issued before September 1, 1993, need not comply with the training requirements in this subsection.

(2) Responsibilities of RSOs. Specific duties of the RSO include, but are not limited to, the following:

(A) establishing and overseeing operating and safety procedures that maintain radiation exposures as low as reasonably achievable (ALARA), and to review them regularly to ensure that the procedures are current and conform with this chapter;

(B) ensuring that individual monitoring devices are properly used by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made as required by §289.203 of this title;

(C) investigating and reporting to the agency each known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter and each theft or loss of source(s) of radiation, determining the cause, and taking steps to prevent its recurrence;

(D) having a thorough knowledge of management policies and administrative procedures of the registrant and keeping management informed on a periodic basis of the performance of the registrant's radiation protection program, if applicable;

(E) assuming control and having the authority to institute corrective actions including shut-down of operations when necessary in emergency situations or unsafe conditions;

(F) maintaining records as required by this chapter;

(G) ensuring that personnel are adequately trained and complying with this chapter, the conditions of the certificate of registration, and the operating and safety procedures of the registrant.

(3) Minimum education and training for persons performing radiation machine assembly, installation or repair. All persons performing radiation machine assembly, installation or repair shall meet the general requirements in subparagraph (A) of this paragraph and one or more of the specialized requirements in subparagraph (B) of this paragraph.

(A) General requirements include:

(i) experience or education providing familiarity with the type(s) of equipment to be serviced, to include radiation safety;

(ii) knowledge of protective measures to reduce potentially hazardous conditions; and

(iii) six months of supervised assembly and repair of the type(s) of equipment to be serviced.

(B) Specialized requirements include:

(i) one year of formal training (may be satisfied by factory school, military technical training school, or other courses in radiation machine assembly, installation or repair techniques) or an associate's degree in biomedical equipment repair;

(ii) a bachelor's degree in electrical engineering with specialized training in radiation producing devices; or

(iii) a combination of training and experience equal to clause (i) of this subparagraph.

(C) Exemptions. A registrant holding a valid certificate of registration who has hired individuals to perform services before September 1, 1993, need not comply with the education and training requirements in this paragraph. Individuals hired after September 1, 1993, shall comply with the education and training requirements in this paragraph.

(4) Information to be submitted by persons proposing to conduct healing arts screening. Persons requesting that the agency approve a healing arts screening program shall submit the following information and evaluation.

(A) Administrative controls to include the following:

(i) the name and address of the applicant and, where applicable, the names and addresses of agents within Texas;

(ii) the diseases or conditions for which the x-ray examinations are to be used in diagnoses;

(iii) a detailed description of the x-ray examinations proposed in the screening program;

(iv) a description of the population to be examined in the screening program, for example, age, sex, physical condition, and other appropriate information;

(v) an evaluation of any known alternate methods not involving ionizing radiation that could achieve the goals of the screening program and why these methods are not used instead of the x-ray examination; and

(vi) for mobile screening operations, location(s) where radiation machines are used and maintained.

(B) Operating procedures for all x-ray systems (except bone densitometers) to include the following:

(i) an evaluation of the x-ray systems to be used in the screening program. The evaluation shall be performed by a licensed medical physicist with a specialty in diagnostic radiological physics. The evaluation shall show that such systems do satisfy all requirements of this section;

(ii) a description of the diagnostic imaging quality control program; and

(iii) a copy of the technique chart for the x-ray examination procedures to be used.

(C) Operating procedures for bone densitometers to include the manufacturer's evaluation of the system to be used in the

screening program. The evaluation shall show that such systems satisfy all requirements of this section.

(D) Training data to include the following:

(i) the qualifications of each individual who will be operating the x-ray systems;

(ii) the qualifications of the individual who will be supervising the operators of the x-ray systems. The extent of supervision and the method of work performance evaluation shall be specified; and

(iii) the name and address of the practitioner licensed in Texas who will interpret the radiographs.

(E) Records to include the following:

(i) a description of the procedures to be used in advising the individuals screened, and their private practitioners of the healing arts, of the results of the screening procedure and any further medical needs indicated; and

(ii) a description of the procedures for the retention or disposition of the radiographs and other records pertaining to the x-ray examinations.

This 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 January 15, 2004.

TRD-200400292
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §289.227

The Texas Department of Health (department) proposes an amendment to §289.227, concerning use of radiation machines in the healing arts.

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 289.227 has been reviewed and the department has determined that the reasons for adopting the section continue to exist; however, revisions to the rule are necessary as outlined in this preamble.

The department published a Notice of Intention to Review for §289.227 as required by Government Code, §2001.039, in the *Texas Register* (28 TexReg 6029) on August 1, 2003. No comments were received by the department on this section.

The Bureau of Radiation Control is reallocating resources for regulation of x-ray and nonionizing radiation based on prioritization of risk to public health and safety. Rules governing the use of radiation machines in the healing arts are revised to reflect this prioritization. Risk to public health and safety is primarily based on machine type and type of use rather than the category of facility in which they are used. Therefore, some requirements in this section have been rearranged and are found under categories of machine type and type of use, rather than type of facility in which they are used. Radiation machines used in veterinary medicine are for non-human use and pose a lower risk. Also, veterinary registrants are a significant portion of all registrants. Therefore, requirements for veterinary facilities are deleted and incorporated in a separate section, §289.233 (concerning Radiation Control Regulations for Radiation Machines Used in Veterinary Medicine). Multiple definitions are deleted as they are not used in the body of the rule. The definitions for mobile services and x-ray equipment were revised to more clearly state the intent of the rule. In addition, requirements for use of radiation machines in morgues are delineated because not all requirements for human use of radiation machines are applicable. The requirements for operating and safety procedures are expanded to include documentation that each individual operating a radiation machine has read the procedures, in order to ensure such individuals are aware of operating and safety issues. The requirement for a skin-to-image distance indicator to be present is clarified to state the indicator must be numerical in order to determine the required accuracy. The source-to-skin distance requirements for fluoroscopy are revised to be compatible with the United States Food and Drug Administration fluoroscopy requirements. Requirements for warning labels, visual indication of x-ray production, and technique factor accuracy found for other machine types are repeated for computerized tomography (CT) x-ray systems because they are applicable to CT machines also. Measurements of radiation output of the CT x-ray system are now required to be performed using the computed tomography dose index as recommended by national and international professional technical organizations. The requirements for acquisition of images using a phantom and made by a licensed medical physicist are clarified and requirements for acquisition of quality control images using a phantom and made by the registrant are added to differentiate between the two situations. Entrance exposure limits measurements for patients are added to the list of tests for equipment performance evaluations as well as language that delineates who may perform equipment performance evaluations. In addition, the frequency of performing equipment performance evaluations is changed for some types of equipment. The department considers measurements to determine compliance with entrance exposure limits to be as critical to properly operating machines and minimization of radiation exposure as the other required tests. Requirements are added for digital imaging acquisition systems to ensure the registrant is performing appropriate quality assurance and quality control for digital imaging acquisition systems. The rule is reformatted and renumbered and other minor grammatical changes are made and reference citations are corrected for clarification.

This amendment is part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, or other factors.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that rules

are clear and specific and that those persons required to operate radiation machines do so in ways that ensure such protection. There will be fiscal impact on applicants/registrants that are small businesses, micro-businesses or other persons required to comply with the rule. There will be an increase in the costs for all registrants except educational facilities, morgues, and facilities with bone density machines, to have entrance exposure limits performed by a licensed medical physicist as a part of the equipment performance evaluation. The cost would range from $25 to $150 per radiographic machine for those registrants who have a licensed medical physicist perform the other tests required for the equipment performance evaluation. If computed tomography quality control images are not already being performed, there will be an increase in time from approximately 15 to 30 minutes per occasion per machine for registrants to perform quality control phantom images on computed tomography units. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 9:00 a.m., Tuesday, February 10, 2004, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The amendment affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.227. Use of Radiation Machines in the Healing Arts [~~and Veterinary Medicine~~].

(a) Purpose. This section establishes requirements for the use of radiation machines in the healing arts [~~and in veterinary medicine~~].

(b) Scope.

(1) The registrant shall be responsible for directing the operation of the radiation machines under the administrative control of the registrant. The registrant shall assure that the requirements of this section are met in the operation of such radiation machines. All usage of such machines under this section shall be made by or under the supervision of a practitioner of the healing arts [~~for human use or licensed veterinarian for veterinary use~~].

(2) (No change.)

(3) The use of mammography radiation machines is subject to the requirements in §289.230 of this title (relating to Certification of Mammography Systems and Accreditation of Mammography Facilities), with the exceptions listed in §289.230(e)(1) and (2) of this title. The use of dental radiation machines is subject to the requirements in §289.232 of this title (relating to Radiation Control Regulations for Dental Radiation Machines). However, dental radiation machines located in a facility that also has other healing arts radiation machines will be inspected at the intervals specified in §289.231(ll)(1) of this title, and equipment performance evaluations performed at the interval specified for a medical facility in subsection (o)(1) [~~(q)(1)~~] of this section. The use of radiation machines for veterinary medicine is subject to the requirements in §289.233 of this title (relating to Radiation Control Regulations for Radiation Machines for Veterinary Medicine).

(c) Prohibitions.

(1) (No change.)

(2) Individuals shall not be exposed to the useful beam except for healing arts purposes and unless such exposure has been authorized by a licensed practitioner of the healing arts. This provision specifically prohibits deliberate exposure for the following purposes:

(A) (No change.)

(B) exposure of an individual for the purpose of healing arts screening, except as authorized by §289.226(h)(1) [~~§289.226(j)(1)~~] of this title; and

(C) exposure of an individual for the purpose of research, except as authorized by §289.226(h)(2) [~~§289.226(j)(2)~~] of this title.

(3) (No change.)

(d) Exemptions.

(1) (No change.)

[~~(2) Veterinary facilities are exempt from the following requirements:~~]

[~~(A) entrance exposure limits for fluoroscopy in subsection (o)(3) and (4) of this section;~~]

[~~(B) aural communication requirements for computed tomography (CT) in subsection (p)(2)(A) of this section; and~~]

[~~(C) CT dose measurements in subsection (p)(3) and (4) of this section.~~]

(2) [~~(3)~~] Individuals who are sole practitioners and sole operators and the only occupationally exposed individual are exempt from the following requirements:

(A) §289.203(b) of this title, "Posting of notices to workers;"

(B) §289.203(c) of this title, "Instructions to workers;" and

(C) operating and safety procedures in accordance with subsection (i)(2) of this section.

(3) [~~(4)~~] Registrants are exempt from the posting of the radiation area requirements in §289.231(x)(1) of this title provided that the operator has continuous surveillance and access control of the radiation area.

[~~(5) Facilities with CT x-ray systems producing digital images only are exempt from subsections (r), (s), and (t)(1)(O) and (P) of this section.~~]

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

(1) - (12) (No change.)

[~~(13) Calibration of machines--The measurement and specification of absorbed dose to a medium, or exposure in air, at a defined point in a radiation beam.~~]

(13) [~~(14)~~] Central axis of the beam--A line passing through the virtual source and the center of the plane figure formed by the edge of the first beam-limiting device.

(14) [~~(15)~~] Certified equipment--Equipment that has been certified in accordance with Title 21, Code of Federal Regulations (CFR).

(15) [~~(16)~~] Coefficient of variation or C--The ratio of the standard deviation to the mean value of a population of observations. It is estimated using the following equation:
Figure: 25 TAC §289.227(e)(15)
[~~Figure: 25 TAC §289.227(e)(16)~~]

(16) [~~(17)~~] Collimator--A device or mechanism by which the x-ray beam is restricted in size.

(17) [~~(18)~~] Computed tomography (CT)--The production of a tomogram by the acquisition and computer processing of x-ray transmission data.

[~~(19) Continuous pressure type switch--A switch so constructed that a circuit closing contact can be maintained only by continuous pressure on the switch by the operator.~~]

[~~(20) Contrast scale (CS)--The change in the linear attenuation coefficient per CT number (CTN) relative to water; that is:~~]
[~~Figure: 25 TAC §289.227(e)(20)~~]

(18) [~~(21)~~] Control panel--The part of the radiation machine control upon which are mounted the switches, knobs, push buttons, and other hardware necessary for manually setting the technique factors.

(19) [~~(22)~~] CT conditions of operation--All selectable parameters governing the operation of a CT x-ray system including, but not limited to, nominal tomographic section thickness, filtration, and the technique factors as defined in this subsection.

(20) [~~(23)~~] CT gantry--The tube housing assemblies, beam-limiting devices, detectors, and the supporting structures and frames that hold these components.

[~~(24) CT number (CTN)--The number used to represent the x-ray attenuation associated with each elemental area of the CT image, that is:~~]
[~~Figure: 25 TAC §289.227(e)(24)~~]

(21) [~~(25)~~] Diagnostic source assembly--The tube housing assembly with a beam-limiting device attached.

(22) [~~(26)~~] Diagnostic x-ray system--An x-ray system designed for irradiation of any part of the human body [~~or any animal~~] for the purpose of diagnosis or visualization.

[~~(27) Diaphragm--A device or mechanism by which the x-ray beam is restricted in size.~~]

(23) [~~(28)~~] Entrance exposure--The exposure expressed in roentgens (R), measured in air with the specified technique, calculated or adjusted to represent the exposure at the point where the center of the useful beam enters the patient.

(24) [~~(29)~~] Entrance exposure rate--The exposure per unit time at the point where the center of the useful beam enters the patient.

(25) [~~(30)~~] Field emission equipment--Equipment that uses an x-ray tube in which electron emission from the cathode is due solely to the action of an electric field.

(26) [~~(31)~~] Field size--The dimensions along the major axes of an area in a plane perpendicular to the central axis of the beam at the normal treatment or examination source to image distance and defined by the intersection of the major axes and the 50% isodose line.

(27) [~~(32)~~] Filter--Material placed in the useful beam to preferentially absorb selected radiations.

(28) [~~(33)~~] Fluoroscopic imaging assembly--A subsystem in which x-ray photons produce a fluoroscopic image. It includes the image receptors such as the image intensifier and spot-film device, electrical interlocks, if any, and structural material providing linkage between the image receptor and diagnostic source assembly.

(29) [~~(34)~~] Focal spot--The area projected on the anode of the x-ray tube bombarded by the electrons accelerated from the cathode and from which the useful beam originates.

[~~(35) Gantry--That part of the system supporting and allowing possible movement of the radiation source.~~]

(30) [~~(36)~~] General purpose x-ray system--Any radiographic x-ray system that is not limited by design to radiographic examinations of specific anatomical regions.

(31) [~~37~~] Gonadal shield--A protective barrier for the testes or ovaries.

(32) [~~(38)~~] Half-value layer (HVL)--The thickness of a specified material that attenuates the beam of radiation to an extent such that the exposure rate is reduced to one-half of its original value.

(33) [~~(39)~~] Healing arts--Any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition.

(34) [~~(40)~~] Healing arts screening--The testing of asymptomatic human beings using radiation machines for the detection or evaluation of health indications when such tests are not specifically and individually ordered by a licensed practitioner of the healing arts legally authorized to prescribe such x-ray tests for the purpose of diagnosis or treatment.

(35) [~~(41)~~] High level control for fluoroscopy--Any selected mode having an entrance exposure rate above 10 roentgens per minute (R/min). This mode shall meet the high level requirements in subsection (m)(3)(A)(i)(II), (ii)(II), or (iii)(II) [~~(e)(3)(A)(i)(II), (ii)(II), or (iii)(II)~~] of this section.

(36) [~~(42)~~] Image intensifier--A device, installed in its housing, that instantaneously converts an x-ray pattern into a corresponding light image of higher energy density.

(37) [~~(43)~~] Image receptor--Any device, such as a fluorescent screen or radiographic film, that transforms incident x-ray photons either into a visible image or into another form that can be made into a visible image by further transformations.

(38) [~~(44)~~] Irradiation--The exposure of matter to ionizing radiation.

(39) [~~(45)~~] kV--Kilovolt.

(40) [~~(46)~~] kVp--Kilovolt peak (See definition for peak tube potential).

(41) [~~(47)~~] kWs--Kilowatt-second. It is equivalent to 10 E 3 watt-second, where 1 watt-second = 1 kV x 1 milliampere (mA) x 1 second.

(42) [~~(48)~~] Lead equivalent--The thickness of lead affording the same attenuation, under specified conditions, as the material in question.

(43) [~~(49)~~] Leakage radiation--Radiation emanating from the diagnostic [~~or therapeutic~~] source assembly except for the useful beam and radiation produced when the exposure switch or timer is not activated.

(44) [~~(50)~~] Leakage technique factors--The technique factors associated with the diagnostic source assembly that are used in measuring leakage radiation. They are defined as follows:

(A) for diagnostic source assemblies intended for capacitor energy storage equipment, the maximum-rated peak tube potential and the maximum-rated number of exposures in an hour for operation at the maximum-rated peak tube potential with the quantity of charge per exposure being 10 millicoulombs (10 milliampere-second (mAs)) or the minimum obtainable from the unit, whichever is larger;

(B) for diagnostic source assemblies intended for field emission equipment rated for pulsed operation, the maximum-rated peak tube potential and the maximum-rated number of x-ray pulses in an hour for operation at the maximum-rated peak tube potential; or

(C) for all other diagnostic source assemblies, the maximum-rated peak tube potential and the continuous tube current for the maximum-rated peak tube potential.

(45) [~~(51)~~] Licensed medical physicist--An individual holding a current Texas license under the Medical Physics Practice Act, Texas Occupations Code, Chapter 602, with a specialty in diagnostic radiological physics.

[~~(52) Linear attenuation coefficient (u)--The quotient of dN/N by dl when dN/N is the fraction of uncharged ionizing radiation that experiences interactions in traversing a distance dl in a specified material.~~]

(46) [~~(53)~~] mA--Milliampere.

(47) [~~(54)~~] mAs--Milliampere-second.

(48) [~~(55)~~] Medical research--The investigation of various health risks and diseases [~~using radiation machines as part of the evaluation process~~].

(49) [~~(56)~~] Mobile service operation [~~services~~]--The provision of radiation machines and personnel at temporary sites for limited time periods. The radiation machines may be fixed inside a motorized vehicle or may be a portable radiation machine that may be removed from the vehicle and taken into a facility for use. [~~The utilization of radiation machines in temporary locations for limited time periods. The radiation machines may be fixed inside a mobile van or transported to temporary locations.~~]

[~~(57) Mobile x-ray equipment--(See definition for x-ray equipment).~~]

(50) [~~(58)~~] Multiple slice tomogram system--A computed tomography x-ray system that obtains x-ray transmission data simultaneously during a single scan to produce more than one tomogram.

(51) [~~(59)~~] Nominal tomographic section thickness--The full-width at half-maximum of the sensitivity profile taken at the center of the cross sectional volume over which x-ray transmission data are collected.

(52) [~~(60)~~] Non-certified radiographic equipment--Equipment manufactured and assembled prior to certification requirements of Title 21, CFR, effective as specified in Title 21, CFR, Part 1020.30(a).

(53) [~~(61)~~] Patient--An individual subjected to healing arts examination, diagnosis, or treatment.

(54) [~~(62)~~] Peak tube potential--The maximum value of the potential difference in kilovolts across the x-ray tube during an exposure.

(55) [~~(63)~~] Phantom--A volume of material behaving in a manner that can be related to tissue with respect to the attenuation and scattering of radiation.

(56) [~~(64)~~] Phototimer--A method for controlling exposures to image receptors by the amount of radiation that reaches a radiation monitoring device. The radiation monitoring device is part of an electronic circuit that controls the duration of time the tube is activated (See definition for automatic exposure control).

(57) [~~(65)~~] Portable x-ray equipment (See definition for x-ray equipment).

(58) [~~(66)~~] Practitioner of the healing arts (practitioner)--A person licensed to practice healing arts by either the Texas State Board of Medical Examiners as a physician, the Texas Board of Chiropractic Examiners, or the Texas State Board of Podiatry Examiners.

(59) [~~(67)~~] Primary protective barrier--(See definition for protective barrier).

(60) [~~(68)~~] Protective apron--An apron made of radiation attenuating [~~absorbing~~] materials used to reduce radiation exposure.

(61) [~~(69)~~] Protective barrier--A barrier of radiation absorbing materials used to reduce radiation exposure. The types of protective barriers are as follows:

(A) primary protective barrier--A barrier sufficient to attenuate the useful beam to the required degree.

(B) secondary protective barrier--A barrier sufficient to attenuate the stray radiation to the required degree.

(62) [~~(70)~~] Protective glove--A glove made of radiation attenuating [~~absorbing~~] materials used to reduce radiation exposure.

(63) [~~(71)~~] Radiograph--An image receptor on which the image is created directly or indirectly by an x-ray exposure and results in a permanent record.

(64) [~~(72)~~] Reference plane--A plane that is displaced from and parallel to the tomographic plane.

(65) [~~(73)~~] Scan--The complete process of collecting x-ray transmission data for the production of a tomogram. Data can be collected simultaneously during a single scan for the production of one or more tomograms.

(66) [~~(74)~~] Scan increment--The amount of relative displacement of the patient with respect to the CT x-ray system between successive scans measured along the direction of such displacement.

(67) [~~(75)~~] Scan sequence--A preselected set of two or more scans performed consecutively under preselected CT conditions of operation.

(68) [~~(76)~~] Scan time--The period of time between the beginning and end of x-ray transmission data accumulation for a single scan.

(69) [~~(77)~~] Scattered radiation--Radiation [~~radiation~~] that has been deviated in direction during passage through matter.

(70) [~~(78)~~] Secondary protective barrier (See definition for protective barrier).

(71) [~~(79)~~] Shutter--A device attached to the tube housing assembly that can totally intercept the useful beam and that has a lead equivalency not less than that of the tube housing assembly.

(72) [~~(80)~~] Single tomogram system--CT x-ray system that obtains x-ray transmission data during a scan to produce a single tomogram.

(73) [~~(81)~~] Source--The focal spot of the x-ray tube.

(74) [~~(82)~~] Source-to-image receptor distance (SID)--The distance from the source to the center of the input surface of the image receptor.

(75) [~~(83)~~] Source-to-skin distance (SSD)--The distance from the source to the skin of the patient.

[~~(84) Spacer--A device designed to limit the target to skin distance.~~]

(76) [~~(85)~~] Special purpose x-ray system--Any radiographic x-ray system that is limited by design to radiographic examinations of specific anatomical regions. Special purpose x-ray systems include, but are not limited to, dedicated chest units, cystography units, and head and skull units.

(77) [~~(86)~~] Special procedures--The application of special x-ray equipment and specialized techniques to obtain required diagnostic information. [~~This usually provides enhanced detail of a given anatomical structure but with reduced visualization of others.~~] Special procedures include, but are not limited to, angiography, cardiac catheterization, myelogram, and surgery.

(78) [~~(87)~~] Spot film--A radiograph that is made during a fluoroscopic examination to permanently record conditions that exist during that fluoroscopic procedure.

(79) [~~(88)~~] Spot film device--A device intended to transport and/or position a radiographic image receptor between the x-ray source and fluoroscopic image receptor. It includes a device intended to hold a cassette over the input end of an image intensifier for the purpose of making a radiograph.

(80) [~~(89)~~] Stationary x-ray equipment--(See definition for x-ray equipment).

(81) [~~(90)~~] Stray radiation--The sum of leakage and scattered radiation.

(82) [~~(91)~~] Supervision--The delegating, by the practitioner, of the task of applying radiation [~~in accordance with this section~~] to persons [~~not licensed in the healing arts or veterinary medicine,~~] who perform tasks [~~provide services~~] under the practitioner's control and who are certified under the Medical Radiologic Technologist Act, Texas Occupations Code, Chapter 601. The [~~licensed~~] practitioner [~~or veterinarian~~] assumes full responsibility for these tasks and shall assure that the tasks will be administered correctly.

(83) [~~(92)~~] Target--The part of a radiation machine head that by design intercepts a beam of accelerated particles with subsequent emission of other radiation.

(84) [~~(93)~~] Technique chart--A chart that provides all necessary generator control settings and geometry needed to make clinical radiographs when the radiography system is in manual mode.

(85) [~~(94)~~] Technique factors--The conditions of operation that are specified as follows:

(A) for capacitor energy storage equipment, peak tube potential in kV and quantity of charge in mAs;

(B) for field emission equipment rated for pulsed operation, peak tube potential in kV and number of x-ray pulses;

(C) for CT equipment designed for pulsed operations, peak tube potential in kV, scan time in seconds, and either tube current in mA, x-ray pulse width in seconds, and the number of x-ray pulses per scan or the product of tube current, x-ray pulse width, and the number of x-ray pulses in mAs;

(D) for CT equipment not designed for pulsed operation, peak tube potential in kV, and either tube current in mA and scan time in seconds or the product of tube current and exposure time in mAs when the scan time and exposure time are equivalent; and

(E) for all other equipment, peak tube potential in kV and either tube current in mA and exposure time in seconds or the product of tube current and exposure time in mAs.

(86) [~~(95)~~] Tomogram--The depiction of the x-ray attenuation properties of a section through the body.

(87) [~~(96)~~] Tomographic plane--The geometric plane that is identified as corresponding to the output.

(88) [~~(97)~~] Tomographic section--The volume of an object whose x-ray attenuation properties are imaged in a tomogram.

(89) [~~(98)~~] Traceable to a national standard--This indicates that a quantity or a measurement has been compared to a national standard, for example, the National Institute of Standards and Technology, directly or indirectly through one or more intermediate steps and that all comparisons have been documented.

(90) [~~(99)~~] Tube--An x-ray tube, unless otherwise specified.

(91) [~~(100)~~] Tube housing assembly--The tube housing with tube installed. It includes high-voltage and/or filament transformers and other appropriate elements when such are contained within the tube housing.

(92) [~~(101)~~] Useful beam--Radiation that passes through the window, aperture, cone, or other collimating device of the source housing. Also referred to as the primary beam.

[~~(102) Veterinarian--An individual licensed by the Texas Board of Veterinary Medical Examiners.~~]

(93) [~~(103)~~] X-ray control--A device that controls input power to the x-ray high-voltage generator and/or the x-ray tube. It includes equipment such as timers, phototimers, automatic brightness stabilizers, and similar devices that control the technique factors of an x-ray exposure.

(94) [~~(104)~~] X-ray equipment--An x-ray system, subsystem, or component thereof. For the purposes of this rule, types [~~Types~~] of x-ray equipment are as follows:

(A) portable x-ray equipment [~~mobile x-ray equipment~~]--x-ray equipment mounted on a permanent base with wheels and/or casters for moving while completely assembled . Portable x-ray equipment may also include equipment designed to be hand-carried; or[~~;~~]

[~~(B) portable x-ray equipment--x-ray equipment designed to be hand-carried; or~~]

(B) [~~(C)~~] stationary x-ray equipment--x-ray equipment that is installed in a fixed location.

(95) [~~(105)~~] X-ray field--That area of the intersection of the useful beam and any one of the set of planes parallel to and including the plane of the image receptor, whose perimeter is the locus of points at which the exposure rate is one-fourth of the maximum in the intersection.

(96) [~~(106)~~] X-ray high-voltage generator--A device that transforms electrical energy from the potential supplied by the x-ray

control to the tube operating potential. The device may also include means for transforming alternating current to direct current, filament transformers for the x-ray tubes, high-voltage switches, electrical protective devices, and other appropriate elements.

(97) [~~(107)~~] X-ray system--An assemblage of components for the controlled production of x rays. It includes minimally an x-ray high-voltage generator, an x-ray control, a tube housing assembly, a beam-limiting device, and the necessary supporting structures. Additional components that function with the system are considered integral parts of the system.

(98) [~~(108)~~] X-ray subsystem--Any combination of two or more components of an x-ray system.

(99) [~~(109)~~] X-ray tube--Any electron tube that is designed to be used primarily for the production of x-rays [~~x rays~~].

(f) Morgues and educational facilities.

(1) Morgues shall comply with the following requirements:

(A) subsection (b)(1) and (2) of this section concerning scope;

(B) subsection (c) of this section concerning prohibitions;

(C) subsection (e) of this section concerning definitions, as applicable;

(D) subsection (i)(2) of this section concerning operating and safety procedures;

(E) subsection (i)(4) of this section concerning protective devices;

(F) subsection (i)(11) of this section concerning holding of tube;

(G) subsection (k)(1) of this section concerning warning labels;

(H) subsection (m)(1)(A) of this section concerning fluoroscopy; and

(I) subsection (s)(1)(A)-(I), and (R) of this section concerning records.

(2) Facilities conducting training using non-humans shall comply with all the requirements of this section except for the following:

(A) subsection (i)(5) of this section concerning operator credentialing;

(B) subsection (j) of this section concerning radiographic entrance exposure limits;

(C) subsections (p), (q) and (r) of this section concerning film processing; and

(D) subsection (o) of this section concerning equipment performance evaluation.

[~~(f) Educational facilities. Facilities conducting training using non-humans shall comply with all the requirements of this section except for subsection (i)(5) of this section concerning operator credentialing, subsection (k) of this section concerning radiographic entrance exposure limits, subsections (r) and (s) of this section concerning film processing, and subsection (q) of this section concerning equipment performance evaluation.~~]

(g) Requirements for bone densitometers. Bone densitometers shall be exempt from this chapter except for the following:

(1) (No change.)

(2) healing arts screening and medical research in accordance with §289.226(h) [~~§289.226(j)~~] of this title;

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

[~~(5) exemptions in accordance with subsection (d)(1),(3), and (4) of this section;~~]

(5) [~~(6)~~] definitions in accordance with subsection (e) of this section, as applicable;

(6) [~~(7)~~] operating and safety procedures in accordance with subsection (i)(2) of this section;

(7) [~~(8)~~] operator credentialing in accordance with subsection (i)(5) of this section;

(8) [~~(9)~~] gonadal shielding in accordance with subsection (i)(13) [~~(j)(3)~~] of this section;

(9) [~~(10)~~] warning labels in accordance with subsection (k)(1) [~~(l)(1)~~] of this section;

(10) [~~(11)~~] record requirements for authorized use locations and authorized records locations for mobile services in accordance with subsection (s)(1)(A)-(D), (G)-(J), (R), and (s)(2) [~~(t)(1)(A)-(D), (G)-(I), (J), (Q), and (t)(2)~~] of this section; and

(11) [~~(12)~~] record requirements for mobile services in accordance with subsection (s)(1)(A)-(D), (H), and (J) [~~(t)(1)(A)-(D), (H), and (J)~~] of this section. These records shall be maintained with the bone densitometer authorized to be used for mobile services.

(h) Certified equipment [~~for chiropractic, medical, and podiatric facilities~~]. [~~This subsection does not apply to veterinary facilities.~~] In addition to the requirements of this chapter, the registrant shall not make, nor cause to be made, any modification of components or installations of components certified in accordance with the United States Food and Drug Administration (FDA) Title 21, CFR, Part 1020, "Performance Standards for Ionizing Radiation Emitting Products," as amended, in any manner that could cause the installations or the components to fail to meet the requirements of the applicable parts of the standards specified in Title 21, CFR, Part 1020, except where a variance has been granted by the Director, Center for Devices and Radiological Health, FDA. A copy of the variance shall be maintained by the registrant in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency.

(i) General operating requirements. [~~for chiropractic, medical, podiatric, and veterinary facilities.~~]

(1) (No change.)

(2) Operating and safety procedures. Each registrant shall have and implement written operating and safety procedures. These procedures shall include, but are not limited to, the items in subsection (t) of this section. The procedures shall be made available to each individual operating a radiation machine, including any restrictions of the operating technique required for the safe operation of the particular x-ray system. The registrant shall document that each individual operating a radiation machine has read the operating and safety procedures and shall maintain this documentation for inspection by the agency. The documentation shall include the following:

(A) name and signature of individual;

(B) date individual read the operating and safety procedures; and

(C) initials of the RSO.

[(2) Operating and safety procedures. Each registrant shall have and implement written operating and safety procedures. These procedures shall be made available to each individual operating a radiation machine, including any restrictions of the operating technique required for the safe operation of the particular x-ray system. These procedures shall include, but are not limited to, the items in subsection (u) of this section.]

(3) (No change.)

(4) Protective devices. Protective devices shall be utilized when required, as in subsection (i)(8)(B) and (D), (i)(10), (i)(13) and (m)(8) [(o)(8)] of this section.

(A) Protective devices shall be of no less than 0.25 millimeter (mm) lead equivalent material except as specified in subsections (i)(13) and (m)(8)(B)(i) of this section.

(B) Protective devices, including aprons, gloves, and shields shall be checked annually for defects such as holes, cracks, and tears. These checks may be performed by the registrant by visual or tactile means, or x-ray imaging. If a defect is found, protective devices shall be replaced or removed from service until repaired. A record of this test shall be made and maintained by the registrant in accordance with subsection (s)(1) [(t)(1)] of this section for inspection by the agency.

(5) - (8) (No change.)

(9) Viewing system and contact with patient. [Windows, mirrors, closed circuit television, or a method shall be provided to permit the operator to continuously observe the patient during irradiation.]

(A) Windows, mirrors, closed circuit television, or another method shall be provided to permit the operator to continuously observe the patient during irradiation.

(B) The operator shall be able to maintain verbal, visual, and aural contact with the patient.

(10) - (11) (No change.)

[(j) Requirements specifically for chiropractic, medical, and podiatric facilities.]

(12) [(1)] Patient protection. Notwithstanding the provisions of subsection (i)(7) of this section, other patients who are in line with the primary beam and who cannot be removed from the room shall be protected by whole body protective barriers of a minimum of 0.25 mm lead equivalent material or so positioned that the nearest portion of their body is at least six feet from both the tube head and the nearest edge of the image receptor.

[(2) Contact with the patient. The operator shall be able to maintain verbal, visual, and aural contact with the patient.]

(13) [(3)] Gonadal shielding. Gonadal shielding shall be used on patients when the gonads are in or within 5 cm of the useful beam. This requirement does not apply if the shielding will interfere with the diagnostic procedure. Gonadal shielding shall be of at least 0.5 mm lead equivalent material.

(j) [(k)] Radiographic entrance exposure limits. [for chiropractic, medical, and podiatric facilities. This subsection does not apply to veterinary facilities.] The in-air exposure determined for the technique used by the registrant for the specified average human adult patient thickness for routine medical radiography shall not exceed the entrance exposure limits in the following Table II [Table I].
Figure: 25 TAC §289.227(j)
[Figure: 25 TAC §289.227(k)]

(k) [(l)] Machine [General] requirements for [all diagnostic] general radiographic and fluoroscopic x-ray systems. [for chiropractic, medical, podiatric, and veterinary facilities.]

(1) Warning label. The warning label will meet the requirements of §289.231(z) of this title.

(2) Mechanical support of tube head. The tube housing assembly shall be adjusted to remain stable during an exposure unless tube housing movement is a designed function of the x-ray system.

(3) Battery charge indicator. On battery-powered x-ray generators, visual means shall be provided on the control panel to indicate whether the battery is in a state of charge adequate for proper operation.

[(4) Radiation from components other than the diagnostic source assembly. The radiation emitted by a component other than the diagnostic source assembly shall not exceed 2 milliroentgens (mR) in one hour at 5 cm from any accessible surface of the component when it is operated in an assembled x-ray system under any conditions for which it was designed. Measurement is averaged over an area of 100 square centimeters (cm^2) with no linear dimension greater than 20 cm.]

(4) [(5)] Beam quality. The following requirements apply to beam quality.

(A) Half-value layer.

(i) The half-value layer of the useful beam for a given x-ray tube potential shall not be less than the values shown in the following Table II. If it is necessary to determine such half-value layer at an x-ray tube potential that is not listed in Table II, linear interpolation may be made.
Figure: 25 TAC §289.227(k)(4)(A)(i)
[Figure: 25 TAC §289.227(k)(5)(A)(i)]

(ii) For capacitor energy storage equipment, compliance with the requirements of paragraph (4) [(5)] of this subsection shall be determined with the maximum quantity of charge per exposure.

(B) Filtration controls.

(i) For x-ray systems that have variable kVp and variable filtration for the useful beam, a device shall link the kVp selector with the filters and shall prevent an exposure unless the minimum amount of filtration required by subparagraph (A) of this paragraph is in the useful beam for the given kVp that has been selected.

(ii) Any other system having removable filters shall be required to have the minimum amount of filtration as required by subparagraph (A)(i) of this paragraph permanently located in the useful beam during each exposure.

(5) [(6)] Multiple tubes. Where two or more radiographic tubes are controlled by one exposure switch, the tube or tubes that have been selected shall be clearly indicated prior to initiation of the exposure. This indication shall be both on the x-ray control panel and at or near the tube housing assembly that has been selected.

(6) [(7)] Technique and exposure indicators.

(A) The technique factors to be used during an exposure shall be indicated before the exposure begins except when automatic exposure controls are used, in which case the technique factors that are set prior to the exposure shall be indicated.

(B) On equipment having fixed technique factors, the requirement of subparagraph (A) of this paragraph may be met by permanent markings.

(C) The x-ray control shall provide visual indication of the production of x rays.

(D) The indicated technique factors shall be accurate to meet manufacturer's specifications. If these specifications are not available from the manufacturer, the factors shall be accurate to within plus or minus 10% of the indicated setting.

(7) X-ray control. An x-ray control shall be incorporated into each x-ray system such that an exposure can be terminated by the operator at any time except for an exposure of 0.5 seconds or less or during serial radiography when means shall be provided to permit completion of any single exposure of the series in process.

(l) [~~(m)~~] Additional machine requirements for radiographic x-ray systems, [~~specifically for chiropractic, medical, and podiatric x-ray systems.~~] This subsection does not apply to fluoroscopic[~~, veterinary,~~] or CT x-ray systems.

(1) Beam limitation. Beam limitation shall be as follows.

(A) Stationary general purpose x-ray systems.

(i) Beam-limiting devices shall restrict the useful beam to the area of clinical interest as follows:

(I) the misalignment of the x-ray field for a manual rectangular collimator shall be within 2.0% of the SID for the length or width of the image receptor;

(II) the x-ray field for a circular or polygon collimator shall not exceed the diagonal of the image receptor by more than 2.0% of the SID; or

(III) the misalignment of the x-ray field for an automatic or semi-automatic collimator shall be within 3.0% of the SID for the length and width of the image receptor and shall be within 4.0% of the SID, without regard to the sign, of the sum of the difference of the length and width of the image receptor.

(ii) A method shall be provided for visually defining the perimeter of the x-ray field. The total misalignment of the edges of the visually defined field with the respective edges, either the length or width, of the x-ray field shall not exceed 2.0% of the SID.

(iii) A numerical SID indicator shall be present and shall be accurate to within 2.0% of the SID.

(iv) The system shall indicate when the axis of the x-ray field is perpendicular to the plane of the image receptor.

(v) The center of the x-ray field, when perpendicular to the image receptor, shall be accurate to within 2.0% of the SID with respect to the center of the image receptor.

(vi) The beam-limiting device shall numerically indicate the field size in the plane of the image receptor.

(vii) Indication of field size dimensions and SIDs shall be specified in inches and/or centimeters.

(viii) The field size indicated on the beam-limiting device shall be within 2.0% of the SID along the width and length, separately, of the actual x-ray field size.

(B) Portable x-ray equipment. Portable x-ray equipment [~~Mobile x-ray systems. Mobile x-ray systems~~] shall comply with the requirements in subparagraph (A) [~~(A)(i)-(iii)~~] of this paragraph, as applicable, based on manufacturer's design.

(C) Radiographic systems designed for one image receptor size. Radiographic equipment designed for only one image receptor size at a fixed SID shall provide a means to do the following:

(i) limit the x-ray field to no greater than the dimensions of the image receptor at the SID, and to align the center of the x-ray field with the center of the image receptor to within 2.0% of the SID center; or

(ii) align the x-ray field such that the x-ray field does not extend beyond any edge of the image receptor at the SID.

(D) Special purpose x-ray systems.

(i) When the x-ray beam is perpendicular to the plane of the image receptor, a means shall be provided to do the following:

(I) limit the x-ray field such that the x-ray field does not exceed each dimension of the image receptor by more than 2.0% of the SID; and

(II) align the center of the x-ray field with the center of the image receptor to within 2.0% of the SID.

(ii) The requirements of clause (i) of this subparagraph may be met with a system that meets the requirements for a general purpose x-ray system as specified in subparagraphs (A)(i)-(iv) of this paragraph or, when alignment means are also provided, may be met with either of the following:

(I) an assortment of removable, fixed-aperture, beam-limiting devices sufficient to meet the requirement for each combination of image receptor size and SID for which the unit is designed with each such device having clear and permanent markings to indicate the image receptor size and SID for which it is designed; or

(II) a beam-limiting device having multiple fixed apertures sufficient to meet the requirement for each combination of image receptor size and SID for which the radiation machine is designed. Permanent, clearly legible markings shall indicate the image receptor size and SID for which each aperture is designed and shall indicate which aperture is in position for use.

(2) Radiation exposure control devices. Radiation exposure control devices shall include the following:

[~~(A) X-ray control. An x-ray control shall be incorporated into each x-ray system such that an exposure can be terminated by the operator at any time except for an exposure of 0.5 seconds or less or during serial radiography when means shall be provided to permit completion of any single exposure of the series in process. The exposure switch shall be of the continuous pressure type.~~]

(A) [~~(B)~~] Timers. Means shall be provided to terminate the exposure at a preset time interval, a preset product of current and time, a preset number of pulses, or a preset radiation exposure to the image receptor. In addition, it shall not be possible to make an exposure when the timer is set to a "zero" or "off" position if either position is provided.

(B) [~~(C)~~] AEC. When [~~an~~] AEC is provided, the following shall occur.

(i) Indication shall be made on the control panel when this mode of operation is selected.

(ii) If the x-ray tube potential is equal to or greater than 50 kVp, the minimum exposure time for field emission equipment rated for pulsed operation shall be equal to or less than a time interval equivalent to two pulses.

(iii) The minimum exposure time for all equipment other than that specified in clause (ii) of this subparagraph shall be equal to or less than 0.0167 second or a time interval required to deliver 5 mAs, whichever is greater.

(iv) Either the product of peak x-ray tube potential, current, and exposure time shall be limited to not more than 60 kWs per exposure, or the product of x-ray tube current and exposure time shall be limited to not more than 600 mAs per exposure except that, when the x-ray tube potential is less than 50 kVp, the product of x-ray tube current and exposure time shall be limited to not more than 2,000 mAs per exposure.

(v) A visible and/or audible signal shall indicate when an exposure has been terminated at the limits required by clause (iv) of this subparagraph, and manual resetting shall be required before further automatically timed exposures can be made.

(C) [~~(D)~~] Exposure interval reproducibility. When all technique factors are held constant, including control panel selections associated with AEC systems, the coefficient of variation of exposure interval for both manual and AEC systems shall not exceed 0.05. This requirement applies to clinically used techniques.

(3) SSD. All mobile or portable radiographic systems shall be provided with means to limit the SSD to equal to or greater than 30 cm.

(4) Exposure reproducibility. When all technique factors are held constant, including control panel selections associated with AEC systems, the coefficient of variation of exposure for both manual and AEC systems shall not exceed 0.05. This requirement applies to clinically used techniques.

(5) Linearity. The average ratios of exposure mR to the indicated mAs product obtained at any two consecutive mA or mAs settings shall not differ by more than 0.10 times their sum, where X_1 and X_2 are the average mR/mAs values obtained at each of two consecutive tube current settings:

Figure: 25 TAC §289.227(l)(5)

[~~Figure: 25 TAC §289.227(m)(5)~~]

(6) Radiation from capacitor energy storage equipment in standby status. Radiation emitted from the x-ray tube when the exposure switch or timer is not activated shall not exceed a rate of 2 milliroentgens per hour (mR/hr) at 5 cm from any accessible surface of the diagnostic source assembly, with the beam-limiting device fully open.

[~~(n) Additional requirements specifically for veterinary x-ray systems.~~]

[~~(1) The x-ray control shall provide visual or audible indication of the production of x-rays observable at or from the operator's protected position whenever x-rays are produced.~~]

[~~(2) Beam limiting devices shall do the following:~~]

[~~(A) provide the same degree of protection as is required of the housing;~~]

[~~(B) restrict the useful beam to the area of clinical interest; and~~]

[~~(C) limit the x-ray field such that the x-ray field shall not exceed:~~]

[~~*(i)* 2.0% of the SID for the length or width of the rectangular image receptor; or~~]

[~~*(ii)* 2.0% of the SID for the diagonal of the image receptor for circular image receptors.~~]

[~~(3) A means shall be provided to center the primary beam to the image receptor within 2.0% of the SID.~~]

[~~(4) A means shall be provided to terminate the exposure at the following:~~]

[~~(A) a preset time interval;~~]

[~~(B) a preset product of current and time;~~]

[~~(C) a preset number of pulses; or~~]

[~~(D) a preset radiation exposure to the image receptor.~~]

[~~(5) The radiation machine shall not be able to make an exposure when the timer is set to a "zero" or "off" position if either position is provided.~~]

[~~(6) All stationary, mobile, or portable x-ray systems used for veterinary x rays shall be provided with the following:~~]

[~~(A) a continuous pressure type exposure switch; and~~]

[~~(B) either a six and one-half foot high protective barrier for operator protection during exposures; or~~]

[~~(C) a means for the operator to be at least six feet from the tube housing assembly.~~]

[~~(7) Operators using portable radiation machines designed to be hand-held are exempt from the requirements of paragraph (6) of this subsection. The hand-held portable radiation machine shall be held by the tube housing support or handle. The operator shall wear protective devices in accordance with subsection (i)(4) of this section.~~]

[~~(8) When all technique factors are held constant, including control panel selections associated with AEC systems, the coefficient of variation of exposure for both manual and AEC systems shall not exceed 0.05. This requirement applies to clinically used techniques.~~]

[~~(9) The technique factors to be used during an exposure shall be indicated before the exposure begins. If AECs are used, the technique factors that are set prior to the exposure shall be indicated.~~]

[~~(10) For machines having fixed technique factors, the requirements of paragraph (9) of this subsection may be met by permanent markings on the equipment. Indication of technique factors shall be visible from the operator's position except in the case of spot films made by the fluoroscopist.~~]

[~~(11) Fluoroscopic and CT units used in veterinary facilities shall meet the requirements of subsections (o) and (p) of this section. Therapy systems used in veterinary facilities shall meet the requirements of §289.229 of this title.~~]

[~~(12) Portable machines shall be used in a manner that complies with this section.~~]

[~~(13) All exams and retakes shall be ordered by the veterinarian.~~]

(m) [~~(o)~~] Fluoroscopic x-ray systems and spot-film devices for all facilities.

(1) Limitation of the useful beam. Limitation of the useful beam shall be as follows.

(A) Primary barrier.

(i) The fluoroscopic imaging assembly shall be provided with a primary protective barrier that intercepts the entire cross section of the useful beam at any SID.

(ii) The x-ray tube used for fluoroscopy shall not produce x rays unless the barrier is in position to intercept the useful beam and the imaging device is in place and operable.

(iii) The exposure rate due to transmission through the barrier with the attenuation block in the useful beam, combined with radiation through the image intensifier if provided, shall not exceed 3.34×10^{-3}% of the entrance exposure rate at a distance of 10 cm from

any accessible surface of the fluoroscopic imaging assembly beyond the plane of the image receptor.

(B) Measuring compliance of barrier transmission.

(i) The exposure rate due to transmission through the primary protective barrier combined with radiation through the image intensifier shall be determined by measurements averaged over an area of 100 cm^2 with no linear dimension greater than 20 cm.

(ii) If the source is below the tabletop, the measurement shall be made with the input surface of the fluoroscopic imaging assembly positioned 30 cm above the tabletop.

(iii) If the source is above the tabletop and the SID is variable, the measurement shall be made with the end of the beam-limiting device or spacer as close to the tabletop as it can be placed, provided that it shall not be closer than 30 cm.

(iv) Movable grids and compression devices shall be removed from the useful beam during the measurement.

(v) The attenuation block shall be positioned in the useful beam 10 cm from the point of measurement of entrance exposure rate and between this point and the input surface of the fluoroscopic imaging assembly.

(vi) The collimator shall be fully open when the measurement is made.

(C) X-ray field.

(i) Compliance with clauses (ii)-(vii) of this subparagraph shall be determined with the beam axis perpendicular to the plane of the image receptor.

(ii) Equipment with a fixed SID and the capability of a visible area of no greater than 300 cm^2 shall be provided with either stepless adjustment of the x-ray field or a means to further limit the x-ray field at the image receptor to 125 cm^2 or less. If the equipment is provided with stepless adjustment, the minimum x-ray field size at the maximum SID shall be less than or equal to 5 cm by 5 cm at the image receptor.

(iii) Equipment with a variable SID or a fixed SID with the capability of a visible area of greater than 300 cm^2 shall be provided with stepless adjustment of the field size. The minimum x-ray field size at the maximum SID shall be less than or equal to 5 cm by 5 cm at the image receptor.

(iv) Neither the length nor the width of the x-ray field in the plane of the image receptor shall exceed that of the visible area of the image receptor by more than 3.0% of the SID. The sum of the excess length and the excess width shall be no greater than 4.0% of the SID.

(v) For rectangular x-ray fields used with circular image receptors, the error in alignment shall be determined along the length and width dimensions of the x-ray field that pass through the center of the visible area of the image receptor.

(vi) For fluoroscopic equipment with only a manual mode of collimation, the x-ray field produced shall be limited to the area of the spot-film cassette at 16 inches above tabletop. Additionally, during fluoroscopy, the beam shall be restricted to the area of the input phosphor.

(vii) Spot-film devices shall meet the following additional requirements.

(I) Means shall be provided between the source and the patient for adjustment of the x-ray field size in the plane of the film to the size of that portion of the film that has been selected on the spot-film selector.

(-a-) Such adjustment shall be automatically accomplished except when the x-ray field size in the plane of the film is smaller than that of the selected portion of the film.

(-b-) The total misalignment of the edges of the x-ray field with the respective edges of the selected portion of the image receptor along the length or width dimensions of the x-ray field in the plane of the image receptor shall not exceed 3.0% of the SID when adjusted for full coverage of the selected portion of the image receptor.

(-c-) The sum, without regard to sign of the misalignment along any two orthogonal dimensions, shall not exceed 4.0% of the SID.

(II) The center of the x-ray field in the plane of the film shall be aligned with the center of the selected portion of the film to within 2.0% of the SID.

(2) Activation of the fluoroscopic tube. X-ray production in the fluoroscopic mode shall be controlled by a device that requires continuous pressure by the fluoroscopist for the entire time of the exposure (continuous pressure type switch). When recording serial fluoroscopic images, the fluoroscopist shall be able to terminate the x-ray exposures at any time, but means may be provided to permit completion of any single exposure of the series in process.

(3) Entrance exposure rate allowable limits.

(A) The following requirements apply to fluoroscopic equipment manufactured prior to May 19, 1995.

(i) Equipment with AERC. Fluoroscopic equipment that is provided with AERC shall not be operable at any combination of tube potential and current that will result in an exposure rate in excess of 2.58×10^{-3} coulomb per kilogram per minute (C/kg/min) (10 roentgens per minute (10 R/min)) at the point where the center of the useful beam enters the patient, except:

(I) during recording of fluoroscopic images, excluding last image hold; or

(II) when an optional high-level control is provided. When so provided, the equipment shall not be operable at any combination of tube potential and current that will result in an exposure rate in excess of 1.29×10^{-3} C/kg/min (5 R/min) at the point where the center of the useful beam enters the patient, unless the high-level control is activated. Special means of activation of high-level controls shall be required. The high-level control shall be operable only when continuous manual activation is provided by the operator. A continuous signal audible to the fluoroscopist shall indicate that the high-level control is being employed.

(ii) Equipment without AERC (manual mode). Fluoroscopic equipment that is not provided with AERC shall not be operable at any combination of tube potential and current that will result in an exposure rate in excess of 1.29×10^{-3} C/kg/min (5 R/min) at the point where the center of the useful beam enters the patient, except:

(I) during recording of fluoroscopic images, excluding last image hold; or

(II) when an optional high-level control is activated. Special means of activation of high-level controls shall be required. The high-level control shall be operable only when continuous manual activation is provided by the operator. A continuous signal audible to the fluoroscopist shall indicate that the high-level control is being employed.

(iii) Equipment with both an AERC mode and a manual mode. Fluoroscopic equipment that is provided with both an AERC mode and a manual mode shall not be operable at any combination of tube potential and current that will result in an exposure rate in excess of 2.58 x 10^{-3} C/kg/min (10 R/min) in either mode at the point where the center of the useful beam enters the patient except:

(I) during recording of fluoroscopic images, excluding last image hold; or

(II) when the mode or modes have an optional high-level control, in which case that mode or modes shall not be operable at any combination of tube potential and current that will result in an exposure rate in excess of 1.29 x 10^{-3} C/kg/min (5 R/min) at the point where the center of the useful beam enters the patient, unless the high level control is activated. Special means of activation of high-level control shall be required. The high level control shall be operable only when continuous manual activation is provided by the operator. A continuous signal audible to the fluoroscopist shall indicate that the high-level is being employed.

(iv) Measuring compliance. Compliance with subparagraph (A) of this paragraph shall be determined as follows.

(I) If the source is below the x-ray table, the exposure rate shall be measured at 1 cm above the tabletop or cradle.

(II) If the source is above the x-ray table, the exposure rate shall be measured at 30 cm above the tabletop with the end of the beam-limiting device or spacer positioned as closely as possible to the point of measurement.

(III) In a C-arm type of fluoroscope, the exposure rate shall be measured at 30 cm from the input surface of the fluoroscopic imaging assembly provided that the end of the beam-limiting device or spacer is no closer than 30 cm from the input surface of the fluoroscopic imaging assembly. The applicable limit shall not be exceeded at any available SID.

(IV) In a lateral (horizontal) type of fluoroscope, the exposure rate shall be measured at a point 15 cm from the centerline of the x-ray table and in the direction of the x-ray source with the end of the beam-limiting device or spacer positioned as closely as possible to the point of measurement. If the table top is movable, it shall be positioned as closely as possible to the lateral x-ray source, with the end of the beam-limiting device or spacer no closer than 15 cm to the centerline of the x-ray table.

(B) The following requirements apply to fluoroscopic equipment manufactured on and after May 19, 1995.

(i) Fluoroscopic equipment operable at any combination of tube potential and current that will result in an exposure rate greater than 1.29 x 10^{-3} C/kg/min (5 R/min) at the point where the center of the useful beam enters the patient shall be equipped with AERC. Provision for manual selection of technique factors may be provided.

(ii) Fluoroscopic equipment shall not be operable at any combination of tube potential and current that will result in an exposure rate in excess of 2.58 x 10^{-3} C/kg/min (10 R/min) at the point where the center of the useful beam enters the patient except:

(I) During the recording of images from an x-ray image-intensifier tube using photographic film or a video camera when the x-ray source is operated in a pulsed mode.

(II) When the high-level control is activated, the equipment shall not be operable at any combination of tube potential and current that will result in an exposure rate in excess of 5.16 x 10^{-3} C/kg/min (20 R/min) at the point where the center of the useful beam enters the patient. Special means of activation of high-level controls shall be required. The high-level control shall only be operable when continuous manual activation is provided by the operator. A continuous signal audible to the fluoroscopist shall indicate that the high-level control is being employed.

(iii) Measuring compliance. Compliance with subparagraph (B) of this paragraph shall be determined as follows.

(I) If the source is below the x-ray table, the exposure rate shall be measured at 1 cm above the tabletop or cradle.

(II) If the source is above the x-ray table, the exposure rate shall be measured at 30 cm above the tabletop with the end of the beam-limiting device or spacer positioned as closely as possible to the point of measurement.

(III) In a C-arm type of fluoroscope, the exposure rate shall be measured at 30 cm from the input surface of the fluoroscopic imaging assembly provided that the end of the beam-limiting device or spacer is no closer than 30 cm from the input surface of the fluoroscopic imaging assembly. The applicable limit shall not be exceeded at any available SID.

(IV) In a lateral (horizontal) type of fluoroscope, the exposure rate shall be measured at a point 15 cm from the centerline of the x-ray table and in the direction of the x-ray source with the end of the beam-limiting device or spacer positioned as closely as possible to the point of measurement. If the table top is movable, it shall be positioned as closely as possible to the lateral x-ray source, with the end of the beam-limiting device or spacer no closer than 15 cm to the centerline of the x-ray table.

(C) For hand-held fluoroscopes, the exposure rate shall be measured at the point closest to the source.

(D) Periodic measurement of entrance exposure rate shall be performed as follows by a licensed medical physicist [~~with a specialty in diagnostic radiological physics~~].

(i) Such measurements shall be made within 30 days of installation, annually, and within 30 days after any maintenance of the system that might affect the exposure rate.

(ii) Results of these measurements shall be posted where any fluoroscopist may have ready access to such results while using the fluoroscope and maintained in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency. The measurement results shall be stated in R/min and include the technique factors used in determining such results. The name of the person performing the measurements and the date the measurements were performed shall be included in the results.

(iii) Conditions of periodic measurement of entrance exposure rate are as follows.

(I) The measurement shall be made in accordance with subparagraph (A)(iv) or (B)(iii) of this paragraph, as applicable.

(II) X-ray systems that do not incorporate an AERC shall utilize a milliamperage and kVp typical of the clinical use of the x-ray system. Materials should be placed in the useful beam between the detection and imaging systems when conducting these periodic measurements to protect the imaging system.

(III) X-ray systems that do incorporate an AERC shall have sufficient material placed in the useful beam to produce a milliamperage and kVp typical of the clinical use of the x-ray system.

(4) Measurements of the output rate. Measurements of the output rate of the fluoroscopic unit shall be performed with a calibrated dosimetry system. The dosimetry system shall have been calibrated within the preceding 24 months and the calibration shall be traceable to a national standard. During the calendar year in which the dosimetry system is not calibrated, an intercomparison to a system calibrated within the previous 12 months shall be performed.

(5) Indication of potential and current. During fluoroscopy and cinefluorography, the kV and the mA shall be continuously indicated at the control panel and/or the fluoroscopist's position.

(6) Source-to-skin distance (SSD).

(A) Means shall be provided to limit the SSD to the following:

(i) not less than 38 centimeters on stationary fluoroscopes; and

(ii) not less than 30 centimeters on mobile and portable fluoroscopes.

(B) For image-intensified fluoroscopes intended for specific surgical application that would be prohibited at the SSDs specified in subparagraph (A) of this paragraph, provisions may be made for operation at shorter SSDs, but in no case less than 20 cm. The registrant's written operating and safety procedures shall provide precautionary measures to be adhered to during the use of the shorter source to skin distance in accordance with manufacturer's precautions, if provided.

[~~(6) SSD. The SSD shall not be less than the following:~~]

[~~(A) 38 cm on stationary fluoroscopes installed after March 1, 1989;~~]

[~~(B) 35.5 cm on stationary fluoroscopes that were in operation prior to March 1, 1989;~~]

[~~(C) 30 cm on all mobile and portable fluoroscopes;~~]

[~~(D) 20 cm for C-arm fluoroscopes used for specific applications that would require a shorter source to skin distance than that specified in subparagraph (C) of this paragraph. The written operating and safety procedures shall provide precautionary measures to be adhered to during the use of the shorter source to skin distance. The procedures shall provide instructions to restore the unit to a minimum SSD of 30 cm prior to performing any procedure other than those specified in the operating and safety procedures; and~~]

(C) [~~(E)~~] The SSD shall not be less than the FDA approved variance for a specific manufacturer of a hand-held fluoroscope.

(7) Fluoroscopic timer.

(A) Means shall be provided to preset the cumulative on-time of the fluoroscopic x-ray tube. The maximum cumulative time of the timing device shall not exceed five minutes without resetting.

(B) A signal audible to the fluoroscopist shall indicate the completion of any preset cumulative on-time. Such signal shall continue to sound while x rays are produced until the timing device is reset. In lieu of such signal, the timer shall terminate the beam after the preset cumulative on-time is completed.

(8) Control of scattered radiation.

(A) Fluoroscopic configuration, including fluoroscopic table designs, shall not permit any portion of any individual's body, except the head, neck, and extremities, to be exposed to scattered radiation emanating from above or below the tabletop unless the radiation has passed through not less than a total of 0.25 mm lead equivalent material. The material may be, but is not limited to, drapes, self-supporting curtains, or viewing shields, in addition to any lead equivalency provided by a protective apron.

(B) Where sterile fields or special procedures prohibit the use of normal protective barriers or drapes, all of the following conditions shall be met.

(i) All persons, except the patient, in the room where fluoroscopy is performed shall wear protective aprons that provide a shielding equivalent of 0.5 mm of lead.

(ii) The fluoroscopic field size shall be reduced to the absolute minimum required for the procedure being performed (area of clinical interest).

(iii) Operating and safety procedures shall reflect the above conditions, and fluoroscopy personnel shall exhibit awareness of situations requiring the use and/or nonuse of the protective drapes.

(C) For image-intensified fluoroscopic equipment with only a manual mode of collimation, the x-ray field produced shall be limited to the area of the spot-film cassette at 16 inches above tabletop. Additionally, during fluoroscopy, the beam shall be restricted to the area of the input phosphor.

(n) [~~(p)~~] CT x-ray systems.

(1) Equipment requirements shall include the following.

(A) Warning label. The warning label will meet the requirements of §289.231(z) of this title.

(B) The x-ray control shall provide visual indication of the production of x rays.

(C) The indicated technique factors shall be accurate to meet manufacturer's specifications. If these specifications are not available from the manufacturer, the factors shall be accurate to within plus or minus 10% of the indicated setting.

(D) [~~(A)~~] Tomographic plane indication and alignment.

(i) For any single tomogram system, means shall be provided to permit visual determination of the tomographic plane or a reference plane offset from the tomographic plane.

(ii) For any multiple slice tomogram system, means shall be provided to permit visual determination of the location of a reference plane. The reference plane can be offset from the location of the tomographic planes.

(iii) If a device using a light source is used to satisfy the requirements of clause (i) or (ii) of this subparagraph, the light source shall provide illumination levels sufficient to permit visual determination of the location of the tomographic plane or reference plane under ambient light conditions of up to 500 lux.

(E) [~~(B)~~] Indication of CT conditions of operation. The CT x-ray system shall be designed such that the CT conditions of operation to be used during a scan or a scan sequence are indicated prior to the initiation of a scan or a scan sequence. On equipment having all or some of these conditions of operation at fixed values, this requirement may be met by permanent markings. Indication of CT conditions of operation shall be visible from any position from which scan initiation is possible.

(F) [~~(C)~~] Initiation of operation.

(i) The x-ray control and gantry shall provide visual indication whenever x rays are produced and, if applicable, whether the shutter is open or closed.

(ii) Means shall be provided to require operator initiation of each individual scan or series of scans.

(iii) All emergency buttons/switches shall be clearly labeled as to their functions.

(G) [~~(D)~~] Termination of exposure.

(i) Means shall be provided to terminate the x-ray exposure automatically by either de-energizing the x-ray source or shuttering the x-ray beam in the event of equipment failure affecting data collection. Such termination shall occur within an interval that limits the total scan time to no more than 110% of its preset value through the use of either a backup timer or devices that monitor equipment function.

(ii) A signal visible to the operator shall indicate when the x-ray exposure has been terminated through the means required by clause (i) of this subparagraph.

(iii) The operator shall be able to terminate the x-ray exposure at any time during a scan or series of scans under CT x-ray system control, of greater than 0.5 seconds duration. Termination of the x-ray exposure shall necessitate resetting of the CT conditions of operation prior to initiation of another scan.

(H) [~~(E)~~] Additional requirements applicable to CT x-ray systems. Additional requirements applicable to CT x-ray systems containing a gantry manufactured after September 3, 1985, are as follows.

(i) The total error in the indicated location of the tomographic plane or reference plane shall not exceed 5 mm.

(ii) If the x-ray production period is less than 0.5 seconds, the indication of x-ray production shall be actuated for at least 0.5 seconds. Indicators at or near the gantry shall be discernible from any point external to the patient opening where insertion of any part of the human body into the primary beam is possible.

(iii) The deviation of indicated scan increment versus actual increment shall not exceed plus or minus 1 mm with any mass from 0 to 100 kilograms (kg) resting on the support device. The patient support device shall be incremented from a typical starting position to the maximum incremented distance or 30 cm, whichever is less, and then returned to the starting position. Measurement of actual versus indicated scan increment can be taken anywhere along this travel.

(2) Facility design requirements shall include the following.

(A) Provision shall be made for two-way aural communication between the patient and the operator at the control panel.

(B) Windows, mirrors, closed-circuit television, or an equivalent shall be provided to permit continuous observation of the patient during irradiation and shall be so located that the operator can observe the patient from the control panel.

(i) Should the viewing system described in subparagraph (B) of this paragraph fail or be inoperative, treatment shall not be performed with the unit until the system is restored.

(ii) In a facility that has a primary viewing system by electronic means and an alternate viewing system, should the viewing system described in subparagraph (B) of this paragraph fail or be inoperative, treatment shall not be performed with the unit until one of the systems is restored.

(3) Measurements [~~Dose measurements~~] of the radiation output of the CT x-ray system, using the computed tomography dose index (CTDI) as recommended by the American Association of Physicists in Medicine (AAPM) and the International Council on Radiation Protection (ICRP), shall be performed [~~as follows~~] by a licensed medical physicist [~~with a specialty in diagnostic radiological physics~~].

(A) Performance of the measurements shall be:

(i) at intervals not to exceed 12 months;

(ii) when major maintenance, except x-ray tube replacement, that could affect radiation output is performed; and

(iii) when a major change in equipment operation is accomplished, for example, introduction of a new software package.

(B) Measurements of the radiation output of a CT x-ray system shall be performed with a calibrated dosimetry system. The dosimetry system shall have been calibrated within the preceding 24 months and the calibration shall be traceable to a national standard. During the calendar year in which the dosimetry system is not calibrated, an intercomparison to a system calibrated within the previous 12 months shall be performed.

(C) Records of dose measurements in this paragraph shall be maintained by the registrant in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency.

(4) A maintenance schedule shall be developed and followed. This schedule shall be included in the registrant's operating and safety procedures and shall include but may not be limited to the following:

(A) dose measurements required by paragraph (3)(A) of this subsection; [~~and~~]

(B) acquisition of images by a licensed medical physicist obtained with phantoms and using the same processing mode and CT conditions of operation as are used to perform dose measurements required by paragraph (3)(A) of this subsection; and [~~. The registrant shall maintain either of the following in accordance with subsection (t)(1) of this section for inspection by the agency:~~]

[(i) ~~photographic copies of the images obtained from the image display device; or~~]

[(ii) ~~images stored in digital form.~~]

(C) acquisition of images by the registrant for quality control purposes obtained with phantoms and using protocol and intervals recommended by the manufacturer or the licensed medical physicist.

(5) The registrant shall maintain the images specified in paragraph (4)(B) and (C) of this subsection in accordance with subsection (s)(1) of this section for inspection by the agency. The images may be maintained by either of the following methods:

(A) photographic copies of the images obtained from the image display device; or

(B) images stored in digital form.

(o) [~~(q)~~] Equipment performance evaluation. [~~for chiropractic, medical, and podiatric facilities. This subsection does not apply to veterinary facilities.~~]

(1) For radiographic, fluoroscopic, and CT x-ray systems, the tests listed in paragraphs (5)-(7) of this subsection shall be performed by or under the supervision of a licensed medical physicist, at the frequency listed in the following table. [~~For all x-ray systems listed in paragraphs (5)-(7) of this subsection, the registrant shall perform, or cause to be performed, tests necessary to assure proper function of equipment with the indicated standard for each item specified. Such tests shall be performed at the frequency listed in the following table.~~]

Figure: 25 TAC §289.227(o)(1)
[~~Figure: 25 TAC §289.227(q)(1)~~]

(2) Records of the test results, including any numerical readings shall be maintained by the registrant in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency.

(3) Any items not meeting the specifications of the tests shall be corrected or repaired. The correction or repair shall begin within 30 days following the check and shall be performed according to a plan designated by the registrant. Correction or repair shall be completed no longer than 90 days from discovery unless authorized by the agency. Records of corrections or repairs shall be maintained by the registrant in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency.

(4) The registrant shall ensure that measurements [~~Measurements~~] of the radiation output of an x-ray system are [~~shall be~~] performed with a calibrated dosimetry system. The dosimetry system shall have been calibrated within the preceding 24 months and the calibration shall be traceable to a national standard. During the calendar year in which the dosimetry system is not calibrated, an intercomparison to a system calibrated within the previous 12 months shall be performed. The registrant shall make and maintain a record of the dosimetry system calibration. If the registrant has caused the tests to be performed by a licensed medical physicist, registered in accordance with §289.226(b)(10) of this title, that licensed medical physicist shall make the record.

(5) Radiographic x-ray equipment performance evaluation.

(A) Timer. The accuracy of the timer shall meet the manufacturer's specifications. If the manufacturer's specifications are not obtainable, the timer accuracy shall be plus or minus 10% of the indicated time with testing performed at 0.5 second.

(B) Exposure reproducibility. Exposure reproducibility shall meet the requirements of subsection (l)(4) [~~(m)(4)~~] of this section.

(C) Linearity. mR/mAs stations shall meet the requirements of subsection (l)(5) [~~(m)(5)~~] of this section.

(D) kVp. If the registrant possesses documentation of the appropriate manufacturer's kVp specifications, the radiation machine shall meet those specifications. If the registrant does not possess documentation of the appropriate manufacturer's kVp specifications, the indicated kVp shall be accurate to within plus or minus 10% of the indicated setting at no less than three points over the usual operating range of the machine.

(E) Tube stability. The x-ray tube shall remain physically stable during exposures. In cases where tubes are designed to move during exposure, the registrant shall assure proper and free movement of the unit.

(F) Collimation. The following items shall meet the requirements of subsection (l)(1) [~~(m)(1)~~] of this section:

(i) numerical indicators of x-ray field size;

(ii) light field versus x-ray field congruence;

(iii) automatic and semi-automatic collimators unless disabled; and

(iv) center of x-ray field alignment with center of image receptor.

(G) Entrance exposure limits. Entrance exposure limits shall meet the requirements specified in subsection (j) of this section.

(6) Fluoroscopic x-ray systems and spot film devices equipment performance evaluation. Fluoroscopic equipment shall meet the requirements of subsection (m)(1)(C) and (m)(3) and (4) [~~(o)~~] of this section.

(7) CT x-ray systems equipment performance evaluation. CT x-ray systems shall meet the requirements of subsection (n)(1)(H) and (n)(3) [~~(p)~~] of this section.

(p) [~~(r)~~] Automatic and manual film processing for [~~chiropractic, medical, podiatric, and veterinary~~] facilities and mobile services.

(1) Films shall be developed in accordance with the time-temperature relationships recommended by the film manufacturer. The specified developer temperature for automatic processing and the time-temperature chart for manual processing shall be posted in the darkroom. If the registrant determines an alternate time-temperature relationship is more appropriate for a specific facility, that time-temperature relationship shall be documented and posted.

(2) Chemicals shall be replaced according to the chemical manufacturer's or supplier's recommendations or at an interval not to exceed three months.

(3) Darkroom light leak tests shall be performed and any light leaks corrected at intervals not to exceed six months.

(4) Lighting in the film processing/loading area shall be maintained with the filter, bulb wattage, and distances recommended by the film manufacturer for that film emulsion or with products that provide an equivalent level of protection against fogging.

(5) Corrections or repairs of the light leaks or other deficiencies in paragraphs (2)-(4) of this subsection shall be initiated within 72 hours of discovery and completed no longer than 15 days from detection of the deficiency unless a longer time is authorized by the agency. Records of the correction or repairs shall include the date and initials of the individual performing these functions and shall be maintained in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency.

(6) Documentation of the items in paragraphs (2), (3), and (5) of this subsection shall be maintained at the site where performed and shall include the date and initials of the individual completing these items. These records shall be maintained in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency.

(q) [~~(s)~~] Alternative processing systems. Users of daylight processing systems, laser processors, self-processing film units, or other alternative processing systems shall follow manufacturer's recommendations for image processing. Documentation that the registrant is following manufacturer's recommendations shall include the date and initials of the individual completing the document and shall be maintained at the site where performed in accordance with subsection (s)(1) [~~(t)(1)~~] of this section for inspection by the agency.

(r) Digital imaging acquisition systems. Users of digital imaging acquisition systems shall follow quality assurance/quality control protocol for image processing established by the manufacturer, or if no manufacturer's protocol is available, by the registrant. The registrant shall include the protocols, whether established by the registrant or the manufacturer, in its operating and safety procedures. The registrant shall document the frequency at which the quality assurance/quality control protocol is performed. Documentation shall include the date and initials of the individual completing the document and shall be maintained at the site where performed in accordance with subsection (s)(1) of this section for inspection by the agency.

(s) [~~(t)~~] Record/document requirements for mobile services and authorized use locations [~~for chiropractic, medical, podiatric, and veterinary facilities~~].

(1) Each registrant shall maintain the following records/documents at each site, including authorized records sites for mobile services at the time intervals specified, for inspection by the agency. The records may be maintained in electronic format.
Figure: 25 TAC §289.227(s)(1)
[~~Figure: 25 TAC §289.227(t)(1)~~]

(2) Records required in items F and S of the graphic figure in paragraph 1 [~~paragraph (1)(F), (Q), and (R)~~] of this subsection shall include the following:

(A) manufacturer's name, model and serial number [~~from the control panel of the radiation machine or from the survey instrument~~];

(B) unique identification of the calibrated dosimetry system and results of the intercomparison; and

[~~(B) dates of receipt, transfer, and disposal for records required by paragraph (1)(Q) of this subsection; and~~]

(C) name of the individual recording the information.

(3) Copies of the records/documents in items (A)-(D), (H), (J), and (N)-(Q) of the graphic figure in paragraph 1 [~~paragraph (1)(A)-(D), (H), (J), and (N)-(P)~~] of this subsection shall be kept with radiation machines authorized to be used for mobile services. Mobile services with on-board film processors shall maintain the records in items (1)(O)-(Q) of the figure in paragraph 1 [~~paragraph (1)(O) and/or (P)~~] of this subsection, as applicable, with the processor or system for a period of no less than one year.

(t) [~~(u)~~] Appendices. The registrant's operating and safety procedures shall include, but are not limited to, the following procedures as applicable:

(1) posting notices to workers in accordance with §289.203(b) of this title;

(2) instructions to workers in accordance with §289.203(c) of this title;

(3) notifications and reports to individuals in accordance with §289.203(d) of this title;

(4) ordering x-ray exams in accordance with §289.231(b)(1) of this title;

(5) occupational dose requirements in accordance with §289.231(m) of this title;

(6) personnel monitoring requirements in accordance with §289.231(n), (q), and (s) of this title;

(7) posting of a radiation area in accordance with §289.231(x) of this title;

(8) use of a technique chart in accordance with subsection (i)(1) of this section;

(9) use of protective devices in accordance with subsection (i)(4) of this section;

(10) credentialing requirements for individuals operating radiation machines in accordance with subsection (i)(5) of this section;

(11) exposure of individuals other than the patient in accordance with subsection (i)(7) of this section;

(12) holding of patients or image receptors in accordance with subsection (i)(8) of this section;

(13) gonadal shielding in accordance with subsection (i)(13) [~~(j)(3)~~] of this section;

[~~(14) use of 20 cm SSD (spacers) in accordance with subsection (o)(6)(D) of this section;~~]

(14) [~~(15)~~] control of scattered radiation in accordance with subsection (m)(8) [~~(o)(8)~~] of this section; and

(15) [~~(16)~~] film processing program or digital image processing protocols in accordance with subsections (p), (q), and (r) [~~(r) and (s)~~] 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 January 15, 2004.

TRD-200400296
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §289.231

The Texas Department of Health (department) proposes an amendment to §289.231, concerning general provisions and standards for protection against machine-produced radiation.

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 289.231 has been reviewed, and the department has determined that the reasons for adopting the section continue to exist; however, revisions to the rule are necessary as outlined in this preamble.

The department published a Notice of Intention to Review for §289.231 regarding Government Code, §2001.039, in the *Texas Register* (28 TexReg 6029) on August 1, 2003. No comments were received by the department on this section following publication of this notice.

The Bureau of Radiation Control (BRC) is reallocating resources for regulation of x-ray and nonionizing radiation based on prioritization of risk to public health and safety. Rules governing the use of radiation machines in the healing arts are revised to reflect this prioritization. Risk to public health and safety is primarily based on machine type and type of use rather than the category of facility in which the machines are used. A definition of "Act," which is the statutory authority for the BRC rules, is added as it was inadvertently omitted from a previous version. The words "with license in good standing" are deleted from the definitions of chiropractor, dentist, physician, podiatrist, and veterinarian because they are unnecessary. The word "registrant" is changed to "person" in the definition of dosimetry processor because dosimetry processors are no longer registered by the department. They are required to be certified by the National Voluntary Laboratory Accreditation Program, so it is unnecessary to also require them to register. The definition of laser radiation is changed as a result of Health and Safety Code, §401.003(17). The wording in the requirements for occupational dose, including the definition of shallow dose equivalent, is being revised for clarification to be compatible with the United States Nuclear Regulatory Commission. Requirements providing for on-site routine inspections and

remote inspections to be alternated are added for facilities using minimal threat radiation machines and radiation machines used for podiatry. A definition of remote inspection is added. The requirement in the certificate of registration referencing the time period an individual monitoring device shall be worn is deleted because the department no longer regulates dosimetry processors. Other references to certificates of registration for dosimetry processors in the requirements for general surveys and monitoring are deleted for the same reason. The requirement to make and maintain receipt, transfer, and disposal records for radiation machines is deleted and moved to §289.226 of this title (relating to Registration of Radiation Machine Use and Services). The word "medical" has been added to language relating to training for inspectors to clarify that the training applies specifically to radiation machines used for medical purposes. The inspection intervals are changed to reflect a more frequent interval for those machines that present a higher risk versus those with lower or minimal risk. Definitions of machine types and types of use are added to reflect the new categories based on prioritization of risk. Electron microscopes have been removed from the list of minimal threat devices and will no longer be required to be registered. The term, "airport baggage x-ray" has been deleted since these machines are now under the jurisdiction of the Transportation Security Administration. Other minor grammatical changes are made and reference citations are corrected for clarification.

This amendment is part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, or other factors.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that rules are clear and specific and that use of those machines that pose a higher risk have the appropriate resource allocation. There will be no fiscal impact on applicants/licensees that are small businesses, micro-businesses or other persons required to comply with the rule. No additional costs will be incurred because no new requirements are added. The revisions correct reference citations and clarify the intent. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 9:00 a.m., Tuesday, February 10, 2004, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The amendment affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.231. General Provisions and Standards for Protection Against Machine-Produced Radiation.

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

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

(1) (No change.)

(2) Act - Texas Radiation Control Act, Health and Safety Code, Chapter 401.

(3) [~~(2)~~] Adult - An individual 18 or more years of age.

(4) [~~(3)~~] Agency - The Texas Department of Health.

(5) [~~(4)~~] Agreement State - Any state with which the United States Nuclear Regulatory Commission (NRC) has entered into an effective agreement under Section 274b. of the Atomic Energy Act of 1954, as amended (73 Stat. 689).

(6) [~~(5)~~] As low as is reasonably achievable (ALARA) - Making every reasonable effort to maintain exposures to radiation as far below the dose limits in this chapter as is practical, consistent with the purpose for which the registered activity is undertaken, taking into account the state of technology, the economics of improvements in relation to the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of ionizing radiation and radiation machines in the public interest.

(7) [~~(6)~~] Background radiation - Radiation from cosmic sources; non-technologically enhanced naturally occurring radioactive material, including radon, except as a decay product of source or special nuclear material, and including global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents, such as Chernobyl, that contribute to background radiation and are not under the control of the registrant. "Background radiation" does not include radiation from sources of radiation regulated by the agency.

(8) [~~(7)~~] Certificate of registration - A form of permission given by the agency to an applicant who has met the requirements for registration or mammography system certification set out in the Texas Radiation Control Act (Act) [~~Act~~] and this chapter.

(9) [~~(8)~~] Certification of mammography systems (state certification) - A form of permission given by the agency to an applicant who has met the requirements for mammography system certification set out in the Act and this chapter.

(10) [~~(9)~~] Chiropractor - An individual licensed by the Texas State Board of Chiropractic Examiners [~~, with license in good standing~~].

(11) [~~(10)~~] Collective dose - The sum of the individual doses received in a given period of time by a specified population from exposure to a specified source of radiation.

(12) [~~(11)~~] Declared pregnant woman - A woman who has voluntarily informed the registrant, in writing, of her pregnancy and the

estimated date of conception. The declaration remains in effect until the declared pregnant woman voluntarily withdraws the declaration in writing or is no longer pregnant.

(13) [~~(12)~~] Deep dose equivalent (DDE), that applies to external whole body exposure - The dose equivalent (DE) [~~DE~~] at a tissue depth of 1 centimeter (cm) (1,000 milligrams per square centimeter (mg/cm^2)) [~~(mg/cm2))~~].

(14) [~~(13)~~] Dentist - An individual licensed by the Texas State Board of Dental Examiners[~~, with license in good standing~~].

(15) [~~(14)~~] Dose - For external exposure to x-ray radiation from radiation machines, a generic term that means absorbed dose, DE, or total effective dose equivalent. For purposes of this chapter, "radiation dose" is an equivalent term.

(16) [~~(15)~~] Dose equivalent (DE) - The product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of DE are the sievert (Sv) and rem.

(17) [~~(16)~~] Dose limits - The permissible upper bounds of radiation doses established in accordance with this chapter. For purposes of this chapter, "limits" is an equivalent term.

(18) [~~(17)~~] Dosimetry processor - A person [~~registrant~~] that processes and evaluates personnel monitoring devices in order to determine the radiation dose delivered to the monitoring devices.

(19) [~~(18)~~] Embryo/fetus - The developing human organism from conception until the time of birth.

(20) [~~(19)~~] Entrance or access point - Any opening through which an individual or extremity of an individual could gain access to radiation areas or to radiation machines. This includes portals of sufficient size to permit human access, irrespective of their intended use.

(21) [~~(20)~~] Exposure - The quotient of dQ by dm where "dQ" is the absolute value of the total charge of the ions of one sign produced in air when all the electrons (negatrons and positrons) liberated by photons in a volume element of air having mass "dm" are completely stopped in air. The International System of Units (SI) [~~SI~~] unit of exposure is the coulomb per kilogram (C/kg). The roentgen is the special unit of exposure. For purposes of this chapter, this term is used as a noun.

(22) [~~(21)~~] Exposure rate - The exposure per unit of time.

(23) [~~(22)~~] External dose - That portion of the DE received from any source of radiation outside the body.

(24) [~~(23)~~] Extremity - Hand, elbow, arm below the elbow, foot, knee, and leg below the knee. The arm above the elbow and the leg above the knee are considered part of the whole body.

(25) [~~(24)~~] Gray (Gy) - The SI unit of absorbed dose. One gray is equal to an absorbed dose of 1 joule per kilogram (J/kg) or 100 rad.

(26) [~~(25)~~] High radiation area - An area, accessible to individuals, in which radiation levels from sources of radiation external to the body could result in an individual receiving a DE in excess of 0.1 rem (1 millisievert (mSv)) in one hour at 30 cm from any source of radiation or from any surface that the radiation penetrates.

(27) [~~(26)~~] Human use - For exposure to x-ray radiation from radiation machines, the external administration of radiation to human beings for healing arts purposes or research and/or development specifically authorized by the agency.

(28) [~~(27)~~] Individual - Any human being.

(29) [~~(28)~~] Individual monitoring - The assessment of DE to an individual by the use of:

(A) individual monitoring devices; or

(B) survey data.

(30) [~~(29)~~] Individual monitoring devices - Devices designed to be worn by a single individual for the assessment of DE. For purposes of this chapter, "personnel dosimeter" and "dosimeter" are equivalent terms. Examples of individual monitoring devices include, but are not limited to, film badges, thermoluminescence dosimeters (TLDs), optically stimulated luminescence dosimeters (OSLs), pocket ionization chambers (pocket dosimeters), and electronic personal dosimeters.

(31) [~~(30)~~] Inspection - An official examination and/or observation including, but not limited to, records, tests, surveys, and monitoring to determine compliance with the Act and rules, orders, requirements, and conditions of the agency.

(32) [~~(31)~~] Ionizing radiation - Any electromagnetic or particulate radiation capable of producing ions, directly or indirectly, in its passage through matter. Ionizing radiation includes gamma rays and x rays, alpha and beta particles, high speed electrons, neutrons, and other nuclear particles.

(33) [~~(32)~~] Lens dose equivalent (LDE) - The external DE to the lens of the eye at a tissue depth of 0.3 cm (300 mg/cm^2[~~2~~]).

(34) [~~(33)~~] License - A form of permission given by the agency to an applicant who has met the requirements for licensing set out in the Act and this chapter.

(35) [~~(34)~~] Licensed material - Radioactive material received, possessed, used, or transferred under a general or specific license issued by the agency.

(36) [~~(35)~~] Licensee - Any person who is licensed by the agency in accordance with the Act and this chapter.

(37) [~~(36)~~] Licensing state - Any state with rules equivalent to the Suggested State Regulations for Control of Radiation relating to, and having an effective program for, the regulatory control of naturally occurring or accelerator-produced radioactive material (NARM) and has been designated as such by the Conference of Radiation Control Program Directors, Inc.

(38) [~~(37)~~] Lost or missing radiation machine(s) - A radiation machine(s) whose location is unknown.

(39) [~~(38)~~] Machine-produced radiation - A stimulated emission of radiation from a manufactured product or device or component part of a manufactured product or device that has an electronic circuit that during operation can generate or emit a physical field of radiation.

(40) [~~(39)~~] Manufacture - To fabricate or mechanically produce.

(41) [~~(40)~~] Member of the public - Any individual, except when that individual is receiving an occupational dose.

(42) [~~(41)~~] Minimal threat radiation machines - Those radiation machines capable of generating or emitting fields of radiation that, during the operation of which:

(A) no deliberate exposure of an individual occurs;

(B) the radiation is not emitted in an open beam configuration; and

(C) no known physical injury to an individual has occurred.

(43) [~~(42)~~] Minor - An individual less than 18 years of age.

(44) [~~(43)~~] Monitoring - The measurement of radiation and the use of the results of these measurements to evaluate potential exposures and doses. For purposes of this chapter, "radiation monitoring" and "radiation protection monitoring" are equivalent terms.

(45) [~~(44)~~] Occupational dose - The dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to sources of radiation from licensed/registered and unlicensed/unregistered sources of radiation, whether in the possession of the licensee/registrant or other person. Occupational dose does not include dose received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, from voluntary participation in medical research programs, or as a member of the public.

(46) [~~(45)~~] Particle accelerator - Any machine capable of accelerating electrons, protons, deuterons, or other charged particles in a vacuum and designed to discharge the resultant particulate or other associated radiation at energies usually in excess of 1 MeV.

(47) [~~(46)~~] Person - Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, local government, any other state or political subdivision or agency thereof, or any other legal entity, and any legal successor, representative, agent, or agency of the foregoing, other than the NRC, and other than federal government agencies licensed or exempted by the NRC.

(48) [~~(47)~~] Personnel monitoring equipment (See definition for individual monitoring devices.)

(49) [~~(48)~~] Physician - An individual licensed by the Texas State Board of Medical Examiners [~~, with license in good standing~~].

(50) [~~(49)~~] Podiatrist - An individual licensed by the Texas State Board of Podiatric Examiners [~~, with license in good standing~~].

(51) [~~(50)~~] Public dose - The dose received by a member of the public from exposure to sources of radiation released by a licensee, or to any other source of radiation under the control of a licensee/registrant. It does not include occupational dose or doses received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, or from voluntary participation in medical research programs.

(52) [~~(51)~~] Quarter - A period of time equal to one-fourth of the year observed by the registrant, approximately 13 consecutive weeks, providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(53) [~~(52)~~] Rad - The special unit of absorbed dose. One rad is equal to an absorbed dose of 100 ergs per gram (erg/g) or 0.01 J/kg (0.01 gray).

(54) [~~(53)~~] Radiation - One or more of the following:

(A) gamma and x rays; alpha and beta particles and other atomic or nuclear particles or rays;

(B) radiation emitted to energy density levels that could reasonably cause bodily harm from an electronic device [~~stimulated emission of radiation from any electronic device to such energy density levels as to reasonably cause bodily harm~~]; or

(C) sonic, ultrasonic, or infrasonic waves from any electronic device or resulting from the operation of an electronic circuit in an electronic device in the energy range to reasonably cause detectable bodily harm.

(55) [~~(54)~~] Radiation area - Any area, accessible to individuals, in which radiation levels could result in an individual receiving a DE in excess of 0.005 rem (0.05 mSv) in one hour at 30 cm from the radiation machine or from any surface that the radiation penetrates.

(56) [~~(55)~~] Radiation machine - Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(57) [~~(56)~~] Radiation safety officer (RSO) - An individual who has a knowledge of and the authority and responsibility to apply appropriate radiation protection rules, standards, and practices, who must be specifically authorized on a certificate of registration, and who is the primary contact with the agency.

(58) [~~(57)~~] Registrant - Any person issued a certificate of registration by the agency in accordance with the Act and this chapter.

(59) [~~(58)~~] Regulation (See definition for rule.)

(60) [~~(59)~~] Rem - The special unit of any of the quantities expressed as DE. The DE in rem is equal to the absorbed dose in rad multiplied by the quality factor (1 rem = 0.01 sievert (Sv)).

(61) Remote inspection - An examination by the agency of information submitted by the registrant on a form provided by the agency.

(62) [~~(60)~~] Research and development - Research and development is defined as:

(A) theoretical analysis, exploration, or experimentation; or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(63) [~~(61)~~] Restricted area - An area, access to which is limited by the registrant for the purpose of protecting individuals against undue risks from exposure to radiation. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building may be set apart as a restricted area.

(64) [~~(62)~~] Roentgen (R) - The special unit of exposure. One roentgen (R) equals 2.58 x 10^{-4}[~~-4~~]C/kg of air. (See definition for exposure.)

(65) [~~(63)~~] Rule (as defined in the Government Code, Chapters 2001 and 2002, as amended) - Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures. The word "rule" was formerly referred to as "regulation."

(66) [~~(64)~~] Shallow dose equivalent (SDE) - The DE at a tissue depth of 0.007 cm (7 mg/cm^2[~~2~~]) that applies to the external exposure of the skin of the whole body or the skin of an extremity. [~~averaged over an area of 1 square centimeter (cm2) (applies to the external exposure of the skin or an extremity).~~]

(67) [~~(65)~~] SI - The abbreviation for the International System of Units.

(68) [~~(66)~~] Sievert (Sv) - The SI unit of any of the quantities expressed as DE. The DE in sievert is equal to the absorbed dose in gray multiplied by the quality factor (1 Sv = 100 rem).

(69) [~~(67)~~] Site boundary - That line beyond which the land or property is not owned, leased, or otherwise controlled by the registrant.

(70) [~~(68)~~] Source of radiation - Any radioactive material, or any device or equipment emitting or capable of producing radiation.

(71) [~~(69)~~] Special units - The conventional units historically used by registrants, for example [~~i.e.~~], rad (absorbed dose), and rem (DE).

(72) [~~(70)~~] Survey - An evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, disposal, and/or presence of sources of radiation. When appropriate, such survey includes, but is not limited to, tests, physical examination of location of equipment, measurements of levels of radiation present, and evaluation of administrative and/or engineered controls.

(73) [~~(71)~~] Termination - A release by the agency of the obligations and authorizations of the registrant under the terms of the certificate of registration. It does not relieve a person of duties and responsibilities imposed by law.

(74) [~~(72)~~] Texas Regulations for Control of Radiation (TRCR) - All sections of Title 25 Texas Administrative Code (TAC), Chapter 289.

(75) [~~(73)~~] Total effective dose equivalent (TEDE) - For external exposures only to x-ray radiation from radiation machines, the TEDE is equal to the DDE. If an individual receives an occupational dose from both radiation machines and radioactive materials, the TEDE is the sum of the DDE for external exposures and the committed effective dose equivalent for internal exposures as defined in §289.201(b) of this title.

(76) [~~(74)~~] Unrestricted area (uncontrolled area) - An area, access to which is neither limited nor controlled by the registrant. For purposes of this chapter, "uncontrolled area" is an equivalent term.

(77) [~~(75)~~] Very high radiation area - An area, accessible to individuals, in which radiation levels from sources of radiation external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at 1 meter (m) from a radiation machine or from any surface that the radiation penetrates. At very high doses received at high dose rates, units of absorbed dose, gray and rad, are appropriate, rather than units of DE, Sv and rem.

(78) [~~(76)~~]Veterinarian - An individual licensed by the Texas Board of Veterinary Medical Examiners [~~, with license in good standing~~].

(79) [~~(77)~~] Week - Seven consecutive days starting on Sunday.

(80) [~~(78)~~] Whole body - For purposes of external exposure, head, trunk including male gonads, arms above the elbow, or legs above the knee.

(81) [~~(79)~~] Worker - An individual engaged in work under a certificate of registration issued by the agency and controlled by a registrant, but does not include the registrant.

(82) [~~(80)~~] Year - The period of time beginning in January used to determine compliance with the provisions of this chapter. The registrant may change the starting date of the year used to determine compliance by the registrant provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

(d) - (f) (No change.)

(g) Violations. A court [~~An~~] injunction or agency [~~other court~~] order may be issued [~~obtained~~] prohibiting any violation of any provision of the Act or any rule or order issued thereunder. Any person who willfully violates any provision of the Act or any rule or order issued thereunder may be subject to civil and/or administrative penalties. Such person may also be guilty of a misdemeanor and upon conviction, may be punished by fine or imprisonment or both, as provided by law.

(h) - (i) (No change.)

(j) Interpretations. Except as specifically authorized by the agency in writing, no interpretation of the meaning of this chapter by any officer or employee of the agency other than a written legal interpretation by the agency, [~~Office of General Counsel, Texas Department of Health,~~] will be considered binding upon the agency.

(k) Mean quality factors and absorbed dose equivalencies.

(1) (No change.)

(2) If it is more convenient to measure the neutron fluence rate than to determine the neutron dose equivalent rate in sievert per hour or rem per hour, as provided in paragraph (1) of this subsection, 1 rem (0.01 Sv) of neutron radiation of unknown energies may, for purposes of this section, be assumed to result from a total fluence of 25 million neutrons per square centimeter incident upon the body. If sufficient information exists to estimate the approximate energy distribution of the neutrons, the licensee or registrant may use the fluence rate per unit DE or the appropriate Q value from the following table to convert a measured tissue dose in rad (gray) to DE in rem (Sv).
Figure: 25 TAC §289.231(k)(2)

(l) (No change.)

(m) Occupational dose limits.

(1) The registrant shall control the occupational dose to individuals to the following dose limits.

(A) (No change.)

(B) The annual limits to the lens of the eye, to the skin of the whole body, and to the skin of the extremities shall be:

(i) an LDE of 15 rems (0.15 Sv); and

(ii) an SDE of 50 rems (0.5 Sv) to the skin of the whole body, or to the skin of any extremity.

(C) - (D) (No change.)

(2) The assigned DDE [~~and SDE~~] shall be for the portion of the body receiving the highest exposure. The assigned SDE shall be the dose averaged over the contiguous 10 square centimeters of skin receiving the highest exposure.

(3) (No change.)

(4) The DDE, LDE, and SDE may be assessed from surveys[~~, calculations,~~] or radiation measurements for the purpose of demonstrating compliance with the occupational dose limits, if the individual monitoring device was not in the region of highest potential exposure, or the results of individual monitoring are unavailable.

(5) (No change.)

(n) Conditions requiring individual monitoring of occupational dose.

(1) (No change.)

(2) Notwithstanding the requirements of paragraph (1)(A) of this subsection, no personnel monitoring shall be required for personnel operating only minimal threat radiation machines as specified in subsection (ll)(3) [~~(ll)(2)~~] of this section.

(o) - (p) (No change.)

(q) Location and use of individual monitoring devices.

(1) Each registrant shall ensure that individuals who are required to monitor occupational doses in accordance with subsection (n)(l) of this section wear and use individual monitoring devices as follows.

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

[~~(F) An individual monitoring device shall be worn for the period of time authorized by the dosimetry processor's certificate of registration or for no longer than three months, whichever is more restrictive.~~]

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

(r) Determination of occupational dose for the current year.

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

(5) If an individual has incomplete (for example, [~~e.g.,~~] a lost or damaged personnel monitoring device) current occupational dose data for the current year and that individual is employed solely by the registrant during the current year, the registrant shall:

(A) - (C) (No change.)

(6) Administrative controls established in accordance with paragraph (4) of this subsection shall be documented and maintained for inspection by the agency. Occupational dose assessments made in accordance with paragraph (5) of this subsection and records of data used to make the assessment shall be maintained for inspection by the agency. The registrant shall retain the records in accordance with subsection (ll)(6) [~~(ll)(5)~~] of this section.

(s) General surveys and monitoring.

(1) (No change.)

(2) The registrant shall ensure that instruments and equipment used for qualitative and quantitative radiation measurements, for example, dose rate, are operable and calibrated:

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

(3) All individual monitoring devices, except for direct and indirect reading pocket dosimeters, electronic personal dosimeters, and those individual monitoring devices used to measure the dose to any extremity, that require processing to determine the radiation dose and that are used by registrants to comply with subsection (m) of this section, with other applicable provisions of this chapter, [~~or with conditions specified in a certificate of registration,~~] shall be processed and evaluated by a dosimetry processor:

(A) holding current personnel dosimetry accreditation from the National Voluntary Laboratory Accreditation Program (NVLAP) of the National Institute of Standards and Technology; and

(B) approved in this accreditation process for the type of radiation or radiations included in the NVLAP program that most closely approximates the type of radiation or radiations for which the individual wearing the dosimeter is monitored. [~~; and~~]

[~~(C) holding a current certificate of registration from the agency authorizing dosimetry processing.~~]

(t) Control of access to high radiation areas.

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

(5) The registrant is not required to control entrance or access to rooms or other areas containing radiation machines capable of producing a high radiation area as described in this subsection if the registrant has met all the specific requirements for access and control specified in other applicable sections of this chapter, such as [~~, §289.119 of this title (relating to Radiation Safety Requirements for Particle Accelerators),~~] §289.227 of this title (relating to Use of Radiation Machines in the Healing Arts [~~and Veterinary Medicine~~]), §289.229 of this title (relating to Radiation Safety for Accelerators, Therapeutic Radiation Machines, and Simulators), and §289.255 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(u) Control of access to very high radiation areas.

(1) (No change.)

(2) The registrant is not required to control entrance or access to rooms or other areas containing radiation machines capable of producing a very high radiation area as described in paragraph (1) of this subsection if the registrant has met all the specific requirements for access and control specified in other applicable sections of this chapter, such as [~~, §289.119 of this title,~~] §289.227 of this title, §289.229 of this title, and §289.255 of this title.

(3) (No change.)

(v) (No change.)

(w) Caution signs. Unless otherwise authorized by the agency, the standard radiation symbol prescribed shall use the colors magenta, or purple, or black on yellow background. The standard radiation symbol prescribed is the three-bladed design as follows:
Figure: 25 TAC §289.231(w) (No change.)

(1) the cross-hatched area of the symbol is to be magenta, [~~or~~] purple, or black; and

(2) (No change.)

(x) - (z) (No change.)

(aa) Open records.

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

(3) The agency will determine whether information falls within one of the exceptions to the Texas Public Information Act. The agency [~~Office of General Counsel~~] will determine [~~be queried as to~~] whether or not there has been a previous determination that the information falls within one of the exceptions to the Texas Public Information Act. If there has been no previous determination and the agency believes that the information falls within one of the exceptions, an opinion of the Attorney General will be requested. If the agency agrees in writing to the request, the information shall not be open for public inspection unless the Attorney General's office subsequently determines that it does not fall within an exception.

(4) (No change.)

(bb) General provisions for records.

(1) All records required by this chapter shall be accurate and factual. These records shall be maintained by the registrant in accordance with subsection (ll)(6) of this section. Additional record requirements are specified elsewhere in this chapter.

[~~(1) Each registrant shall make and maintain records showing the receipt, transfer, and disposal of all radiation machines. These~~

~~records shall be maintained by the registrant in accordance with subsection (ll)(5) of this section. Additional record requirements are specified elsewhere in this chapter. All records required by this chapter shall be accurate and factual.~~]

(2) - (4) (No change.)

(5) Records required in accordance with [~~paragraph (1) of this subsection, and~~] subsections (cc)-(ee) of this section shall include the date and the identification of individual(s) making the record, and, as applicable, a unique identification of survey instrument(s) used, and an exact description of the location of the survey. [~~Records of receipt, transfer, and disposal shall uniquely identify the radiation machine(s).~~]

(6) Copies of records required in accordance with [~~paragraph (1) of this subsection, and~~] subsections (cc)-(ee) of this section, and by certificate of registration conditions that are relevant to operations at an additional authorized use/storage site shall be maintained at that site in addition to the main site specified on a certificate of registration in accordance with subsection (ll)(6) [~~(ll)(5)~~] of this section.

(cc) Records of surveys.

(1) Each registrant shall make and maintain records showing the results of surveys and calibrations required by subsection (s) of this section. The registrant shall retain these records in accordance with subsection (ll)(6) [~~(ll)(5)~~] of this section.

(2) The registrant shall retain the results of surveys to determine the dose from external sources of radiation used, in the absence of or in combination with individual monitoring data, in the assessment of individual DEs in accordance with subsection (ll)(6) [~~(ll)(5)~~] of this section.

(dd) Records of individual monitoring results.

(1) Each registrant shall make and maintain records in accordance with subsection (r) of this section of the doses received by all individuals for whom monitoring was required in accordance with subsection (n) of this section, and records of doses received during accidents, and emergency conditions. Assessments of DE and records made using units in effect before January 1, 1994, need not be changed. These records shall include, when applicable:

(A) the DDE to the whole body, LDE, SDE to the skin of the whole body, and SDE to the skin of any extremities; and

(B) (No change.)

(2) The registrant shall make entries of the records specified in paragraph (1) of this subsection at intervals not to exceed one year and within 90 [~~60~~] days of the end of the year.

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

(5) The registrant shall retain each required form or record required by this subsection and records used in preparing BRC Form 231-3 or equivalent in accordance with subsection (ll)(6) [~~(ll)(5)~~] of this section. [~~The registrant shall retain records used in preparing BRC Form 231-3 or equivalent in accordance with subsection (ll)(5) of this section.~~]

(ee) Records of dose to individual members of the public.

(1) (No change.)

(2) The registrant shall retain the records required by paragraph (1) of this subsection in accordance with subsection (ll)(6) [~~(ll)(5)~~] of this section.

(ff) - (gg) (No change.)

(hh) Notification of incidents.

(1) Notwithstanding other requirements for notification, each registrant shall immediately report each event involving a radiation machine possessed by the registrant that may have caused or threatens to cause an individual to receive:

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

(C) an SDE to the skin of the whole body or to the skin of the extremities of 250 rads (2.5 grays) or more.

(2) Each registrant shall, within 24 hours of discovery of the event, report to the agency each event involving loss of control of a radiation machine possessed by the registrant that may have caused, or threatens to cause an individual to receive, in a period of 24 hours:

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

(C) an SDE to the skin of the whole body or to the skin of the extremities exceeding 50 rems (0.5 Sv).

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

(ii) - (jj) (No change.)

(kk) Inspections.

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

(4) Inspection [~~Routine inspection~~] of radiation machines and services.

(A) Routine inspections by agency personnel will be made no more frequently than the intervals specified in subsection (ll)(2) [~~(ll)(1)~~] of this section. Registrants having certificates of registration authorizing multiple uses will be inspected at the most frequent interval specified for the uses authorized.

[~~(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, for those radiation machines determined by the agency to constitute a minimal threat to human health and safety, the routine inspection interval will be five years. The applicable categories are listed in subsection (ll)(2) of this section.~~]

(B) [~~(C)~~] Notwithstanding the inspection intervals specified in this section, the agency may inspect registrants more frequently due to:

(i) the persistence or severity of violations found during an inspection;

(ii) investigation of an incident or complaint concerning the facility;

(iii) a request for an inspection by a worker(s) in accordance with §289.203 of this title;

(iv) any change in a facility or equipment that might cause a significant increase in radiation output or hazard; or

(v) a mutual agreement between the agency and registrant.

(C) On-site routine inspections and remote inspections may be alternated.

(D) On-site routine inspections and remote inspections will be alternated for the following:

(i) facilities possessing and using only radiation machines defined as minimal threat machines in accordance with subsection (ll)(3) of this section; and

(ii) facilities possessing and using only radiographic machines for podiatry.

(E) For remote inspection of radiation machines, each registrant shall respond to a request from the agency for a remote inspection by perfuming the following:

(i) completing the remote inspection forms in accordance with the instructions included with the forms; and

(iii) returning to the agency the completed remote inspection forms with documentation of the most recent equipment performance evaluation performed in accordance with section §289.227(q) of this title, by the deadline indicated on the form.

(F) [~~(D)~~] The agency will conduct inspections of [~~medical, podiatric medical, veterinary, and chiropractic~~] radiation machines or lasers in a manner designed to cause as little disruption of a healing arts [~~medical, podiatric medical, veterinary, or chiropractic~~] practice as is practicable.

(5) A person who inspects medical [~~, podiatric medical, veterinary, or chiropractic~~] radiation machines or lasers will have training in the design and uses of the machines [~~products~~] and will receive training specified in subsection (ll)(4) and/or (5) [~~(ll)(3) and/or (4)~~] of this section.

(6) Each registrant shall perform, upon instructions from the agency, or shall permit the agency to perform such reasonable surveys as the agency deems appropriate or necessary including, but not limited to, surveys of:

(A) (No change.)

(B) facilities where [~~wherein~~] radiation machines are used or stored;

(C) - (D) (No change.)

(ll) Appendices.

(1) Definitions of Machine Types and Types of Use. For the purposes of this section, the listed machine types and types of use have the following meanings: [~~Routine inspection intervals for registrants.~~] [~~Figure: 25 TAC §289.231(ll)(1)~~]

(A) CT - computerized tomography machines used for medical purposes;

(B) fluoroscopy - fluoroscopic machines used for medical purposes;

(C) accelerators, simulators and other therapeutic machines used for medical purposes;

(D) radiographic only - facilities possessing and using only radiographic machines for medical purposes, including but not limited to, tomography, chiropractic machines, and bone densitometers;

(E) podiatric radiographic only - facilities possessing and using only radiographic machines for podiatry. This category may also include bone densitometers;

(F) minimal threat only - facilities possessing and using only machines defined as minimal threat machines;

(G) industrial radiography only - facilities possessing and using radiographic machines for industrial radiography, including accelerators. This category includes machines used at permanent and temporary job sites;

(H) other industrial - facilities possessing and using radiation machines for other industrial purposes (non-human use), including diffraction, hand-held light intensifying imaging devices, flash radiography, accelerators, CT, and fluoroscopy;

(I) services - persons providing the services listed in §289.226(b)(10) of this title;

(J) laser (human use/research/academic) - lasers used for medical and/or research or academic purposes, including veterinary use; and

(K) laser other (industrial/entertainment/services) - lasers used for industrial purposes, for demonstration/sales, and for stationary/mobile entertainment light shows. This category also includes facilities that provide calibration/repair services for lasers and that provide lasers to facilities for short periods of time.

(2) Inspection intervals for registrants.
Figure: 25 TAC §289.231(ll)(2)

(3) [~~(2)~~] Minimal threat radiation machines. Minimal threat radiation machines include, but are not limited to, the following:

[~~(A) electron microscope;~~]

(A) [~~(B)~~] x-ray fluorescence (machine);

(B) [~~(C)~~] x-ray gauges;

(C) [~~(D)~~] particle size analyzer (x-ray);

[~~(E) airport baggage x-ray;~~]

(D) [~~(F)~~] electron beam welding;

(E) [~~(G)~~] ion implantation devices;

(F) [~~(H)~~] cathodoluminescence devices;

(G) [~~(I)~~] package x-ray; and

(H) [~~(J)~~] certified cabinet x-ray.

(4) [~~(3)~~] Training for agency inspectors of radiation machines for human use.

(A) Objectives. Training of agency individuals performing inspections of [~~inspectors of~~] radiation machines for human use will be conducted by the agency. Upon completion of training, the inspector will be able to:

(i) select and operate the necessary testing equipment used to perform an inspection of radiation machines;

(ii) utilize radiation protection principles;

(iii) operate radiation detection instruments;

(iv) define basic regulatory terminology;

(v) apply this section regarding radiation machines;

(vi) perform routine agency inspections of radiation machines;

(vii) complete agency inspection documentation;

(viii) demonstrate knowledge of agency ethics, professional, and technical policies; and

(ix) successfully achieve the objectives in this subparagraph.

(B) Initial training program.

(i) Initial training will be conducted during a six-month period.

(ii) All training evaluation instruments will be developed by the agency.

(iii) Instruments to be used in determining a proficiency level are as follows:

(I) evaluation of each inspector's training needs prior to initial training;

(II) evaluation of knowledge obtained and verification of tasks performed by each inspector subsequent to training received by the agency; and

(III) evaluation of each inspector's task performance by the agency.

(C) Continuing education.

(i) The agency inspector of radiation machines for human use will accumulate 24 hours of continuing education regarding radiation machines for human use, at intervals not to exceed 24 months. These hours of continuing education may be acquired as follows:

(I) documented continuing education earned in an agency-accepted training format; and

(II) agency staff meetings.

(ii) Failure to obtain 24 hours of continuing education within each 24-month interval may result in a reassessment by the agency of an agency inspector's proficiency level.

(iii) After the initial training period, each inspector of radiation machines for human use will be evaluated by the agency, at intervals not to exceed 12 months.

(D) Agency proficiency standards. The agency proficiency standards for agency inspectors of radiation machines for human use are as follows.

(i) Level I. The agency inspector has not successfully achieved the objectives in subparagraph (A) of this paragraph after the initial training period. Additional training is required. Unsupervised inspections will not be performed.

(ii) Level II. The agency inspector has partially achieved the objectives in subparagraph (A) of this paragraph, but has not achieved the objective in subparagraph (A)(ix) of this paragraph after the initial training period. Additional training is required. Unsupervised inspections are not permitted for the type of radiation machines for human use for which the objectives of subparagraph (A)(ix) of this paragraph have not been achieved. Unsupervised inspections may be performed for the type of radiation machines for human use for which the objectives in subparagraph (A)(ix) of this paragraph have been successfully achieved.

(iii) Level III. The agency inspector has successfully achieved the objectives in subparagraph (A) of this paragraph. Supervision is not required for routine inspections.

(5) [~~(4)~~] Training for agency inspectors of lasers. Initial training will include an introduction to the requirements in this chapter and inspection forms. Inspections of two medical and two entertainment lasers, conducted by an inspector having completed the requirements of this paragraph, shall be observed before unsupervised inspection of lasers is permitted.

(6) [~~(5)~~] Time requirements for record keeping. The following are time requirements for record keeping.
Figure: 25 TAC §289.231(ll)(6)
[~~Figure: 25 TAC §289.231(ll)(5)~~]

(7) [~~(6)~~] Occupational exposure form. The following, BRC Form 231-3, is to be used to document occupational exposure record for a monitoring period. [~~: (Please find BRC Form 231-3 at the end of this section).~~]
Figure: 25 TAC §289.231(ll)(7)
[~~Figure: 25 TAC §289.231(ll)(6)~~]

This 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 January 15, 2004.

TRD-200400293
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §289.233

The Texas Department of Health (department) proposes new §289.233, concerning radiation control regulations for radiation machines used in veterinary medicine.

The new section consolidates requirements that are applicable only to persons using radiation machines in veterinary medicine from the current requirements in §289.203 (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 (relating to Hearing and Enforcement Procedures), §289.226 (relating to Registration of Radiation Machine Use and Services), §289.227 (relating to Use of Radiation Machines in the Healing Arts and Veterinary Medicine), and §289.231 (relating to General Provisions and Standards for Protection Against Machine-Produced Radiation). The requirements for other types of radiation machines found in those sections are much lengthier and more complex. Therefore, separating and consolidating the requirements applicable only to radiation machines used in veterinary medicine will provide for a more efficient rule and less burden on the persons required to comply with these requirements.

In addition to the consolidation of requirements, the proposed new rule incorporates legislation passed by the 78th Legislature, Regular Session. House Bill (HB) 2292 requires two-year terms for certificates of registration and requires recovery through fees of 100% of regulatory program costs for the two-year term of the certificate of registration. Therefore, references to annual fees are omitted throughout the section. The department is also simplifying its fee structure for certificates of registration. Registrants that use radiation machines in veterinary medicine now have one specified fee of $240 every two years, rather than a base fee plus machine fee. References to base fee and machine fee are omitted throughout the section. The registrant will be required to renew the certificate of registration every two years by paying the required fee and having a satisfactory compliance history. Registrants will receive a fee bill from the department every two years rather than every year. The requirement for an annual late payment fee is omitted. Senate Bill 1152, 78th Legislature, Regular Session, directs the department to participate in Texas Online, an electronic fee payment system developed and maintained by the Texas Online Authority. Wording is added that authorizes the department to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online. The implementation of these requirements is reflected in subsections (g) and (h)(6).

The revision changed references to the Formal Hearing Procedures throughout the rule to properly cite the references. A definition of "Act," which is the statutory authority for the radiation control rules, is added as it was inadvertently omitted from a previous version. The definitions of "notice of violation," "radiation," "shallow dose equivalent," and "supervision" are revised to be consistent with language used in other sections in this title. The definitions of "mobile service operation" and "x-ray equipment" are revised to more clearly state the intent of the rule. The wording in the requirements concerning occupational dose, including the definition of shallow dose equivalent, is clarified to be compatible with the United States Nuclear Regulatory Commission (NRC), and as an agreement state, Texas must adopt these requirements. The word "registrant" was replaced with "person" in several subsections because the applicable requirements are not limited to registrants. The requirements apply to any person not complying with the provisions of this chapter.

House Bill 253, 78th Legislature, Regular Session, requires the department to deny a certificate of registration application, amendment or renewal if the applicant's compliance history reveals a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations of the Radiation Control Act or the department's radiation control rules. The department has defined "a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations..." by adding a requirement that states the department will deny an application if at least three department or judicial orders are issued that assess administrative or civil penalties against the registrant or to revoke or suspend the certificate of registration. The requirement is reflected in subsection (h)(4)(D).

Subsection (h)(5)(A) and (B) includes inventory requirements to ensure registrants, especially those with multiple radiation machines, are aware of the location of machines and how many machines the registrant possesses. The requirements for radiation machines used for loaner or demonstration radiation machines include specific notification requirements. Language is included for the expiration and termination subsections to clarify requirements for the disposition or transfer of radiation machines if a registrant terminates a certificate of registration or it expires. In subsection (h)(8)(B), clause (iv) states that a certificate of registration may also be modified, suspended, or revoked in whole or in part as a result of existing conditions that constitute a substantial threat to the public health or safety or the environment to be consistent with language used in other sections of this title. Subsections (h)(9)(A)(vii) and (h)(9)(G) expand the requirements for requesting reciprocal recognition to be consistent with language used throughout this chapter. Subsection (i)(2)(A) specifies that a registrant shall document that each individual operating a radiation machine has read the operating and safety procedures. Subsection (i)(5)(S) requires registrants using radiation machines in veterinary medicine to perform, or cause to be performed, tests necessary to assure proper function of equipment with the indicated standard for the machine timer, kilovolt peak, tube stability, and collimation. Paragraphs (6) and (7) of subsection (i) include only a limited number of requirements for fluoroscopic and CT x-ray systems used on animals compared to the requirements for fluoroscopic and CT x-ray systems used on humans. Subsection (i)(11) specifies that users of digital imaging acquisition systems shall follow quality assurance/quality control protocols, that such protocols shall be included in the registrant's operating and safety procedures, and that the frequency at which the protocols are performed shall be documented. The method by which inspections are performed is modified based upon a review of how radiation machines used in veterinary medicine are regulated, compliance history, and the health and safety risk associated with the use of such machines is reflected in subsection (k)(1)(R) and (S).

This new rule is part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, other factors, or to incorporate requirements that are items of compatibility with NRC regulations because as an agreement state, Texas must adopt compatible requirements.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed. The subscription and convenience fees for electronic payment of fees as determined by Texas Online will be collected by the department and paid directly to the Texas Online Authority to offset the costs to state government for operating Texas Online.

Mrs. McBurney has also determined that for each year of the first five years the proposed section will be in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that rules are clear and specific and that those persons required to operate radiation machines do so in ways that ensure such protection. There will be fiscal impact on applicants/licensees that are small businesses, micro-businesses or other persons required to comply with the rule. The fee amounts will increase for some registrants and will decrease for others because the department is implementing one specified fee, rather than a base fee plus a machine fee. Approximately 19% of veterinary registrants will have an average decrease in fee of $25. Approximately 81% will have an average increase in fee of $5. There will also be an additional cost to registrants ranging from $25 to $150 per radiographic machine to have the equipment performance evaluations performed for the radiographic machines that are required every five years. When implemented, the subscription and convenience fees determined by Texas Online will be $10 for credit card use by registrants. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 1:00 p.m., Tuesday, February 10, 2004, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The new rule is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The new rule affects Health and Safety Code, Chapters 12 and 401.

§289.233. Radiation Control Regulations for Radiation Machines Used in Veterinary Medicine.

(a) Purpose. This section establishes the following.

(1) Fees for certificates of registration for veterinary facilities and provisions for their payment.

(2) Requirements for the registration of persons using radiation machines. No person shall use radiation machines except as authorized in a certificate of registration issued by the agency in accordance with the requirements of this section. A person who receives, possesses, uses, owns, or acquires radiation machines prior to receiving a certificate of registration is subject to the requirements of this chapter.

(3) Requirements intended to control the receipt, possession, use, and transfer of radiation machines by any person so the total dose to an individual, including doses resulting from all radiation machines other than background radiation, does not exceed the standards for protection against radiation prescribed in this section. However, nothing in this section shall be construed as limiting actions that may be necessary to protect health and safety in an emergency.

(4) Requirements for the use of radiation machines used in veterinary medicine. The registrant shall assure that the requirements of this section are met in the operation of such radiation machines.

(5) Specific record keeping requirements and general provisions for records and reports.

(6) Requirements for providing notices to employees and instructions and options available to such individuals in connection with agency inspections of registrants to ascertain compliance with the provisions of the Texas Radiation Control Act (Act), Health and Safety Code, Chapter 401, and requirements of this chapter, orders, and certificates of registration issued thereunder regarding radiological working conditions.

(7) Governing of the following in accordance with the Act, Health and Safety Code, Chapter 401; the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001; Title 1, Texas Administrative Code (TAC), Chapter 155; and the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title (relating to the Texas Board of Health).

(A) proceedings for the granting, denying, renewing, transferring, amending, suspending, revoking, or annulling of a certificate of registration;

(B) determining compliance with or granting of exemptions from requirements of this chapter, an order, or a condition of certificate of registration;

(C) assessing administrative penalties; and

(D) determining propriety of other agency orders.

(b) Scope.

(1) Except as specifically provided in other sections of this chapter, this section applies to persons who receive, possess, use, or transfer radiation machines used in veterinary medicine. The dose limits in this section do not apply to doses due to background radiation or voluntary participation in medical research programs. No radiation may be deliberately applied to animals except by or under the supervision of a veterinarian authorized by the Texas Board of Veterinary Medical Examiners to engage in veterinary medicine.

(2) Registrants who are also registered by the agency to receive, possess, acquire, transfer, or use class IIIb and class IV lasers in veterinary medicine shall also comply with the requirements of §289.301 of this title (relating to Registration of Radiation Safety Requirements for Lasers).

(3) Registrants who are also registered by the agency to receive, possess, transfer, or use accelerators, therapeutic radiation machines, and radiation therapy simulation systems for use in veterinary medicine shall also comply with the requirements of §289.229 of this title (relating to Radiation Safety Requirements for Accelerators, Therapeutic Radiation Machines, and Simulators).

(4) Registrants who are also licensed by the agency to receive, possess, use, and transfer radioactive materials must also comply with the applicable requirements of §289.201 of this title (relating to General Provisions for Radioactive Material), §289.202 of this title (relating to Standards for Protection Against Radiation from Radioactive Materials), §289.252 of this title (relating to Licensing of Radioactive Material), §289.256 of this title (relating to Medical and Veterinary Use of Radioactive Material), and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

(5) The agency may, by requirements in this chapter, an order, or a condition of certificate of registration, impose upon any registrant such requirements in addition to those established in this chapter as it deems appropriate or necessary to minimize danger to public health and safety or property or the environment.

(c) Definitions.

(1) Absorbed dose--The energy imparted by ionizing radiation per unit mass of irradiated material. The units of absorbed dose are the gray (Gy) and the rad.

(2) Accessible surface--The external surface of the enclosure or housing provided by the manufacturer.

(3) Act--Texas Radiation Control Act, Health and Safety Code, Chapter 401.

(4) Administrative Law Judge (ALJ)--Administrative law judge from the State Office of Administrative Hearings.

(5) Administrative penalty--A monetary penalty assessed by the agency in accordance with the Act, Health and Safety Code, §401.384, to emphasize the need for lasting remedial action and to deter future violations.

(6) Adult--An individual 18 or more years of age.

(7) Agency--The Texas Department of Health.

(8) Agreement State--Any state with which the United States Nuclear Regulatory Commission (NRC) has entered into an effective agreement under Section 274b. of the Atomic Energy Act of 1954, as amended (73 Stat. 689).

(9) As low as is reasonably achievable (ALARA)--Making every reasonable effort to maintain exposures to radiation as far below the dose limits in this chapter as is practical, consistent with the purpose for which the registered activity is undertaken, taking into account the state of technology, the economics of improvements in relation to the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of ionizing radiation and radiation machines in the public interest.

(10) Attenuate--To reduce the exposure rate upon passage of radiation through matter.

(11) Attenuation block--A block or stack, having dimensions 20 centimeters (cm) by 20 cm by 3.8 cm, of type 1100 aluminum alloy or other materials having equivalent attenuation. The nominal

chemical composition of type 1100 aluminum alloy is 99% minimum aluminum, 0.12% copper.

(12) Background radiation--Radiation from cosmic sources; non-technologically enhanced naturally occurring radioactive material, including radon, except as a decay product of source or special nuclear material, and including global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents, such as Chernobyl, that contribute to background radiation and are not under the control of the registrant. "Background radiation" does not include radiation from radiation machines regulated by the agency.

(13) Barrier--(See definition for protective barrier.)

(14) Beam axis--A line from the source through the centers of the x-ray fields.

(15) Beam-limiting device--A device that provides a means to restrict the dimensions of the x-ray field.

(16) Beam quality (diagnostic x-ray)--A term that describes the penetrating power of the x-ray beam. This is identified numerically by half-value layer and is influenced by kilovolt peak (kVp) and filtration.

(17) Board--The Texas Board of Health.

(18) Certificate of registration--A form of permission given by the agency to an applicant who has met the requirements for registration set out in the Act and this chapter.

(19) Coefficient of variation or C--The ratio of the standard deviation to the mean value of a population of observations. It is estimated using the following equation:
Figure: 25 TAC §289.233(c)(19)

(20) Collective dose--The sum of the individual doses received in a given period of time by a specified population from exposure to a specified source of radiation.

(21) Computed tomography (CT)--The production of a tomogram by the acquisition and computer processing of x-ray transmission data.

(22) Control panel--The part of the radiation machine control upon which are mounted the switches, knobs, push buttons, and other hardware necessary for manually setting the technique factors.

(23) CT conditions of operation--All selectable parameters governing the operation of a CT x-ray system including, but not limited to, nominal tomographic section thickness, filtration, and the technique factors as defined in this subsection.

(24) CT gantry--The tube housing assemblies, beam-limiting devices, detectors, and the supporting structures and frames that hold these components.

(25) Declared pregnant woman--A woman who has voluntarily informed the registrant, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman voluntarily withdraws the declaration in writing or is no longer pregnant.

(26) Deep dose equivalent (DDE), that applies to external whole body exposure--The DE at a tissue depth of 1 centimeter (cm) (1,000 milligrams per square centimeter (mg/cm^2)).

(27) Diagnostic source assembly--The tube housing assembly with a beam-limiting device attached.

(28) Diagnostic x-ray system--An x-ray system designed for irradiation of any part of any animal for the purpose of diagnosis or visualization.

(29) Director--The director of the radiation control program under the agency's jurisdiction.

(30) Dose--For external exposure to x-ray radiation from radiation machines, a generic term that means absorbed dose, DE, or total effective dose equivalent. For purposes of this chapter, "radiation dose" is an equivalent term.

(31) Dose equivalent (DE)--The product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of DE are the sievert (Sv) and rem.

(32) Dose limits--The permissible upper bounds of radiation doses established in accordance with this chapter. For purposes of this chapter, "limits" is an equivalent term.

(33) Embryo/fetus--The developing human organism from conception until the time of birth.

(34) Enforcement conference--A meeting held by the agency with a person to discuss the following:

(A) safety, safeguards, or environmental problems;

(B) compliance with regulatory or registration condition requirements;

(C) proposed corrective measures including, but not limited to, schedules for implementation; and

(D) enforcement options available to the agency.

(35) Exposure--The quotient of dQ by dm where "dQ" is the absolute value of the total charge of the ions of one sign produced in air when all the electrons (negatrons and positrons) liberated by photons in a volume element of air having mass "dm" are completely stopped in air. The SI unit of exposure is the coulomb per kilogram (C/kg). The roentgen is the special unit of exposure. For purposes of this chapter, this term is used as a noun.

(36) Exposure rate--The exposure per unit of time.

(37) External dose--That portion of the DE received from any source of radiation outside the body.

(38) Extremity--Hand, elbow, arm below the elbow, foot, knee, and leg below the knee. The arm above the elbow and the leg above the knee are considered part of the whole body.

(39) Field emission equipment--Equipment that uses an x-ray tube in which electron emission from the cathode is due solely to the action of an electric field.

(40) Field size--The dimensions along the major axes of an area in a plane perpendicular to the central axis of the beam at the normal treatment or examination source to image distance and defined by the intersection of the major axes and the 50% isodose line.

(41) Filter--Material placed in the useful beam to preferentially absorb selected radiation.

(42) Fluoroscopic imaging assembly--A subsystem in which x-ray photons produce a fluoroscopic image. It includes the image receptors such as the image intensifier and spot-film device, electrical interlocks, if any, and structural material providing linkage between the image receptor and diagnostic source assembly.

(43) Gray (Gy)--The SI unit of absorbed dose. One gray is equal to an absorbed dose of 1 joule per kilogram (J/kg) or 100 rad.

(44) Half-value layer (HVL)--The thickness of a specified material that attenuates the beam of radiation to an extent such that the exposure rate is reduced to one-half of its original value.

(45) Healing arts--Any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition.

(46) Hearing--A proceeding to examine an application or other matter before the agency in order to adjudicate rights, duties, or privileges.

(47) High radiation area--An area, accessible to individuals, in which radiation levels from radiation machines external to the body could result in an individual receiving a DE in excess of 0.1 rem (1 millisievert (mSv)) in one hour at 30 cm from any source of radiation or from any surface that the radiation penetrates.

(48) Image intensifier--A device, installed in its housing, that instantaneously converts an x-ray pattern into a corresponding light image of higher energy density.

(49) Image receptor--Any device, such as a fluorescent screen or radiographic film, that transforms incident x-ray photons either into a visible image or into another form that can be made into a visible image by further transformations.

(50) Individual--Any human being.

(51) Individual monitoring--The assessment of DE to an individual by the use of:

(A) individual monitoring devices; or

(B) survey data.

(52) Individual monitoring devices--Devices designed to be worn by a single individual for the assessment of DE. For purposes of this chapter, "personnel dosimeter" and "dosimeter" are equivalent terms. Examples of individual monitoring devices include, but are not limited to, film badges, thermoluminescence dosimeters (TLDs), optically stimulated luminescence dosimeters (OSLs), pocket ionization chambers (pocket dosimeters), and electronic personal dosimeters.

(53) Inspection--An official examination and/or observation including, but not limited to, records, tests, surveys, and monitoring to determine compliance with the Act and rules, orders, requirements, and conditions of the agency.

(54) Ionizing radiation--Any electromagnetic or particulate radiation capable of producing ions, directly or indirectly, in its passage through matter. Ionizing radiation includes gamma rays and x rays, alpha and beta particles, high speed electrons, neutrons, and other nuclear particles.

(55) Irradiation--The exposure of matter to ionizing radiation.

(56) kV--Kilovolt.

(57) kVp--Kilovolt peak (See definition for peak tube potential).

(58) Lead equivalent--The thickness of lead affording the same attenuation, under specified conditions, as the material in question.

(59) Lens dose equivalent (LDE)--The external DE to the lens of the eye at a tissue depth of 0.3 cm (300 mg/cm^2).

(60) Lost or missing radiation machine(s)--A radiation machine(s) whose location is unknown.

(61) mA--Milliampere.

(62) Machine-produced radiation--A stimulated emission of radiation from a manufactured product or device or component part of a manufactured product or device that has an electronic circuit that during operation can generate or emit a physical field of radiation.

(63) mAs--Milliampere-second.

(64) Member of the public--Any individual, except when that individual is receiving an occupational dose.

(65) Minor--An individual less than 18 years of age.

(66) Mobile service operation--The provision of radiation machines and personnel at temporary sites for limited time periods. The radiation machines may be fixed inside a motorized vehicle or may be a portable radiation machine that may be removed from the vehicle and taken into a facility for use.

(67) Monitoring--The measurement of radiation and the use of the results of these measurements to evaluate potential exposures and doses. For purposes of this chapter, "radiation monitoring" and "radiation protection monitoring" are equivalent terms.

(68) Notice of violation--A written statement of one or more alleged infringements of a legally binding requirement. The notice requires the person receiving the notice to provide a written statement describing the following:

(A) corrective steps taken by the registrant and the results achieved;

(B) corrective steps to be taken to prevent recurrence; and

(C) the projected date for achieving full compliance. The agency may require responses to notices of violation to be under oath.

(69) Occupational dose--The dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to sources of radiation from licensed/registered and unlicensed/unregistered sources of radiation, whether in the possession of the licensee/registrant or other person. Occupational dose does not include dose received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, from voluntary participation in medical research programs, or as a member of the public.

(70) Order--A specific directive contained in a legal document issued by the agency.

(71) Party--A person designated as such by the hearing examiner. A party may consist of the following:

(A) the agency; and

(B) an applicant, licensee, registrant, accredited mammography facility, or certified industrial radiographer.

(72) Peak tube potential--The maximum value of the potential difference in kilovolts across the x-ray tube during an exposure.

(73) Person--Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, local government, any other state or political subdivision or agency thereof, or any other legal entity, and any legal successor, representative, agent, or agency of the foregoing, other than the United States Nuclear Regulatory Commission (NRC) and other federal government agencies licensed or exempted by the NRC.

(74) Personnel monitoring equipment--(See definition for individual monitoring devices.)

(75) Phototimer--A method for controlling exposures to image receptors by the amount of radiation that reaches a radiation monitoring device. The radiation monitoring device is part of an electronic circuit that controls the duration of time the tube is activated (See definition for automatic exposure control.)

(76) Portable x-ray equipment--(See definition for x-ray equipment.)

(77) Primary protective barrier--(See definition for protective barrier.)

(78) Protective apron--An apron made of radiation absorbing materials used to reduce radiation exposure.

(79) Protective barrier--A barrier of radiation absorbing materials used to reduce radiation exposure. The types of protective barriers are as follows:

(A) Primary protective barrier--A barrier sufficient to attenuate the useful beam to the required degree; or

(B) Secondary protective barrier--A barrier sufficient to attenuate the stray radiation to the required degree.

(80) Protective glove--A glove made of radiation absorbing materials used to reduce radiation exposure.

(81) Public dose--The dose received by a member of the public from exposure to sources of radiation released by a licensee or registrant, or to any other source of radiation under the control of a licensee/registrant. It does not include occupational dose or doses received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, or from voluntary participation in medical research programs.

(82) Rad--The special unit of absorbed dose. One rad is equal to an absorbed dose of 100 ergs per gram (erg/g) or 0.01 J/kg (0.01 gray).

(83) Radiation--One or more of the following:

(A) gamma and x rays; alpha and beta particles and other atomic or nuclear particles or rays;

(B) radiation emitted to energy density levels that could reasonably cause bodily harm from an electronic device; or

(C) sonic, ultrasonic, or infrasonic waves from any electronic device or resulting from the operation of an electronic circuit in an electronic device in the energy range to reasonably cause detectable bodily harm.

(84) Radiation area--Any area, accessible to individuals, in which radiation levels could result in an individual receiving a DE in excess of 0.005 rem (0.05 mSv) in one hour at 30 cm from the radiation machine or from any surface that the radiation penetrates.

(85) Radiation machine--Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(86) Radiation safety officer (RSO)--An individual who has a knowledge of and the authority and responsibility to apply appropriate radiation protection rules, standards, and practices, who must be specifically authorized on a certificate of registration, and who is the primary contact with the agency.

(87) Radiograph--An image receptor on which the image is created directly or indirectly by an x-ray exposure and results in a permanent record.

(88) Registrant--Any person issued a certificate of registration by the agency in accordance with the Act and this chapter.

(89) Regulation--(See definition for rule.)

(90) Rem--The special unit of any of the quantities expressed as DE. The DE in rem is equal to the absorbed dose in rad multiplied by the quality factor (1 rem = 0.01 sievert (Sv)).

(91) Remote inspection--An examination by the agency of information submitted by the registrant on a form provided by the agency.

(92) Research and development--Research and development is defined as:

(A) theoretical analysis, exploration, or experimentation; or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(93) Restricted area--An area, access to which is limited by the registrant for the purpose of protecting individuals against undue risks from exposure to radiation. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building may be set apart as a restricted area.

(94) Roentgen (R)--The special unit of exposure. One roentgen (R) equals 2.58×10^{-4} C/kg of air. (See definition for exposure.)

(95) Rule--Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures. The word "rule" was formerly referred to as "regulation."

(96) Scan--The complete process of collecting x-ray transmission data for the production of a tomogram. Data can be collected simultaneously during a single scan for the production of one or more tomograms.

(97) Scan time--The period of time between the beginning and end of x-ray transmission data accumulation for a single scan.

(98) Scattered radiation--Radiation that has been deviated in direction during passage through matter.

(99) Secondary protective barrier--(See definition for protective barrier.)

(100) Severity level--A classification of violations based on relative seriousness of each violation and the significance of the effect of the violation on the occupational or public health or safety or the environment.

(101) Shallow dose equivalent (SDE)--The DE at a tissue depth of 0.007 cm (7 mg/cm^2) that applies to the external exposure of the skin of the whole body or the skin of an extremity.

(102) Shutter--A device attached to the tube housing assembly that can totally intercept the useful beam and that has a lead equivalency not less than that of the tube housing assembly.

(103) SI--The abbreviation for the International System of Units.

(104) Sievert (Sv)--The SI unit of any of the quantities expressed as DE. The DE in sievert is equal to the absorbed dose in gray multiplied by the quality factor (1 Sv = 100 rem.)

(105) Source--The focal spot of the x-ray tube.

(106) Source of radiation--Any radioactive material, or any device or equipment emitting or capable of producing radiation.

(107) Source-to-image receptor distance (SID)--The distance from the source to the center of the input surface of the image receptor.

(108) Source-to-skin distance (SSD)--The distance from the source to the skin of the patient.

(109) Special units--The conventional units historically used by registrants, for example, rad (absorbed dose), and rem (DE).

(110) Spot film--A radiograph that is made during a fluoroscopic examination to permanently record conditions that exist during that fluoroscopic procedure.

(111) Stationary x-ray equipment--(See definition for x-ray equipment.)

(112) Stray radiation--The sum of leakage and scattered radiation.

(113) Supervision--The delegating of the task of applying radiation in accordance with this section to persons who perform tasks under the veterinarian's control. The veterinarian assumes full responsibility for these tasks and shall assure that the tasks will be administered correctly.

(114) Survey--An evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, disposal, and/or presence of radiation machines. When appropriate, such survey includes, but is not limited to, tests, physical examination of location of equipment, measurements of levels of radiation present, and evaluation of administrative and/or engineered controls.

(115) Technique chart--A chart that provides all necessary generator control settings and geometry needed to make clinical radiographs when the radiography system is in manual mode.

(116) Technique factors--The conditions of operation that are specified as follows:

(A) for capacitor energy storage equipment, peak tube potential in kV and quantity of charge in mAs;

(B) for field emission equipment rated for pulsed operation, peak tube potential in kV and number of x-ray pulses;

(C) for CT equipment designed for pulsed operations, peak tube potential in kV, scan time in seconds, and either tube current in mA, x-ray pulse width in seconds, and the number of x-ray pulses per scan or the product of tube current, x-ray pulse width, and the number of x-ray pulses in mAs;

(D) for CT equipment not designed for pulsed operation, peak tube potential in kV, and either tube current in mA and scan time in seconds or the product of tube current and exposure time in mAs when the scan time and exposure time are equivalent; and

(E) for all other equipment, peak tube potential in kV and either tube current in mA and exposure time in seconds or the product of tube current and exposure time in mAs.

(117) Termination--A release by the agency of the obligations and authorizations of the registrant under the terms of the certificate of registration. It does not relieve a person of duties and responsibilities imposed by law.

(118) Texas Regulations for Control of Radiation (TRCR)--All sections of Title 25 Texas Administrative Code (TAC), Chapter 289.

(119) Total effective dose equivalent (TEDE)--For external exposures only to x-ray radiation from radiation machines, the TEDE is equal to the DDE. If an individual receives an occupational dose from both radiation machines and radioactive materials, the TEDE is the sum of the DDE for external exposures and the committed effective dose equivalent for internal exposures as defined in §289.201(b) of this title.

(120) Tube--An x-ray tube, unless otherwise specified.

(121) Tube housing assembly--The tube housing with tube installed. It includes high-voltage and/or filament transformers and other appropriate elements when such are contained within the tube housing.

(122) Unrestricted area (uncontrolled area)--An area, access to which is neither limited nor controlled by the registrant. For purposes of this chapter, "uncontrolled area" is an equivalent term.

(123) Useful beam--Radiation that passes through the window, aperture, cone, or other collimating device of the source housing. Also referred to as the primary beam.

(124) Veterinarian--An individual licensed by the Texas Board of Veterinary Medical Examiners.

(125) Very high radiation area--An area, accessible to individuals, in which radiation levels from radiation machines external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at 1 meter (m) from a radiation machine or from any surface that the radiation penetrates. At very high doses received at high dose rates, units of absorbed dose, gray and rad, are appropriate, rather than units of DE, Sv and rem.

(126) Violation--An infringement of any rule, license or registration condition, order of the agency, or any provision of the Act.

(127) Whole body--For purposes of external exposure, head, trunk including male gonads, arms above the elbow, or legs above the knee.

(128) Worker--An individual engaged in work under a certificate of registration issued by the agency and controlled by a registrant, but does not include the registrant.

(129) X-ray control--A device that controls input power to the x-ray high-voltage generator and/or the x-ray tube. It includes equipment such as timers, phototimers, automatic brightness stabilizers, and similar devices that control the technique factors of an x-ray exposure.

(130) X-ray equipment--An x-ray system, subsystem, or component thereof. For the purposes of this rule, types of x-ray equipment are as follows:

(A) portable x-ray equipment--x-ray equipment mounted on a permanent base with wheels and/or casters for moving while completely assembled. Portable x-ray equipment may also include equipment designed to be hand-carried; or

(B) stationary x-ray equipment--x-ray equipment that is installed in a fixed location.

(131) X-ray field--That area of the intersection of the useful beam and any one of the set of planes parallel to and including the plane of the image receptor, whose perimeter is the locus of points at which the exposure rate is one-fourth of the maximum in the intersection.

(132) X-ray high-voltage generator--A device that transforms electrical energy from the potential supplied by the x-ray control to the tube operating potential. The device may also include means for transforming alternating current to direct current, filament transformers for the x-ray tubes, high-voltage switches, electrical protective devices, and other appropriate elements.

(133) X-ray system--An assemblage of components for the controlled production of x rays. It includes minimally an x-ray high-voltage generator, an x-ray control, a tube housing assembly, a beam-limiting device, and the necessary supporting structures. Additional components that function with the system are considered integral parts of the system.

(134) X-ray subsystem--Any combination of two or more components of an x-ray system.

(135) X-ray tube--Any electron tube that is designed to be used primarily for the production of x rays.

(136) Year--The period of time beginning in January used to determine compliance with the provisions of this chapter. The registrant may change the starting date of the year used to determine compliance by the registrant provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

(d) Exemptions.

(1) Electronic equipment that produces radiation incidental to its operation for other purposes is exempt from the registration and notification requirements of this section, provided that the dose equivalent rate averaged over an area of 10 square centimeters (cm^2) does not exceed 0.5 millirem per hour (mrem/hr) at 5 centimeters (cm) from any accessible surface of such equipment. The production, testing, or factory servicing of such equipment shall not be exempt.

(2) Radiation machines in transit or in storage incident to transit are exempt from the requirements of this section. This exemption does not apply to the providers of radiation machines for mobile services. Facilities that have placed all radiation machines in storage, including on-site storage, and have notified the agency in writing, are exempt from the requirements of this section. This exemption is void if any radiation machine is energized resulting in the production of radiation.

(3) Domestic television receivers and video display terminals, including the servicing of such devices, are exempt from the requirements of this section.

(4) Inoperable radiation machines are exempt from the requirements of this section. For the purposes of this section, an inoperable radiation machine means a radiation machine that cannot be energized when connected to a power supply without repair or modification.

(5) Financial institutions that take possession of radiation machines as the result of foreclosure, bankruptcy, or other default of payment are exempt from the requirements in this section to the extent that they demonstrate that the unit is operable for the sole purpose of selling, leasing, or transferring.

(6) Individuals who are sole veterinarians, sole operators, and the only occupationally exposed individual are exempt from the following requirements:

(A) subsection (i)(4)(B) of this "Posting of notices to workers;"

(B) subsection (i)(3)(G) of this section "Instructions to workers;" and

(C) operating and safety procedures in accordance with subsection (i)(2) of this section.

(e) Communications.

(1) Except where otherwise specified, all communications and reports concerning this chapter and applications filed under them should be addressed to the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3189. Communications, reports, and applications may be delivered in person to the agency's office located at 8407 Wall Street, Austin, Texas.

(2) Documents transmitted to the agency will be deemed submitted on the date of the postmark, telegram, telefacsimile, or electronic media transmission.

(f) Interpretations. Except as specifically authorized by the agency in writing, no interpretation of the meaning of this chapter by any officer or employee of the agency other than a written legal interpretation by the agency, will be considered binding upon the agency.

(g) Fees for certificates of registration for veterinary facilities.

(1) Payment of fees.

(A) Each application for a certificate of registration shall be accompanied by a nonrefundable fee of $240.

(B) A nonrefundable fee shall be paid for each certificate of registration for radiation machines used in veterinary medicine. The fee shall be for the two-year term of the certificate of registration. The fee shall be paid in full on or before the last day of the expiration month and year of the certificate of registration. In the case of a single certificate of registration that authorizes more than one category of use, the category listed in §289.204(h) of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services) and assigned the higher fee will be used. For each additional use location on a single certificate of registration, the registrant shall pay an additional $72.

(C) Each application for reciprocal recognition of an out-of-state registration in accordance with subsection (h)(9) of this section shall be accompanied by the $240 fee, provided that no such fee has been submitted within 24 months of the date of commencement of the proposed activity.

(D) Fee payments shall be in cash or by check or money order made payable to the Texas Department of Health. The payments may be made by personal delivery to the central office, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas, or mailed to the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3189.

(2) Failure to pay prescribed fees.

(A) In any case where the agency finds that an applicant for a certificate of registration has failed to pay the fee prescribed in this section, the agency will not process that application until such fee is paid.

(B) In any case where the agency finds that a registrant has failed to pay a fee prescribed by this section by the due date, the certificate of registration has expired and the agency may implement compliance procedures as provided in subsection (k)(2) of this section.

(3) Fees for Texas Online participation. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(h) Registration of radiation machine use.

(1) Requirements for application for registration for use of radiation machines for veterinary medicine.

(A) Each person having a radiation machine used in veterinary medicine shall apply for registration with the agency within 30 days after beginning use of the radiation machine, except for mobile services that shall be registered in accordance with subsection (h)(2) of this section.

(B) Application for registration shall be completed on forms prescribed by the agency and shall contain all the information required by the form and accompanying instructions.

(C) The applicant shall be qualified by reason of training and experience to use the radiation machine for the purpose requested in accordance with this section in such a manner as to minimize danger to occupational and public health and safety.

(D) The applicant's proposed equipment, facilities, and operating and safety procedures shall be adequate to minimize danger to occupational and public health and safety.

(E) A radiation safety officer (RSO) shall be designated on each application form. The qualifications of that individual shall be submitted to the agency with the application.

(i) The RSO shall have the following qualifications:

(I) knowledge of potential hazards and emergency precautions; and

(II) completed educational courses related to ionizing radiation safety or a radiation safety officer course; or

(III) experience in the use and familiarity of the type of equipment used; and

(ii) In addition to the qualifications in clause (i) of this subparagraph, documentation of the following shall be submitted to the agency:

(I) for veterinarian RSOs, veterinary license board number; or

(II) for non-veterinarian RSOs, two years minimum experience in the use of radiation machines in veterinary medicine under the supervision of a licensed veterinarian.

(iii) The RSO identified on a certificate of registration issued before September 1, 1993, need not comply with the training requirements in this subsection.

(iv) Specific duties of the RSO include, but are not limited to, the following:

(I) establishing and overseeing operating and safety procedures that maintain radiation exposures as low as reasonably achievable (ALARA), and to review them regularly to ensure that the procedures are current and conform with this chapter;

(II) ensuring that individual monitoring devices are properly used by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made as required by subsections (i)(4)(B) and (C) and (j)(3)(B)-(D) of this section;

(III) investigating and reporting to the agency each known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter and each theft or loss of source(s) of radiation, determining the cause, and taking steps to prevent its recurrence;

(IV) having a thorough knowledge of management policies and administrative procedures of the registrant and keeping management informed on a periodic basis of the performance of the registrant's radiation protection program, if applicable;

(V) assuming control and having the authority to institute corrective actions including shut-down of operations when necessary in emergency situations or unsafe conditions;

(VI) making and maintaining records as required by this chapter; and

(VII) ensuring that personnel are adequately trained and complying with this chapter, the conditions of the certificate of registration, and the operating and safety procedures of the registrant.

(F) An application for use of radiation machines for veterinary medicine shall be signed by a licensed veterinarian. The signature of the administrator, president, or chief executive officer will be accepted in lieu of a veterinarian's signature if the facility has more than one veterinarian who may direct the operation of radiation machines. The application shall also be signed by the RSO if the RSO is someone other than the licensed veterinarian.

(G) Each application for a certificate of registration shall be accompanied by the fee prescribed in subsection (g) of this section. No application will be accepted for filing or processed prior to payment of the full amount specified.

(H) Each application shall be accompanied by a completed BRC Form 226-1 (Business Information Form).

(I) The agency may at any time after the filing of the original application, require further statements in order to enable the agency to determine whether the certificate of registration should be issued or denied.

(J) An application for a certificate of registration may include a request for a certificate of registration authorizing one or more activities.

(K) Applications and documents submitted to the agency may be made available for public inspection except that the agency may withhold any document or part thereof from public inspection in accordance with subsection (j)(1)(K)-(N) of this section.

(2) Application for registration of mobile service operation used in veterinary medicine. In addition to the requirements of paragraph (1) of this subsection, as applicable, each applicant shall apply for and receive authorization for mobile service operation before beginning mobile service operation. The following shall be submitted:

(A) an established main location where the machine(s), records, etc. will be maintained for inspection. This shall be a street address, not a post office box number;

(B) a sketch or description of the normal configuration of each radiation machine's use, including the operator's position and any ancillary personnel's location during exposures. If a mobile van is used with a fixed unit inside, furnish the floor plan indicating protective shielding and the operator's location; and

(C) a current copy of the applicant's operating and safety procedures regarding radiological practices for protection of operators, employees, and the general public.

(3) Issuance of certificate of registration.

(A) Upon a determination that an application meets the requirements of the Act and the requirements of the agency, the agency may issue a certificate of registration authorizing the proposed activity in such form and containing such conditions and limitations as the agency deems appropriate or necessary.

(B) The agency may incorporate in the certificate of registration at the time of issuance, or thereafter by amendment, such additional requirements and conditions with respect to the registrant's possession, use, and transfer of radiation machines subject to this chapter as it deems appropriate or necessary in order to:

(i) minimize danger to occupational and public health and safety;

(ii) require additional reports and the keeping of additional records as may be appropriate or necessary; and

(iii) prevent loss or theft of radiation machines subject to this section.

(4) Specific terms and conditions of certificates of registration.

(A) Each certificate of registration issued in accordance with this section shall be subject to the applicable provisions of the Act, now or hereafter in effect, and to the applicable requirements of this chapter and orders of the agency.

(B) No certificate of registration issued or granted under this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, to any person unless the agency authorizes the transfer in writing.

(C) Each person registered by the agency for radiation machine use in accordance with this section shall confine use and possession of the radiation machine registered to the locations and purposes authorized in the certificate of registration.

(D) In making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a certificate of registration, the agency may consider the technical competence and compliance history of an applicant or holder of a certificate of registration. After an opportunity for a hearing, the agency shall deny an application for a certificate of registration, an amendment to a certificate of registration, or renewal of a certificate of registration if the applicant's compliance history reveals that at least three agency or judicial orders have been issued against the applicant that assess administrative or civil penalties against the applicant, or that revoke or suspend the certificate of registration.

(5) Responsibilities of the registrant.

(A) Each registrant shall inventory all radiation machines at an interval not to exceed one year. The inventory shall be made and maintained for inspection by the agency in accordance with subsection (j)(2) of this section and shall include:

(i) manufacturer's name;

(ii) model and serial number of the control panel; and

(iii) location of radiation machine(s), for example, room number.

(B) Notification to the agency concerning radiation machine inventory is required within 30 days of either of the following:

(i) any change in the category(ies) of machine type or type of use as authorized in the certificate of registration (for example, addition of a computerized tomography machine to the authorized veterinary radiographic machine); or

(ii) any increase in the number of machines authorized by the certificate of registration in any machine type or type of use category.

(C) The registrant shall notify the agency in writing of any changes that would render the information contained in the application for registration and/or the certificate of registration inaccurate. Notification is required within 30 days of the following changes:

(i) name and mailing address;

(ii) street address where machine will be used;

(iii) RSO; or

(iv) name of entity contracted for "provider of equipment," registered in accordance with §289.226 of this title (relating to Registration of Radiation Machines Use and Services.)

(D) The following criteria applies to radiation machines used for loaner or demonstration radiation machines. For persons having a valid certificate of registration, radiation machines used for loaner or demonstration radiation machines may be used for up to 60 days. After 60 days, the registrant shall notify the agency of the following:

(i) any change in the category(ies) of machine type or type of use as authorized in the certificate of registration (for example, addition of a computerized tomography machine to the authorized veterinary radiographic machine); or

(ii) any increase in the number of machines authorized by the certificate of registration in any machine type or type of use category.

(E) No registrant shall engage any person for services described in §289.226(b)(9) and (10) of this title until such person provides to the registrant evidence of registration with the agency.

(F) Records of training and experience required by this section shall be made and maintained by the registrant for inspection by the agency until disposal is authorized by the agency.

(G) The following applies to voluntary or involuntary petitions for bankruptcy.

(i) Each registrant shall notify the agency, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by the registrant or its parent company. This notification shall include:

(I) the bankruptcy court in which the petition for bankruptcy was filed; and

(II) the date of the filing of the petition.

(ii) A copy of the "petition for bankruptcy" shall be submitted to the agency along with the written notification.

(H) The registrant is responsible for complying with this chapter and the conditions of the certificate of registration.

(I) No person shall use radiation machines that are not authorized in the certificate of registration issued by the agency.

(J) Records of training and experience required by this section shall be maintained for inspection by the agency until disposal is authorized by the agency.

(6) Expiration of certificates of registration.

(A) Effective September 1, 2004, the term of the certificate of registration is two years. Each certificate of registration expires at the end of the day, in the month and year stated in the certificate of registration. Upon payment of the fee required by subsection (g) of this section and if the agency does not deny the renewal in accordance with paragraph (4)(D) of this subsection, the certificate of registration will be renewed.

(B) If the fee is not paid and the certificate of registration is not renewed in accordance with subparagraph (A) of this paragraph, the certificate of registration expires, and the registrant is in violation of the requirements in this chapter and is subject to administrative penalties in accordance with §289.205 of this title.

(i) If the registrant pays the fee required by §289.204 of this title within 30 days after expiration of the certificate of registration, the certificate of registration will be reinstated and the registrant will not be required to file an application in accordance with subsection (h) of this section.

(ii) If the registrant fails to pay the fee within 30 days after expiration of the certificate of registration, the registrant shall file an application in accordance with subsection (h) of this section.

(C) If a registrant fails to pay the fee required by subsection (g) of this section and the certificate of registration is not renewed, the registrant shall:

(i) terminate use of all radiation machines and/or terminate radiation machine servicing or radiation services within 30 days following the expiration date; and

(ii) submit to the agency a record of the disposition of the radiation machines and if transferred, to whom transferred within 30 days following the expiration date.

(D) Expiration of the certificate of registration does not relieve the registrant of the requirements of this chapter.

(7) Termination of certificates of registration. When a registrant decides to terminate all activities involving radiation machines authorized under the certificate of registration, the registrant shall notify the agency immediately and do the following:

(A) request termination of the certificate of registration in writing;

(B) submit to the agency a record of the disposition of the radiation machines and if transferred, to whom transferred; and

(C) pay any outstanding fees in accordance with subsection (g) of this section.

(8) Modification, suspension, and revocation of certificates of registration.

(A) The terms and conditions of all certificates of registration shall be subject to revision or modification. A certificate of registration may be suspended or revoked by reason of amendments to the Act, by reason of requirements of this chapter or orders issued by the agency.

(B) Any certificate of registration may be revoked, suspended, or modified, in whole or in part, for any of the following:

(i) any material false statement in the application or any statement of fact required under provisions of the Act;

(ii) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a certificate of registration on an original application;

(iii) violation of, or failure to observe any of the terms and conditions of the Act, this chapter, the certificate of registration, or order of the agency; or

(iv) existing conditions that constitute a substantial threat to the public health or safety or the environment.

(C) Each certificate of registration revoked by the agency ends at the end of the day on the date of the agency's final determination to revoke the certificate of registration, or on the revocation date stated in the determination, or as otherwise provided by the agency order.

(D) Except in cases in which the occupational and public health or safety requires otherwise, no certificate of registration shall be suspended or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the registrant in writing and the registrant shall have been afforded an opportunity to demonstrate compliance with all lawful requirements.

(9) Reciprocal recognition for out-of-state certificates of registration.

(A) Whenever any radiation machine is to be brought into the state for any temporary use, the person proposing to bring the machine into the state shall apply for and receive a notice from the agency granting reciprocal recognition prior to beginning operations. The request for reciprocity shall include the following:

(i) completed BRC Form 226-1 (Business Information Form);

(ii) completed BRC Form 252-3 (Notice of Intent to Work in Texas Under Reciprocity);

(iii) name and Texas licensing board number of the veterinarian if the machines are used to irradiate animals;

(iv) copy of the applicant's current state certificate of registration or equivalent document;

(v) copy of the applicant's current operating and safety procedures pertinent to the proposed use;

(vi) fee as specified in subsection (g) of this section; and

(vii) qualifications of personnel who will be operating the machines.

(B) Upon a determination that the request for reciprocity meets the requirements of the agency, the agency may issue a notice granting reciprocal recognition authorizing the proposed use.

(C) Once reciprocity is granted, the out-of-state registrant shall file a BRC Form 252-3 with the agency prior to each entry into the state. This form shall be filed at least three working days before the radiation machine is to be used in the state. If, for a specific case, the three-day period would impose an undue hardship, the out-of-state registrant may, at the determination of the agency, obtain permission to proceed sooner.

(D) When radiation machines are used as authorized under reciprocity, the out-of-state registrant shall have the following in its possession at all times for inspection by the agency:

(i) completed BRC Form 252-3;

(ii) copy of the notice from the agency granting reciprocity;

(iii) copy of the out-of-state registrant's operating and safety procedures; and

(iv) copy of the applicable rules as specified in the notice granting reciprocity.

(E) If the state from which the radiation machine is proposed to be brought does not issue certificates of registration or equivalent documents, a certificate of registration shall be obtained from the agency in accordance with the requirements of this section.

(F) The agency may withdraw, limit, or qualify its acceptance of any certificate of registration or equivalent document issued by another agency upon determining that such action is necessary in order to prevent undue hazard to occupational and public health and safety or property.

(G) Reciprocal recognition will expire one year from the date it is granted. A new request for reciprocity shall be submitted to the agency each year. Reciprocity requests made after the initial request shall include only the following:

(i) a completed BRC Form 226-1;

(ii) a completed BRC Form 252-3;

(iii) the fee as specified in subsection (g) of this section; and

(iv) copy of the applicant's current state certificate of registration or equivalent document;

(v) copy of the applicant's current operating and safety procedures pertinent to the proposed use; and

(vi) qualifications of personnel who will be operating the machines.

(i) Use of radiation machines for veterinary medicine.

(1) As low as reasonably achievable. The registrant shall use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and public doses that are as low as reasonably achievable.

(2) Operating and safety procedures. Each registrant shall have and implement written operating and safety procedures. These procedures shall be made available to each individual operating a radiation machine, including any restrictions of the operating technique required for the safe operation of the particular x-ray system.

(A) The registrant shall document that each individual operating a radiation machine has read the operating and safety procedures and shall maintain this documentation for inspection by the agency in accordance with subsection (j)(2) of this section. The documentation shall include the following:

(i) name and signature of individual;

(ii) date individual read the operating and safety procedures; and

(iii) initials of the RSO.

(B) The operating and safety procedures shall include, but are not limited to, the following procedures as applicable:

(i) posting notices to workers in accordance with paragraph (4)(B) of this subsection;

(ii) instructions to workers in accordance with paragraph (3)(G) of this subsection;

(iii) notifications and reports to individuals in accordance with paragraph (4)(B) and (C) of this subsection and subsection (j)(3)(B)-(D) of this section;

(iv) ordering x-ray exams in accordance with subsection (b)(1) of this section;

(v) occupational dose requirements in accordance with paragraph (3)(A) of this subsection;

(vi) personnel monitoring requirements in accordance with paragraphs (3)(B), (D) and (E) and (4)(F)(iii) of this subsection;

(vii) posting of a radiation area in accordance with paragraph (4)(D) of this subsection;

(viii) use of a technique chart in accordance with paragraph (5)(A) of this subsection;

(ix) use of protective devices in accordance with paragraph (3)(H) of this subsection;

(x) exposure of individuals other than the animal in accordance with paragraph (3)(I) of this subsection;

(xi) holding of animals or image receptors in accordance with paragraph (3)(J) of this subsection;

(xii) control of scattered radiation in accordance with paragraph (6)(C) of this subsection; and

(xiii) film processing program or digital image processing in accordance with paragraphs (9)-(11) of this subsection.

(3) Personnel requirements.

(A) Occupational dose limits. Except as otherwise exempted, all individuals who are associated with the operation of a radiation machine are subject to the occupational dose limits of this subparagraph regarding dose limits to individuals, and the personnel monitoring requirements of subparagraph (B) of this paragraph.

(i) The registrant shall control the occupational dose to individuals to the following dose limits.

(I) An annual limit shall be the TEDE being equal to 5 rems (0.05 Sv).

(II) The annual limits to the lens of the eye, to the skin of the whole body, and to the skin of the extremities shall be:

(-a-) an LDE of 15 rems (0.15 Sv); and

(-b-) an SDE of 50 rems (0.5 Sv) to the skin of the whole body or to the skin of any extremity.

(III) The annual limits for a minor shall be 10% of the annual occupational dose limits specified in subclauses (I) and (II) of this clause.

(IV) If a woman declares her pregnancy, the registrant shall ensure that the DE to an embryo/fetus during the entire pregnancy, due to occupational exposure of a declared pregnant woman, does not exceed 0.5 rem (5 mSv). If a woman chooses not to declare pregnancy, the occupational dose limits specified in subclauses (I) and (II) of this clause are applicable to the woman.

(-a-) The registrant shall make efforts to avoid substantial variation above a uniform monthly exposure rate to a declared pregnant woman so as to satisfy the limit in clause (i) of this subparagraph. The National Council on Radiation Protection and Measurements recommended in NCRP Report No. 91 "Recommendations on Limits for Exposure to Ionizing Radiation" (June 1, 1987) that no more than 0.05 rem (0.5 mSv) to the embryo/fetus be received in any one month.

(-b-) If by the time the woman declares pregnancy to the registrant, the DE to the embryo/fetus has exceeded 0.45 rem (4.5 mSv), the registrant shall be deemed to be in compliance with clause (i) of this subparagraph, if the additional DE to the embryo/fetus does not exceed 0.05 rem (0.5 mSv) during the remainder of the pregnancy.

(-c-) The DE to an embryo/fetus shall be taken as the DE that is most representative of the DE to the embryo/fetus from external radiation, that is, in the mother's lower torso region.

(-d-) If multiple measurements have been made, assignment of the DDE for the declared pregnant woman from the individual monitoring device that is most representative of the DE to the embryo/fetus shall be the DE to the embryo/fetus. Assignment of the highest DDE for the declared pregnant woman to the embryo/fetus is not required unless that dose is also the most representative DDE for the region of the embryo/fetus.

(-e-) If multiple measurements have not been made, assignment of the highest DDE for the declared pregnant woman shall be the DE to the embryo/fetus.

(ii) The assigned DDE shall be for the portion of the body receiving the highest exposure. The assigned SDE shall be the dose averaged over the contiguous 10 cm^2 of skin receiving the highest exposure.

(iii) When a protective apron is worn while working with fluoroscopic equipment used for clinical diagnostic or research purposes, the effective dose equivalent (EDE) for external radiation shall be determined as follows:

(I) when only one individual monitoring device is used and it is located at the neck (collar) outside the protective apron, the reported DDE shall be the EDE for external radiation; or

(II) when only one individual monitoring device is used and it is located at the neck (collar) outside the protective apron, and the reported dose exceeds 25% of the limit specified in clause (i) of this subparagraph, the reported DDE value multiplied by 0.3 shall be the EDE for external radiation; or

(III) when individual monitoring devices are worn, both under the protective apron at the waist and outside the protective apron at the neck (collar), the EDE for external radiation shall be assigned the value of the sum of the DDE reported for the individual monitoring device located at the waist under the protective apron multiplied by 1.5 and the DDE reported for the individual monitoring device located at the neck (collar) outside the protective apron multiplied by 0.04.

(iv) The DDE, LDE, and SDE may be assessed from surveys or radiation measurements for the purpose of demonstrating compliance with the occupational dose limits, if the individual monitoring device was not in the region of highest potential exposure, or the results of individual monitoring are unavailable.

(v) The registrant shall reduce the dose that an individual may be allowed to receive in the current year by the amount of occupational dose received from radiation machines or radioactive materials while employed by any other person. See subparagraph (F)(iv) of this paragraph.

(B) Conditions requiring individual monitoring of occupational dose. Each registrant shall monitor exposures from radiation machines at levels sufficient to demonstrate compliance with the occupational dose limits of this section. As a minimum, each registrant shall monitor occupational exposure to radiation from radiation machines and shall supply and require the use of individual monitoring devices by:

(i) adults likely to receive, in one year from sources external to the body, a dose in excess of 10% of the limits in subparagraph (A)(i) of this paragraph;

(ii) minors likely to receive, in one year from radiation machines external to the body, a DDE in excess of 0.1 rem (1 mSv), an LDE in excess of 0.15 rem (1.5 mSv), or an SDE to the skin of the whole body or to the skin of any extremities in excess of 0.5 rem (5 mSv);

(iii) declared pregnant women likely to receive during the entire pregnancy, from radiation machines external to the body, a DDE in excess of 0.1 rem (1 mSv); and

(iv) individuals entering a high or very high radiation area.

(C) Dose limits for individual members of the public.

(i) Each registrant shall conduct operations so that:

(I) the TEDE to individual members of the public from exposure to radiation from radiation machines does not exceed 0.5 rem (5 mSv) in a year, exclusive of the dose contribution from background radiation, exposure of patients to radiation for the purpose of medical diagnosis or therapy, or to voluntary participation in medical research programs; and

(II) the dose in any unrestricted area from registered external sources does not exceed 0.002 rem (0.02 mSv) in any one hour.

(ii) If the registrant permits members of the public to have access to restricted areas, the limits for members of the public continue to apply to those individuals.

(iii) The agency may impose additional restrictions on radiation levels in unrestricted areas in order to restrict the collective dose.

(D) Compliance with dose limits for individual members of the public.

(i) The registrant shall make or cause to be made surveys of radiation levels in unrestricted areas to demonstrate compliance with the dose limits for individual members of the public as required in subparagraph (C) of this paragraph.

(ii) A registrant shall show compliance with the annual dose limit in subparagraph (C) of this paragraph by demonstrating by measurement or calculation that the TEDE to the individual likely to receive the highest dose from the registered operation does not exceed the annual dose limit.

(iii) Registrants exempt from individual monitoring requirements in accordance with subparagraph (B)(ii) of this paragraph are exempt from the requirements of clauses (i) and (ii) of this subparagraph.

(E) Location and use of individual monitoring devices.

(i) Each registrant shall ensure that individuals who are required to monitor occupational doses in accordance with subparagraph (B) of this paragraph wear and use individual monitoring devices as follows.

(I) An individual monitoring device shall be assigned to and worn by only one individual.

(II) An individual monitoring device used for monitoring the dose to the whole body shall be worn at the unshielded location of the whole body likely to receive the highest exposure. When a protective apron is worn, the location of the individual monitoring device is typically at the neck (collar).

(III) If an additional individual monitoring device is used for monitoring the dose to an embryo/fetus of a declared pregnant woman, in accordance with subparagraph (B)(iii) of this paragraph, it shall be located at the waist under any protective apron being worn by the woman.

(IV) An individual monitoring device used for monitoring the LDE, to demonstrate compliance with subparagraph (A)(i)(II)(-a-) of this paragraph, shall be located at the neck (collar) or at a location closer to the eye, outside any protective apron being worn by the monitored individual.

(V) An individual monitoring device used for monitoring the dose to the extremities, to demonstrate compliance with subparagraph (A)(i)(II)(-b-) of this paragraph, shall be worn on the extremity likely to receive the highest exposure. Each individual monitoring device, to the extent practicable, shall be oriented to measure the highest dose to the extremity being monitored.

(ii) Each registrant shall ensure that individual monitoring devices are returned to the dosimetry processor for proper processing.

(iii) Each registrant shall ensure that adequate precautions are taken to prevent a deceptive exposure of an individual monitoring device.

(F) Determination of occupational dose for the current year.

(i) For each individual who is likely to receive, in a year, an occupational dose requiring monitoring in accordance with subparagraph (B) of this paragraph, the registrant shall determine the occupational radiation dose received during the current year. Occupational dose includes doses received from exposure to registered/licensed or unregistered/unlicensed sources of radiation as defined in subsection (c) of this section.

(ii) In complying with the requirements of clause (i) of this subparagraph, a registrant may:

(I) accept, as a record of the occupational dose that the individual received during the current year, BRC Form 233-1 (Occupational Exposure Record for a Monitoring Period) from prior or other current employers, or other clear and legible record, of all information required on that form and indicating any periods of time for which data are not available; or

(II) accept, as a record of the occupational dose that the individual received during the current year, a written signed statement from the individual, or from the individual's prior or other current employer(s) for work involving radiation exposure, that discloses the nature and the amount of any occupational dose that the individual received during the current year; or

(III) obtain reports of the individual's DE from prior or other current employer(s) for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the registrant, by telephone, telegram, facsimile, or letter. The registrant shall request a written verification of the dose data if the authenticity of the transmitted report cannot be established.

(iii) The registrant shall record the exposure data for the current year, as required by clause (i) of this subparagraph, on BRC Form 233-1, or other clear and legible record, of all the information required on BRC Form 233-1.

(iv) If the registrant is unable to obtain a complete record of an individual's current occupational dose while employed by any other registrant or licensee, the registrant shall assume in establishing administrative controls in accordance with subsection (m)(5) of this section for the current year, that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 millisieverts (mSv)) for each quarter; or 416 millirems (mrem) (4.16 mSv) for each month for which records were unavailable and the individual was engaged in activities that could have resulted in occupational radiation exposure.

(v) If an individual has incomplete (for example, a lost or damaged personnel monitoring device) current occupational dose data for the current year and that individual is employed solely by the registrant during the current year, the registrant shall:

(I) assume that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 mSv) for each quarter;

(II) assume that the allowable dose limit for the individual is reduced by 416 mrem (4.16 mSv) for each month; or

(III) assess an occupational dose for the individual during the period of missing data using surveys, radiation measurements, or other comparable data for the purpose of demonstrating compliance with the occupational dose limits.

(vi) Administrative controls established in accordance with clause (iv) of this subparagraph shall be documented and maintained for inspection by the agency. Occupational dose assessments made in accordance with clause (v) of this subparagraph and records of data used to make the assessment shall be made and maintained for inspection by the agency. The registrant shall retain the records in accordance with subsection (j)(2) of this section.

(vii) Occupational exposure form. The following BRC Form 233-1 (Occupational Exposure Record for a Monitoring Period), is to be used to document occupational exposures for a monitoring period.
Figure: 25 TAC §289.233(i)(3)(F)(vii)

(G) Instructions to workers.

(i) All individuals likely to receive in a year an occupational dose in excess of 100 millirem (1 millisievert) shall be:

(I) kept informed of the storage, transfer, or use of sources of radiation in the licensee's or registrant's workplace;

(II) instructed in the health protection problems associated with exposure to sources of radiation, in precautions or procedures to minimize exposure, and in the purposes and functions of protective devices employed;

(III) instructed in, and instructed to observe, to the extent within the worker's control, the applicable provisions of agency requirements and certificates of registration, for the protection of personnel from exposures to sources of radiation occurring in such areas;

(IV) instructed of their responsibility to report promptly to the registrant any condition that may constitute, lead to, or cause a violation of agency requirements or certificate of registration conditions, or unnecessary exposure to sources of radiation;

(V) instructed in the appropriate response to warnings made in the event of any unusual occurrence or malfunction that may involve exposure to sources of radiation; and

(VI) advised as to the radiation exposure reports that workers may request in accordance with subsection (j)(3)(D)(i) and (ii) of this section.

(ii) The extent of these instructions shall be commensurate with potential radiological health protection problems associated with the source(s) of radiation in the workplace.

(H) Protective devices. Protective devices shall be utilized when required, as in subparagraphs (J)(i) and (ii) and (K) of this paragraph and paragraph (6)(C) of this subsection.

(i) Protective devices shall be of no less than 0.25 millimeter (mm) lead equivalent material except as specified in paragraph (6)(C)(ii)(I) of this subsection.

(ii) Protective devices, including aprons, gloves, and shields shall be checked annually for defects such as holes, cracks, and tears. These checks may be performed by the registrant by visual or tactile means, or x-ray imaging. If a defect is found, protective devices shall be replaced or removed from service until repaired. A record of this test shall be made and maintained by the registrant in accordance with subsection (j)(2) of this section for inspection by the agency.

(I) Exposure of individuals other than the animal. No individual other than the animal, operator, and ancillary personnel shall be in the x-ray room or area while exposures are being made unless such individual's assistance is required.

(J) Holding of animal or image receptor.

(i) When an animal or image receptor must be held in position during radiography, mechanical supporting or restraining devices shall be used when the exam permits.

(ii) If an animal or image receptor must be held by an individual during an exposure, that individual shall be protected with appropriate shielding devices described in subparagraph (H) of this paragraph.

(iii) The registrant's written operating and safety procedures required by paragraph (2) of this subsection shall include the following:

(I) a list of circumstances in which mechanical holding devices cannot be routinely utilized; and

(II) a procedure used for selecting an individual to hold or support the animal or image receptor.

(K) Operator position. The operator position during the exposure shall be such that the operator's exposure is as low as reasonably achievable (ALARA) and the operator is a minimum of six feet from the radiation machine or protected by an apron, gloves, or other shielding having a minimum of 0.25 lead equivalent material.

(L) Holding of tube. In no case shall an individual hold the tube or tube housing assembly supports during any radiographic exposure.

(4) Facility requirements.

(A) Caution signs. Unless otherwise authorized by the agency, the standard radiation symbol prescribed shall use the colors magenta, or purple, or black on yellow background. The standard radiation symbol prescribed is the three-bladed design as follows:
Figure: 25 TAC §289.233(i)(4)(A)

(i) the cross-hatched area of the symbol is to be magenta, or purple, or black; and

(ii) the background of the symbol is to be yellow.

(B) Posting of notices to workers.

(i) Each registrant shall post current copies of the following documents:

(I) §289.233 of this title;

(II) the certificate of registration and conditions or documents incorporated into the certificate of registration by reference, and amendments thereto;

(III) the operating procedures applicable to work under the certificate of registration; and

(IV) any notice of violation, if applicable, involving radiological working conditions, or order issued in accordance with subsection (k)(2) of this section.

(ii) If posting of a document specified in clause (i) of this subparagraph is not practicable, the registrant shall post a notice that describes the document and states where it may be examined.

(iii) Bureau of Radiation Control (BRC) Form 233-2, "Notice to Employees," which is found at the end of the section, or an equivalent document containing at least the same wording as BRC Form 233-2.
Figure: 25 TAC §289.233(i)(4)(B)(iii)

(iv) Documents, notices, or forms posted in accordance with this subsection shall:

(I) appear in a sufficient number of places to permit individuals engaged in work under the certificate of registration to observe them on the way to or from any particular work location to which the document applies;

(II) be conspicuous; and

(III) be replaced if defaced or altered.

(C) Posting requirements.

(i) The registrant shall post each radiation area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, RADIATION AREA."

(ii) The registrant shall post each high radiation area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, HIGH RADIATION AREA" or "DANGER, HIGH RADIATION AREA."

(iii) The registrant shall post each very high radiation area with a conspicuous sign or signs bearing the radiation symbol and words "GRAVE DANGER, VERY HIGH RADIATION AREA."

(D) Exceptions to posting requirements. A registrant is not required to post caution signs in areas or rooms containing radiation machines for periods of less than 8 hours, if each of the following conditions is met:

(i) the radiation machines are constantly attended during these periods by an individual who takes the precautions necessary to prevent the exposure of individuals to radiation in excess of the limits established in this section; and

(ii) the area or room is subject to the registrant's control.

(E) General surveys and monitoring.

(i) Each registrant shall make, or cause to be made, surveys that:

(I) are necessary for the registrant to comply with this section; and

(II) are necessary under the circumstances to evaluate:

(-a-) the magnitude and extent of radiation levels; and

(-b-) the potential radiological hazards.

(ii) The registrant shall ensure that instruments and equipment used for qualitative and quantitative radiation measurements, for example, dose rate, are operable and calibrated:

(I) by a person licensed or registered by the agency, another agreement state, a licensing state, or the United States Nuclear Regulatory Commission to perform such service;

(II) at intervals not to exceed 12 months unless a different time interval is specified in another section of this chapter;

(III) after each instrument or equipment repair;

(IV) for the types of radiation used and at energies appropriate for use; and

(V) at an accuracy within 20% of the true radiation level.

(iii) All individual monitoring devices, except for direct and indirect reading pocket dosimeters, electronic personal dosimeters, and those individual monitoring devices used to measure the dose to any extremity, that require processing to determine the radiation dose and

that are used by registrants to comply with subparagraph (A) of this paragraph, with other applicable provisions of this chapter, shall be processed and evaluated by a dosimetry processor:

(I) holding current personnel dosimetry accreditation from the National Voluntary Laboratory Accreditation Program (NVLAP) of the National Institute of Standards and Technology; and

(II) approved in this accreditation process for the type of radiation or radiations included in the NVLAP program that most closely approximates the type of radiation or radiations for which the individual wearing the dosimeter is monitored.

(F) Control of access to high radiation areas.

(i) The registrant shall ensure that each entrance or access point to a high radiation area has one or more of the following features:

(I) a control device that, upon entry into the area, causes the level of radiation to be reduced below that level at which an individual might receive a DDE of 0.1 rem (1 mSv) in one hour at 30 cm from the source of radiation from any surface that the radiation penetrates;

(II) a control device that energizes a conspicuous visible or audible alarm signal so that the individual entering the high radiation area and the supervisor of the activity are made aware of the entry; or

(III) entryways that are locked, except during periods when access to the areas is required, with positive control over each individual entry.

(ii) In place of the controls required by clause (i) of this subparagraph for a high radiation area, the registrant may substitute continuous direct or electronic surveillance that is capable of preventing unauthorized entry.

(iii) The registrant may apply to the agency for approval of alternative methods for controlling access to high radiation areas.

(iv) The registrant shall establish the controls required by clauses (i) and (iii) of this subparagraph in a way that does not prevent individuals from leaving a high radiation area.

(G) Control of access to very high radiation areas.

(i) In addition to the requirements in subparagraph (F) of this paragraph, the registrant shall institute measures to ensure that an individual is not able to gain unauthorized or inadvertent access to areas in which radiation levels could be encountered at 500 rads (5 grays) or more in one hour at 1 m from a radiation machine or any surface through which the radiation penetrates at this level.

(ii) The entry control devices required by clause (i) of this subparagraph shall be established in such a way that no individual will be prevented from leaving the area.

(H) Security and control of radiation machines.

(i) The registrant shall secure radiation machines from unauthorized removal.

(ii) The registrant shall use devices and/or administrative procedures to prevent unauthorized use of radiation machines.

(5) Radiation Machine Requirements.

(A) Technique chart. A technique chart relevant to the particular radiation machine shall be provided or electronically displayed in the vicinity of the control panel and used by all operators.

(B) Labeling radiation machines. Each registrant shall ensure that each radiation machine is labeled in a conspicuous manner that cautions individuals that radiation is produced when it is energized. This label shall be affixed in a clearly visible location on the face of the control unit.

(C) Mechanical support of tube head. The tube housing assembly shall be adjusted to remain stable during an exposure unless tube housing movement is a designed function of the x-ray system.

(D) Battery charge indicator. On battery-powered x-ray generators, visual means shall be provided on the control panel to indicate whether the battery is in a state of charge adequate for proper operation.

(E) Beam quality. The following requirements apply to beam quality.

(i) Half-value layer.

(I) The half-value layer of the useful beam for a given x-ray tube potential shall not be less than the values shown in the following Table I. If it is necessary to determine such half-value layer at an x-ray tube potential that is not listed in Table I, linear interpolation may be made.
Figure: 25 TAC §289.233(i)(5)(E)(i)(I)

(II) For capacitor energy storage equipment, compliance with the requirements of subparagraph (K) of this paragraph shall be determined with the maximum quantity of charge per exposure.

(ii) Filtration controls.

(I) For x-ray systems that have variable kVp and variable filtration for the useful beam, a device shall link the kVp selector with the filters and shall prevent an exposure unless the minimum amount of filtration required by subparagraph (A) of this paragraph is in the useful beam for the given kVp that has been selected.

(II) Any other system having removable filters shall be required to have the minimum amount of filtration as required by subparagraph (E)(i)(I) of this paragraph permanently located in the useful beam during each exposure.

(F) Multiple tubes. Where two or more radiographic tubes are controlled by one exposure switch, the tube or tubes that have been selected shall be clearly indicated prior to initiation of the exposure. This indication shall be both on the x-ray control panel and at or near the tube housing assembly that has been selected.

(G) Technique and exposure indicators.

(i) The technique factors to be used during an exposure shall be indicated before the exposure begins except when automatic exposure controls are used, in which case the technique factors that are set prior to the exposure shall be indicated.

(ii) On equipment having fixed technique factors, the requirement of subparagraph (A) of this paragraph may be met by permanent markings.

(iii) The x-ray control shall provide visual indication of the production of x rays.

(iv) The indicated technique factors shall be accurate to meet manufacturer's specifications. If these specifications are not available from the manufacturer, the factors shall be accurate to within plus or minus 10% of the indicated setting.

(H) The x-ray control shall provide visual or audible indication of the production of x-rays observable at or from the operator's protected position whenever x-rays are produced.

(I) Beam limiting devices shall do the following:

(i) provide the same degree of protection as is required of the housing;

(ii) restrict the useful beam to the area of clinical interest;

(iii) the numerical SID indicator shall be present and shall be accurate to within 2.0% of the SID; and

(iv) limit the x-ray field such that the x-ray field shall not exceed:

(I) 2.0% of the SID for the length or width of the rectangular image receptor; or

(II) 2.0% of the SID for the diagonal of the image receptor for circular image receptors.

(J) A means shall be provided to center the primary beam to the image receptor within 2.0% of the SID.

(K) A means shall be provided to terminate the exposure at the following:

(i) a preset time interval;

(ii) a preset product of current and time;

(iii) a preset number of pulses; or

(iv) a preset radiation exposure to the image receptor.

(L) The radiation machine shall not be able to make an exposure when the timer is set to a "zero" or "off" position if either position is provided.

(M) All stationary, mobile, or portable x-ray systems used for veterinary x rays shall be provided with the following:

(i) a continuous pressure type exposure switch; and

(ii) either a six and one-half foot high protective barrier for operator protection during exposures; or

(iii) a means for the operator to be at least six feet from the tube housing assembly.

(N) Operators using portable radiation machines designed to be hand-held are exempt from the requirements of subparagraph (M) of this paragraph. The hand-held portable radiation machine shall be held by the tube housing support or handle. The operator shall wear protective devices in accordance with paragraph (3)(H) of this subsection.

(O) The technique factors to be used during an exposure shall be indicated before the exposure begins. If AECs are used, the technique factors that are set prior to the exposure shall be indicated.

(P) For machines having fixed technique factors, the requirements of subparagraph (O) of this paragraph may be met by permanent markings on the equipment. Indication of technique factors shall be visible from the operator's position except in the case of spot films made by the fluoroscopist.

(Q) Portable machines shall be used in a manner that complies with this section.

(R) All exams and retakes shall be ordered by the veterinarian.

(S) Equipment performance evaluations.

(i) For all radiation machines used in veterinary medicine, the registrant shall perform, or cause to be performed, tests necessary to assure proper function of equipment with the indicated standard for each of the following items. After installation, the tests listed shall be performed every five years.

(I) Timer.

(-a-) The accuracy of the timer shall meet the manufacturer's specifications. If the manufacturer's specifications are not obtainable, the timer accuracy shall be plus or minus 10% of the indicated time with testing performed at 0.5 second.

(-b-) Means shall be provided to terminate the exposure at a preset time interval, a preset product of current and time, a preset number of pulses, or a preset radiation exposure to the image receptor. In addition, it shall not be possible to make an exposure when the timer is set to a "zero" or "off" position if either position is provided.

(II) Kilovolt peak. If the registrant possesses documentation of the appropriate manufacturer's kilovolt peak specifications, the radiation machine shall meet those specifications. If the registrant does not possess documentation of the appropriate manufacturer's kilovolt peak specifications, the indicated kilovolt peak shall be accurate to within plus or minus 10% of the indicated setting(s). For radiation machines with fewer than three fixed kilovolt peak settings, the radiation machine shall be checked at those settings.

(III) Tube stability. The x-ray tube shall remain physically stable during exposures. In cases where tubes are designed to move during exposure, the registrant shall assure proper and free movement of the radiation machine.

(IV) Collimation. Field limitation shall meet the requirements of subparagraph (I) of this paragraph.

(ii) Records of the test results, including any numerical readings shall be maintained by the registrant in accordance with subsection (j)(2) of this section.

(iii) Any items not meeting the specifications of the tests shall be corrected or repaired. Correction or repair shall begin within 30 days following the check and shall be performed according to a plan designated by the registrant. Correction or repair shall be completed no longer than 90 days from discovery unless authorized by the agency. Records of corrections or repairs shall be maintained by the registrant in accordance with subsection (j)(2) of this section for inspection by the agency.

(iv) Measurements of the radiation output of an x-ray system shall be performed with a calibrated dosimetry system. The dosimetry system shall have been calibrated within the preceding 24 months and the calibration shall be traceable to a national standard. During the calendar year in which the dosimetry system is not calibrated, an intercomparison to a system calibrated within the previous 12 months shall be performed.

(6) Additional requirements for fluoroscopic x-ray systems.

(A) Limitation of the useful beam. Limitation of the useful beam shall be as follows.

(i) Primary barrier.

(I) The fluoroscopic imaging assembly shall be provided with a primary protective barrier that intercepts the entire cross section of the useful beam at any SID.

(II) The x-ray tube used for fluoroscopy shall not produce x rays unless the barrier is in position to intercept the useful beam and the imaging device is in place and operable.

(III) The exposure rate due to transmission through the barrier with the attenuation block in the useful beam, combined with radiation through the image intensifier if provided, shall not exceed 3.34×10^{-3}% of the entrance exposure rate at a distance of 10

cm from any accessible surface of the fluoroscopic imaging assembly beyond the plane of the image receptor.

(ii) Measuring compliance of barrier transmission.

(I) The exposure rate due to transmission through the primary protective barrier combined with radiation through the image intensifier shall be determined by measurements averaged over an area of 100 cm^2 with no linear dimension greater than 20 cm.

(II) If the source is below the tabletop, the measurement shall be made with the input surface of the fluoroscopic imaging assembly positioned 30 cm above the tabletop.

(III) If the source is above the tabletop and the SID is variable, the measurement shall be made with the end of the beam-limiting device or spacer as close to the tabletop as it can be placed, provided that it shall not be closer than 30 cm.

(IV) Movable grids and compression devices shall be removed from the useful beam during the measurement.

(V) The attenuation block shall be positioned in the useful beam 10 cm from the point of measurement of entrance exposure rate and between this point and the input surface of the fluoroscopic imaging assembly.

(VI) The collimator shall be fully open when the measurement is made.

(iii) X-ray field.

(I) Compliance with subclauses (II)-(VII) of this clause shall be determined with the beam axis perpendicular to the plane of the image receptor.

(II) Equipment with a fixed SID and the capability of a visible area of no greater than 300 cm^2 shall be provided with either stepless adjustment of the x-ray field or a means to further limit the x-ray field at the image receptor to 125 cm^2 or less. If the equipment is provided with stepless adjustment, the minimum x-ray field size at the maximum SID shall be less than or equal to 5 cm by 5 cm at the image receptor.

(III) Equipment with a variable SID or a fixed SID with the capability of a visible area of greater than 300 cm^2 shall be provided with stepless adjustment of the field size. The minimum x-ray field size at the maximum SID shall be less than or equal to 5 cm by 5 cm at the image receptor.

(IV) Neither the length nor the width of the x-ray field in the plane of the image receptor shall exceed that of the visible area of the image receptor by more than 3.0% of the SID. The sum of the excess length and the excess width shall be no greater than 4.0% of the SID.

(V) For rectangular x-ray fields used with circular image receptors, the error in alignment shall be determined along the length and width dimensions of the x-ray field that pass through the center of the visible area of the image receptor.

(VI) For fluoroscopic equipment with only a manual mode of collimation, the x-ray field produced shall be limited to the area of the spot-film cassette at 16 inches above tabletop. Additionally, during fluoroscopy, the beam shall be restricted to the area of the input phosphor.

(VII) Spot-film devices shall meet the following additional requirements.

(-a-) Means shall be provided between the source and the animal for adjustment of the x-ray field size in the plane of the film to the size of that portion of the film that has been selected on the spot-film selector.

(-1-) Such adjustment shall be automatically accomplished except when the x-ray field size in the plane of the film is smaller than that of the selected portion of the film.

(-2-) The total misalignment of the edges of the x-ray field with the respective edges of the selected portion of the image receptor along the length or width dimensions of the x-ray field in the plane of the image receptor shall not exceed 3.0% of the SID when adjusted for full coverage of the selected portion of the image receptor.

(-3-) The sum, without regard to sign of the misalignment along any two orthogonal dimensions, shall not exceed 4.0% of the SID.

(-b-) The center of the x-ray field in the plane of the film shall be aligned with the center of the selected portion of the film to within 2.0% of the SID.

(B) Activation of the fluoroscopic tube. X-ray production in the fluoroscopic mode shall be controlled by a device that requires continuous pressure by the fluoroscopist for the entire time of the exposure (continuous pressure type switch). When recording serial fluoroscopic images, the fluoroscopist shall be able to terminate the x-ray exposures at any time, but means may be provided to permit completion of any single exposure of the series in process.

(C) Control of scattered radiation.

(i) Fluoroscopic configuration, including fluoroscopic table designs, shall not permit any portion of any individual's body, except the head, neck, and extremities, to be exposed to scattered radiation emanating from above or below the tabletop unless the radiation has passed through not less than a total of 0.25 mm lead equivalent material. The material may be, but is not limited to, drapes, self-supporting curtains, or viewing shields, in addition to any lead equivalency provided by a protective apron.

(ii) Where sterile fields or special procedures prohibit the use of normal protective barriers or drapes, all of the following conditions shall be met.

(I) All persons in the room where fluoroscopy is performed shall wear protective aprons that provide a shielding equivalent of 0.5 mm of lead.

(II) The fluoroscopic field size shall be reduced to the absolute minimum required for the procedure being performed (area of clinical interest).

(III) Operating and safety procedures shall reflect the above conditions, and fluoroscopy personnel shall exhibit awareness of situations requiring the use and/or nonuse of the protective drapes.

(iii) For image-intensified fluoroscopic equipment with only a manual mode of collimation, the x-ray field produced shall be limited to the area of the spot-film cassette at 16 inches above tabletop. Additionally, during fluoroscopy, the beam shall be restricted to the area of the input phosphor.

(7) Additional requirements for CT x-ray systems.

(A) Initiation of operation.

(i) The x-ray control and gantry shall provide visual indication whenever x rays are produced and, if applicable, whether the shutter is open or closed.

(ii) Means shall be provided to require operator initiation of each individual scan or series of scans.

(iii) All emergency buttons/switches shall be clearly labeled as to their functions.

(B) Termination of exposure.

(i) Means shall be provided to terminate the x-ray exposure automatically by either de-energizing the x-ray source or shuttering the x-ray beam in the event of equipment failure affecting data collection. Such termination shall occur within an interval that limits the total scan time to no more than 110% of its preset value through the use of either a backup timer or devices that monitor equipment function.

(ii) A signal visible to the operator shall indicate when the x-ray exposure has been terminated through the means required by clause (i) of this subparagraph.

(iii) The operator shall be able to terminate the x-ray exposure at any time during a scan or series of scans under CT x-ray system control of greater than 0.5 seconds duration. Termination of the x-ray exposure shall necessitate resetting of the CT conditions of operation prior to initiation of another scan.

(8) Educational facilities. Facilities conducting training using animals are held to the requirements of this section except for paragraphs (9)-(11) of this subsection concerning film processing.

(9) Automatic and manual film processing for veterinary facilities and mobile veterinary services.

(A) Films shall be developed in accordance with the time-temperature relationships recommended by the film manufacturer. The specified developer temperature for automatic processing and the time-temperature chart for manual processing shall be posted in the darkroom. If the registrant determines an alternate time-temperature relationship is more appropriate for a specific facility, that time-temperature relationship shall be documented and posted.

(B) Chemicals shall be replaced according to the chemical manufacturer's or supplier's recommendations or at an interval not to exceed three months.

(C) Darkroom light leak tests shall be performed and any light leaks corrected at intervals not to exceed six months.

(D) Lighting in the film processing/loading area shall be maintained with the filter, bulb wattage, and distances recommended by the film manufacturer for that film emulsion or with products that provide an equivalent level of protection against fogging.

(E) Corrections or repairs of the light leaks or other deficiencies in paragraphs (2)-(4) of this subsection shall be initiated within 72 hours of discovery and completed no longer than 15 days from detection of the deficiency unless a longer time is authorized by the agency. Records of the correction or repairs shall include the date and initials of the individual performing these functions and shall be maintained in accordance with subsection (t)(1) of this section for inspection by the agency.

(F) Documentation of the items in subparagraphs (B, (C), and (E) of this paragraph shall be maintained at the site where performed and shall include the date and initials of the individual completing these items. These records shall be made and maintained in accordance with subsection (j)(2) of this section for inspection by the agency.

(10) Alternative processing systems. Users of daylight processing systems, laser processors, self-processing film units, or other alternative processing systems shall follow manufacturer's recommendations for image processing. Documentation that the registrant is following manufacturer's recommendations shall include the date and initials of the individual completing the document and shall be maintained at the site where performed in accordance with subsection (j)(2) of this section for inspection by the agency.

(11) Digital imaging acquisition systems. Users of digital imaging acquisition systems shall follow quality assurance/quality control protocol for image processing established by the manufacturer, or if no manufacturer's protocol is available, by the registrant. The registrant shall include the protocols, whether established by the registrant or the manufacturer, in its operating and safety procedures. The registrant shall document the frequency at which the quality assurance/quality control protocol is performed. Documentation shall include the date and initials of the individual completing the document and shall be maintained at the site where performed in accordance with subsection (j)(2) of this section for inspection by the agency. Documentation that the registrant is following manufacturer's recommendations shall include the date and initials of the individual completing the document and shall be maintained at the site where performed in accordance with subsection (j)(2) of this section for inspection by the agency.

(j) Records and reports.

(1) General provisions for records and reports.

(A) Each registrant shall maintain records at each site including sites authorized by certificate of registration condition and records sites for mobile services. The records shall include those specified in paragraph (2) of this subsection and shall be maintained at the time interval indicated for inspection by the agency. Additional record requirements are specified elsewhere in this chapter. All records required by this chapter shall be accurate and factual.

(B) Records are only valid if stamped, initialed, or signed and dated by authorized personnel or otherwise authenticated. Records such as letters, drawings, and specifications, shall include all pertinent information, such as stamps, initials, and signatures.

(C) Each registrant shall use the SI units gray, sievert, and coulomb per kilogram, or the special units rad, rem, and roentgen, including multiples and subdivisions, and shall clearly indicate the units of all quantities on records required by this chapter.

(D) The registrant shall make a clear distinction among the quantities entered on the records required by this section, such as TEDE, SDE, LDE, or DDE.

(E) Each record required by this section shall be legible throughout the specified retention period.

(F) The record shall be the original or a reproduced copy or a mircroform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period.

(G) The record may also be stored in electronic format with the capability for producing legible, accurate, and complete records during the required retention period.

(H) Each registrant shall maintain records of receipt, transfer, and disposal of radiation machines for inspection by the agency. The records shall include the following information and shall be kept until disposal is authorized by the agency:

(i) manufacturer's name;

(ii) model and serial number from the control panel;

(iii) date of the receipt, transfer, and disposal; and

(iv) name of the individual recording the information.

(I) The registrant shall maintain adequate safeguards against tampering with and loss of records.

(J) Subject to the limitations provided in the Texas Public Information Act, Government Code, Chapter 552, all information and

data collected, assembled, or maintained by the agency are public records open to inspection and copying during regular office hours.

(K) Any person who submits written information or data to the agency and requests that the information be considered confidential, privileged, or otherwise not available to the public under the Texas Public Information Act, shall justify such request in writing, including statutes and cases where applicable, addressed to the agency.

(i) Documents containing information that is claimed to fall within an exception to the Texas Public Information Act shall be marked to indicate that fact. Markings shall be placed on the document on origination or submission.

(I) The words "NOT AN OPEN RECORD" shall be placed conspicuously at the top and bottom of each page containing information claimed to fall within one of the exceptions.

(II) The following wording shall be placed at the bottom of the front cover and title page, or first page of text if there is no front cover or title page:
Figure: 25 TAC §289.233(j)(1)(K)(i)(II)

(ii) The agency requests, whenever possible, that all information submitted under the claim of an exception to the Texas Public Information Act be extracted from the main body of the application and submitted as a separate annex or appendix to the application.

(iii) Failure to comply with any of the procedures described in clauses (i) and (ii) of this subparagraph may result in all information in the agency file being disclosed upon an open records request.

(L) The agency will determine whether information falls within one of the exceptions to the Texas Public Information Act. The agency will determine whether or not there has been a previous determination that the information falls within one of the exceptions to the Texas Public Information Act. If there has been no previous determination and the agency believes that the information falls within one of the exceptions, an opinion of the Attorney General will be requested. If the agency agrees in writing to the request, the information shall not be open for public inspection unless the Attorney General's office subsequently determines that it does not fall within an exception.

(M) Requests for information.

(i) All requests for open records information must be in writing and refer to documents currently in possession of the agency.

(ii) The agency will ascertain whether the information may be released or whether it falls within an exception to the Texas Public Information Act.

(I) The agency may take a reasonable period of time to determine whether information falls within one of the exceptions to the Texas Public Information Act.

(II) If the information is determined to be public, it will be presented for inspection and/or copies of documents will be furnished within a reasonable period of time. A fee will be charged to recover agency costs for copies.

(iii) Original copies of public records may not be removed from the agency. Under no circumstances shall material be removed from existing records.

(N) Records of surveys.

(i) Each registrant shall make and maintain records showing the results of surveys required by subsection (i)(4)(D) of this section for inspection by the agency. The registrant shall retain these records in accordance with subsection (j)(2) of this section.

(ii) The registrant shall retain the results of surveys to determine the dose from external sources of radiation used, in the absence of or in combination with individual monitoring data, in the assessment of individual DEs in accordance with subsection (j)(2) of this section.

(O) Records of individual monitoring results.

(i) Each registrant shall make or cause to be made and maintain records in accordance with subsection (i)(3)(F) of this section of the doses received by all individuals for whom monitoring was required in accordance with subsection (i)(3)(B) of this section, and records of doses received during accidents, and emergency conditions. Assessments of DE and records made using units in effect before January 1, 1994, need not be changed. These records shall include, when applicable:

(I) the DDE to the whole body, LDE, SDE to the skin of the whole body, and SDE to the skin of any extremities; and

(II) the data used to make occupational dose assessments in accordance with subsection (i)(3)(F)(v) of this section.

(ii) The registrant shall make entries of the records specified in clause (i) of this subparagraph at intervals not to exceed one year and within 90 days of the end of the year.

(iii) The registrant shall make or cause to be made and maintain the records specified in clause (i) of this subparagraph on BRC Form 233-1, in accordance with the instructions for BRC Form 233-1, or in clear and legible records containing all the information required by BRC Form 233-1.

(iv) The registrant shall make or cause to be made and maintain the records of dose to an embryo/fetus with the records of dose to the declared pregnant woman. The declaration of pregnancy, including the estimated date of conception, shall also be kept on file, but may be maintained separately from the dose records.

(v) The registrant shall retain each required form or record required by this subsection in accordance with subsection (j)(2) of this section for inspection by the agency. The registrant shall retain records used in preparing BRC Form 233-1 or equivalent in accordance with subsection (j)(2) of this section.

(P) Records of dose to individual members of the public.

(i) Each registrant shall make and maintain records sufficient to demonstrate compliance with the dose limit for individual members of the public for inspection by the agency. See subsection (i)(3)(C) and (D) of this section.

(ii) The registrant shall retain the records required by clause (i) of this subparagraph in accordance with subsection (j)(2) of this section.

(2) Record/document requirements. Each registrant shall maintain the following records/documents at each site, including authorized records sites for mobile services at the time intervals specified and make available to the agency for inspection.
Figure: 25 TAC §289.233(j)(2)

(3) Reports.

(A) Reports of stolen, lost, or missing radiation machines.

(i) Each registrant shall report to the agency by telephone a stolen, lost, or missing radiation machine immediately after its occurrence becomes known to the registrant.

(ii) Each registrant required to make a report in accordance with clause (i) of this subparagraph shall, within 30 days after making the telephone report, make a written report to the agency that includes the following information:

(I) a description of the radiation machine involved, including, the manufacturer and model and serial number;

(II) a description of the circumstances under which the loss or theft occurred;

(III) a statement of disposition, or probable disposition, of the radiation machine involved;

(IV) exposures of individuals to radiation, circumstances under which the exposures occurred, and the possible TEDE to persons in unrestricted areas;

(V) actions that have been taken, or will be taken, to recover the radiation machine; and

(VI) procedures or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of radiation machines.

(iii) Subsequent to filing the written report, the registrant shall also report additional substantive information on the loss or theft within 30 days after the registrant learns of such information.

(iv) The registrant shall prepare any report filed with the agency in accordance with this subsection so that names of individuals who may have received exposure to radiation are stated in a separate and detachable portion of the report.

(B) Reports of incidents.

(i) Notwithstanding other requirements for notification, each registrant shall immediately report each event involving a radiation machine possessed by the registrant that may have caused or threatens to cause an individual to receive:

(I) a TEDE of 25 rems (0.25 Sv) or more;

(II) an LDE of 75 rems (0.75 Sv) or more; or

(III) an SDE to the skin of the whole body or to the skin of any extremities of 250 rads (2.5 grays) or more.

(ii) Each registrant shall, within 24 hours of discovery of the event, report to the agency each event involving loss of control of a radiation machine possessed by the registrant that may have caused, or threatens to cause an individual to receive, in a period of 24 hours:

(I) a TEDE exceeding 5 rems (0.05 Sv);

(II) an LDE exceeding 15 rems (0.15 Sv); or

(III) an SDE to the skin of the whole body or to the skin of any extremities exceeding 50 rems (0.5 Sv).

(iii) Registrants shall make the initial notification reports required by clauses (i) and (ii) of this subparagraph by telephone to the agency and shall confirm the initial notification report within 24 hours by telegram, mailgram, or facsimile to the agency.

(iv) The registrant shall prepare each report filed with the agency in accordance with this section so that names of individuals who have received exposure to radiation are stated in a separate and detachable portion of the report.

(C) Reports of exposures and radiation levels exceeding the limits.

(i) In addition to the notification required by subparagraph (B) of this paragraph, each registrant shall submit a written report within 30 days after learning of any of the following occurrences:

(I) incidents for which notification is required by subparagraph (B) of this paragraph;

(II) doses in excess of any of the following:

(-a-) the occupational dose limits for adults in subsection (i)(3)(A)(i)(I) of this section;

(-b-) the occupational dose limits for a minor in subsection (i)(3)(A)(i)(III) of this section;

(-c-) the limits for an embryo/fetus of a declared pregnant woman in subsection (i)(3)(A)(i)(IV) of this section;

(-d-) the limits for an individual member of the public in subsection (i)(3)(C) of this section; or

(-e-) any applicable limit in the registration;

(III) levels of radiation in:

(-a-) a restricted area in excess of applicable limits in the certificate of registration; or

(-b-) an unrestricted area in excess of 10 times the applicable limit set forth in this section or in the registration, whether or not involving exposure of any individual in excess of the limits in subsection (i)(3)(C) of this section.

(ii) Each report required by clause (i) of this subparagraph shall describe the extent of exposure of individuals to radiation, including, as appropriate:

(I) estimates of each individual's dose;

(II) the levels of radiation involved;

(III) the cause of the elevated exposures, dose rates; and

(IV) corrective steps taken or planned to ensure against a recurrence, including the schedule for achieving conformance with applicable limits, and associated registration conditions.

(iii) Each report filed in accordance with clause (i) of this subparagraph shall include for each individual exposed: the name, social security number, and date of birth. With respect to the limit for the embryo/fetus in subsection (i)(3)(A)(i)(IV) of this section, the identifiers should be those of the declared pregnant woman. The report shall be prepared so that this information is stated in a separate and detachable portion of the report.

(iv) All registrants who make reports in accordance with clause (i) of this subparagraph shall submit the report in writing to the agency.

(D) Reports to individuals of exposures.

(i) Radiation exposure data for an individual shall be reported annually to the individual as specified in this section. The information reported shall include data and results obtained in accordance with agency requirements, orders, certificate of registration conditions, as shown in records maintained by the registrant in accordance with paragraph (3)(D) of this subsection. Each notification and report shall:

(I) be in writing;

(II) include appropriate identifying data such as the name of the registrant, the name of the individual, and the individual's identification number;

(III) include the individual's exposure information; and

(IV) contain the following statement: "This report is furnished to you under the provisions of the Texas Regulations for Control of Radiation, 25 Texas Administrative Code §289.233. You should preserve this report for further reference."

(ii) Each registrant shall advise each worker annually of the worker's dose as shown in records maintained by the registrant in accordance with paragraph (1)(P) of this subsection.

(iii) At the written request of a worker formerly engaged in activities controlled by the registrant, each registrant shall furnish a written report of the worker's exposure to radiation machines. The report shall include the dose record for each year the worker was required to be monitored in accordance with subsection (i)(3)(B) of this section. Such report shall be furnished within 30 days from the date of the request, or within 30 days after the dose of the individual has been determined by the registrant, whichever is later. The report shall cover the period of time that the worker's activities involved exposure to radiation machines and the dates and locations of work under the certificate of registration in which the worker participated during this period.

(iv) When a registrant is required, in accordance with subparagraphs (B) and (C) of this paragraph, to report to the agency any exposure of an individual to radiation machines, the registrant shall also provide the individual a written report of that individual's exposure data included therein. Such reports shall be transmitted at a time not later than the transmittal to the agency.

(v) At the written request of a worker who is terminating employment with the registrant in work involving exposure to radiation machines during the current year, each registrant shall provide at termination to each such worker, or to the worker's designee, a written report regarding the radiation dose received by that worker from operations of the registrant during the current year or fraction thereof. If the most recent individual monitoring results are not available at that time, a written estimate of the dose shall be provided together with a clear indication that this is an estimate. When the final individual monitoring results are available, those written results shall be provided to the worker or the worker's designee.

(vi) When a registrant is required in accordance with paragraph (3)(C) of this subsection to report to the agency any exposure of an identified occupationally exposed individual, or an identified member of the public, to radiation, the registrant shall also notify the individual and provide a copy of the report submitted to the agency, to the individual. Such notice shall be transmitted at a time not later than the transmittal to the agency, and shall comply with the provisions of paragraph (3)(D) of this subsection.

(k) Compliance and hearing procedures.

(1) Inspections.

(A) The agency may enter public or private property at reasonable times to determine whether, in a matter under the agency's jurisdiction, there is compliance with the Act, the agency's rules, certificate of registration conditions, and orders issued by the agency.

(B) Each registrant shall afford the agency, at all reasonable times, opportunity to inspect machines, activities, facilities, premises, and records in accordance with this section.

(C) Each registrant shall make available to the agency for inspection, upon reasonable notice, records made and maintained in accordance with this chapter.

(D) During an inspection, agency inspectors may consult privately with workers as specified in subparagraphs (J)-(L) of this paragraph. The registrant may accompany agency inspectors during other phases of an inspection.

(E) If, at the time of inspection, an individual has been authorized by the workers to represent them during agency inspections, the registrant shall notify the inspectors of such authorization and shall give the workers' representative an opportunity to accompany the inspectors during the inspection of physical working conditions.

(F) Each worker's representative shall be routinely engaged in work under control of the registrant and shall have received instructions as specified in subsection (i)(3)(K) of this section.

(G) Different representatives of registrants and workers may accompany the inspectors during different phases of an inspection if there is no resulting interference with the conduct of the inspection. However, only one worker's representative at a time may accompany the inspectors.

(H) With the approval of the registrant and the worker's representative, an individual who is not routinely engaged in work under control of the registrant, for example, a consultant to the registrant or to the worker's representative, shall be afforded the opportunity to accompany agency inspectors during the inspection of physical working conditions.

(I) Notwithstanding the other provisions of this section, agency inspectors are authorized to refuse to permit accompaniment by any individual who deliberately interferes with a fair and orderly inspection. With regard to any area containing proprietary information, the worker's representative for that area shall be an individual previously authorized by the registrant to enter that area.

(J) Agency inspectors may consult privately with workers concerning matters of occupational radiation protection and other matters related to applicable provisions of agency regulations and certificates of registration to the extent the inspectors deem necessary for the conduct of an effective and thorough inspection.

(K) During the course of an inspection any worker may bring privately to the attention of the inspectors, either orally or in writing, any past or present condition which that individual has reason to believe may have contributed to or caused any violation of the Act, the requirements in this chapter, certificate of registration conditions, or any unnecessary exposure of an individual to radiation from any source of radiation under the registrant's control. Any such notice in writing shall comply with the requirements of subparagraph (m) of this paragraph.

(L) The provisions of subparagraph (K) of this paragraph shall not be interpreted as authorization to disregard instructions in accordance with subsection (i)(3)(K) of this section.

(M) Any worker or representative of workers who believes that a violation of the Act, the requirements of this chapter, or certificate of registration conditions exists or has occurred in work under a certificate of registration with regard to radiological working conditions in which the worker is engaged, may request an inspection by giving notice of the alleged violation to the agency. Any such notice shall be in writing, shall set forth the specific grounds for the notice, and shall be signed by the worker or representative of the workers. A copy shall be provided to the registrant by the agency no later than at the time of inspection except that, upon the request of the worker giving such notice, the worker's name and the name(s) of individual(s) referred to therein shall not appear in such copy or on any record published, released, or made available by the agency, except for good cause shown.

(N) If, upon receipt of such notice, the agency determines that the request meets the requirements set forth in subparagraph (M) of this paragraph, and that there are reasonable grounds to believe that the alleged violation exists or has occurred, an inspection shall be made as

soon as practicable to determine if such alleged violation exists or has occurred. Inspections in accordance with this section need not be limited to matters referred to in the request.

(O) No registrant, contractor or subcontractor of a registrant shall discharge or in any manner discriminate against any worker because of the following:

(i) such worker has filed any request or instituted or caused to be instituted any proceeding under this chapter;

(ii) such worker has testified or is about to testify in any such proceeding; or

(iii) because of the exercise by such worker on behalf of that individual or others of any option afforded by this section.

(P) If the agency determines, with respect to a request under subparagraphs (M)-(O) of this paragraph, that an inspection is not warranted because there are no reasonable grounds to believe that a violation exists or has occurred, the agency shall notify the requestor in writing of such determination. The requestor may obtain review of such determination in accordance with the provisions of the Act and the Government Code, Chapters 2001 and 2002.

(Q) If the agency determines that an inspection is not warranted because the requirements of subparagraph (M) of this paragraph have not been met, the agency shall notify the requestor in writing of such determination. Such determination shall be without prejudice to the filing of a new request meeting the requirements of subparagraph (M) of this paragraph.

(R) The routine inspection interval for veterinary facilities is five years. On-site inspections and remote inspections may be alternated. The inspection interval specified is based upon the average number of health-related violations per inspection, as determined from compliance history data. This interval will be reviewed at least every two years, and appropriate adjustments will be made.

(S) For remote inspection of radiation machines for veterinary medicine, each registrant shall:

(i) respond to a request from the agency for a remote inspection;

(ii) complete the remote inspection forms in accordance with the instructions included with the forms; and

(iii) return to the agency the completed remote inspection forms including documentation of the most recent equipment performance evaluation performed in accordance with subsection (i)(5)(S) of this section and an inventory in accordance with subsection (h)(5)(A) and (B) of this section by the deadline indicated on the forms.

(T) Notwithstanding the inspection intervals specified in this section, the agency may inspect registrants more frequently due to:

(i) the persistence or severity of violations found during an inspection;

(ii) investigation of an incident or complaint concerning the facility;

(iii) a request for an inspection by a worker(s) in accordance with subparagraphs (M)-(O) of this paragraph;

(iv) any change in a facility or equipment that might cause a significant increase in radiation output or hazard; or

(v) a mutual agreement between the agency and registrant.

(U) The agency will conduct inspections of veterinary radiation machines in a manner designed to cause as little disruption of a veterinary practice as is practicable.

(V) Each registrant shall perform, upon instructions from the agency, or shall permit the agency to perform such reasonable surveys as the agency deems appropriate or necessary including, but not limited to, surveys of:

(i) radiation machines;

(ii) facilities where radiation machines are used or stored;

(iii) radiation detection and monitoring instruments; and

(iv) other equipment and devices used in connection with utilization or storage of radiation machines.

(W) A person who performs on-site inspections of veterinary radiation machines will have training in the design and use of the machines and will receive the following training.

(i) Objectives. Training of agency inspectors of radiation machines will be conducted by the agency. Upon completion of training, the inspector will be able to:

(I) select and operate the necessary testing equipment used to perform an inspection of radiation machines;

(II) utilize radiation protection principles;

(III) operate radiation detection instruments;

(IV) define basic regulatory terminology;

(V) apply this section regarding radiation machines;

(VI) perform routine agency inspections of radiation machines;

(VII) complete agency inspection documentation;

(VIII) demonstrate knowledge of agency ethics, professional, and technical policies; and

(IX) successfully achieve the objectives in this subparagraph.

(ii) Initial training program.

(I) Initial training will be conducted during a six-month period.

(II) All training evaluation instruments will be developed by the agency.

(III) Instruments to be used in determining a proficiency level are as follows:

(-a-) evaluation of each inspector's training needs prior to initial training;

(-b-) evaluation of knowledge obtained and verification of tasks performed by each inspector subsequent to training received by the agency; and

(-c-) evaluation of each inspector's task performance by the agency.

(iii) Continuing education.

(I) The agency inspector of radiation machines will accumulate 24 hours of continuing education regarding radiation

machines, at intervals not to exceed 24 months. These hours of continuing education may be acquired as follows:

(-a-) documented continuing education earned in an agency-accepted training format; and

(-b-) agency staff meetings.

(II) Failure to obtain 24 hours of continuing education within each 24 month interval may result in a reassessment by the agency of an agency inspector's proficiency level.

(III) After the initial training period, each inspector of radiation machines will be evaluated by the agency, at intervals not to exceed 12 months.

(iv) Agency proficiency standards. The agency proficiency standards for agency inspectors of veterinary radiation machines are as follows.

(I) Level I. The agency inspector has not successfully achieved the objectives in clause (i) of this subparagraph after the initial training period. Additional training is required. Unsupervised inspections will not be performed.

(II) Level II. The agency inspector has partially achieved the objectives in clause (i) of this subparagraph, but has not achieved the objective in clause (i)(IX) of this subparagraph after the initial training period. Additional training is required. Unsupervised inspections are not permitted for the type of veterinary radiation machines for which the objectives of clause (i)(IX) of this subparagraph have not been achieved. Unsupervised inspections may be performed for the type of veterinary radiation machines for which the objectives in clause (i)(IX) of this subparagraph have been successfully achieved.

(III) Level III. The agency inspector has successfully achieved the objectives in clause (i) of this subparagraph. Supervision is not required for routine inspections.

(2) Hearing and enforcement procedures.

(A) Violations. A court injunction or agency order may be issued prohibiting any violation of any provision of the Act or any rule or order issued thereunder. Any person who willfully violates any provision of the Act or any rule or order issued thereunder may be subject to civil and/or administrative penalties. Such person may also be guilty of a misdemeanor and upon conviction, may be punished by fine or imprisonment or both, as provided by law.

(B) Denial of an application for a certificate of registration.

(i) When the agency contemplates denial of an application for a certificate of registration, the registrant shall be afforded the opportunity for a hearing. Notice of the denial shall be delivered by personal service or certified mail, addressed to the last known address, to the registrant.

(ii) Any applicant or registrant against whom the agency contemplates an action described in clause (i) of this subparagraph may request a hearing by submitting a written request to the director within 30 days of service of the notice.

(I) The written request for a hearing must contain the following:

(-a-) statement requesting a hearing; and

(-b-) name and address of the applicant or registrant;

(II) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(C) Compliance procedures for registrants and other persons.

(i) A registrant or other person who commits a violation(s) will be issued a notice of violation.

(ii) The terms and conditions of all certificates of registration shall be subject to amendment or modification. A certificate of registration may be modified, suspended, or revoked by reason of amendments to the Act, or for violation of the Act, the requirements of this chapter, a condition of the certificate of registration, or an order of the agency.

(iii) Any certificate of registration may be modified, suspended, or revoked in whole or in part, for any of the following:

(I) any material false statement in the application or any statement of fact required in accordance with provisions of the Act;

(II) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a certificate of registration on an original application;

(III) violation of, or failure to observe applicable terms and conditions of the Act, this chapter, or of the certificate of registration or order of the agency; or

(IV) existing conditions that constitute a substantial threat to the public health or safety or the environment.

(iv) If another state or federal entity takes an action such as modification, revocation, or suspension of the certificate of registration, the agency may take a similar action against the registrant.

(v) When the agency determines that the action provided for in clause (viii) of this subparagraph or subparagraph (D) of this paragraph is not to be taken immediately, the agency may offer the registrant an opportunity to attend an enforcement conference to discuss the following with the agency:

(I) methods and schedules for correcting the violation(s); or

(II) methods and schedules for showing compliance with applicable provisions of the Act, the requirements of this chapter, certificate of registration conditions, or any orders of the agency.

(vi) Notice of any enforcement conference shall be delivered by personal service, or certified mail, addressed to the last known address. An enforcement conference is not a prerequisite for the action to be taken under clause (viii) of this subparagraph or subparagraph (D) of this paragraph.

(vii) Except in cases in which the occupational and public health, or safety requires otherwise, no certificate of registration shall be suspended or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the registrant in writing, and the registrant shall have been accorded an opportunity to demonstrate compliance with all lawful requirements.

(viii) When the agency contemplates modification, suspension, or revocation of the certificate of registration, the registrant shall be afforded the opportunity for a hearing. Notice of the contemplated action, along with a complaint, shall be given to the registrant by personal service or certified mail, addressed to the last known address.

(ix) Any applicant or registrant against whom the agency contemplates an action described in clause (viii) of this subparagraph may request a hearing by submitting a written request to the director within 30 days of service of the notice.

(I) The written request for a hearing must contain the following:

(-a-) statement requesting a hearing;

(-b-) name, address, and identification number of the registrant against whom the action is being taken.

(II) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(D) Assessment of administrative penalties.

(i) When the agency determines that monetary penalties are appropriate, proposals for assessment of and hearings on administrative penalties shall be made in accordance with the Act, Health and Safety Code, §401.384, Title 1, TAC, Chapter 155, and applicable sections of Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title.

(ii) Assessment of administrative penalties shall be based on the following criteria:

(I) the seriousness of the violation(s);

(II) previous compliance history;

(III) the amount necessary to deter future violations;

(IV) efforts to correct the violation; and

(V) any other mitigating or enhancing factors.

(iii) Application of administrative penalties. The agency may impose differing levels of penalties for different severity level violations and different classes of users as follows.

(I) Administrative penalties may be imposed for severity level I and II violations. Administrative penalties may be imposed for severity level III, IV, and V violations when they are combined with those of higher severity level(s) or for repeated violations.

(II) The following Tables IIA and IIB show the base administrative penalties.
Figure: 25 TAC §289.233(k)(2)(D)(iii)(II)

(III) Adjustments to the severity levels and percentages in Table IIB may be made for the presence or absence of the following factors:

(-a-) prompt identification and reporting;
(-b-) corrective action to prevent recurrence;
(-c-) compliance history;
(-d-) prior notice of similar event;
(-e-) multiple occurrences; and
(-f-) negligence that resulted in or increased adverse effects.

(IV) The penalty may be in an amount not to exceed $10,000 a day for a person who violates the Act or requirements of this chapter, order, certificate of registration issued under the Act. Each day a violation continues may be considered a separate violation for purposes of penalty assessment.

(iv) The agency may conduct settlement negotiations.

(E) Severity levels of violations for registrants or other persons.

(i) Violations for registrants or other persons shall be categorized by one of the following severity levels.

(I) Severity level I are violations that are most significant and may have a significant negative impact on occupational and/or public health and safety or on the environment.

(II) Severity level II are violations that are very significant and may have a negative impact on occupational and/or public health and safety or on the environment.

(III) Severity level III are violations that are significant and which, if not corrected, could threaten occupational and/or public health and safety or the environment.

(IV) Severity level IV are violations that are of more than minor significance, but if left uncorrected, could lead to more serious circumstances.

(V) Severity level V are violations that are of minor safety or environmental significance.

(ii) Criteria to elevate or reduce severity levels.

(I) Violations may be elevated to a higher severity level for the following reasons:

(-a-) more than one violation resulted from the same underlying cause;

(-b-) a violation contributed to or was the consequence of the underlying cause, such as a management breakdown or breakdown in the control of licensed or registered activities;

(-c-) a violation occurred multiple times between inspections;

(-d-) a violation was willful. This means the violation was the result of careless regard for requirements, deception, or other indications of willfulness by the registrant or employees of the registrant; or

(-e-) compliance history.

(II) Violations may be reduced to a lower level for the following reasons:

(-a-) the registrant identified and corrected the violation prior to the agency inspection; or

(-b-) the registrant's actions corrected the violation and prevented recurrence.

(iii) Examples of severity levels. Examples of severity levels are available upon request to the agency.

(F) Impoundment of radiation machines. Radiation machines shall be subject to impounding in accordance with the Act, Health and Safety Code, §401.068, and this paragraph.

(i) In the event of an emergency, the agency shall have the authority to impound or order the impounding of radiation machines possessed by any person not equipped to observe or failing to observe the provisions of the Act, Health and Safety Code, Chapter 401, or any rules, certificate of registration conditions, or orders issued by the agency. The agency shall submit notice of the action to be published in the *Texas Register* no later than 30 days following the end of the month in which the action was taken.

(ii) At the agency's discretion, the impounded radiation machines may be disposed of by:

(I) returning the source of radiation to a properly registered owner, upon proof of ownership, who did not cause the emergency;

(II) releasing the source of radiation as evidence to police or courts;

(III) returning the source of radiation to a registrant after the emergency is over and settlement of any compliance action; or

(IV) sale, destruction or other disposition within the agency's discretion.

(iii) If agency action is necessary to protect the public health and safety, no prior notice need be given the owner or possessor. If agency action is not necessary to protect the public health and safety, the agency will give written notice to the owner and/or the possessor of the radiation machine of the intention to dispose of the radiation machine. Notice shall be the same as provided in subparagraph (C)(viii) of this paragraph. The owner or possessor shall have 30 days from the date of personal service or mailing to request a hearing under Title 1, TAC, Chapter 155, and the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title, and in accordance with subparagraph (C)(ix) of this paragraph, concerning the intention of the agency. If no hearing is requested within that period of time, the agency may take the contemplated action, and such action is final.

(iv) Upon agency disposition of a radiation machine, the agency may notify the owner and/or possessor of any expense the agency may have incurred during the impoundment and/or disposition and request reimbursement. If the amount is not paid within 60 days from the date of notice, the agency may request the Attorney General to file suit against the owner/possessor for the amount requested.

(v) If the agency determines from the facts available to the agency that an impounded radiation machine is abandoned, with no reasonable evidence showing its owner or possessor, the agency may make such disposition of the radiation machine as it sees fit.

(G) Emergency orders.

(i) When an emergency exists requiring immediate action to protect the public health or safety or the environment, the agency may, without notice or hearing, issue an order citing the existence of such emergency and require that certain actions be taken as it shall direct to meet the emergency. The agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register*. The action taken will remain in full force and effect unless and until modified by subsequent action of the agency.

(ii) An emergency order takes effect immediately upon service.

(iii) Any person receiving an emergency order shall comply immediately.

(iv) The person receiving the order shall be afforded the opportunity for a hearing on an emergency order. Notice of the action, along with a complaint, shall be given to the person by personal service or certified mail, addressed to the last known address. A hearing shall be held on an emergency order if the person receiving the order submits a written request to the director within 30 days of the date of the order.

(I) The hearing shall be held not less than 10 days nor more than 20 days after receipt of the written application for hearing.

(II) At the conclusion of the hearing and after the proposal for decision is made as provided in the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, the commissioner shall take one of the following actions:

(-a-) determine that no further action is warranted;

(-b-) amend the certificate of registration;

(-c-) revoke or suspend the certificate of registration;

(-d-) rescind the emergency order; or

(-e-) issue such other order as is appropriate.

(III) The application and hearing shall not delay compliance with the emergency order.

(H) Miscellaneous provisions.

(i) Computation of time. A time period established by the requirements of this chapter shall begin on the first day after the event that invokes the time period. When the last day of the period falls on a Saturday, Sunday, or state or federal holiday, the period shall end on the next day that is not a Saturday, Sunday, or state or federal holiday. The time period shall expire at 5:00 p.m. of the last day of the computed period.

(ii) Hearing location. Hearings will be held at the offices of the State Office of Administrative Hearings in Austin unless the ALJ specifies another location.

(iii) Non-party witness and mileage fees.

(I) A witness or deponent who is not a party (or an employee, agent, or representative of a party) and who is subpoenaed or otherwise compelled to attend an agency hearing or a proceeding to give a deposition, or to produce books, records, papers, accounts, documents, or other objects necessary and proper for the purposes of the hearing or proceeding may receive reimbursement for transportation and other costs at rates established by the current Appropriations Act for state employees.

(II) The person requesting the attendance of the witness or deponent must deposit with the agency the funds estimated to accrue in accordance with subclause (I) of this clause when filing a motion for the issuance of a subpoena or a commission to take a deposition.

(iv) Service. A return of service by the person who performed personal service, postal return receipt, or proof of mailing to the last known address shall be conclusive evidence of service.

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

Filed with the Office of the Secretary of State on January 15, 2004.

TRD-200400298
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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SUBCHAPTER F. LICENSE REGULATIONS

The Texas Department of Health (department) proposes the repeal of §289.251 and new §289.251, concerning radiation control exemptions, general licenses, and general license acknowledgements.

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 289.251 has been reviewed, and the department has determined that the reasons for adopting the section continue to exist; however, revisions to the rule are necessary as outlined in this preamble.

The department published a Notice of Intention to Review for §289.251 regarding Government Code, §2001.039, in the *Texas Register* (27 TexReg 1537) on March 1, 2002. No comments were received by the department on this section following publication of the notice.

The proposed revision incorporates legislation passed by the 78th Legislature, Regular Session. House Bill (HB) 2292

requires two-year terms for radioactive material licenses and requires recovery through fees of 100% of regulatory program costs for the two-year term of the license. In order to incorporate the provisions of HB 2292 concerning two-year terms, the department is implementing an administrative renewal. The general licensee will be required to renew the general license acknowledgement every two years by paying the required fee and having a satisfactory compliance history. The change to the rule is reflected in subsection (j).

House Bill 253, 78th Legislature, Regular Session, requires the department to deny a radioactive material application, amendment or renewal if the applicant's compliance history reveals a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations of the Radiation Control Act or the department's radiation control rules. The department has defined "a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations..." by adding a requirement that states the department will revoke, suspend, or restrict a general license if at least three department or judicial orders are issued that assess administrative or civil penalties against the general licensee or revoke or suspend the general license. The change to the rule is reflected in subsection (f)(1).

The entire section has been reorganized and reformatted to better differentiate between general licenses for source material and general licenses for material other than source material.

The definitions of "general license" and "general license acknowledgement" in subsection (c) are clarified, as these requirements are items of compatibility with the United States Nuclear Regulatory Commission (NRC) regulations, and as an agreement state, Texas must adopt these requirements.

The revisions to §289.251 incorporate items of compatibility regarding general licensed devices. NRC has implemented a "registration" of certain generally licensed devices based on not only type of generally licensed device, but also quantities of radioactive material contained in the device. The "registration" requirement is similar to the department's general license acknowledgement (GLA) concept and many of the NRC compatibility requirements already exist in this section. However, requirements are added specifying how long a device that is not in use may be held and requiring a quarterly physical inventory of devices being kept in standby for future use. A GLA for generally licensed *in vitro* testing will no longer be required. *In vitro* testing general licensees will be required to notify the department, on an application for registration as prescribed by the department, of the devices in their possession. The requirements for certain generally licensed measuring, detecting, gauging or controlling devices pertain to all such devices. However, those devices that contain the specified quantities also require a general license acknowledgement. Other minor grammatical changes have been made throughout the section.

This repeal and new section are part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, other factors, or to incorporate requirements that are items of compatibility with NRC regulations because as an agreement state, Texas must adopt compatible requirements.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is in effect, there will be fiscal implications for state government as a result of enforcing or administering the section as proposed. *In vitro* testing general licensees will no longer be required to obtain a general license acknowledgment and will no longer pay a fee for a general license acknowledgement. The department will have a decrease in fee recovery of approximately $3,036 for each year of the first five years the section will be in effect. There will be no fiscal implications for local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that rules are clear and specific and that security of certain gauging, measuring, and controlling devices is enhanced. There will be a fiscal impact on all general license acknowledgement holders who hold devices that are not in use for longer than two years and do not perform a quarterly physical inventory of devices in standby for future use. Such devices must be disposed of, typically by return to the manufacturer. The cost to return devices to the manufacturer ranges from approximately $655 for a device containing a 10 millicurie source to $1,195 for a device containing a 200 millicurie source. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 1:00 p.m., Wednesday, February 11, 2004, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

25 TAC §289.251

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

The repeal is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The repeal affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.251. Exemptions, General Licenses, and General License Acknowledgements.

This 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 January 16, 2004.

TRD-200400318
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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25 TAC §289.251

The new section is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The new section affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.251. Exemptions, General Licenses, and General License Acknowledgements.

(a) Purpose. This section provides for exemptions to licensing requirements, general licensing of radioactive material, and acknowledgement of general licenses.

(b) Scope. Except as otherwise authorized, no person shall receive, possess, use, transfer, own, or acquire radioactive material except as authorized in a general license or general license acknowledgement issued in accordance with this section, or in a specific license issued in accordance with §289.252 of this title (relating to Licensing of Radioactive Material), §289.254 of this title (relating to Licensing of Radioactive Waste Processing and Storage Facilities), §289.255 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography), §289.256 of this title (relating to Medical and Veterinary Use of Radioactive Material), §289.258 of this title (relating to Licensing and Radiation Safety Requirements for Irradiators), §289.259 of this title (relating to Licensing of Naturally Occurring Radioactive Material (NORM)), or §289.260 of this title (relating to Licensing of Uranium Recovery and Byproduct Material Disposal Facilities).

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

(1) General license--An authorization in accordance with this section that grants authority to a person for certain activities involving radioactive material, and is effective without the filing of applications with the agency or the issuance of licensing documents to the particular persons. The general licensee is subject to all other applicable portions of this chapter and any limitations of the general license.

(2) General license acknowledgement--A written recognition of a general license issued in accordance with this section. The issuance of a general license acknowledgement requires the submission of an application to the agency. A written acknowledgement of a general license granted in accordance with this section is issued by the agency. The holder of a general license acknowledgement is subject to all other applicable portions of this chapter as well as any conditions specified in the acknowledgement document.

(d) Exemptions for source material.

(1) Any person is exempt from this section and §289.252 of this title if that person receives, possesses, uses, or transfers source material in any chemical mixture, compound, solution, or alloy in which the source material is by weight less than 1/20 of 1.0% (0.05%) of the mixture, compound, solution, or alloy.

(2) Any person is exempt from this section and §289.252 of this title if that person receives, possesses, uses, or transfers unrefined and unprocessed ore containing source material; provided that, except as authorized in a specific license, such person shall not refine or process such ore. This exemption does not apply to the mining of ore containing source material.

(3) Any person is exempt from this section and §289.252 of this title if that person receives, possesses, uses, or transfers:

(A) any quantities of thorium contained in:

(i) incandescent gas mantles;

(ii) vacuum tubes;

(iii) welding rods;

(iv) electric lamps for illuminating purposes provided that each lamp does not contain more than 50 milligrams (mg) of thorium;

(v) germicidal lamps, sunlamps, and lamps for outdoor or industrial lighting provided that each lamp does not contain more than two grams of thorium;

(vi) rare earth metals and compounds, mixtures, and products containing not more than 0.25% by weight thorium, uranium, or any combination of these; or

(vii) personnel neutron dosimeters, provided that each dosimeter does not contain more than 50 mg of thorium;

(B) source material contained in the following products:

(i) glazed ceramics, for example tableware, provided that the glaze contains not more than 20% by weight source material;

(ii) glassware containing not more than 10% by weight source material, but not including commercially manufactured glass brick, pane glass, ceramic tile, or other glass or ceramic used in construction;

(iii) glass enamel or glass enamel frit containing not more than 10% by weight source material imported or ordered for importation into the United States, or initially distributed by manufacturers in the United States, before July 25, 1983; or

(iv) piezoelectric ceramic containing not more than 2.0% by weight source material;

(C) photographic film, negatives, and prints containing uranium or thorium;

(D) any finished product or part fabricated of, or containing, metal-thorium alloys, provided that the thorium content of the alloy does not exceed 4% by weight and that the exemption contained in this subparagraph shall not be deemed to authorize the chemical, physical, or metallurgical treatment or processing of any such product or part;

(E) depleted uranium contained in counterweights installed in aircraft, rockets, projectiles, and missiles, or stored or handled in connection with installation or removal of such counterweights, provided that:

(i) the counterweights are manufactured in accordance with a specific license issued by the United States Nuclear Regulatory Commission (NRC) authorizing distribution by the licensee in accordance with Title 10, Code of Federal Regulations (CFR), Part 40;

(ii) each counterweight has been impressed with the following legend clearly legible through any plating or other covering: "DEPLETED URANIUM" (The requirements specified in this clause need not be met by counterweights manufactured prior to December 31, 1969, provided that such counterweights are impressed with the legend, "CAUTION - RADIOACTIVE MATERIAL - URANIUM," as previously required by this chapter);

(iii) each counterweight is durably and legibly labeled or marked with the identification of the manufacturer and the statement: "UNAUTHORIZED ALTERATIONS PROHIBITED" (The requirements specified in this clause need not be met by counterweights manufactured prior to December 31, 1969, provided that such counterweights are impressed with the legend, "CAUTION - RADIOACTIVE MATERIAL - URANIUM," as previously required by this chapter); and

(iv) the exemption contained in this subparagraph shall not be deemed to authorize the chemical, physical, or metallurgical treatment or processing of any such counterweights other than repair or restoration of any plating, covering, or labeling;

(F) depleted uranium used as shielding constituting part of any shipping container, provided that:

(i) the shipping container is conspicuously and legibly impressed with the legend "CAUTION - RADIOACTIVE SHIELDING - URANIUM;" and

(ii) the uranium metal is encased in a one-eighth inch minimum wall thickness of mild steel or equally fire resistant material;

(G) thorium contained in finished optical lenses, provided that each lens does not contain more than 30% by weight of thorium, and that the exemption contained in this subparagraph shall not be deemed to authorize either:

(i) the shaping, grinding, or polishing of such lens or manufacturing processes other than the assembly of such lens into optical systems and devices without any alteration of the lens; or

(ii) the receipt, possession, use, or transfer of thorium contained in contact lenses, or in spectacles, or in eyepieces in binoculars or in other optical instruments;

(H) uranium contained in detector heads for use in fire detection units, provided that each detector head contains not more than 0.005 microcurie (μCi) of uranium; or

(I) thorium contained in any finished aircraft engine part containing nickel-thoria alloy, provided that:

(i) the thorium is dispersed in the nickel-thoria alloy in the form of finely divided thoria (thorium dioxide); and

(ii) the thorium content in the nickel-thoria alloy does not exceed 4.0% by weight.

(4) The exemptions in subsection (d)(3) of this section do not authorize the manufacture of any of the products described.

(e) Exemptions for radioactive material other than source material.

(1) Exempt concentrations.

(A) Except as provided in subparagraph (B) of this paragraph, any person is exempt from this section and §289.252 of this title if that person receives, possesses, uses, transfers, or acquires products or materials containing radioactive material in concentrations not in excess of those listed in subsection (q)(1) of this section.

(B) No person may introduce radioactive material into a product or material, including waste, knowing or having reason to believe that it will be transferred to persons exempt in accordance with subparagraph (A) of this paragraph or equivalent regulations of the NRC, any agreement state, or any licensing state, except in accordance with a specific license issued in accordance with §289.252(i) of this title or the general license provided in §289.252(ee) of this title.

(2) Exempt quantities.

(A) Except as provided in subparagraph (C) of this paragraph, any person is exempt from these rules if that person receives, possesses, uses, transfers, or acquires radioactive material in individual quantities, each of which does not exceed the applicable quantity set forth in subsection (q)(2) of this section.

(B) Any person who possesses radioactive material received or acquired, prior to September 25, 1971, in accordance with the general license provided in subsection (f)(4)(A) of this section, is exempt from the requirements for a license set forth in §289.252 of this title if that person possesses, uses, or transfers such radioactive material.

(C) This paragraph does not authorize the production, packaging, or repackaging of radioactive material for purposes of commercial distribution, or the incorporation of radioactive material into products intended for commercial distribution.

(D) No person may, for purposes of commercial distribution, transfer radioactive material in quantities greater than the individual quantities set forth in subsection (q)(2) of this section, knowing or having reason to believe that such quantities of radioactive material will be transferred to persons exempt in accordance with this paragraph or equivalent regulations of the NRC, any agreement state, or any licensing state, except in accordance with a specific license issued by the NRC in accordance with Title 10, CFR, §32.18 or by the agency in accordance with §289.252(j) of this title, which states that the radioactive material may be transferred by the licensee to persons exempt in accordance with this paragraph or the equivalent regulations of the NRC, any agreement state, or any licensing state.

(E) The schedule of quantities set forth in subsection (q)(2) of this section applies only to radioactive materials distributed as exempt quantities in accordance with a specific license issued by the agency, another licensing state, or the commission. Subsection (q)(2) of this section does not apply to radioactive materials that have decayed from quantities not originally exempt and does not make such material, or the sources or devices in which the material is contained, exempt from the licensing requirements in this section or §289.252 of this title.

(3) Exempt items.

(A) Certain items containing radioactive material.

(i) Except for persons who apply radioactive material to, or persons who incorporate radioactive material into the following products, any person is exempt from this chapter if that person receives, possesses, uses, transfers, or acquires the following products:

(I) timepieces, hands, or dials containing not more than the following specified quantities of radioactive material and not exceeding the following specified levels of radiation:

(-a-) 25 millicuries (mCi) of tritium per timepiece;

(-b-) 5 mCi of tritium per hand;

(-c-) 15 mCi of tritium per dial (bezels when used shall be considered as part of the dial);

(-d-) 100 μCi of promethium-147 per watch or 200 μCi of promethium-147 per any other timepiece;

(-e-) 20 μCi of promethium-147 per watch hand or 40 μCi of promethium-147 per other timepiece hand;

(-f-) 60 µCi of promethium-147 per watch dial or 120 µCi of promethium-147 per other timepiece dial (bezels when used shall be considered as part of the dial);

(-g-) the levels of radiation from hands and dials containing promethium-147 will not exceed, when measured through 50 milligrams per square centimeter (mg/cm^2) of absorber:

(-1-) for wrist watches, 0.1 millirad per hour (mrad/hr) at 10 centimeters (cm) from any surface;

(-2-) for pocket watches, 0.1 mrad/hr at 1 cm from any surface; and

(-3-) for any other timepiece, 0.2 mrad/hr at 10 cm from any surface; or

(-h-) 1 µCi of radium-226 per timepiece in timepieces, hands, or dials manufactured or initially distributed prior to January 1, 1986;

(II) lock illuminators containing not more than 15 mCi of tritium or not more than 2 mCi of promethium-147 installed in automobile locks. The levels of radiation from each lock illuminator containing promethium-147 will not exceed 1 mrad/hr at 1 cm from any surface when measured through 50 mg/cm^2 of absorber;

(III) balances of precision containing not more than 1 mCi of tritium per balance or not more than 0.5 mCi of tritium per balance part;

(IV) automobile shift quadrants containing not more than 25 mCi of tritium;

(V) marine compasses containing not more than 750 mCi of tritium gas and other marine navigational instruments containing not more than 250 mCi of tritium gas;

(VI) thermostat dials and pointers containing not more than 25 mCi of tritium per thermostat;

(VII) electron tubes, provided that each tube does not contain more than one of the following specified quantities of radioactive material and that the levels of radiation from each electron tube containing byproduct material do not exceed 1 mrad/hr at 1 cm from any surface when measured through 7 mg/cm^2 of absorber (For purposes of this clause, "electron tubes" include spark gap tubes, power tubes, gas tubes including glow lamps, receiving tubes, microwave tubes, indicator tubes, pick-up tubes, radiation detection tubes, and any other completely sealed tube designed to control electrical currents):

(-a-) 150 mCi of tritium per microwave receiver protector tube or 10 mCi of tritium per any other electron tube;

(-b-) 1 µCi of cobalt-60;

(-c-) 5 µCi of nickel-63;

(-d-) 30 µCi of krypton-85;

(-e-) 5 µCi of cesium-137; or

(-f-) 30 µCi of promethium-147;

(VIII) ionizing radiation measuring instruments containing, for purposes of internal calibration or standardization, a source of radioactive material not exceeding the applicable quantity set forth in subsection (q)(2) of this section or 0.05 µCi of americium-241; or

(IX) spark gap irradiators containing not more than 1 µCi of cobalt-60 per spark gap irradiator for use in electrically ignited fuel oil burners having a firing rate of at least 3 gallons per hour.

(ii) Authority to transfer possession or control by the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source material or byproduct material whose subsequent possession, use, transfer, and disposal by all other persons are exempted from regulatory requirements may be obtained only from the United States Nuclear Regulatory Commission, Washington, DC 20555.

(B) Self-luminous products containing tritium, krypton-85, promethium-147, or radium-226.

(i) Except for persons who manufacture, process, or produce self-luminous products containing tritium, krypton-85, or promethium-147, any person is exempt from this chapter if that person receives, possesses, uses, transfers, owns, or acquires tritium, krypton-85, or promethium-147 in self-luminous products manufactured, processed, produced, imported, or transferred in accordance with a specific license issued by the NRC in accordance with Title 10, CFR, §32.22, which authorizes the transfer of the product to persons who are exempt from regulatory requirements. The exemption in this subparagraph does not apply to tritium, krypton-85, or promethium-147 used in products for frivolous purposes or in toys or adornments.

(ii) Any person is exempt from this chapter if that person receives, possesses, uses, transfers, or owns articles acquired prior to January 1, 1986, each of which contains less than 0.1 µCi of radium-226.

(C) Gas and aerosol detectors containing radioactive material.

(i) Except for persons who manufacture, process, or produce gas and aerosol detectors containing radioactive material, any person is exempt from this chapter if that person receives, possesses, uses, transfers, owns, or acquires radioactive material in gas and aerosol detectors designed to protect life or property from fires and airborne hazards provided that:

(I) detectors containing radioactive material shall have been manufactured, imported, or transferred in accordance with a specific license issued by the NRC in accordance with Title 10, CFR, §32.26, or an agreement state or a licensing state in accordance with §289.252(k) of this title; and

(II) the specific license issued in accordance with §289.252 of this title authorizes the transfer of the detectors to persons who are exempt from regulatory requirements.

(ii) Authority to transfer possession or control by the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source material or byproduct material whose subsequent possession, use, transfer, and disposal by all other persons are exempted from regulatory requirements may be obtained only from the United States Nuclear Regulatory Commission, Washington, DC 20555.

(iii) Gas and aerosol detectors previously manufactured and distributed to general licensees in accordance with a specific license issued by an agreement state or a licensing state shall be considered exempt in accordance with clause (i) of this subparagraph, provided that the devices are labeled in accordance with the specific license authorizing distribution of the generally licensed device, and provided further that they meet the requirements of §289.252 of this title.

(D) Resins containing scandium-46 and designed for sand consolidation in oil wells. Any person is exempt from this chapter if that person receives, possesses, uses, transfers, or acquires synthetic plastic resins containing scandium-46, which are designed for sand consolidation in oil wells. Such resins shall have been manufactured or imported in accordance with a specific license issued by the NRC, or shall have been manufactured in accordance with the specifications contained in a specific license issued by the agency or any agreement state to the manufacturer of such resins in accordance with licensing requirements equivalent to those in Title 10, CFR, §§32.16 and 32.17. This

exemption does not authorize the manufacture of any resins containing scandium-46.

(4) Exemption for capsules containing carbon-14 urea for "in vivo" diagnostic use in humans.

(A) Except as provided in subparagraphs (B) and (C) of this paragraph, a person is exempt from the requirements of this section and §289.256 of this title provided that such person receives, possesses, uses, transfers, owns, or acquires capsules containing 1 µCi (37 kilobecquerels) or less of carbon-14 urea each (allowing for nominal variation that may occur during the manufacturing process), for "in vivo" diagnostic use in humans.

(B) A person desiring to use the capsules for research involving human subjects shall apply for and receive a specific license in accordance with §289.256 of this title.

(C) A person desiring to manufacture, prepare, process, produce, package, repackage, or transfer for commercial distribution such capsules shall apply for and receive a specific license in accordance with Title 10, CFR, §32.21.

(D) Nothing in this subsection relieves a person from complying with applicable requirements of the United States Food and Drug Administration (FDA) and other federal and state requirements governing the receipt, administration, and use of drugs.

(f) General licenses. In addition to the requirements of this section, all general licenses, unless otherwise specified, are subject to the requirements of §289.201 of this title (relating to General Provisions for Radioactive Material), §289.202(ww) and (xx) of this title (relating to Standards for Protection Against Radiation from Radioactive Materials), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

(1) In making a determination whether to revoke, suspend, or restrict a general license, the agency may consider the technical competence and compliance history of a general licensee. After an opportunity for a hearing, the agency may revoke, suspend, or restrict a general license if the general licensee's compliance history reveals that at least three agency or judicial orders have been issued against the general licensee that assess administrative or civil penalties against the general licensee, or that revoke or suspend the general license.

(2) Modification, suspension, and revocation of a general license.

(A) The terms and conditions of all general licenses shall be subject to revision or modification.

(B) A general license may be suspended or revoked by reason of amendments to the Texas Radiation Control Act (Act), Health and Safety Code, Chapter 401, by reason of rules in this chapter, or orders issued by the agency.

(C) Any general license may be revoked, suspended, or modified, in whole or in part, for any of the following:

(i) any material false statement in the application for a general license acknowledgement or any statement of fact required in accordance with provisions of the Act;

(ii) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a general license on an original application;

(iii) violation of, or failure to observe, any of the terms and conditions of the Act, this chapter, or of the general license, or order of the agency; or

(iv) existing conditions that constitute a substantial threat to the public health or safety or the environment.

(D) Except in cases in which the occupational and public health, interest, or safety requires otherwise, no general license shall be suspended or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the holder of the general license in writing and the holder of the general license shall have been afforded an opportunity to demonstrate compliance with all lawful requirements.

(E) Each general license revoked by the agency expires at the end of the day on the date of the agency's final determination to revoke the general license, or on the revocation date stated in the determination, or as otherwise provided by agency order.

(3) General licenses for source material.

(A) A general license is issued authorizing commercial and industrial firms, research, educational and medical institutions, and state and local government agencies to use and transfer not more than 15 pounds of source material at any one time for research, development, educational, commercial, or operational purposes.

(i) A person authorized to use or transfer source material, in accordance with this general license, may not possess more than a total of 150 pounds of source material in any one calendar year.

(ii) Persons who receive, possess, use, or transfer source material in accordance with the general license in subparagraph (A) of this paragraph are prohibited from administering source material, or the radiation therefrom, either externally or internally, to humans except as may be authorized by the agency in a specific license.

(B) A general license is issued to own source material without regard to quantity. This general license does not authorize any person to receive, possess, use or transfer source material.

(C) A general license is issued to mine, transport, and transfer ores containing source material without regard to quantity. In addition to the provisions of subsection (f) of this section, persons who mine, transport, and transfer ores containing source material in accordance with this section shall comply with the provisions of §289.202(n) and (ff) of this title.

(D) A general license is issued to receive, acquire, possess, use, or transfer depleted uranium contained in products or devices for the purpose of providing shielding, including beam shaping and collimation, in accordance with the provisions of clauses (i)-(iv) of this subparagraph.

(i) The general license in this paragraph applies only to products or devices that have been manufactured either in accordance with a specific license issued by the agency to the manufacturer of the products or devices in accordance with §289.252(s) of this title or in accordance with a specific license issued to the manufacturer by another agreement state or the NRC that authorizes manufacture of the products or devices for distribution to persons generally licensed by another agreement state or the NRC.

(ii) Persons who receive, acquire, possess, or use depleted uranium in accordance with the general license in this paragraph shall notify the agency within 30 days after the first receipt of acquisition of such depleted uranium. The general licensee shall furnish the following information and such other information as may be required by the agency:

(I) name and address of the general licensee;

(II) a statement that the general licensee has developed and will maintain procedures designed to establish physical control over the depleted uranium in accordance with this paragraph and designed to prevent transfer of such depleted uranium in any form, including metal scrap, to persons not authorized to receive the depleted uranium; and

(III) name and/or title, address, and telephone number of the individual duly authorized to act for and on behalf of the general licensee in supervising the procedures identified in clause (ii) of this subparagraph.

(iii) The general licensee possessing or using depleted uranium in accordance with the general license in this paragraph shall report in writing to the agency any changes in information furnished by the general licensee. The report shall be submitted within 30 days after the effective date of such change.

(iv) A person who receives, acquires, possesses, or uses depleted uranium in accordance with the general license in this paragraph:

(I) shall not introduce such depleted uranium, in any form, into a chemical, physical, or metallurgical treatment or process, except a treatment or process for repair or restoration of any plating or other covering of the depleted uranium;

(II) shall not abandon such depleted uranium;

(III) shall transfer or dispose of such depleted uranium only in accordance with the provisions of §289.252(cc) of this title. In the case where the transferee receives the depleted uranium in accordance with the general license in this paragraph or equivalent rule of the NRC or an agreement state, the transferor shall furnish the transferee a copy of this paragraph;

(IV) within 30 days of transfer, shall report in writing to the agency the name and address of the person receiving the depleted uranium in accordance with such transfer; and

(V) shall not export such depleted uranium except in accordance with a license issued by the NRC in accordance with Title 10, CFR, Part 110.

(v) Any person receiving, acquiring, possessing, using, or transferring depleted uranium in accordance with the general license in this paragraph is exempt from the requirements of §289.202 of this title and §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections) with respect to the depleted uranium covered by that general license.

(4) General licenses for radioactive material other than source material.

(A) General licenses for static elimination devices and ion generating tubes. A general license is issued to transfer, receive, acquire, possess, and use radioactive material incorporated in the devices or equipment specified in clauses (i) and (ii) of this subparagraph that have been manufactured, tested, and labeled by the manufacturer in accordance with a specific license issued to the manufacturer by the NRC. In addition to the provisions of subsection (f) of this section, this general license is subject to the provisions of subsection (e)(1)(B) of this section and §289.252(cc) of this title:

(i) static elimination devices designed for use as static eliminators that contain, as a sealed source or sources, radioactive material totaling not more than 500 μCi of polonium-210 per device; or

(ii) ion generating tubes designed for ionization of air that contain, as a sealed source or sources, radioactive material totaling not more than 500 μCi of polonium-210 per device or a total of not more than 50 mCi of tritium per device.

(B) General license for luminous safety devices for aircraft.

(i) A general license is issued to receive, acquire, possess, and use tritium or promethium-147 contained in luminous safety devices for use in aircraft, provided:

(I) each device contains not more than 10 curies (Ci) of tritium or 300 mCi of promethium-147; and

(II) each device has been manufactured, assembled, or initially transferred in accordance with a specific license issued by the NRC, or each device has been manufactured or assembled in accordance with the specifications contained in a specific license issued by the agency or any agreement state that authorizes the manufacture or assembly of the device to persons generally licensed by the agency or an agreement state.

(ii) The general license in clause (i) of this subparagraph does not authorize the manufacture, assembly, or repair of luminous safety devices containing tritium or promethium-147.

(iii) The general license in clause (i) of this subparagraph does not authorize the receipt, acquisition, possession, or use of tritium or promethium-147 contained in instrument dials.

(C) General license for ownership of radioactive material. A general license is issued to own radioactive material without regard to quantity. Notwithstanding any other provisions of this section, this general license does not authorize the manufacture, production, transfer, receipt, possession, or use of radioactive material.

(D) General license for calibration, stabilization, and reference sources.

(i) A general license is issued to own, receive, acquire, possess, use, and transfer, in accordance with the provisions of clauses (ii) and (iii) of this subparagraph, americium-241, plutonium, and/or radium-226, in the form of calibration, stabilization, or reference sources to any person who holds a specific license issued by the:

(I) agency that authorizes that person to receive, possess, use, and transfer radioactive material; and

(II) NRC that authorizes that person to receive, possess, use, and transfer radioactive material.

(ii) The general license in clause (i) of this subparagraph applies only to calibration, stabilization, or reference sources that have been manufactured or initially transferred in accordance with the specifications contained in a specific license issued to the manufacturer or importer of the sources by the NRC in accordance with Title 10, CFR, §32.57 or Title 10, CFR, §70.39 or that have been manufactured or initially transferred in accordance with the authorizations contained in a specific license issued to the manufacturer by the agency, any agreement state, or any licensing state, in accordance with licensing requirements equivalent to those contained in Title 10, CFR, §32.57 or 10 CFR, §70.39.

(iii) Persons who own, receive, acquire, possess, use, or transfer one or more calibration or reference sources in accordance with these general licenses:

(I) shall not possess at any one time, at any one location of storage or use, more than 5 μCi each of americium-241, plutonium-238, plutonium-239, and radium-226 in such sources;

(II) shall not receive, possess, use, or transfer such source unless the source or the storage container bears a label that includes the following statements, or a substantially similar statement that contains the information in the following statements:

(-a-) option 1, as appropriate:

Figure: 25 TAC §289.251(f)(4)(D)(iii)(II)(-a-)

(-b-) option 2, as appropriate:

Figure: 25 TAC §289.251(f)(4)(D)(iii)(II)(-b-)

(III) shall not transfer, abandon, or dispose of such source except by transfer to a person authorized by a specific license from the agency, the NRC, an agreement state, or a licensing state to receive the source;

(IV) shall store such source, except when the source is being used, in a closed container adequately designed and constructed to contain americium-241, plutonium-238, plutonium-239, or radium-226 that might otherwise escape during storage; and

(V) shall not use such source for any purpose other than the calibration of radiation detectors or the standardization of other sources.

(iv) The general license in subparagraph (A) of this paragraph does not authorize the manufacture of calibration or reference sources containing americium-241, plutonium-238, plutonium-239, or radium-226.

(E) General license for ice detection devices.

(i) A general license is issued to own, receive, acquire, possess, use, and transfer strontium-90 contained in ice detection devices, provided each device contains not more than 50 µCi of strontium-90 and each device has been manufactured or initially transferred in accordance with a specific license issued by the NRC or each device has been manufactured in accordance with the authorizations contained in a specific license issued by the agency or any agreement state to the manufacturer of such device in accordance with licensing requirements equivalent to those in Title 10, CFR, §32.61.

(ii) Persons who receive, acquire, possess, use, or transfer strontium-90 contained in ice detection devices in accordance with the general license in clause (i) of this paragraph shall do the following:

(I) upon occurrence of visually observable damage, such as bend or crack or discoloration from overheating to the device, discontinue use of the device until it has been inspected, tested for leakage, and repaired by a person holding a specific license from the NRC or an agreement state to manufacture or service such devices; or dispose of the device by transfer to a person authorized by a specific license from the agency, the NRC, or an agreement state; and

(II) assure that all labels affixed to the device at the time of receipt, and which bear a statement prohibiting removal of the labels, are maintained on the device.

(iii) The general license in subparagraph (A) of this paragraph does not authorize the manufacture, assembly, disassembly, or repair of strontium-90 in ice detection devices.

(F) General license for intrastate transportation of radioactive material.

(i) A general license is issued to any common or contract carrier to transport and store radioactive material in the regular course of their carriage for another or storage incident to transport, provided the transportation and storage is in accordance with the applicable requirements of §289.257 of this title insofar as such requirements relate to the loading and storage of packages, placarding of the transporting vehicle, and incident reporting. Any notification of incidents referred to in those requirements shall be filed with the agency and the United States Department of Transportation (DOT). Persons who transport and store radioactive material in accordance with the general license in this paragraph are exempt from the requirements of §§289.202 and 289.203 of this title.

(ii) A general license is issued to any private carrier to transport radioactive material, provided the transportation is in accordance with the applicable requirements, appropriate to the mode of transport, of the DOT insofar as such requirements relate to the loading and storage of packages, placarding of the transporting vehicle, and incident reporting. Any notification of incidents referred to in those requirements shall be filed with the agency and the DOT.

(G) General license for the use of radioactive material for certain *in vitro* clinical or laboratory testing, not to include research and development. (The New Drug provisions of the Federal Food, Drug, and Cosmetic Act also govern the availability and use of any specific diagnostic drugs in interstate commerce.)

(i) A general license is issued to any physician, veterinarian, clinical laboratory, or hospital to receive, acquire, possess, transfer, or use, for any of the following stated tests, in accordance with the provisions of clauses (ii)-(iii) of this subparagraph, the following radioactive materials in prepackaged units:

(I) iodine-125, in units not exceeding 10 µCi each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals;

(II) iodine-131, in units not exceeding 10 µCi each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals;

(III) carbon-14, in units not exceeding 10 µCi each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals;

(IV) hydrogen-3 (tritium), in units not exceeding 50 µCi each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals;

(V) iron-59, in units not exceeding 20 µCi each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals;

(VI) selenium-75, in units not to exceed 10 µCi each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals;

(VII) mock iodine-125 reference or calibration sources, in units not exceeding 0.05 µCi of iodine-129 and 0.005 µCi of americium-241 each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals; or

(VIII) cobalt-57, in units not exceeding 10 µCi each for use in *in vitro* clinical or laboratory tests not involving internal or external administration of radioactive material, or the radiation therefrom, to humans or animals.

(ii) A person who receives, acquires, possesses, or uses radioactive material in accordance with the general license in clause (i) of this subparagraph shall comply with the following.

(I) The general licensee shall not possess at any one time, at any one location of storage or use, a total amount of iodine-125, iodine-131, selenium-75, iron-59, and/or cobalt-57 in excess of 200 µCi.

(II) The general licensee shall store the radioactive material in the original shipping container or in a container providing equivalent radiation protection and meeting the requirements of §289.202(cc) of this title until used.

(III) The general licensee shall use the radioactive material only for the uses authorized by clause (i) of this subparagraph.

(IV) The general licensee shall not transfer the radioactive material to a person who is not authorized to receive it in accordance with a specific license issued by the agency, the NRC, any agreement state, or any licensing state, nor transfer the radioactive material in any manner other than in the unopened, labeled shipping container as received from the supplier.

(V) The general licensee shall dispose of the mock iodine-125 reference or calibration sources described in clause (i)(VII) of this subparagraph as required by §289.202(ff) of this title.

(iii) The general licensee shall not receive, acquire, possess, or use radioactive material in accordance with the general license in clause (i) of this subparagraph:

(I) except as prepackaged units that are labeled in accordance with the provisions of an applicable specific license issued in accordance with §289.252(p) of this title or in accordance with the provisions of a specific license issued by the NRC, any agreement state, or any licensing state that authorizes the manufacture and distribution of iodine-125, iodine-131, carbon-14, hydrogen-3 (tritium), iron-59, selenium-75, cobalt-57, or mock iodine-125 to general licensees in accordance with this subparagraph or its equivalent; and

(II) unless one of the statements in the following figures, as appropriate, or a substantially similar statement that contains the information called for in one of the following statements, appears on a label affixed to each prepackaged unit or appears in a leaflet or brochure that accompanies the package:

(-a-) option 1, as appropriate:

Figure: 25 TAC §289.251(f)(4)(G)(iii)(II)(-a-)

(-b-) option 2, as appropriate:

Figure: 25 TAC §289.251(f)(4)(G)(iii)(II)(-b-)

(iv) No person shall receive, acquire, possess, use, or transfer radioactive material in accordance with the general license in clause (i) of this subparagraph until that person has filed an application for registration on a form prescribed by the agency and has received from the agency a notification of receipt with an assigned registration number. The applicant shall submit the following information and any other information as may be required by the agency:

(I) name and address of the physician, veterinarian, clinical laboratory, or hospital;

(II) the location of use; and

(III) a statement that the physician, veterinarian, clinical laboratory, or hospital has appropriate radiation measuring instruments to carry out *in vitro* clinical or laboratory tests with radioactive material as authorized in accordance with clause (i) of this subparagraph, and that such tests will be performed only by personnel competent in the use of such instruments and in the handling of the radioactive material.

(H) General license for certain detecting, measuring, gauging, or controlling devices and certain devices for producing light or an ionized atmosphere.

(i) A general license is issued to commercial and industrial firms and to research, educational, and medical institutions, individuals in the conduct of their business, and state or local government agencies to receive, acquire, possess, use, or transfer in accordance with the provisions of clauses (ii)-(iv) of this subparagraph, radioactive material, excluding special nuclear material, contained in devices designed and manufactured for the purpose of detecting, measuring, gauging or controlling thickness, density, level, interface location, radiation, leakage, or qualitative or quantitative chemical composition or for producing light or an ionized atmosphere.

(ii) The general license in clause (i) of this subparagraph applies only to radioactive material contained in devices that have been manufactured or initially transferred and labeled in accordance with the specifications contained in a specific license issued by the agency in accordance with §289.252(l) of this title or in a specific license issued by the NRC, an agreement state, or a licensing state that authorizes distribution of devices to persons generally licensed by the NRC, an agreement state, or a licensing state.

(iii) The devices must have been received from a specific licensee described in clause (ii) of this subparagraph or through a transfer made in accordance with clause (iv)(XII) of this subparagraph.

(iv) Any person who receives, acquires, possesses, uses, or transfers radioactive material in a device in accordance with the general license in this subparagraph shall do the following:

(I) assure that all labels, affixed to the device at the time of receipt and bearing a statement that removal of the label is prohibited are maintained on the device and are clearly visible and legible. The general licensee shall comply with all instructions and precautions provided by such labels;

(II) assure that the device is tested for leakage of radioactive material and proper operation of the "on-off" mechanism and indicator, if any, at no longer than six-month intervals or at such other intervals as specified in the label; however:

(-a-) devices containing only krypton need not be tested for leakage of radioactive material; and

(-b-) devices containing only tritium or not more than 100 µCi of other beta and/or gamma emitting material or 10 µCi of alpha emitting material and devices held in storage in the original shipping container prior to initial installation need not be tested for any purpose, provided that each source is tested for leakage within six months prior to being used or transferred;

(III) assure that the tests required by subclause (II) of this clause and other testing, installation (removal of the manufacturer's lock and initial alignment of the radiation beam), servicing, and removal from location of installation involving the radioactive materials, its shielding or containment, are performed:

(-a-) in accordance with the instructions provided by the labels;

(-b-) in accordance with written instructions provided by the manufacturer as specified in §289.252(l)(3) of this title; or

(-c-) by a person holding a specific license from the agency, the NRC, an agreement state, or a licensing state to perform such activities;

(IV) maintain records for inspection by the agency showing compliance with the requirements of subclauses (II) and (III) of this clause. The records shall show the test results. The records also shall

identify the device tested by manufacturer, model and serial number of the device, serial number of the sealed source, and show the dates of performance of and the names of persons performing testing, installation, servicing, and removal from location of installation, of the radioactive material, its shielding or containment. Retention shall be as follows:

(-a-) records for tests for leakage or radioactive material required by subclause (II) of this clause must be kept for three years after the next required leak text is performed or until the sealed source is transferred or disposed of; and

(-b-) records of the test of the on-off mechanism and indicator required by subclause (II) of this clause must be kept for three years after the next required test of the on-off mechanism and indicator is performed or until the sealed source is transferred or disposed of.

(-c-) records of the testing, installation (removal of the manufacturer's lock and initial alignment of the radiation beam), servicing, and removal from location of installation involving the radioactive materials, its shielding or containment required by subclause (III) of this clause shall be kept for three years from the date of the recorded event or until the device is transferred or disposed of.

(V) maintain assignment records (utilization records) for portable or mobile devices for inspection by the agency at the location listed in the general license acknowledgement in accordance with subsection (g) of this section. These records shall include:

(-a-) a unique identification (for example, serial number) of each portable or mobile device;

(-b-) the location(s) where each portable or mobile device is assigned; and

(-c-) the date(s) each portable or mobile device is assigned to the location(s) in accordance with item (-b-) of this subclause;

(VI) have a copy of the appropriate operating and instruction manual at each temporary site for agency inspection;

(VII) immediately suspend operation of the device if there is a failure of, or damage to, or any indication of a possible failure of or damage to, the shielding of the radioactive material or the "on-off" mechanism, or indicator, or upon the detection of 1.85 becquerels (0.005 μCi) or more of removable radioactive material. The device shall not be operated until it has been repaired by the manufacturer or other person holding a specific license from the agency, the NRC, an agreement state, or a licensing state to repair such devices. The device and any radioactive material from the device may only be disposed of by transfer to a person authorized by a specific license to receive the radioactive material in the device. A report containing a brief description of the event and the remedial action taken and in the case of detection of 1.85 becquerels (0.005 μCi) or more removable radioactive material or failure of, or damage to a source likely to result in contamination of the premises or the environs, a plan for ensuring that the premises and environs are acceptable for unrestricted use shall be furnished to the agency within 30 days. Under these circumstances, the requirements in §289.202(ddd) of this title may be applicable, as determined by the agency on a case-by-case basis;

(VIII) not abandon the device containing radioactive material;

(IX) transfer or dispose of the device containing radioactive material only by transfer to another general licensee as authorized in subclause (XII) of this clause or to a person authorized to receive the device by a specific license issued by the agency in accordance with §289.252(l) of this title, or an equivalent specific license issued by the NRC, an agreement state, or a licensing state, or as otherwise approved under subclause (XI) of this clause;

(X) furnish a report to the agency within 30 days after the transfer of a device to a specific licensee. The report must contain the following:

(-a-) identification of the device by manufacturer's (or initial transferor's) name, model and serial number;

(-b-) name, address, and license number of the person receiving the device; and

(-c-) date of the transfer.

(XI) obtain written agency approval before transferring the device to any other specific licensee not specifically identified in subclause (IX) of this clause;

(XII) transfer the device to another general licensee only if:

(-a-) the device remains in use at a particular location. In such case, the transferor shall give the transferee a copy of this section and any safety documents identified in the label on the device. Within 30 days of the transfer, the transferor shall report the following to the agency:

(-1-) manufacturer's (or initial transferor's) name;

(-2-) model and serial number of the device transferred;

(-3-) transferee's name and mailing address for the location of use; and

(-4-) name, title, and phone number of the responsible individual identified by the transferee in accordance with subclause (XIII) of this clause to have knowledge of and authority to take actions to ensure compliance with the appropriate regulations and requirements; or

(-b-) the device is held in storage by an intermediate person in the original shipping container at its intended location of use prior to initial use by a general licensee.

(XIII) appoint an individual responsible for having knowledge of the appropriate agency requirements and the authority for taking required actions to comply with appropriate agency requirements. The general licensee, through this individual, shall ensure the day-to-day compliance with appropriate agency requirements. This appointment does not relieve the general licensee of any of its responsibility in this regard;

(XIV) report changes to the mailing address for the location of use (including change in name of general licensee) to the agency within 30 days of the effective date of the change. If it is a portable device, a report of address change is only required for a change in the device's primary place of storage; and

(XV) not hold devices that are not in use for longer than two years. If devices with shutters are not being used, the shutter shall be locked in the closed position. The testing required by clause (iv) of this subparagraph need not be performed during the period of storage only. However, when devices are put back into service or transferred to another person, and have not been tested within the required test interval, they shall be tested for leakage before use or transfer and the shutter tested before use. Devices kept in standby for future use are excluded from the two-year time limit if the general licensee performs quarterly physical inventories of these devices while they are in standby. The licensee shall make and maintain, for intervals of five years, records of the quarterly physical inventories for inspection by the agency.

(I) The general license in subparagraph (H) of this paragraph does not authorize the manufacture or import of devices containing radioactive material.

(J) The written instructions specified in subparagraph (H)(iv)(III)(-a-) of this paragraph shall be followed while performing the testing and shall be maintained for inspection by the agency.

(g) General license acknowledgements for radioactive material other than source material. In addition to the requirements of this section, all general license acknowledgement holders, unless otherwise specified, are subject to the requirements of §§289.201, 289.202(ww) and (xx), 289.204, 289.205, and 289.257 of this title.

(1) Persons possessing a general license for devices in accordance with subsection (f)(4)(H) of this section and being in the possession of radioactive material in devices containing at least 370 MBq (10 mCi) of cesium-137, 3.7 MBq (0.1 mCi) of strontium-90, 37 MBq (1 mCi) of cobalt-60, 37 MBq (1 mCi) of americium-241, or any transuranic (for example, element with atomic number greater than uranium (92)), based on the activity indicated on the label on the device, shall file an application for acknowledgement within 30 days of receipt, acquisition, or possession of such a device. The application shall be on a form prescribed by the agency to include the following information and any other information specifically requested by the agency:

(A) name and mailing address of the general licensee;

(B) information about each device to include the manufacturer (or initial transferor), model number, and serial number of the device, and the radioisotope and activity (as indicated on the label);

(C) name, title, and telephone number of the responsible person designated as a representative of the general licensee in accordance with subparagraph (H)(iv)(XIII) of this paragraph;

(D) address or location at which the device(s) are used and/or stored. For portable devices, the address of the primary place of storage;

(E) certification by the responsible representative of the general licensee that the information concerning the device(s) has been verified through a physical inventory and checking of label information;

(F) certification by the responsible representative of the general licensee that they are aware of the requirements of this section; and

(G) a completed BRC Form 252-1, Business Information Form and the applicable fee as required by §289.204 of this title.

(2) Persons generally licensed by the agency with respect to devices meeting the criteria in paragraph (1) of this subsection, are not subject to the requirements of paragraph (1) of this subsection if the devices are used in areas subject to agency jurisdiction for a period less than 30 days in any calendar year.

(h) Issuance of general license acknowledgements.

(1) When the agency determines that an application meets the requirements of the Act and the rules of the agency, the agency will issue a general license acknowledgement recognizing the general license authorizing the activity in such form and containing the conditions and limitations as it deems appropriate or necessary.

(2) The agency may incorporate in any general license acknowledgement at the time of issuance, or thereafter by amendment, additional requirements and conditions with respect to the licensee's receipt, possession, use, and transfer of radioactive material subject to this section as the agency deems appropriate or necessary in order to:

(A) minimize danger to occupational and public health and safety or the environment;

(B) require reports and the keeping of records, and to provide for inspections of activities in accordance with the license as may be appropriate or necessary; and

(C) prevent loss or theft of material subject to this section.

(3) The agency may request, and the licensee shall provide, additional information after the general license acknowledgement has been issued to enable the agency to determine whether the general license acknowledgement should be modified in accordance with subsection (l) of this section.

(i) Specific terms and conditions.

(1) Each general license acknowledgement issued in accordance with this section shall be subject to the applicable provisions of the Act, now or hereafter in effect, and to the applicable rules and orders of the agency.

(2) Each person holding a general license acknowledgement issued by the agency in accordance with this section shall confine use and possession of the devices and radioactive material identified in the general license acknowledgement to the locations specified in the general license acknowledgement.

(3) Each holder of a general license acknowledgement shall notify the agency, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by the general license acknowledgement holder or its parent company.

(4) The notification in paragraph (3) of this subsection shall include:

(A) the bankruptcy court in which the petition for bankruptcy was filed; and

(B) the date of the filing of the petition.

(5) A copy of the "Petition for Bankruptcy" shall be submitted to the agency with the written notification.

(j) Expiration of general license acknowledgement and administrative renewal.

(1) Effective September 1, 2004, the term of the general license acknowledgement is two years. Each general license acknowledgement expires at the end of the day, in the month and year stated in the general license acknowledgement. Upon payment of the fee required by §289.204 of this title and if the agency does not deny the renewal in accordance with subsection (f)(1) of this section, the general license acknowledgement will be administratively renewed.

(2) Expiration of the general license acknowledgement does not relieve the holder of the general license acknowledgement of the requirements of this chapter.

(3) If the holder of the general license acknowledgement does not pay the fee required by §289.204 of this title and the general license acknowledgement is not renewed, the holder of the general license acknowledgement shall:

(A) terminate use of all generally licensed devices; and

(B) submit to the agency a record of the disposition of the devices and if transferred, to whom it was transferred, within 30 days following the expiration date.

(k) Termination of general license acknowledgements.

(1) Each holder of a general license acknowledgement shall notify the agency immediately, in writing, and request termination of the general license acknowledgement when the holder of the general license

acknowledgement decides to terminate all activities involving materials specified in the general license acknowledgement.

(2) Each holder of a general license acknowledgement shall, no less than 30 days before vacating or relinquishing possession of control of premises that have been used as a place of storage or use of radioactive material as a result of general licensed activities, notify the agency in writing of intent to vacate and do the following:

(A) terminate use of radioactive material;

(B) dispose of radioactive material in accordance with this section and/or §289.202(ff) of this title; and

(C) pay any outstanding fees in accordance with §289.204 of this title.

(l) Amendment of general license acknowledgements.

(1) The holder of the general license acknowledgement required by subsection (g)(1) of this section shall report in writing to the agency any changes in information furnished by the holder of the general license acknowledgement. The report shall be submitted within 30 days after the effective date of such change.

(2) Applications for amendments of a general license acknowledgement shall be filed in accordance with subsection (g)(1)(A)-(F) of this section, as applicable, and shall specify the respects in which the holder of a general license acknowledgement desires a general license acknowledgement to be amended.

(m) Appendices.

(1) Exempt concentrations.
Figure: 25 TAC §289.251(m)(1)

(2) Exempt quantities.
Figure: 25 TAC §289.251(m)(2)

This 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 January 16, 2004.

TRD-200400317
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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25 TAC §289.252

The Texas Department of Health (department) proposes an amendment to §289.252, concerning licensing of radioactive material.

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 289.252 has been reviewed and the department has determined that the reasons for adopting the section continue to exist; however, revisions to the rule are necessary as outlined in this preamble.

The department published a Notice of Intention to Review for §289.252 regarding Government Code, §2001.039, in the *Texas Register* (28 TexReg 11118) on December 12, 2003. No comments were received by the department on this section following publication of the notice.

The proposed revision incorporates legislation passed by the 78th Legislature, Regular Session. House Bill (HB) 2292 requires two-year terms for radioactive material licenses and requires recovery through fees of 100% of regulatory program costs for the two-year term of the license. The department has historically required renewal of specific licenses that includes submission to the department of updated technical information regarding the radioactive material possessed, operating, safety and emergency procedures, and personnel responsible for the security of safe use of the radioactive materials. In order to incorporate the provisions of HB 2292 concerning two-year terms and to continue requiring a renewal that includes pertinent technical information, the department is implementing an administrative renewal and a technical renewal. The licensee will be required to renew the license every two years by paying the required fee and having a satisfactory compliance history. This administrative renewal will not involve review of technical information regarding the license. At a longer interval, the licensee will be required to submit certain technical information for review. This technical renewal date will be specified in the license and will be for an interval of an even number of years in order to eventually coincide with the fee renewal. Maintaining the more resource-intensive technical renewal allows the department to ensure continued security and safe use of radioactive material. The change to the rule is reflected in revised subsections (y) and (z).

House Bill 253, 78th Legislature, Regular Session, requires the department to deny a radioactive material application, amendment or renewal if the applicant's compliance history reveals a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations of the Radiation Control Act or the department's radiation control rules. The department has defined "a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process through significant violations..." by adding a requirement that states the department will deny an application if at least three department or judicial orders are issued that assess administrative or civil penalties against the licensee or to revoke or suspend the radioactive material license. The change to the rule is reflected in new subsection (x)(7).

The proposed revision changes references to the Formal Hearing Procedures throughout the rule to properly cite the references. In subsection (f)(1), the sentence "A single individual may be designated as RSO for more than one license if authorized by the agency." is added to clearly state the department's current practice in approving an individual to be a radiation safety officer (RSO) for a license. New subsection (f)(3)(L) is added as a requirement of the RSO to ensure both licensees and the department have an accounting of all authorized sources. This requirement is being added to enhance security by increasing accountability for sources of radiation.

Several revisions are made to the subsection concerning specific licenses for the manufacture and commercial distribution of devices to persons generally licensed. The requirements are items of compatibility with the United States Nuclear Regulatory Commission and as an agreement state, Texas is required to adopt them. These revisions include new subsection (l)(1)(D) and (E) concerning labeling, new (l)(4)(G) concerning enforcement, and

new subsection (l)(5) concerning alternative approaches to informing customers. The revisions also include addition of new and clarification of existing language concerning reports that are required by the licensee.

Subsection (x)(4) is revised to add the words "by the licensee or its parent company, if the parent company is involved in the bankruptcy" at the end of the sentence to be consistent with language used throughout this chapter. New subsection (y)(5)(A) adds the words "or has been revoked" after "expired" to clearly state that the license can also be revoked as is intended by the rule. Subsection (dd) adds the word ", suspension," after "Modification" to state the complete list of options for this subsection as is intended within the rule language. New subparagraph (D) is added to subsection (dd) to state that a license may also be modified, suspended, or revoked in whole or in part as a result of existing conditions that constitute a substantial threat to the public health or safety or the environment. Subsection (gg)(6)(B)(ii) replaced the word "Fund" with "Account" after "Care" to accurately state the name of the account as a result of implementing changes authorized by House Bill 1678 (78th Legislature 2003). In the figure for subsection (ii)(2), the radionuclides "Th-232" and "U-238" are deleted from the category of the 0.01µCi limit and moved to the category of the 1.0 mCi limit so these radionuclides are included in the correct limit category.

Concerning the entire section, several changes were made to rule citations to state the correct citations and for renumbering purposes as needed due to language being added or deleted throughout the section. Other minor grammatical changes have been made throughout the section.

This amendment is part of the department's continuing effort to update, clarify, and simplify its rules regarding the control of radiation based upon technological advances, public concerns, legislative directives, other factors, or to incorporate requirements that are items of compatibility with NRC regulations because as an agreement state, Texas must adopt compatible requirements.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring adequate requirements relative to the risk associated with radioactive material. There will be no fiscal impact on applicants/licensees that are small businesses, micro-businesses or other persons required to comply with the rule. No additional costs will be incurred because the additional requirements are relatively minor changes to existing requirements to current reporting and record-keeping requirements. The revisions correct reference citations and clarify the intent. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 1:00 p.m., Wednesday, February 11, 2004, in Conference Room N-218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, §401.051, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The amendment affects Health and Safety Code, Chapters 12 and 401. The review of the rule implements Government Code, §2001.039.

§289.252. Licensing of Radioactive Material.

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

(d) Filing application for specific licenses. The agency may, at any time after the filing of the original application, require further statements in order to enable the agency to determine whether the application should be denied or the license should be issued.

(1)-(8) (No change.)

(9) Notwithstanding the provisions of §289.204(d)(1) [~~§289.204(e)(1)~~] of this title, reimbursement of application fees may be granted in the following manner.

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

(C) If the request for full reimbursement authorized by subparagraph (A) of this paragraph is denied, the applicant may then request a hearing by appeal to the Commissioner of Health for a resolution of the dispute. The appeal will be processed in accordance with Title 1, Texas Administrative Code, Chapter 155, and the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title (relating to the Texas Board of Health).

(10) (No change.)

(e) General requirements for the issuance of specific licenses. A license application will be approved if the agency determines that:

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

(10) there is no reason to deny the license as specified in subsection (d)(10) or (x)(7) of this section.

(f) Radiation safety officer.

(1) An RSO shall be designated for every license issued by the agency. A single individual may be designated as RSO for more than one license if authorized by the agency.

(2) (No change.)

(3) The specific duties of the RSO include, but are not limited to, the following:

(A)-(K) (No change.)

(L) to perform an inventory of the radioactive material sources authorized for use on the license every six months and make and maintain records of the inventory of the radioactive material sources authorized for use on the license every six months, to include, but not be limited to the following:

(i) isotope(s);

(ii) quantity(ies);

(iii) activity(ies);

(iv) form(s);

(v) last date(s) of use;

(vi) name of individual making the inventory; and

(vii) signature of individual making the inventory.

(M) [~~(L)~~] to ensure that personnel are complying with this chapter, the conditions of the license, and the operating, safety, and emergency procedures of the licensee; and

(N) [~~(M)~~] to serve as the primary contact with the agency.

(4)-(5) (No change.)

(g)-(h) (No change.)

(i) Specific licenses for introduction of radioactive material into products in exempt concentrations.

(1) (No change.)

(2) the applicant provides reasonable assurance that:

(A) the concentrations of radioactive material at the time of transfer will not exceed the concentrations in §289.251(m)(1) [~~§289.251(q)(1)~~] of this title;

(B) reconcentration of the radioactive material in concentrations exceeding those in §289.251(m)(1) [~~§289.251(q)(1)~~] of this title will not occur;

(C)-(D) (No change.)

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

(j)-(k) (No change.)

(l) Specific licenses for the manufacture and commercial distribution of devices to persons generally licensed in accordance with §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title.

(1) In addition to the requirements in subsection (e) of this section, a specific license to manufacture or commercially distribute devices containing radioactive material to persons generally licensed in accordance with §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title or equivalent requirements of the NRC, an agreement state, or a licensing state will be issued if the agency approves the following information submitted by the applicant:

(A)-(C) (No change.)

(D) Each device having a separable source housing that provides the primary shielding for the source also bears, on the source housing, a durable label containing the device model number and serial numbers, the isotope and quantity, the words, "Caution-Radioactive Material," the radiation symbol described in §289.202(z) of this title, and the name of the manufacturer or initial distributor.

(E) Each device meeting the criteria of §289.251(g)(1) of this title, bears a permanent (for example, embossed, etched, stamped, or engraved) label affixed to the source housing if separable, or the device if the source housing is not separable, that includes the words, "Caution-Radioactive Material," and, if practicable, the radiation symbol described in §289.202(z) of this title.

(2) (No change.)

(3) In the event the applicant desires that the general licensee in accordance with §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title or in accordance with equivalent regulations of the NRC, an agreement state, or a licensing state, be authorized to mount the device, collect the sample to be analyzed by a specific licensee for radioactive material leakage, perform maintenance of the device consisting of replacement of labels, rust and corrosion prevention, and for fixed gauges, repair and maintenance of sealed source holder mounting brackets, test the "on-off" mechanism and indicator, or remove the device from installation, the applicant shall include in the application written instructions to be followed by the general licensee, estimated annual doses associated with such activity or activities, and bases for such estimates. The submitted information shall demonstrate that performance of such activity or activities by an individual untrained in radiological protection, in addition to other handling, storage, and use of devices in accordance with the general license, is unlikely to cause that individual to receive an annual dose in excess of 10% of the limits specified in §289.202(f) of this title.

(4) Before the device may be transferred, each person licensed in accordance with this subsection to commercially distribute devices to generally licensed persons shall furnish:

(A) a copy of the general license in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title to each person to whom the licensee directly commercially distributes radioactive material in a device for use in accordance with the general license in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title;

(B) a copy of the general license in the NRC's, agreement state's, or licensing state's regulation equivalent to §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title, or alternatively, a copy of the general license in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title to each person to whom the licensee directly commercially distributes radioactive material in a device for use in accordance with the general license of the NRC, the agreement state, or the licensing state. If certain requirements of the regulations do not apply to the particular device, those requirements may be omitted. If a copy of the general license in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title is furnished to such a person, it shall be accompanied by an explanation that the use of the device is regulated by the NRC, agreement state, or licensing state in accordance with requirements substantially the same as those in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title;

(C) a copy of §289.251(g) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title;

(D) (No change.)

(E) information on acceptable disposal options including estimated costs of disposal; [~~and~~]

(F) the name or position, address, and phone number of a contact person at the agency, an agreement state, or licensing state, or the NRC from which additional information may be obtained; and [~~.~~]

(G) an indication that it is the NRC's policy to issue high civil penalties for improper disposal if the device is commercially distributed to a general licensee of the NRC.

(5) An alternative approach to informing customers may be submitted by the licensee for approval by the agency.

(6) [~~(5)~~] In the case of a transfer through an intermediate person, each licensee who commercially distributes radioactive material in a device for use in accordance with the general license in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title, shall furnish the information in paragraph (4) of this subsection to the intended user prior to the initial transfer to the intermediate person.

(7) [~~(6)~~] Each person licensed in accordance with this subsection to commercially distribute devices to generally licensed persons shall:

(A) report to the agency all commercial distributions of devices to persons for use in accordance with the general license in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title and all receipts of devices from general licensees licensed in accordance with §289.251(f)(4)(H) of this title.

(i) The report shall:

(I) cover each calendar quarter; [~~,~~]

(II) [~~shall~~] be filed within 30 days thereafter; [~~, and shall include:~~]

(III) be submitted on a form prescribed by the agency or in a clear and legible report containing all of the data required by the form;

(IV) clearly indicate the period covered by the report;

(V) clearly identify the specific licensee submitting the report and include the license number of the specific licensee;

(VI) [~~(I)~~] identify [~~identity of~~] each general licensee by name and mailing address for the location of use; if there is no mailing address for the location of use, an alternate address for the general licensee shall be submitted along with information on the actual location of use;

(VII) [~~(II)~~] identify [~~identity of~~] an individual by name, [~~and/or position~~] title, and phone number who has knowledge of and authority to take required actions to ensure compliance with the appropriate regulations and requirements [~~may constitute a point of contact between the agency and the general licensee~~];

(VIII) [~~(III)~~] identify the type, model and serial number of device, and serial number of sealed source commercially distributed; [~~and~~]

(IX) [~~(IV)~~] identify the quantity and type of radioactive material contained in the device; and [~~.~~]

(X) include the date of transfer.

(ii) If one or more intermediate persons will temporarily possess the device at the intended place of use prior to its possession by the user, the report shall also include the information in accordance with paragraph (7)(A)(i) of this subsection for both the intended user and [~~identification of~~] each intermediate person and clearly designate the intermediate person(s) [~~by name, address, contact, and relationship to the intended user~~].

(iii) If no commercial distributions have been made to persons generally licensed in accordance with §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title during the reporting period, the report shall so indicate.

(iv) For devices received from a general licensee, the report shall include the identity of the general licensee by name and address, the type, model number, and serial number of the device received, the date of receipt, and, in the case of devices not initially transferred by the reporting licensee, the name of the manufacturer or initial transferor.

(B) report the following to the NRC to include covering each calendar quarter to be filed within 30 days thereafter, clearly indicating the period covered by the report, the identity of the specific licensee submitting the report, and the license number of the specific licensee:

(i) all commercial distributions of such devices to persons for use in accordance with the NRC general license in Title 10, CFR, §31.5 and all receipts of devices from general licensees in areas under NRC jurisdiction including the following:

(I) identity of each general licensee by name and address;

[(II) ~~identity of an individual by name and/or position who may constitute a point of contact between the agency and the general licensee;~~]

(II) [~~(III)~~] the type, model and serial number of device, and serial number of sealed source commercially distributed; [~~and~~]

(III) [~~(IV)~~] the quantity and type of radioactive material contained in the device; [~~or~~]

(IV) the date of transfer; or

(ii) if the licensee makes changes to a device possessed in accordance with the general license in §289.251(f)(4)(H) of this title, such that the label must be changed to update required information, the report shall identify the licensee, the device, and the changes to information on the device label;

(iii) in the case of devices not initially transferred by the reporting licensee, the name of the manufacturer or initial transferor;

(iv) [~~(ii)~~] if no commercial distributions have been made to the NRC licensees during the reporting period; the report shall so indicate; and

(C) report to the appropriate agreement state or licensing state all transfers of devices manufactured and commercially distributed in accordance with this subsection for use in accordance with a general license in that state's requirements equivalent to §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title and all receipts of devices from general licensees.

(i) The report shall:

(I) be submitted within 30 days after the end of each calendar quarter in which such a device is commercially distributed to the generally licensed person; [~~and shall include the following:~~]

(II) clearly indicate the period covered by the report;

(III) clearly identify the specific licensee submitting the report and include the license number of the specific licensee;

(IV) [~~(I)~~] identify [~~identity of~~] each general licensee by name and mailing address for the location of use; if there is no mailing address for the location of use an alternate address for the licensee shall be submitted along with the information on the actual location of use;

(V) [~~(II)~~] identify [~~identity of~~] an individual by name, [~~and/or~~] position, and phone number who has knowledge of and authority to take required actions to ensure compliance with the appropriate regulations and requirements [~~may constitute a point of contact between the agency and the general licensee~~];

(VI) [~~(III)~~] the type, model and serial number of the device, and serial number of sealed source commercially distributed; [~~and~~]

(VII) [~~(IV)~~] the quantity and type of radioactive material contained in the device; and [~~.~~]

(VIII) date of receipt.

(ii) If one or more intermediate persons will temporarily possess the device at the intended place of use prior to its possession by the user, the report shall also include the same information for both the intended user and [~~identification of~~] each intermediate person, and clearly designate the intermediate person(s) [~~by name, address, contact, and relationship to the intended user~~]; and

(iii) If no commercial distributions have been made to persons in the agreement state or licensing state during the reporting period, the report shall so indicate.

(iv) For devices received from a general licensee, the report shall include the identity of the general licensee by name and address, the type, model number, and serial number of the device received, the date of receipt, and, in the case of devices not initially transferred by the reporting licensee, the name of the manufacturer or initial transferor.

(D) keep records for three years following the date of the recorded event, showing the name, address, and the point of contact for each general licensee to whom the licensee directly or through an intermediate person commercially distributes radioactive material in devices for use in accordance with the general license provided in §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title, or equivalent requirements of the NRC, an agreement state, or a licensing state.

(i) The records shall show the following:

(I) date of each commercial distribution;

(II) the isotope and the quantity of radioactivity in each device commercially distributed;

(III) the identity of any intermediate person; and

(IV) compliance with the reporting requirements of this subsection.

(ii) If no commercial distributions have been made to persons generally licensed in accordance with §289.251(f)(4)(H) [~~§289.251(h)(1)(C) and (k)(1)~~] of this title during the reporting period, the records shall so indicate.

(8) [~~(7)~~] If a notification of bankruptcy has been made in accordance with subsection (x)(4) of this section or the license is to be terminated, each person licensed under this subsection shall provide, upon request to the NRC and to any appropriate agreement state or licensing state, records of final disposition required under subsection (y)(16)(A) [~~(y)(14)(A)~~] of this section.

(9) Each device that is transferred after February 19, 2002, shall meet the labeling requirements in accordance with paragraph (1)(C)-(E) of this subsection.

(m) Specific licenses for the manufacture, assembly, or repair of luminous safety devices for use in aircraft for commercial distribution to persons generally licensed in accordance with §289.251(f)(4)(B) [~~§289.251(h)(4)~~] of this title. In addition to the requirements in subsection (e) of this section, a specific license to manufacture, assemble, or repair luminous safety devices containing tritium or promethium-147 for use in aircraft, for commercial distribution to persons generally licensed in accordance with §289.251(f)(4)(B) [~~§289.251(h)(4)~~] of this title, will be issued if the agency approves the information submitted by the applicant. The information shall satisfy the requirements of Title 10, CFR, §§32.53, 32.54, 32.55, 32.56, and 32.101 or their equivalent.

(n) Specific licenses for the manufacture of calibration sources containing americium-241, plutonium, or radium-226 for commercial distribution to persons generally licensed in accordance with §289.251(f)(4)(D) [~~§289.251(h)(6)~~] of this title. In addition to the requirements in subsection (e) of this section [~~title~~], a specific license to manufacture calibration sources containing americium-241, plutonium, or radium-226 to persons generally licensed in accordance with §289.251(f)(4)(D) [~~§289.251(h)(6)~~] of this title will be issued if the agency approves the information submitted by the applicant. The information shall satisfy the requirements of Title 10, CFR, §§32.57, 32.58, 32.59, and 32.102, and 10 CFR 70.39 or their equivalent.

(o) (No change.)

(p) Specific licenses for the manufacture and commercial distribution of radioactive material for certain *in vitro* clinical or laboratory testing in accordance with the general license. In addition to the requirements in subsection (e) of this section, a specific license to manufacture or commercially distribute radioactive material for use in accordance with the general license in §289.251(f)(4)(G) [~~§289.251(k)(2)~~] of this title will be issued if the agency approves the following information submitted by the applicant:

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

(q) Specific licenses for the manufacture and commercial distribution of ice detection devices. In addition to the requirements of subsection (e) of this section, a specific license to manufacture and commercially distribute ice detection devices to persons generally licensed in accordance with §289.251(f)(4)(E) [~~§289.251(h)(5)~~] of this title will be issued if the agency approves the information submitted by the applicant. This information shall satisfy the requirements of Title 10, CFR, §§32.61, 32.62, and 32.103.

(r) (No change.)

(s) Specific licenses for the manufacture and commercial distribution of products containing depleted uranium for mass-volume applications.

(1) In addition to the requirements in subsection (e) of this section, a specific license to manufacture products and devices containing depleted uranium for use in accordance with §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title or equivalent regulations of the NRC or an agreement state, will be issued if the agency approves the following information submitted by the applicant:

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

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

(4) Each person licensed in accordance with paragraph (1) of this subsection shall:

(A)-(C) (No change.)

(D) furnish a copy of the following:

(i) the general license in §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title to each person to whom the licensee commercially distributes depleted uranium in a product or device for use in accordance with the general license in §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title;

(ii) the NRC's or agreement state's requirements equivalent to the general license in §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title and a copy of the NRC's or agreement state's certificate; or

(iii) alternately, a copy of the general license in §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title to each person to whom the licensee commercially distributes depleted uranium in a product or device for use in accordance with the general license of the NRC or an agreement state;

(E) report to the agency all commercial distributions of products or devices to persons for use in accordance with the general license in §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title.

(i) (No change.)

(ii) If no commercial distributions have been made to persons generally licensed in accordance with §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title during the reporting period, the report shall so indicate;

(F) report to the NRC and each responsible agreement state agency all commercial distributions of industrial products or devices to persons for use in accordance with the general license in the NRC's or agreement state's equivalent requirements to §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title. The report shall meet the provisions of subparagraph (E)(i) and (ii) of this paragraph; and

(G) keep records showing the name, address, and point of contact for each general licensee to whom the licensee commercially distributes depleted uranium in products or devices for use in accordance with the general license provided in §289.251(f)(3)(D) [~~§289.251(g)(5)~~] of this title or equivalent requirements of the NRC or of an agreement state. The records shall be maintained for a period of two years for inspection by the agency and shall show the date of each commercial distribution, the quantity of depleted uranium in each product or device commercially distributed, and compliance with the report requirements of this section.

(t)-(v) (No change.)

(w) Issuance of specific licenses.

(1) When the agency determines that an application meets the requirements of the Act and the rules of the agency, the agency will issue a specific license authorizing the proposed activity in such form and containing the conditions and limitations as the agency [~~it~~] deems appropriate or necessary.

(2) The agency may incorporate in any license at the time of issuance, or thereafter by amendment, additional requirements and conditions with respect to the licensee's receipt, possession, use, and transfer of radioactive material subject to this section as the agency [~~it~~] deems appropriate or necessary in order to:

(A)-(C) (No change.)

(3) The agency may request, and the licensee shall provide, additional information after the license has been issued to enable the agency to determine whether the license should be modified in accordance with subsection (dd) of this section.

(x) Specific terms and conditions of licenses.

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

(4) Each licensee shall notify the agency, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by the licensee or its parent company, if the parent company is involved in the bankruptcy.

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

(7) In making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a license, the agency may consider the technical competence and compliance history of an applicant or holder of a license. After an opportunity for a hearing, the agency shall deny an application for a license, an amendment to a license, or renewal of a license if the applicant's compliance history reveals that at least three agency or judicial orders have been issued against the applicant that assess administrative or civil penalties against the applicant, or that revoke or suspend the license.

(y) Expiration and termination of licenses, and administrative renewal; [~~and~~] decommissioning of sites and separate buildings or outdoor areas.

(1) Effective September 1, 2004, the term of the specific license is two years. Except as provided in paragraph (3) [~~(2)~~] of this subsection and subsection (z)(2) of this section, each specific license expires at the end of the day, in the month and year stated in the license. Upon payment of the fee required by §289.204 of this title and if the agency does not deny the renewal in accordance with subsection (x)(7) of this section, the specific license will be administratively renewed.

(2) If the fee is not paid and the license is not renewed in accordance with paragraph (1) of this subsection, the license expires, and the licensee is in violation of the rules and is subject to administrative penalties in accordance with §289.205 of this title.

(A) If the licensee pays the fee required by §289.204 of this title within 30 days after expiration of the license, the license will be reinstated and the licensee will not be required to file an application in accordance with subsection (d) of this section.

(B) If the licensee fails to pay the fee within 30 days after expiration of the license, the licensee shall file an application in accordance with subsection (d) of this section.

(3) Expiration of the specific license does not relieve the licensee of the requirements of this chapter.

(4) [~~(2)~~] All license provisions continue in effect beyond the expiration date, with respect to possession of radioactive material until the agency notifies the former licensee in writing that the provisions of the license are no longer binding. During this time, the former licensee shall:

(A) be limited to actions involving radioactive material that are related to decommissioning; and

(B) continue to control entry to restricted areas until the location(s) is suitable for release for unrestricted use in accordance with the requirements in §289.202(ddd) of this title.

(5) [~~(3)~~] Within 60 days of the occurrence of any of the following, each licensee shall provide notification to the agency in writing and either begin decommissioning its site, or any separate building or outdoor area that contains residual radioactivity, so that the building and/or outdoor area is suitable for release in accordance with §289.202(eee) of this title, or submit within 12 months of notification a decommissioning plan, if required by paragraph (8) [~~(6)~~] of this subsection, and begin decommissioning upon approval of that plan if:

(A) the license has expired or has been revoked in accordance with this subsection or subsection (dd) [~~(dd)(3)~~] of this section;

(B) the licensee has decided to permanently cease principal activities, as defined in §289.201(b) of this title, at the entire site or in any separate building or outdoor area;

(C) no principal activities under the license have been conducted for a period of 24 months; or

(D) no principal activities have been conducted for a period of 24 months in any separate building or outdoor area that contains residual radioactivity such that the building or outdoor area is unsuitable for release in accordance with §289.202(eee) of this title.

(6) [~~(4)~~] Coincident with the notification required by paragraph (5) [~~(3)~~] of this subsection, the licensee shall maintain in effect all decommissioning financial assurances established by the licensee in accordance with subsection (gg) of this section in conjunction with a license issuance or renewal or as required by this section. The amount

of the financial assurance shall be increased, or may be decreased, as appropriate, with agency approval, to cover the detailed cost estimate for decommissioning established in accordance with paragraph (11)(E) [~~(9)(E)~~] of this subsection.

(7) [~~(5)~~] The agency may grant a request to delay or postpone initiation of the decommissioning process if the agency determines that such relief is not detrimental to the occupational and public health and safety and is otherwise in the public interest. The request shall be submitted no later than 30 days before notification in accordance with paragraph (5) [~~(3)~~] of this subsection. The schedule for decommissioning set forth in paragraph (5) [~~(3)~~] of this subsection may not commence until the agency has made a determination on the request.

(8) [~~(6)~~] A decommissioning plan shall be submitted if required by license condition or if the procedures and activities necessary to carry out decommissioning of the site or separate building or outdoor area have not been previously approved by the agency and these procedures could increase potential health and safety impacts to workers or to the public, such as in any of the following cases:

(A) procedures would involve techniques not applied routinely during cleanup or maintenance operations;

(B) workers would be entering areas not normally occupied where surface contamination and radiation levels are significantly higher than routinely encountered during operation;

(C) procedures could result in significantly greater airborne concentrations of radioactive materials than are present during operation; or

(D) procedures could result in significantly greater releases of radioactive material to the environment than those associated with operation.

(9) [~~(7)~~] The agency may approve an alternate schedule for submittal of a decommissioning plan required in accordance with paragraph (5) [~~(3)~~] of this subsection if the agency determines that the alternative schedule is necessary to the effective conduct of decommissioning operations and presents no undue risk from radiation to the occupational and public health and safety and is otherwise in the public interest.

(10) [~~(8)~~] The procedures listed in paragraph (8) [~~(6)~~] of this subsection may not be carried out prior to approval of the decommissioning plan.

(11) [~~(9)~~] The proposed decommissioning plan for the site or separate building or outdoor area shall include the following:

(A) a description of the conditions of the site or separate building or outdoor area sufficient to evaluate the acceptability of the plan;

(B) a description of planned decommissioning activities;

(C) a description of methods used to ensure protection of workers and the environment against radiation hazards during decommissioning;

(D) a description of the planned final radiation survey;

(E) an updated detailed cost estimate for decommissioning, comparison of that estimate with present funds set aside for decommissioning, and a plan for assuring the availability of adequate funds for completion of decommissioning; and

(F) for decommissioning plans calling for completion of decommissioning later than 24 months after plan approval, a justification for the delay based on the criteria in paragraph (15) [~~(13)~~] of this subsection.

(12) [~~(10)~~] The proposed decommissioning plan will be approved by the agency if the information in the plan demonstrates that the decommissioning will be completed as soon as practicable and that the health and safety of workers and the public will be adequately protected.

(13) [~~(11)~~] Except as provided in paragraph (15) [~~(13)~~] of this subsection, licensees shall complete decommissioning of the site or separate building or outdoor areas as soon as practicable but no later than 24 months following the initiation of decommissioning.

(14) [~~(12)~~] Except as provided in paragraph (15) [~~(13)~~] of this subsection, when decommissioning involves the entire site, the licensee shall request license termination as soon as practicable but no later than 24 months following the initiation of decommissioning.

(15) [~~(13)~~] The agency may approve a request for an alternate schedule for completion of decommissioning of the site or separate building or outdoor area, and license termination if appropriate, if the agency determines that the alternative is warranted by consideration of the following:

(A) whether it is technically feasible to complete decommissioning within the allotted 24 month period;

(B) whether sufficient waste disposal capacity is available to allow completion of decommissioning within the allotted 24 month period;

(C) whether a significant volume reduction in wastes requiring disposal will be achieved by allowing short-lived radionuclides to decay;

(D) whether a significant reduction in radiation exposure to workers can be achieved by allowing short-lived radionuclides to decay; and

(E) other site-specific factors that the agency may consider appropriate on a case-by-case basis, such as the regulatory requirements of other government agencies, lawsuits, groundwater treatment activities, monitored natural ground-water restoration, actions that could result in more environmental harm than deferred cleanup, and other factors beyond the control of the licensee.

(16) [~~(14)~~] As the final step in decommissioning, the licensee shall do the following:

(A) certify the disposition of all licensed material, including accumulated wastes; and

(B) conduct a radiation survey of the premises where the licensed activities were carried out and submit a report of the results of this survey unless the licensee demonstrates that the premises are suitable for release in accordance with the radiological requirements for license termination specified in §289.202(ddd) of this title. The licensee shall do the following, as appropriate:

(i) report the following levels:

(I) gamma radiation in units of microroentgen per hour (μR/hr) (millisieverts per hour (mSv/hr)) at 1 meter (m) from surfaces;

(II) radioactivity, including alpha and beta, in units of disintegrations per minute (dpm) or microcuries (μCi) (megabecquerels (MBq)) per 100 square centimeters (cm^2) for surfaces;

(III) μCi (MBq) per milliliter for water; and

(IV) picocuries (pCi) (becquerels (Bq)) per gram (g) for solids such as soils or concrete; and

(ii) specify the manufacturer's name and model and serial number of survey instrument(s) used and certify that each instrument is properly calibrated and tested.

(17) [~~(15)~~] The agency will provide written notification to specific licensees, including former licensees with provisions continued in effect beyond the expiration date in accordance with paragraph (4) [~~2~~] of this subsection, that the provisions of the license are no longer binding. The agency will provide such notification when the agency determines that:

(A) radioactive material has been properly disposed;

(B) reasonable effort has been made to eliminate residual radioactive contamination, if present;

(C) a radiation survey has been performed that demonstrates that the premises are suitable for release in accordance with the radiological requirements for license termination specified in §289.202(ddd) of this title, or other information submitted by the licensee is sufficient to demonstrate that the premises are suitable for release in accordance with the radiological requirements for license termination specified in §289.202(ddd) of this title; and

(D) any outstanding fees in accordance with §289.204 of this title are paid and any outstanding notices of violations of this chapter or of license conditions are resolved.

(18) [~~(16)~~] Each licensee shall submit to the agency all records required by §289.202(nn)(2) of this title before the license is terminated.

(z) Technical renewal of licenses [~~Renewal of license~~].

(1) An application [~~Requests~~] for a technical renewal of specific licenses shall be filed in accordance with subsection (d)(1)-(3) and (5)-(7) of this section. An application for a technical renewal of a specific license shall be filed by the date specified in the existing license condition. If the licensee fails to apply and pay the fee required by §289.204 of this title, the license expires and the licensee shall comply with the requirements of subsection (y) of this section. In any application for renewal, the applicant may incorporate drawings by clear and specific reference (for example, title, date and unique number of drawing), if no modifications have been made since previously submitted.

(2) In any case in which a licensee, [~~not less than 30 days~~] prior to expiration of an existing license, has filed a request in proper form for a technical renewal or for a new license authorizing the same activities, such existing license shall not expire until the request has been finally determined by the agency. In any case in which a licensee, not more than 30 [~~90~~] days after the expiration of an existing license, has filed an application for technical renewal in entirety and paid the fee required by §289.204 of this title [~~a request in proper form for renewal~~] or for a new license authorizing the same activities, the agency may reinstate the license and extend the expiration until the request has been finally determined by the agency.

(3) An application for technical renewal of a license will be approved if the agency determines that the requirements of subsection (e) of this section have been satisfied.

(4) If the application for technical renewal of the license is not approved in accordance with paragraph (3) of this subsection, the license expires, and the former licensee is in violation of the rules and is subject to administrative penalties.

(5) Expiration of the specific license does not relieve the former licensee of the requirements of this chapter.

(aa)-(cc) (No change.)

(dd) Modification, suspension, and revocation of licenses.

(1) The terms and conditions of all licenses shall be subject to [~~amendment,~~] revision[~~,~~] or modification. A license may be modified, suspended or revoked by reason of amendments to the Act, by reason of rules in this chapter, or orders issued by the agency.

(2) Any license may be revoked, suspended, or modified, in whole or in part, for any of the following:

(A) (No change.)

(B) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a license on an original application; [~~or~~]

(C) violation of, or failure to observe any of the terms and conditions of the Act, this chapter, the license, or order of the agency; or [~~,~~]

(D) existing conditions that constitute a substantial threat to the public health or safety or the environment.

(3) (No change.)

(4) Except in cases in which the occupational and public health[~~, interest~~] or safety requires otherwise, no license shall be [~~modified,~~] suspended[~~,~~] or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the licensee in writing and the licensee shall have been afforded an opportunity to demonstrate compliance with all lawful requirements.

(ee) Reciprocal recognition of licenses.

(1) Subject to this section, any person who holds a specific license from NRC, any agreement state, or any licensing state, and issued by the agency having jurisdiction where the licensee maintains an office for directing the licensed activity and at which radiation safety records are normally maintained, is granted a general license to conduct the activities authorized in such licensing document within the State [~~state~~] of Texas provided that:

(A) (No change.)

(B) the out-of-state licensee notifies the agency in writing at least three working days prior to engaging in such activity. If, for a specific case, the three-working-day period would impose an undue hardship on the out-of-state licensee, the licensee may, upon application to the agency, obtain permission to proceed sooner. The agency may waive the requirement for filing additional written notifications during the remainder of the calendar year following the receipt of the initial notification from a person engaging in activities in accordance with the general license provided in this subsection. Such notification shall include:

(i)-(iii) (No change.)

(iv) a copy of the applicant's pertinent license;

(v) (No change.)

(vi) a [~~an annual~~] fee as specified in §289.204 of this title.

(C)-(E) (No change.)

(2) In addition to the provisions of paragraph (1) of this subsection, any person who holds a specific license issued by NRC, an agreement state, or a licensing state authorizing the holder to manufacture, transfer, install, or service the device described in §289.251(f)(4)(H) [~~§289.251 (h)(1)(C) and (k)(1)~~] of this title, within areas subject to the jurisdiction of the licensing body, is granted a general license to install, transfer, demonstrate, or service the device in the State [~~state~~] of Texas provided that:

(A)-(C) (No change.)

(D) the holder of the specific license furnishes to each general licensee to whom the holder of the specific license transfers the device, or on whose premises the holder of the specific license installs the device, a copy of the general license contained in §289.251(f)(4)(H) [~~§289.251 (h)(1)(C) and (k)(1)~~] of this title.

(3) (No change.)

(ff) (No change.)

(gg) Financial assurance and record keeping for decommissioning.

(1)-(5) (No change.)

(6) Financial assurance for decommissioning shall be provided by one or more of the following methods. The financial instrument obtained shall be continuous for the term of the license in a form prescribed by the agency. The applicant or licensee shall obtain written approval of the financial instrument or any amendment to it from the agency.

(A) (No change.)

(B) A surety method, insurance, or other guarantee method. These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond, letter of credit, or line of credit. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in subsection (ii)(3) of this section. A parent company guarantee may not be used in combination with other financial methods to satisfy the requirements of this section. For commercial corporations that issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in subsection (ii)(4) of this section. For commercial companies that do not issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs may be used if the guarantee and test are as contained in subsection (ii)(5) of this section. For nonprofit entities, such as colleges, universities, and nonprofit hospitals, a guarantee of funds by the applicant or licensee may be used if the guarantee and test are as contained in subsection (ii)(6) of this section. A guarantee by the applicant or licensee may not be used in combination with any other financial methods to satisfy the requirements of this section or in any situation where the applicant or licensee has a parent company holding majority control of the voting stock of the company. Any surety method or insurance used to provide financial assurance for decommissioning shall contain the following conditions.

(i) (No change.)

(ii) The surety method or insurance shall be payable in the State [~~state~~] of Texas to the Radiation and Perpetual Care Account [~~Fund~~].

(iii) (No change.)

(C)-(E) (No change.)

(7)-(8) (No change.)

(hh) (No change.)

(ii) Appendices.

(1) (No change.)

(2) Isotope quantities (for use in subsection (gg) of this section).

Figure: 25 TAC §289.252(ii)(2)

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

(5) Criteria relating to use of financial tests and self guarantees for providing reasonable assurance of funds for decommissioning by commercial companies that have no outstanding rated bonds.[~~)~~]

(A)-(C) (No change.)

(6)-(8) (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 January 16, 2004.

TRD-200400319
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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CHAPTER 295. OCCUPATIONAL HEALTH
SUBCHAPTER J. TEXAS MOLD ASSESSMENT AND REMEDIATION RULES

25 TAC §§295.301 - 295.338

The Texas Department of Health (department) proposes new §§295.301 - 295.338, concerning the regulation of mold-related activities that affect indoor air quality. The sections cover the following: general provisions; definitions; exceptions and exemptions to licensing and registration; code of ethics; general conditions; general responsibilities; requirements for licensing, registration, and accreditation; minimum work practices and procedures for mold assessment and mold remediation; and enforcement.

These rules are required as a result of House Bill 329, 78th Legislative Session, 2003, which added Chapter 1958 to the Occupations Code, and requires the department to develop rules to regulate mold-related activities, including licensing and regulation of mold assessors and remediators and to establish minimum performance standards for the licensees; Senate Bill 1152, 78th Legislative Session, 2003, which amended Government Code, Chapter 2054, regarding the TexasOnline Authority; and House Bill 2292, 78th Legislative Session, 2003, which revised Health and Safety Code, §§12.0111 and 12.0112, and requires two-year licenses effective January 1, 2005, with a provision for staggering the issuance and renewal of licenses.

Alan Morris, Director, Toxic Substances Control Division, has determined that for each year of the first five years the sections are in effect there will be fiscal implications as a result of administering the rules as proposed. The effect on state government will be

increased revenue to the department estimated to be $361,500 in fiscal year 2004, and $343,225 in each of fiscal years 2005 to 2008 from collection of licensing, registration, accreditation, notification and examination fees. It is estimated that the costs to the department to administer the new program will equal the estimated revenue increases.

No significant fiscal impact to units of local government is anticipated. Situations where mold affects more than 25 square feet for a project may require a licensed mold assessor or remediator and could cause a fiscal impact. Factors that could increase the cost to local government include fees for training and licensing in-house personnel, fees for the state exam, notification fees, and increased costs of third-party services. Factors that could decrease the cost to local government include savings from using licensed in-house personnel rather than third-party services, from more efficient remediation practices by both in-house and third-party personnel, from fewer sick days for occupants working in remediated buildings, and from a decreased risk of lawsuits due to concern over mold exposure. Whether these rules create increased costs or savings will depend on the circumstances of each case.

Mr. Morris 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 administering the sections will be to ensure compliance by mold assessors and mold remediators with the new legislative mandates. There will be a varying impact on micro-businesses, small businesses, and individuals who are required to comply with the sections. These are outlined in the paragraphs that follow. Economic costs to persons who are required to comply with the rules will be the fees for licensing, registration, or accreditation; costs to take required training courses and refresher training through accredited training providers; fees for the state exam; project notification fees; and costs to maintain required liability insurance. There will be no impact on local employment.

Prior to January 1, 2005, individuals who meet the qualifications to be a mold assessment technician, mold assessment consultant, or mold remediation contractor, may take the state licensing examination required for those categories without attending a state-accredited training course. For these individuals, costs will be $25 to take the state examination, and licensing costs as follows: $100 for a one-year mold assessment technician license; $300 for a one-year mold assessment consultant license; and $250 for a one-year mold remediation contractor license. Individuals seeking initial licenses in these categories after January 1, 2005, will be required to attend, depending on the license sought, a three- to five-day state-accredited training course taught by a training provider from the private sector at an estimated tuition cost of $450-$750. Mold remediation workers will be required to attend a four-hour training course provided by either their employer or a state-accredited training provider from the private sector at an estimated tuition cost of $75 and to pay $30 for a one-year registration prior to January 1, 2005.

House Bill 2292 requires all licenses, including registrations, issued by the state on or after January 1, 2005, to be for a two-year period, with a provision for staggering the issuance and renewal of licenses. For 2005, licenses will be valid for either one or two years, depending upon the birth year of the applicant. Effective January 1, 2006, all licenses will be issued for a two-year period. Fees for two-year licenses will be double the fees for one-year licenses. Costs for a mold assessment or remediation company, mold analysis laboratory, or training provider are $500 for a one-year license or accreditation and $1000 for a two-year license or accreditation. Companies may pay the licensing or registration fees for individual employees, which shifts the cost but results in no change in fees or revenues to the department. Licensed companies and sole proprietors are required to have a minimum amount of $1 million of liability insurance. Many micro-businesses and small businesses conducting mold assessment and remediation already carry such insurance, at an approximate cost of $50-$1,000 per month (depending on the amount of business activity), so this requirement is not an increased cost to those companies. Some companies in these categories may cease operation, including those that conduct only a few projects per year and may not generate adequate income to pay the costs of insurance, training, licensing and notification fees. In-house and third-party remediation contractors and companies are also required to remit a $100 notification fee to the department for each remediation project conducted when the mold contamination affects a total surface area for the project of 25 contiguous square feet or greater.

There may be increased costs of an estimated 1-5% to property owners that hire licensed mold companies, as these companies may raise their rates as a result of the new rules. On the other hand, costs may decrease for some property owners, particularly homeowners, as the new regulations may discourage fraudulent or overzealous practices by licensees. Based on reports in the news media, some companies took advantage of the public's fear of "toxic mold" resulting in unneeded or excessive testing and remediation. Some companies, having no performance standards as guidance in remediation, would unnecessarily remove or clean items and areas. Increased education of the public regarding the prevention, control and mitigation of mold, as required by House Bill 329, should decrease costs.

Written comments on the proposal may be sent to Mr. Alan Morris, Director, Toxic Substances Control Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, or by e-mail to alan.morris@tdh.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*. In addition, a public hearing on the proposed sections will be held at 9:00 a.m., Friday, February 13, 2004, in the Texas Department of Health Auditorium, Room K-100, 1100 West 49th Street, Austin, Texas.

Individuals needing additional information should contact Quade Stahl, Ph.D., Chief, Environmental Lead and Indoor Air Quality Branch, at (512) 834-4509 or (800) 293-0753, extension 2444. Those needing ADA assistance should contact Mr. Redge Westbrook at (512) 458-7627 or T.D.D. (877) 432-7232.

The new sections are proposed under the Occupations Code, §1958.053, which provides the department with the authority to adopt necessary regulations to discharge the powers and duties of Chapter 1958; and Health and the Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

These new sections affect the Occupations Code, Chapter 1958.

§295.301. General Provisions.

(a) Purpose. This subchapter implements the provisions of the Texas Occupations Code, Chapter 1958 (relating to Mold Assessors and Remediators), concerning the regulation of mold assessors and remediators conducting mold-related activities that affect indoor air quality in regulated buildings.

(b) Scope. This subchapter contains requirements for the licensing and registration of persons performing mold assessments and mold remediation, requirements for the accreditation of mold training providers, minimum work standards for the conduct of mold assessments and remediation by licensed and registered persons, a code of ethics, and penalties.

(c) Severability. Should any section or subsection in this subchapter be found to be void for any reason, such finding shall not affect any other sections.

(d) TexasOnline. The department is authorized to collect subscription and convenience fees, in amounts determined by the TexasOnline Authority, to recover costs associated with processing applications, examinations, and notifications specified under this subchapter through TexasOnline, in accordance with the Texas Government Code, Chapter 2054, §2054.111 (relating to Use of TexasOnline Project).

§295.302. Definitions.

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

(1) Accredited training program--A training program that has been accredited by the department to provide training for persons seeking licensure or registration under this subchapter.

(2) Act--The Texas Occupations Code, Chapter 1958 (relating to Mold Assessors and Remediators).

(3) Allied field--Mold assessment, mold remediation, and any field whose principles and practices are applicable to mold analysis or mold remediation, including asbestos abatement, lead abatement, industrial hygiene, building sciences, public health, and environmental remediation.

(4) Assessor--A person who conducts mold assessment as defined in this section and who is licensed under this subchapter as a mold assessment technician, consultant, or company.

(5) Board--The Texas Board of Health.

(6) Building sciences--The field of study covering the design, construction, management, and performance of building systems, including structures, enclosures, electrical and mechanical systems, environmental systems (such as temperature and moisture control), safety systems (such as fire suppression and alarms), lighting, acoustics, and diagnosis and correction of problems with building systems.

(7) Commissioner--The Texas Commissioner of Health.

(8) Containment area--An area that has been enclosed to prevent the release of mold or mold-containing dust or materials into surrounding areas.

(9) Contiguous--In close proximity; neighboring.

(10) Contiguous square feet--See "Total surface area of contiguous square feet".

(11) Credential--A license, registration, or accreditation issued under this subchapter.

(12) Department--The Texas Department of Health.

(13) Direct microscopic examination--Visible examination of a surface (as opposed to a sample collected from a surface) through a microscope having a minimum magnification of 100 times (100X), during which particles that are or resemble mold are counted by a licensed mold assessment consultant.

(14) Dwelling unit--A room or rooms occupied or intended for occupancy as separate living quarters, including such rooms that are vacant or under construction. Examples of dwelling units include single houses, individual apartments or condominiums, mobile homes, and rooms other than common areas in dormitories, fraternity houses, sorority houses, rooming houses, and boarding houses.

(15) Employee--An individual who is paid a salary, wage, or remuneration by another person or entity for services performed and over whom the person or entity exerts supervision or control as to the place, time, and manner of the individual's work.

(16) Facility--Any institutional, commercial, public, governmental, industrial or residential structure or building.

(17) Indoor air--Air within the envelope of a building, including air in spaces normally occupied by persons in the building.

(18) Indoor mold--Mold contamination that was not purposely grown or brought into a building and that has the potential to affect the indoor air quality of the building.

(19) License--Any license issued under this subchapter. The term "license" does not include a registration, accreditation, or approval issued under this subchapter.

(20) Mold--Any living or dead fungi or related products or parts, including spores, hyphae, and mycotoxins.

(21) Mold analysis--The examination of a sample collected during a mold assessment for the purpose of:

(A) determining the amount or presence of or identifying the genus or species of any living or dead mold or related parts (including spores and hyphae) present in the sample;

(B) growing or attempting to grow fungi for the purposes of subparagraph (A) of this paragraph; or

(C) identifying or determining the amount or presence of any fungal products, including but not limited to mycotoxins and fungal volatile organic compounds, present in the sample.

(22) Mold assessment--Activity that involves:

(A) an inspection, investigation, or survey of a dwelling or other structure to provide the owner or occupant with information regarding the presence, identification, or evaluation of mold;

(B) the development of a mold management plan or mold remediation protocol; or

(C) the collection or analysis of a mold sample.

(23) Mold assessment report--A document, prepared by a licensed mold assessment consultant for a client, that describes any observations made, measurements taken, and locations and analysis results of samples taken by the consultant or by a licensed mold assessment technician during a mold assessment. An assessment report can be either a stand-alone document or a part of a mold management plan or mold remediation protocol.

(24) Mold management plan--A document, prepared by a licensed mold assessment consultant for a client, that provides guidance on how to prevent and control indoor mold growth at a location.

(25) Mold-related activities--The performance of mold assessment, mold remediation or any other related activities.

(26) Mold remediation--The removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, of mold or mold-contaminated matter that was not purposely grown at a location. Preventive activities include those intended to prevent future mold contamination of a remediated area, including applying biocides or anti-microbial compounds.

(27) Mold remediation protocol (mold remediation work analysis)--A document, prepared by a licensed mold assessment consultant for a client, that specifies the estimated quantities and locations of materials to be remediated and the proposed remediation methods and clearance criteria for each type of remediation in each type of area for a mold remediation project.

(28) Mold remediation work plan--A document, prepared by a licensed mold remediation contractor that provides specific instructions and/or standard operating procedures for how a mold remediation project will be performed.

(29) Office--A stationary physical location assigned a street address by the United States Postal Service, where a licensee or an employee of a licensee may be contacted to conduct business related to mold assessment and/or mold remediation.

(30) Person--An individual, corporation, company, contractor, subcontractor, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, governmental entity, or any other association of individuals.

(31) Program administrator--The administrator of the Texas Department of Health's Mold Licensing Program.

(32) Project--All activities connected with a mold remediation work plan, including activities necessary for the preparation of the work plan and any associated mold remediation protocol(s), site preparation, and post-remediation assessment and clearance.

(33) Remediator--A person who conducts mold remediation as defined in this section and who is credentialed under this subchapter as a mold remediation worker, contractor, or company.

(34) Residential property--A building, group of buildings, or portion of a building that is intended to provide living quarters for a person for an extended period of time, including a residential property that is vacant or under construction and portions of non-residential properties that serve as living quarters for employees (such as a caretaker's dwelling at a commercial property or staff housing at an institutional facility). Residential properties do not include:

(A) lodgings (such as hotels and motels) that rent units on a transient basis;

(B) institutional facilities that provide care for residents or inmates (such as hospitals, nursing homes, homes for children with physical or mental disabilities, mental institutions, jails, prisons and detention centers); and

(C) former residential properties that do not currently provide living quarters (such as houses converted into shops or restaurants).

(35) Responsible person--An employee or principal designated by a licensed mold assessment company, mold remediation company, or mold analysis laboratory or by an accredited mold training provider as responsible for its operations and compliance with rules concerning mold-related activities or mold-related training.

(36) Start date--The date on which the actual remediation of mold begins.

(37) Stop date (completion date)--The date following the date on which final clearance is achieved following a mold remediation project.

(38) Supervise--To direct and exercise control over the activities of a person by being physically present at the job site or, if not physically present, accessible by telephone and able to be at the site within one hour of being contacted.

(39) Survey--An activity undertaken in a building to determine the presence, location, or quantity of indoor mold or to determine the underlying condition(s) contributing to indoor mold growth, whether by visual or physical examination or by collecting samples of potential mold for further analysis.

(40) Total surface area of contiguous square feet--The contiguous area of surface material that needs to be cleaned or removed to remediate visible mold contamination.

(41) Training hours--Hours spent in classroom instruction, hands-on activities, and field trips, including time used for course tests and brief breaks but not including scheduled lunch periods.

(42) Visible--Exposed to view; capable of being seen.

(43) Work analysis--A mold remediation protocol.

(44) Work plan--A mold remediation work plan.

(45) Working days--Monday through Friday, including holidays that fall on those days.

§295.303. Exceptions and Exemptions.

(a) Exceptions. This subchapter does not apply to:

(1) the following activities when not conducted for the purpose of mold assessment or mold remediation:

(A) routine cleaning;

(B) the diagnosis, repair, cleaning, or replacement of plumbing, heating, ventilation, air conditioning, electrical, or air duct systems or appliances;

(C) commercial or residential real estate inspections; and

(D) the incidental discovery or emergency containment of potential mold contamination during the conduct or performance of services listed in this subsection. For purposes of this subsection, an emergency exists if a delay in mold remediation services in response to a water damage occurrence would increase mold contamination;

(2) the repair, replacement, or cleaning of construction materials during the building phase of the construction of a structure;

(3) the standard performance of custodial activities for, preventive maintenance of, and the routine assessment of property owned or operated by a governmental entity; or

(4) a pest control inspection conducted by a person regulated under the Texas Occupations Code, Chapter 1951 (relating to Structural Pest Control).

(b) Minimum area exemption. A person is not required to be licensed under this subchapter to perform mold remediation in an area in which the mold contamination for the project affects a total surface area of less than 25 contiguous square feet.

(c) Residential property exemption. An owner, or a managing agent or employee of an owner, is not required to be licensed under this subchapter to perform mold assessment or mold remediation on a residential property which is owned by that person, and which has fewer than 10 dwelling units. This exemption applies regardless of the total surface area within the residential property that is affected by mold growth. This exemption does not apply to a managing agent or employee who engages in the business of performing mold assessment or mold remediation for the public.

(d) Facility exemption. An owner or tenant, or a managing agent or employee of an owner or tenant, is not required to be licensed under this subchapter to perform mold assessment or mold remediation on property owned or leased by the owner or tenant. This exemption does not apply:

(1) if the managing agent or employee engages in the business of performing mold assessment or mold remediation for the public;

(2) if the mold remediation is performed in an area in which the mold contamination affects a total surface area of 25 contiguous square feet or more; or

(3) to a person exempt under subsection (c) of this section.

(e) Construction and improvement exemption. A person is not required to be licensed under this subchapter to perform mold assessment or mold remediation in a one-family or two-family dwelling that the person constructed or improved if the person performs the mold assessment or mold remediation at the same time the person performs the construction or improvement or at the same time the person performs repair work on the construction or improvement. This exemption applies regardless of the total surface area that is affected by mold growth. This exemption does not apply if the person engages in the business of performing mold assessment or mold remediation for the public. For purposes of this subsection, "improve" means "to build, construct, or erect a new building or structure or a new portion of a building or structure that is attached to an existing building or structure" and "improvement" means "a building or structure, or a portion of a building or structure, that was built, constructed, or erected as an attachment to an existing building or structure after the construction or erection of the existing building or structure".

(f) Supervised employee exemption. An employee of a license holder is not required to be licensed under this subchapter to perform mold assessment or mold remediation while supervised by the license holder. Such an employee must, however, be registered as provided under §295.314 of this title (relating to Mold Remediation Worker: Registration Requirements).

(g) Loss of exemption. A person who is performing mold remediation under the licensing exemptions of subsection (b) or (d) of this section and identifies additional mold such that the total mold contamination affects a total surface area of 25 contiguous square feet or more shall:

(1) immediately cease all remediation work and implement emergency containment if necessary; and

(2) advise the person requesting the remediation that the exemption under subsection (b) or (d) of this section has been lost and that any additional mold remediation and post-remediation assessment in the area must be done by a person licensed or registered under this subchapter.

§295.304. Code of Ethics.

(a) The purpose of this section is to establish the standards of professional and ethical conduct required of all persons holding credentials or approvals issued under this subchapter.

(b) All credentialed persons or approved instructors shall, as applicable to their discipline:

(1) undertake to perform only services for which they are qualified by license, education, training or experience in the specific technical fields involved;

(2) meet or exceed the minimum standards for mold assessment and remediation as set forth in this subchapter;

(3) not participate in activities where a conflict of interest might arise, pursuant to §295.307 of this title (relating to Conflict of Interest and Disclosure Requirement) and disclose any known or potential conflicts of interest to any party affected or potentially affected by such conflicts;

(4) provide only necessary and desired services to a client and not sell unnecessary or unwanted products or services;

(5) to the extent required by law, keep confidential any personal information regarding a client (including medical conditions) obtained during the course of a mold-related activity;

(6) not misrepresent any professional qualifications or credentials;

(7) not provide to the department any information that is false, deceptive, or misleading;

(8) cooperate with the department by promptly furnishing required documents or information and by promptly responding to requests for information;

(9) not work if impaired as a result of drugs, alcohol, sleep deprivation or other conditions and not allow those under their supervision to work if known to be impaired;

(10) maintain knowledge and skills for continuing professional competence and participate in continuing education programs and activities;

(11) not make any false, misleading, or deceptive claims, or claims that are not readily subject to verification, in any advertising, announcement, presentation, or competitive bidding;

(12) not make a representation that is designed to take advantage of the fears or emotions of the public or a customer;

(13) provide cost-effective mold-related activities; and

(14) notify each client of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department:

(A) on each written contract for services; or

(B) in each bill for services provided to the client.

(c) Duty to report ethical violations. All credentialed persons:

(1) have the responsibility of promptly reporting alleged misrepresentations or violations of the Act or this subchapter to the department;

(2) are responsible for competent and efficient performance of their duties and shall report to the department incompetent, illegal or unethical conduct of any practitioner of mold assessment and/or remediation; and

(3) shall not retaliate against any person who reported in good faith to the department alleged incompetent, illegal or unethical conduct.

§295.305. Credentials: General Conditions.

(a) Licensing or registration requirement. A person must be licensed or registered in compliance with this subchapter to engage in mold assessment or mold remediation unless specifically exempted under §295.303 of this title (relating to Exceptions and Exemptions).

(b) Accreditation requirement. A person must be accredited as a mold training provider in compliance with this subchapter to offer mold training for fulfillment of specific training requirements for licensing under this subchapter.

(c) Age requirement. Each individual applying to be licensed or registered under this subchapter must be at least 18 years old at the time of application.

(d) Office requirement. A person licensed under this subchapter must maintain an office in Texas. An individual employed by a person licensed under this subchapter is considered to maintain an office in Texas through that employer.

(e) Training requirement.

(1) An applicant for an initial license under §295.311 of this title (relating to Mold Assessment Technician: Licensing Requirements), §295.312 of this title (relating to Mold Assessment Consultant: Licensing Requirements), or §295.315 of this title (relating to Mold Remediation Contractor: Licensing Requirements) must successfully complete an initial training course offered by a department-accredited training provider in the discipline for which the credential is sought and receive a course-completion certificate before applying for the license. This paragraph does not apply to applicants who submit complete applications to the department before January 1, 2005, as evidenced by a postmark or shipping paperwork.

(2) Except as described under subsection (g)(3) of this section, an applicant for renewal of a license listed under paragraph (1) of this subsection must successfully complete a refresher training course offered by a department-accredited training provider in the discipline for which renewal is sought and receive a course-completion certificate before applying for the renewal. The applicant must successfully complete the refresher course no later than 24 months after successful completion of the previous course and no earlier than 12 months prior to the expiration date of the license.

(3) Except as described under subsection (g)(3) of this section, an applicant for an initial or renewal registration under §295.314 of this title (relating to Mold Remediation Worker: Registration Requirements) must successfully complete a training course as described under §295.320(d) and (f) of this title (relating to Training: Required Mold Training Courses) and receive a course-completion certificate before applying for the registration. If a refresher course is required, the applicant must successfully complete the refresher course no later than 24 months after successful completion of the previous course and no earlier than 12 months prior to the expiration date of the registration.

(f) Examination requirement. In accordance with §295.310 of this title (relating to Licensing: State Licensing Examination), an applicant for an initial license under §§295.311, 295.312, or 295.315 of this title must pass the state licensing examination in the discipline for which licensure is sought with a score of at least 70% correct before applying for the license. All applicants must pass the state examination within six months of completing any training course required under subsection (e)(1) of this section in three or fewer attempts or must successfully complete a new initial training course before re-taking the state examination.

(g) Applications. Each application for a credential or approval must provide all required information. An applicant shall indicate that a question does not apply by answering "not applicable" or "N/A". Applicants must submit complete applications, including all supporting documents, for each credential or approval sought.

(1) An applicant for an initial license under §§295.311, 295.312, or 295.315 of this title must submit the complete application to the department within six months of passing the required state licensing examination, as evidenced by a postmark or shipping documents, or must successfully complete a new initial training course, receive a new training certificate, and pass a new state examination before submitting a new initial license application.

(2) An applicant for an initial or renewal registration under §295.314 of this title must submit the complete application to the department within five working days of successfully completing the required training course, as evidenced by a postmark or shipping paperwork.

(3) An applicant for a renewal of a license listed under paragraph (1) of this subsection must successfully complete a required refresher training course and receive a course-completion certificate before applying for renewal, except that this paragraph does not apply to a holder of an initial license that is valid for one year, as described under subsections (h)(1) and (h)(2)(A) of this section. The applicant must complete the refresher course before the expiration date of the license but no earlier than 12 months prior to the expiration date of the license and no later than 24 months after completion of the previous course.

(h) Term and expiration.

(1) All credentials issued before January 1, 2005, are valid for one year and expire on the anniversary of the effective date.

(2) A credential issued between January 1, 2005, and December 31, 2005, (including renewal of a credential issued before January 1, 2005, regardless of the issue date of the renewal) is valid for:

(A) one year and expires on the anniversary of the effective date, if the birth year of the applicant (or the birth year of the mold training manager or the first individual named as a responsible person, as described under subsection (j) of this section, if the applicant is not an individual) is an odd number; or

(B) two years and expires on the second anniversary of the effective date, if the birth year of the applicant (or the birth year of the mold training manager or the first individual named as a responsible person, as described under subsection (j) of this section, if the applicant is not an individual) is an even number.

(3) All credentials issued on or after January 1, 2006, except as specified in paragraph (2) of this subsection, are valid for two years and expire on the second anniversary of the effective date.

(4) Fees commensurate with a two-year credential must be included with any application for a credential that will expire on the second anniversary of its effective date.

(5) A credential holder is in violation of this subchapter if the holder practices with lapsed qualifications.

(i) Condition of issuance. No credential, identification (ID) card, or approval issued under this subchapter shall be sold, assigned, or transferred. ID cards issued by the department must be present at the worksite any time an individual is engaged in mold-related activities. The department retains the right to confiscate and revoke any credential, ID card, or approval that has been altered.

(j) Persons other than individuals. A mold assessment company, mold remediation company, mold analysis laboratory, or mold training provider that has been issued a credential under this subchapter:

(1) shall designate one or more individuals as responsible persons. The credentialed person must notify the department in writing of any additions or deletions of responsible persons within 10 days of such occurrences;

(2) shall not transfer that credential to any other person, including to any company that has bought the credentialed entity. The credentialed entity must apply for a new credential within 60 days of being bought; and

(3) must submit to the department a name-change application and a processing fee of $20 within 60 days of any change.

§295.306. Credentials: General Responsibilities.

(a) Persons who are licensed, registered, or accredited under this subchapter shall:

(1) adhere to the code of ethics prescribed by §295.304 of this title (relating to Code of Ethics);

(2) comply with work practices and procedures of this subchapter;

(3) refrain from engaging in activity prohibited under §295.307(a) of this title (relating to Conflict of Interest and Disclosure Requirement);

(4) maintain any insurance required under §295.309 of this title (relating to Licensing: Insurance Requirements) while engaging in mold-related activities regulated under this subchapter;

(5) cooperate with department personnel in the discharge of their official duties, as described in §295.329 of this title (relating to Compliance: Inspections and Investigations); and

(6) notify the department of changes in mailing address and telephone number.

(b) All individuals who are required to be licensed or registered under this subchapter must have a valid department-issued identification card present at the worksite when engaged in mold-related activities, except as provided under §295.314(e) of this title (relating to Mold Remediation Worker: Registration Requirements) for applicants for registration as mold remediation workers.

(c) The license holder overseeing mold-related activities, with the exception of activities performed by a mold analysis laboratory, must ensure that a client is provided a copy of the department Consumer Mold Information Sheet prior to the initiation of any mold-related activity.

(d) A credentialed person who becomes aware of violations of this subchapter must report these violations within 24 hours to the department if, to that person's knowledge, the responsible party has not corrected the violations within that timeframe.

(e) The individual that is designated by a licensed mold assessment company or mold remediation company as its responsible person shall not be the responsible person for another licensee with the same category of license.

§295.307. Conflict of Interest and Disclosure Requirement.

(a) Conflict of interest.

(1) A licensee shall not perform both mold assessment and mold remediation on the same project.

(2) A person shall not own an interest in an entity that performs mold assessment services and an entity that performs mold remediation services on the same project.

(b) Disclosure requirement. At the time of application for licensing, an applicant that is not an individual shall disclose to the department the name, address, and occupation of each person that has an ownership interest of 10% or more in the applicant. A licensee shall report to the department within 10 days any change related to a person who has an ownership interest of 10% or more including additions to or deletions from any list of such persons previously supplied to the department and any changes in the names, addresses, or occupations of any persons on such a list.

§295.308. Credentials: Applications and Renewals.

(a) General requirements. Applications for a license, registration or accreditation must be made on forms provided by the department and signed by the applicant. The department shall consider only complete applications. The application form must be accompanied by:

(1) a check or money order for the amount of the required fee made payable to the Texas Department of Health, unless the application fee is paid through TexasOnline, as provided under the Texas Government Code, Chapter 2054, §2054.252 (relating to TexasOnline Project);

(2) a current one-inch by one-inch photograph of the applicant's face (or, if the application is for a company license, of the face of the individual designated as the responsible person for the company) with a white background. The photograph of the face is not required with applications for approvals. If the application is for an individual license and successful completion of a department-approved training course is being used to satisfy the training requirement, a copy of the wallet-size photo-identification card from the applicable training course as required under §295.318(f)(6)(B) of this title (relating to Mold Training Provider: Accreditation) must also be submitted; and

(3) proof that the applicant meets all other requirements for obtaining the credential being sought.

(b) Inquiries. Applicants who wish to discuss or obtain information concerning qualification requirements may call the program administrator at (512) 834-4509 or (800) 293-0753 (toll-free). Applicants may visit the Mold Licensing Program's website at www.tdh.state.tx.us/beh/mold to obtain information and download forms.

(c) Denials. The department may deny a credential to a person who fails to meet the standards established by this subchapter.

(d) Processing applications and renewals.

(1) Reimbursement of fees. The department shall refund application fees, less an administrative fee of $50 ($20 for remediation worker applications), if an applicant does not meet the requirements for the credential. The department shall refund fees paid in excess of the amounts required under this subchapter, less a $10 administrative fee. The department will not refund fees if the application was abandoned due to the applicant's failure to respond to a written request from the department for a period of 90 days.

(2) Contested case hearing. The applicant has the right to request a hearing in writing within 30 days of the date on the department's letter denying the credential. The hearing will be conducted in accordance with the Administrative Procedure Act (Texas Government Code, Chapter 2001) and the department's formal hearing rules in Chapter 1 of this title (relating to the Board of Health).

(e) Renewal notices. At least 60 days before a person's license, registration, or accreditation is scheduled to expire, the department shall send a renewal notice by first-class mail to the person's last known address from the department's records. A person credentialed by the department retains full responsibility for supplying the department with a correct current address and phone number. The renewal notice will state:

(1) the type of credential requiring renewal;

(2) the time period allowed for renewal;

(3) the amount of the renewal fee; and

(4) how to obtain and submit a renewal application.

(f) Renewal requirements. A person seeking to renew a license, registration, or accreditation shall submit a renewal application no sooner than 60 days before the credential expires. The department shall renew the license, registration, or accreditation for a term as provided under §295.305(h) of this title (relating to Credentials: General Conditions) if the person:

(1) is qualified to be credentialed;

(2) pays to the department the nonrefundable renewal fee;

(3) submits to the department a renewal application on the prescribed form along with all required documentation; and

(4) has complied with all final orders resulting from any violations of this subchapter, unless an exception is granted in writing by the department and submitted with the application.

(g) Renewals and late fees. A person shall not perform any mold-related activity with an expired license, registration, or accreditation. If a person makes a timely and complete application for the renewal of a valid credential, the credential does not expire until the department has finally granted or denied the application. The department shall renew a credential that has been expired for 180 days or less if the person meets the requirements of subsection (f) of this section. A person whose credential has been expired for more than 180 days must obtain a new credential and must comply with current requirements and procedures, including any state examination requirements.

(h) Replacements. A person desiring a replacement credential or ID card shall submit a request in writing on a department-issued form with a $20 fee.

§295.309. Licensing: Insurance Requirements.

(a) Persons required to have insurance must obtain policies for general liability insurance in the amount of not less than $1 million per occurrence. Self-insurance is allowed for persons who meet the self-insurance requirements under the insurance laws of Texas and receive written approval from the Texas Department of Insurance (TDI). An individual required to have insurance must obtain individual coverage unless covered under the policy of the individual's employer or employed by a person approved by TDI to be self-insured. Insurance policies required under this section must be currently in force and must be written by:

(1) an insurance company authorized to do business in Texas;

(2) an eligible Texas surplus lines insurer as defined in the Texas Insurance Code, Article 1.14-2 (relating to Surplus Lines Insurance);

(3) a Texas registered risk retention group; or

(4) a Texas registered purchasing group.

(b) The certificate of insurance must be complete, including all applicable coverages and endorsements, and must name the Texas Department of Health, Toxic Substances Control Division, as a certificate holder. Each required policy shall be endorsed to provide the department with at least a ten-day notice of cancellation.

(c) An applicant for initial or renewal licenses must provide proof of insurance in one of the following forms:

(1) a copy of the required certificate of insurance;

(2) a copy of the approval for self-insurance granted by the TDI; or

(3) proof that the applicant is employed by a licensed mold assessment or remediation company that has the required insurance.

(d) The department may impose an administrative penalty or take other disciplinary action against any person who fails to have the insurance required under this section.

(1) If a policy is canceled, the licensee shall notify the department in writing not later than 10 working days prior to the cancellation effective date. A licensed company may file a single notification for the company and its licensed employees.

(2) If a policy expires or is canceled, the policy shall promptly be renewed or replaced without any lapse in coverage. If no insurance is in effect, the licensee shall cease work. The licensee must provide a certificate of the renewal or replacement policy to the department prior to resuming work.

(3) If an individual licensee ceases to be covered under an employer's insurance, the individual must obtain replacement coverage either individually or through a new employer. The individual must submit the documentation required under subsection (c) of this section to the department before engaging in any mold-related activities.

§295.310. Licensing: State Licensing Examination.

(a) Examination requirements.

(1) An applicant for an initial individual license who has successfully completed the required training from a department-accredited training provider must pass the state examination prior to applying for the license. The applicant must pass the examination within six months of completing the training course.

(2) An applicant is permitted to take the state examination before January 1, 2005, without completing a department-approved training course. The applicant must pass the examination with a score of at least 70% correct and submit a complete application to the department before January 1, 2005, (as evidenced by a postmark or shipping paperwork). An applicant who fails to pass the examination in three or fewer attempts or to submit a complete application before January 1, 2005, must successfully complete a state accredited training course and then pass a state examination with a score of at least 70% correct before re-applying for a license.

(b) Re-examination. An individual is permitted to take two re-examinations after failing an initial examination. An individual who fails both re-examinations must repeat the initial training course, submit a new application for the licensing examination, and provide a copy of the new training certificate.

(c) Scheduling and registration. Annually, the department shall publish a schedule of examination dates and locations. Training providers shall provide state examination schedules as a part of their instruction. Registrations must be submitted by mailing, faxing, or e-mailing a registration form to the administrator and must be received by the department no later than five working days before the examination date. Information on the examination schedule and assistance with registration is available by calling the Mold Licensing Program at (512) 834-4509 or (800) 293-0753 (toll-free in Texas). Entrance into the examination site will be allowed only upon presentation of a valid photo identification from an accredited training provider. Companies with 30 or more employees to be tested may call the department to arrange an additional examination date for a $50 per person examination fee.

(d) Fees. A fee of $25 is required for any examination or re-examination. A fee of $50 per person shall be paid for examinations administered at locations and times other than those published. The department must receive the required fees no later than five working days before the examination.

(e) Grading and reporting of examination scores. A grade of at least 70% correct must be achieved in order to pass the examination. Scores will be reported only by mail no later than 30 working days after the date the examination is taken. Information regarding re-examination, if necessary, will be included.

(f) Request for information concerning examination. If requested in writing by an individual who fails a licensing examination, the department shall furnish the individual with a written analysis of the individual's performance on the examination.

§295.311. Mold Assessment Technician: Licensing Requirements.

(a) Licensing requirement. Unless exempted under §295.303 of this title (relating to Exceptions and Exemptions), as of January 1, 2005, an individual must be licensed as a mold assessment technician to perform activities listed under subsection (b) of this section, except that an individual licensed under §295.312 of this title (relating to Mold Assessment Consultant: Licensing Requirements) is not required to be separately licensed under this section.

(b) Scope. An individual licensed under this section is authorized to determine the location and extent of mold or suspected mold present in a facility. A mold assessment technician is licensed to:

(1) record visual observations and take on-site measurements, including temperature, humidity, and moisture levels, during an initial or post-remediation mold assessment;

(2) collect samples for mold analysis during an initial mold assessment; and

(3) as directed by an on-site assessment consultant, collect samples during a post-remediation mold assessment.

(c) Qualifications. In addition to the requirements for all applicants listed in §295.305 of this title (relating to Credentials: General Conditions) and §295.309 of this title (relating to Licensing: Insurance Requirements), an applicant must be a high-school graduate or have obtained a General Educational Development (GED) certificate. If the application is for an initial license and a complete application is submitted to the department before January 1, 2005, as evidenced by a postmark or shipping paperwork, the applicant may satisfy the training requirement under §295.305(e)(1) of this title by either:

(1) successfully completing an initial mold assessment technician course offered by a department-accredited training provider and receiving a course-completion certificate; or

(2) successfully completing, within two years prior to the application date, a minimum of 24 hours of instruction in mold assessment. The applicant is not required to receive all 24 hours of instruction from the same organization. Successful completion shall be shown by a certificate of course completion. Any instruction used to satisfy this requirement must be offered by one of the following:

(A) a college or university accredited by an organization recognized by the Council for Higher Education Accreditation;

(B) a training provider accredited by the federal government to provide instruction on hazardous materials;

(C) a national professional organization that is administered by an active board of directors and whose criteria for full membership include minimum education and experience requirements and adherence to a published code of ethics;

(D) an organization that is administered by an active board of directors, that offers certification to individuals who fulfill minimum education and experience requirements at least equivalent to the education and experience requirements under this section, and that requires passing a certification examination with a score of at least 70% correct in order to receive the certification; or

(E) a training provider that is approved by an organization meeting the requirements under subparagraph (D) of this paragraph to offer training required by the organization.

(d) Fees. The fees for a mold assessment technician license are:

(1) $100 for a one-year license issued before January 1, 2006; and

(2) $200 for a two-year license issued on or after January 1, 2005.

(e) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals). An applicant shall include the following:

(1) if the application is for an initial license and a complete application is submitted to the department before January 1, 2005, as evidenced by a postmark or shipping paperwork:

(A) a copy of a high school diploma or GED certificate;

(B) proof of compliance with the insurance requirement specified in §295.309 of this title;

(C) proof of successfully fulfilling the training requirement under subsection (c)(1)-(2) of this section; and

(D) proof of successfully passing the state licensing examination with a score of at least 70% correct;

(2) if the application is for an initial license and a complete application is submitted to the department on or after January 1, 2005:

(A) a copy of a high school diploma or GED certificate;

(B) proof of compliance with the insurance requirement specified in §295.309 of this title;

(C) a copy of a certificate of training as described in §295.320(b) of this title (relating to Training: Required Mold Training Courses); and

(D) proof of successfully passing the state licensing examination with a score of at least 70% correct; or

(3) if the application is for renewal of a license:

(A) a copy of a certificate of training as described in §295.320(g) of this title, unless the applicant is exempt under §295.305(g)(3) of this title; and

(B) proof of compliance with the insurance requirement specified in §295.309 of this title.

(f) Responsibilities. In addition to the requirements listed in §295.306 of this title (relating to Credentials: General Responsibilities), a licensed mold assessment technician shall:

(1) perform only activities allowed under subsection (b) of this section;

(2) comply with mold sampling protocols accepted as industry standards, as presented in training course materials or as required by his/her employer; and

(3) utilize the services of a laboratory that is licensed by the department to provide analysis of mold samples, except as provided under §295.312(b)(4) of this title.

§295.312. Mold Assessment Consultant: Licensing Requirements.

(a) Licensing requirements. Unless exempted under §295.303 of this title (relating to Exceptions and Exemptions), as of January 1, 2005, an individual must be licensed as a mold assessment consultant to perform activities listed under subsection (b) of this section. A licensed mold assessment consultant who employs one or more individuals required to be licensed under this section or §295.311 of this title (relating to Mold Assessment Technician: Licensing Requirements) must be separately licensed as a mold assessment company under §295.313 of this title (relating to Mold Assessment Company: Licensing Requirements), except that an individual licensed as a mold assessment consultant and doing business as a sole proprietorship is not required to be separately licensed under §295.313 of this title.

(b) Scope. An individual licensed under this section is also licensed to perform all activities of a mold assessment technician listed in §295.311(b) and (f) of this title. In addition, a licensed mold assessment consultant is licensed to:

(1) plan surveys to identify conditions favorable for indoor mold growth or to determine the presence, extent, amount, or identity of mold or suspected mold in a building;

(2) conduct activities recommended in a plan developed under paragraph (1) of this subsection and describe and interpret the results of those activities;

(3) determine locations at which a licensed mold assessment technician will record observations, take measurements, or collect samples;

(4) perform direct microscopic examination;

(5) prepare a mold assessment report, including the observations made, measurements taken, and locations and analysis results of samples taken by the consultant or by a licensed mold assessment technician during the mold assessment;

(6) develop a mold management plan for a building, including recommendations for periodic surveillance, response actions, and prevention and control of mold growth;

(7) prepare a mold remediation protocol, including the evaluation and selection of appropriate methods, personal protective equipment, engineering controls, project layout, and preparation of plans and specifications;

(8) evaluate a mold remediation project for the purpose of certifying that mold contamination identified for the remediation project has been remediated as outlined in a mold remediation protocol;

(9) evaluate a mold remediation project for the purpose of certifying that the underlying cause of the mold has been remediated so that it is reasonably certain that the mold will not return from that remediated cause; and

(10) complete appropriate sections of a mold remediation certificate as specified under §295.327(b) of this title (relating to Photographs; Certificate of Mold Remediation; Duty of Property Owner).

(c) Qualifications. In addition to the requirements for all applicants listed in §295.305 of this title (relating to Credentials: General Conditions) and §295.309 of this title (relating to Licensing: Insurance Requirements), an applicant must:

(1) meet at least one of the following education and/or experience requirements:

(A) a bachelor's degree from an accredited college or university with a major in a natural or physical science, engineering, architecture, building construction, or building sciences, and at least one year of experience in an allied field;

(B) at least 60 college credit hours with a grade of C or better in the natural sciences, physical sciences, environmental sciences, building sciences, or a field related to any of those sciences, and at least three years of experience in an allied field;

(C) a high-school diploma or a General Educational Development (GED) certificate and at least five years of experience in an allied field; or

(D) certification as an industrial hygienist, a professional engineer, a professional registered sanitarian, a certified safety professional, or a registered architect and at least one year of experience in an allied field; and

(2) if a complete application for an initial license is submitted to the department before January 1, 2005 as evidenced by a postmark or shipping paperwork, satisfy the training requirement under §295.305(e)(1) of this title by either:

(A) successfully completing an initial mold assessment consultant course offered by a department-accredited training provider and receiving a course-completion certificate; or

(B) successfully completing, within two years prior to the application date, a minimum of 40 hours of instruction in mold assessment. The applicant is not required to receive all 40 hours of instruction from the same organization. Successful completion shall be shown by a certificate of course completion. Any instruction used to satisfy this requirement must include classroom and hands-on training and must be offered by an entity meeting one of the qualifications listed under §295.311(c)(2)(A)-(E) of this title.

(d) Fees. The fees for a mold assessment consultant license are:

(1) $300 for a one-year license issued before January 1, 2006; and

(2) $600 for a two-year license issued on or after January 1, 2005.

(e) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals). An applicant shall include the following in the application package:

(1) if the application is for an initial license and a complete application is submitted to the department before January 1, 2005, as evidenced by a postmark or shipping paperwork:

(A) verifiable evidence that the applicant meets at least one of the eligibility requirements under subsection (c)(1)(A)-(D) of this section;

(B) proof of compliance with the insurance requirement specified in §295.309 of this title;

(C) proof of successfully fulfilling the training requirement under subsection (c)(2) of this section; and

(D) proof of successfully passing the state licensing examination with a score of at least 70% correct;

(2) if the application is for an initial license and a complete application is submitted to the department on or after January 1, 2005:

(A) all documentation required under paragraphs (1)(A), (1)(B), and (1)(D) of this subsection; and

(B) a copy of a certificate of training as described in §295.320(c) of this title (relating to Training: Required Mold Training Courses); or

(3) if the application is for renewal of a license:

(A) a copy of a certificate of training as described in §295.320(g) of this title, unless the applicant is exempt under §295.305(g)(3) of this title; and

(B) proof of compliance with the insurance requirement specified in §295.309 of this title.

(f) Responsibilities. In addition to the requirements listed in §295.306 of this title (relating to Credentials: General Responsibilities), a licensed mold assessment consultant shall:

(1) provide adequate consultation to the client to diminish or eliminate hazards or potential hazards to building occupants caused by the presence of mold growth in buildings;

(2) provide, in accordance with a client's instructions, professional services concerning surveys, building conditions that have or might have contributed to mold growth, proper building operations and maintenance to prevent mold growth, and compliance with work practices and standards;

(3) comply with mold sampling protocols as presented in training course materials or as required by his/her employer;

(4) inquire of the client whether any hazardous materials, including lead-based paint and asbestos, are present in the project area;

(5) provide to the client a mold assessment report following an initial (pre-remediation) mold assessment. If the consultant includes the results of the initial assessment in a mold remediation protocol or a mold management plan, a separate assessment report is not required;

(6) provide to the client a mold remediation protocol before a remediation project begins;

(7) utilize the services of a laboratory that is licensed by the department to provide analysis of mold samples, except as permitted under subsection (b)(4) of this section;

(8) if he/she performs post-remediation assessment on a project and ceases to be involved with the project before it achieves clearance, provide a final status report to the client and to the mold remediation contractor or company performing mold remediation work for the client as specified under §295.324(f) of this title (relating to Post-Remediation Assessment and Clearance);

(9) provide a passed clearance report to the client as specified under §295.324(e) of this title and complete applicable sections of a certificate of mold remediation as specified under §295.327(b) of this title (relating to Photographs; Certificate of Mold Remediation; Duty of Property Owner);

(10) comply with recordkeeping responsibilities under §295.326(c) of this title (relating to Recordkeeping);

(11) sign and date each mold assessment report and each mold management plan that he/she prepares and include his/her license number and expiration date on each report and each plan;

(12) sign and date each mold remediation protocol on the cover page, including his/her license number and expiration date. The consultant must also initial the protocol on every page that addresses the scope of work and on all drawings related to the remediation work; and

(13) review and approve changes to any protocol by signing or initialing according to paragraph (11) of this subsection.

§295.313. Mold Assessment Company: Licensing Requirements.

(a) Licensing requirements. A person performing mold assessment work on or after January 1, 2005 must be licensed as a mold assessment company if the person employs two or more individuals required to be licensed under §295.311 of this title (relating to Mold Assessment Technician: Licensing Requirements) or §295.312 of this title (relating to Mold Assessment Consultant: Licensing Requirements), except that an individual licensed as a mold assessment consultant and doing business as a sole proprietorship is not required to be separately licensed under this section. A mold assessment company shall designate one or more individuals licensed as mold assessment consultants as its responsible person(s).

(b) Authorization and conditions. As a condition of licensure, a mold assessment company must:

(1) notify the department in writing of any changes in individual licensed mold assessment consultants as responsible persons within 10 days of such occurrences;

(2) maintain general liability insurance, as described in §295.309 of this title (relating to Licensing: Insurance Requirements);

(3) refrain from mold assessment activity during any period without the active employment of at least one individual licensed mold assessment consultant designated as the responsible person for the company;

(4) notify the department in writing of any change related to a person who has an ownership interest of 10% or more (including additions to or deletions from any list of such persons previously supplied to the department and any changes in the names, addresses, or occupations of any persons on such a list) within 10 days of the change; and

(5) refrain from engaging in activity prohibited under §295.307(a) of this title (relating to Conflict of Interest and Disclosure Requirement).

(c) Eligibility for licensing. To be eligible for licensing, an applicant must:

(1) employ at least one licensed mold assessment consultant; and

(2) maintain an office in Texas.

(d) Fees. The fees for a mold assessment company license are:

(1) $500 for a one-year license issued before January 1, 2006; and

(2) $1,000 for a two-year license issued on or after January 1, 2005.

(e) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals). An applicant shall include the following in the application package:

(1) proof of compliance with the insurance requirement specified in §295.309 of this title;

(2) the name, address, and occupation of each person that has an ownership interest of 10% or more in the company; and

(3) the name and license number of each licensed mold assessment consultant designated by the applicant as a responsible person.

(f) Responsibilities. In addition to the requirements as listed in §295.306 of this title (relating to Credentials: General Responsibilities), a licensed mold assessment company shall:

(1) follow the recordkeeping requirements, at both the Texas office and work site locations, as described in §295.326(c) of this title (relating to Recordkeeping);

(2) provide each client with a mold assessment report following an initial (pre-remediation) mold assessment. If the company includes the results of the initial assessment in a mold remediation protocol or a mold management plan, a separate assessment report is not required;

(3) provide each client a mold remediation protocol before remediation begins;

(4) ensure that all employees who will conduct mold assessment activities are provided with, fit tested for, and trained in the correct use of personal protection equipment appropriate for the activities to be performed;

(5) ensure that the training and license of each licensed employee are current, as described in §295.320 of this title (relating to Training: Required Mold Training Courses);

(6) utilize the services of a laboratory that is licensed by the department to provide analysis of mold samples, except as permitted under §295.312(b)(4) of this title;

(7) maintain general liability insurance, as described in §295.309 of this title;

(8) if the company performs post-remediation assessment on a project and ceases to be involved with the project before it achieves clearance, provide a final status report to the client and to the mold remediation contractor or company performing mold remediation work for the client as specified under §295.324(f) of this title (relating to Post-Remediation Assessment and Clearance); and

(9) provide a passed clearance report to the client as specified under §295.324(e) of this title and provide a certificate of mold remediation, with applicable sections completed by a mold assessment consultant, to a mold remediation company or contractor, as specified under §295.327(b) of this title (relating to Photographs; Certificate of Mold Remediation; Duty of Property Owner).

§295.314. Mold Remediation Worker: Registration Requirements.

(a) Registration requirement. Unless exempted under §295.303 of this title (relating to Exceptions and Exemptions), as of January 1, 2005, an individual must be registered as a mold remediation worker to perform mold remediation, except that an individual licensed under §295.315 of this title (relating to Mold Remediation Contractor: Licensing Requirements) is not required to be separately registered under this section.

(b) Qualifications. In addition to the requirements for all applicants listed in §295.305 of this title (relating to Credentials: General Conditions), an applicant must:

(1) be employed by a licensed mold remediation contractor or company; and

(2) complete a mold remediation worker training course provided by either the applicant's employer or an accredited mold training provider, as described under §295.320(d) of this title (relating to Training: Required Mold Training Courses).

(c) Fees. The fees for a mold remediation worker registration are:

(1) $30 for a one-year registration issued before January 1, 2006; and

(2) $60 for a two-year registration issued on or after January 1, 2005.

(d) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals) and shall include a copy of the training certificate required under §295.320(d)(5)(A) of this title, unless the applicant is exempt under §295.305(g)(3) of this title. An applicant must submit an application to the department within five working days of completing a worker training course, as evidenced by a postmark or shipping paperwork.

(e) Temporary registration. An individual who has successfully completed remediation worker training and received a training certificate may perform mold remediation work allowed under this section for a period of not more than 30 days from the training date if:

(1) the individual has submitted an application for registration to the department as required under subsection (d) of this section;

(2) a copy of the training certificate is present at the work site at all times while the individual engages in mold remediation; and

(3) the individual is in possession of a valid government-issued photo identification at all times while performing mold remediation work.

(f) Responsibilities. In addition to the requirements as listed in §295.306 of this title (relating to Credentials: General Responsibilities), a registered mold remediation worker shall use remediation techniques specified in the project mold remediation work plan.

(g) Prohibitions. Registered mold remediation workers are prohibited from:

(1) performing mold remediation except under the supervision, as defined in §295.303(f) of this title, of a licensed remediation contractor; and

(2) engaging in any mold-related activity as a contractor.

§295.315. Mold Remediation Contractor: Licensing Requirements.

(a) Licensing requirements. Unless exempted under §295.303 of this title (relating to Exceptions and Exemptions), as of January 1, 2005, an individual must be licensed as a mold remediation contractor to perform activities listed under subsection (b) of this section. A licensed mold remediation contractor who employs one or more individuals required to be licensed under this section or §295.314 of this title (relating to Mold Remediation Worker: Registration Requirements) must be separately licensed as a mold remediation company under §295.316 of this title (relating to Mold Remediation Company: Licensing Requirements), except that an individual licensed as a mold remediation contractor and doing business as a sole proprietorship is not required to be separately licensed under §295.316 of this title. A mold remediation company shall designate one or more individuals licensed as mold remediation contractors as its responsible person(s).

(b) Scope. An individual licensed under this section may perform mold remediation and supervise registered mold remediation workers performing mold remediation. In addition, a licensed mold remediation contractor is licensed to provide mold remediation services including:

(1) preparing a mold remediation work plan providing instructions for the remediation efforts to be performed for a mold remediation project; and

(2) conducting and interpreting the results of activities recommended in a work plan developed under paragraph (1) of this subsection, including any of the activities of a registered mold remediation worker under §295.314 of this title.

(c) Qualifications. In addition to the requirements for all applicants listed in §295.305 of this title (Credentials: General Conditions) and §295.309 of this title (relating to Licensing: Insurance Requirements), an applicant must:

(1) meet at least one of the following education and/or experience requirements:

(A) a bachelor's degree from an accredited college or university with a major in a natural or physical science, engineering, architecture, building construction, or building sciences and at least one year of experience either in an allied field or as a general contractor in building construction;

(B) at least 60 college credit hours with a grade of C or better in the natural sciences, physical sciences, environmental sciences, building sciences, or a field related to any of those sciences, and at least three years of experience in an allied field or as a general contractor in building construction;

(C) a high school diploma or General Educational Development (GED) certificate, plus at least five years of experience in an allied field or as a general contractor in building construction; or

(D) certification as an industrial hygienist, a professional engineer, a professional registered sanitarian, a certified safety professional, or a registered architect, and at least one year of experience in an allied field or as a general contractor in building construction; and

(2) if the application is for an initial license and a complete application is submitted to the department before January 1, 2005, as evidenced by a postmark or shipping paperwork, satisfy the training requirement under §295.305(e)(1) of this title by either:

(A) successfully completing an initial mold remediation contractor course offered by a department-accredited training provider and receiving a course-completion certificate; or

(B) successfully completing, within two years prior to the application date, a minimum of 40 hours of instruction in mold remediation. The applicant is not required to receive all 40 hours of instruction from the same organization. Successful completion shall be shown by a certificate of course completion. Any instruction used to satisfy this requirement must include classroom and hands-on training and must be offered by an entity meeting one of the qualifications listed under §295.311(c)(2)(A)-(E) of this title (relating to Mold Assessment Technician: Licensing Requirements).

(d) Fees. The fees for a mold remediation contractor license are:

(1) $250 for a one-year license issued before January 1, 2006; and

(2) $500 for a two-year license issued on or after January 1, 2005.

(e) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals). An applicant shall include the following in the application package:

(1) if the application is for an initial license and a complete application is submitted to the department before January 1, 2005, as evidenced by a postmark or shipping paperwork:

(A) verifiable evidence that the applicant meets at least one of the eligibility requirements under subsection (c)(1) of this section;

(B) proof of compliance with the insurance requirement specified in §295.309 of this title;

(C) proof of successfully fulfilling the training requirement under subsection (c)(2) of this section; and

(D) proof of successfully passing the state licensing examination with a score of at least 70% correct;

(2) if the application is for an initial license and a complete application is submitted to the department on or after January 1, 2005:

(A) verifiable evidence that the applicant meets at least one of the qualifications under subsection (c)(1) of this section;

(B) proof of compliance with the insurance requirement specified in §295.309 of this title;

(C) a copy of a certificate of training indicating successful completion within the past six months of an initial training course offered by a department-accredited training provider as described in §295.320(e) of this title (relating to Training: Required Mold Training Courses); and

(D) proof of successfully passing the state licensing examination; or

(3) if the application is for renewal of a license:

(A) a copy of a certificate of training as described in §295.320(g) of this title, unless the applicant is exempt under §295.305(g)(3) of this title; and

(B) proof of compliance with the insurance requirement specified in §295.309 of this title.

(f) Responsibilities. In addition to the requirements as listed in §295.306 of this title (relating to Credentials: General Responsibilities), the mold remediation contractor shall be responsible for:

(1) accurate interpretation of field notes, drawings, and reports relating to mold assessments;

(2) advising clients about options for mold remediation;

(3) complying with standards for preparing work plans, as presented in training course materials or as required by the mold remediation company by whom the contractor is employed;

(4) providing to a client a mold remediation project work plan before the mold remediation begins;

(5) inquiring of the client whether any known or suspected hazardous materials, including lead-based paint and asbestos, are present in the project area;

(6) signing and dating each mold remediation work plan that he/she prepares on the cover page. The cover page shall also include his/her license number and expiration date. He/she must also initial the work plan on every page that addresses the scope of work and on all drawings related to the remediation work;

(7) submitting the required notification to the department, as described in §295.325 of this title (relating to Notifications), unless employed by a licensed mold remediation company;

(8) ensuring that all individuals who conduct activities specified under paragraph (4) of this subsection are provided with, fit tested for, and trained in the correct use of personal protection equipment required under §295.322(c) of this title (relating to Minimum Work Practices and Procedures for Mold Remediation);

(9) if the mold remediation contractor is doing business as a sole proprietorship and is not required to be separately licensed as a mold remediation company under §295.316 of this title (Mold Remediation Company: Licensing Requirements):

(A) ensuring that the training, as described in §295.320 of this title (relating to Training: Required Mold Training Courses), and license of each employee who is required to be licensed under this subchapter is current;

(B) ensuring that the training, as described in §295.320 of this title, and registration of each registered employee is current;

(C) ensuring that each unregistered employee who is required to be registered under this subchapter is provided the training required under §295.320(d) of this title before performing any mold remediation work;

(D) complying with all requirements under §295.320(d) of this title if the contractor provides the training; and

(E) ensuring that a previously unregistered employee who is provided training as specified in subparagraph (C) of this paragraph:

(i) has applied to the department for registration before allowing that employee to perform any mold remediation work, except as provided under §295.314(e) of this title; and

(ii) is registered before allowing that employee to perform any mold remediation work more than 30 days after the date of the training, in accordance with §295.314(e) of this title;

(10) complying with recordkeeping responsibilities under §295.326 of this title (relating to Recordkeeping); and

(11) providing to the property owner a completed mold remediation certificate as specified under §295.327 of this title (relating to Photographs; Certificate of Mold Remediation; Duty of Property Owner).

§295.316. Mold Remediation Company: Licensing Requirements.

(a) Licensing requirements. A person performing mold remediation work on or after January 1, 2005 must be licensed as a mold remediation company if the person employs one or more individuals required to be licensed under §295.314 of this title (relating to Mold Remediation Worker: Registration Requirements) or §295.315 of this title (relating to Mold Remediation Contractor: Licensing Requirements), except that an individual licensed as a mold remediation contractor and doing business as a sole proprietorship is not required to be separately licensed under this section.

(b) Authorization and conditions. A licensed mold remediation company is specifically authorized to employ mold remediation contractors and mold remediation workers who are currently licensed or registered under this subchapter to assist in the company's mold remediation activity. As a condition of licensure, a mold remediation company must:

(1) employ at least one licensed mold remediation contractor and refrain from mold remediation activity during any period without the active employment of at least one individual licensed mold remediation contractor designated as the responsible person for the company;

(2) notify the department in writing of any additions or deletions of responsible persons within 10 days of such occurrences;

(3) maintain general liability insurance, as described under §295.309 of this title (relating to Licensing: Insurance Requirements);

(4) notify the department in writing of any change related to a person who has an ownership interest of 10% or more (including additions to or deletions from any list of such persons previously supplied to the department and any changes in the names, addresses, or occupations of any persons on such a list) within 10 days of the change; and

(5) refrain from engaging in activity prohibited under §295.307(a) of this title (relating to Conflict of Interest and Disclosure Requirement).

(c) Fees. The fees for a mold remediation company license are:

(1) $500 for a one-year license issued before January 1, 2006; and

(2) $1,000 for a two-year license issued on or after January 1, 2005.

(d) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals). An applicant shall include the following in the application package:

(1) proof of compliance with the insurance requirement specified in §295.309 of this title;

(2) the name, address, and occupation of each person that has an ownership interest of 10% or more in the company; and

(3) the name and license number of each licensed mold remediation contractor designated by the applicant as a responsible person.

(e) Responsibilities. In addition to the requirements as listed in §295.306 of this title (relating to Credentials: General Responsibilities), the mold remediation company shall be responsible for:

(1) complying with recordkeeping requirements, at both central office and work site locations, as described in §295.326 of this title (relating to Recordkeeping);

(2) submitting the required notification to the department, as required under §295.325 of this title (relating to Notifications);

(3) providing to each client a mold remediation work plan project before the mold remediation begins;

(4) ensuring that all employees who will conduct mold remediation activities are provided with, fit tested for, and trained in the correct use of personal protection equipment required under §295.322 of this title (relating to Minimum Work Practices and Procedures for Mold Remediation);

(5) ensuring that the training, as described in §295.320 of this title (relating to Training: Required Mold Training Courses), and license of each employee who is required to be licensed under this subchapter is current;

(6) ensuring that the training, as described in §295.320 of this title, and registration of each registered employee is current;

(7) ensuring that each unregistered employee who is required to be registered under this subchapter is provided the training required under §295.320(d) of this title before performing any mold remediation work;

(8) complying with all requirements under §295.320(d) of this title if the company provides the training; and

(9) ensuring that a previously unregistered employee who is provided training as specified in paragraph (7) of this subsection:

(A) has applied to the department for registration before allowing that employee to perform any mold remediation work, except as provided under §295.314(e) of this title; and

(B) is registered before allowing that employee to perform any mold remediation work more than 30 days after the date of the training, in accordance with §295.314(e) of this title.

§295.317. Mold Analysis Laboratory: Licensing Requirements.

(a) Licensing requirement. A person other than an individual must be licensed in compliance with the provisions of this section to engage in activities listed under subsection (b) of this section on or after January 1, 2005. Branch offices that perform mold analysis must fulfill the same equipment and operational standards as the main office that has been licensed and must be accredited in accordance with subsection (c) of this section for the types of analysis they will be performing.

(b) Scope. A person licensed under this section is authorized to analyze samples collected during mold-related activities to:

(1) determine the presence, identity, or amount of mold present;

(2) provide any other information regarding the sample that the submitter requests; or

(3) obtain any other information that the laboratory deems useful.

(c) Qualifications. Applicants must submit documentation showing that:

(1) the laboratory is either:

(A) accredited by the American Industrial Hygiene Association under the Environmental Microbiology Laboratory Accreditation Program (EMLAP); or

(B) accredited or certified by a program deemed equivalent by the department; and

(2) mold analysis activity at the laboratory is overseen by a full-time mycologist or microbiologist with an advanced academic degree.

(d) Fees. The fees for a mold analysis laboratory license are:

(1) $500 for a one-year license issued before January 1, 2006; and

(2) $1,000 for a two-year license issued on or after January 1, 2005.

(e) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals). An applicant shall include the following in the application package:

(1) the name, address, and occupation of each person that has an ownership interest of 10% or more in the laboratory;

(2) evidence of laboratory accreditation and the most recently available results of proficiency analytical testing in accordance with subsection (c) of this section;

(3) proof of compliance with the insurance requirements specified in §295.309 of this title (relating to Licensing: Insurance Requirements); and

(4) the name of each individual designated by the applicant as a responsible person.

(f) Responsibilities. In addition to the requirements as listed in §295.306 of this title (relating to Credentials: General Responsibilities), the mold analysis laboratory shall be responsible for:

(1) following recordkeeping requirements as described in §295.326(d) of this title (relating to Recordkeeping);

(2) providing to a client, as applicable, details of analysis methods used, amounts (percentages) analyzed, raw counts for each genus of mold that is identified, magnification used for counting and identifying mold, and culture media and conditions used;

(3) ensuring that all employees who will conduct mold analysis are properly trained in analysis techniques;

(4) maintaining accreditation required under subsection (c) of this section. A licensed mold assessment laboratory that loses the required accreditation must:

(A) provide to the department written notification of a change in accreditation status within 10 working days of the change; and

(B) cease providing services related to the licensure until the accreditation is reinstated;

(5) notifying the department in writing of any additions or deletions of responsible persons within 10 days of such occurrences; and

(6) maintaining general liability insurance, as described in §295.309 of this title.

§295.318. Mold Training Provider: Accreditation.

(a) Accreditation requirement. A person must be accredited as a mold training provider to offer mold training courses that are prerequisites for licensing.

(b) Authorizations and Conditions. The following shall apply to issuance of accreditations under this section.

(1) No person shall advertise or offer as initial or refresher training courses, for fulfillment of requirements for licensing under this subchapter, any courses that the department has not approved under §295.319 of this title (relating to Training: Approval Of Training Courses and Instructors). Accredited training providers may offer, without department approval, mold remediation technician training courses and other courses relevant to mold-related activities, including, but not limited to, courses on respirator training and compliance.

(2) Accredited training providers must offer approved courses as described below.

(A) Each initial and refresher course shall address only one discipline and shall not be combined with other disciplines. Initial training courses shall not be combined with refresher courses. This prohibition against combined training applies to hands-on training sessions as well as other aspects of the course.

(B) Each course shall be conducted in one language throughout and not combined with the same course taught in another language. A training provider may offer a course in a language other than English if all instructors and guest speakers are fluent in that language and all books, training materials, and course tests are in that language.

(3) Each accredited training provider shall submit schedules for approved training courses to the department at least 14 calendar days prior to the start of any course on the schedule. Requests for exceptions to the 14-day rule shall be submitted in writing to the program administrator along with a written justification describing why the notice could not be submitted earlier. Approval requests for shorter notice must be received by the department 72 hours prior to the start of the course and will be granted in writing if approved. A training provider that cancels a scheduled course must notify the department in writing at least 24 hours prior to the scheduled start time of the course. The department will accept facsimiles of cancellation notices. If the training provider cannot provide written notice of cancellation at least 24 hours in advance, the training provider shall notify the department by phone not later than two hours after the scheduled class start time and provide a written explanation of the short cancellation notice within 24 hours of the phone call.

(4) Training courses must be conducted during scheduled hours as notified in accordance with paragraph (3) of this subsection. Training providers shall not conduct any approved course for more than eight training hours (including hands-on portions) in a calendar day.

(5) A training provider must require instructors and guest speakers to present in person at least 50% of the classroom instruction and all of the hands-on instruction. The training provider may allow an instructor or guest speaker to use training films and videotapes, but audiovisual materials shall not be used as substitutes for the required in-person presentations or the hands-on instruction.

(6) Courses requiring hands-on practical training must be presented in an environment that permits each student to have actual experience performing tasks associated with the mold-related activity.

(7) The maximum number of students in a lecture session shall be 40. Hands-on training sessions shall maintain a student-to-instructor ratio of not more than 15 to one and must be conducted so that the instructor is able to assist and evaluate each student individually. Field trips shall maintain a student-to-instructor ratio of not more than 40 to one.

(8) Approved training courses shall be conducted in facilities acceptable as classrooms and conducive to learning. The facilities must have restrooms available for the students.

(9) Course instructors shall maintain a master attendance record for each course and take attendance at the beginning of each four-hour instruction segment. A student who is absent from more than 10% of the course instruction, including hands-on sessions and field trips, is ineligible to complete the course.

(10) An accredited training provider must verify and keep a written record of any student achieving a minimum score of 70% correct on each course test. The training provider shall have a written policy concerning the administration of tests, including allowing only one re-test per student for each course. The use of the same questions for both the original and re-test is not allowed. Oral tests are not allowed; however, a training provider may read the written test questions and possible answers to a student who must then mark his or her answer on an answer sheet. If a student fails the re-test, the student must repeat the course and pass a new test.

(11) Each training provider shall send at least one course instructor to any meeting held by the department for the purpose of ensuring quality training. The department shall hold no more than two such meetings per year.

(12) An individual instructor shall not train himself/herself to qualify for a license or a registration.

(c) Qualification. To qualify for an accreditation, each applicant:

(1) must have a written policy concerning refunds and cancellations in all languages in which training is offered. The refund and cancellation policy must be made available to students prior to payment of fees and shall include the cancellation procedures;

(2) shall employ a mold training manager who:

(A) meets at least one of the following requirements:

(i) at least two years of experience, education, or training in teaching workers or adults;

(ii) a bachelor's or graduate degree in building construction technology, engineering, industrial hygiene, safety, public health, education, or business administration or program management; or

(iii) at least two years of experience in managing an occupational health and safety training program specializing in environmental hazards; and

(B) has demonstrated experience, education, or training in mold assessment or remediation, lead or asbestos abatement, occupational safety and health, or industrial hygiene;

(3) shall provide for each course a qualified principal instructor who meets the requirements under §295.319 of this title; and

(4) must develop and implement a plan to maintain and improve the quality of the training program. This plan shall contain at least the following elements:

(A) procedures for periodic revision of training materials and the course test to reflect innovations in the field; and

(B) procedures for the training manager's annual review of instructor competency.

(d) Fees. The fees for mold training provider accreditation are:

(1) $500 for a one-year accreditation issued before January 1, 2006; and

(2) $1,000 for a two-year accreditation issued on or after January 1, 2005.

(e) Applications and renewals. Applications shall be submitted as required by §295.308(a) of this title (relating to Credentials: Applications and Renewals). An applicant shall include:

(1) for an initial accreditation, at least one complete application for approval of a training course and at least one complete application for approval of an instructor, as described under §295.319 of this title;

(2) for a renewal accreditation, a list of all of the training provider's courses and instructors currently approved by the department; and

(3) a description of the training provider's organization, including the address of its central office, the names and business addresses of its principals, a statement of any affiliation with another mold-related company doing business in Texas, and a listing of the courses to be offered. The organization shall designate a staff member as the mold training manager who meets the qualifications of subsection (c)(2) of this section.

(f) Responsibilities. In addition to the requirements listed in §295.306 of this title (relating to Credentials: General Responsibilities), an accredited mold training provider shall be responsible for:

(1) confirming, before enrolling a student in a refresher training course, that the student has successfully completed a previous training course in the same discipline within 24 months;

(2) maintaining the hands-on skills assessment to ensure that it accurately evaluates student performance of the work practices and procedures associated with the course topics contained in §295.320 of this title (relating to Training: Required Mold Training Courses);

(3) maintaining the validity and integrity of the course test to ensure that it accurately evaluates the student's knowledge and retention of the course topics;

(4) furnishing appropriate equipment in good working order and in sufficient quantities for each training session in which equipment is required;

(5) presenting to students all course information and material approved by the department;

(6) at the conclusion of each training course, providing to each student who successfully completes the course and passes the required test:

(A) a course-completion certificate as described in §295.319(c)(8) of this title;

(B) a wallet-size photo-identification card, indicating the course completed, the effective date, and a number identifier for the student;

(C) a current one-inch square photo of the student's face on a white background taken during the course to be attached by the student to an application for licensing or registration; and

(D) a copy of the application and schedule for the state licensing examination;

(7) submitting to the department, within 10 working days of the completion date of each course:

(A) the names and number identifiers of each student who attended the course, on a form provided by the department;

(B) individual one-inch square photos of the face of each student on a white background taken during the course; and

(C) a group photo taken at the end of the course that identifies which students did and did not pass the course. Digital or scanned images will be accepted. The group photograph must be no smaller than a standard 3 1/2-inch by 4 1/4-inch print;

(8) documenting that each person who receives a certificate has successfully completed an initial course in accordance with §295.320 of this title (relating to Training: Required Mold Training Courses) and has achieved a passing score on the written test. The training provider must maintain a file for each course that includes the training course name, dates and discipline, a copy of the course test and each student's name and graded answer sheet, the date and location where the test was administered, the name of the test proctor, the names of students receiving certificates, the certificate numbers, and the expiration date of the training. All information from the training course and test must correspond to the information on each person's course-completion certificate. All records under this section shall be available for inspection by the department immediately upon conclusion of the course and the test; and

(9) complying with all requirements under §295.320(d) of this title if the company provides training to individuals seeking registration as mold remediation workers and maintaining copies of the required training documents at a central location at its Texas office.

(g) Inspections and audits. Training providers shall permit department representatives to attend, evaluate, and monitor any training course, without charge or advance notice, to ensure compliance with this subchapter. The following criteria are grounds for suspending or withdrawing training provider accreditations or instructor approvals under §295.330 of this title (relating to Compliance: Reprimand, Suspension, Revocation, Probation) or for assessing administrative penalties under §295.331 of this title (relating to Compliance: Administrative Penalty):

(1) failure to adhere to the training standards and requirements of this subchapter;

(2) misrepresentation of the extent of approval of a training course or instructor;

(3) falsification of records or submitting false information to the department;

(4) failure to submit required information in a timely manner; or

(5) failure to comply with these regulations in a manner that demonstrates a lack of ability, capacity or fitness to perform training duties and responsibilities.

§295.319. Training: Approval Of Training Courses and Instructors.

(a) General provisions. The department must approve all training courses and instructors in advance of the course being offered except as provided under §295.318(b)(1) of this title (relating to Mold Training Provider: Accreditation). Applications for approval of courses or instructors submitted with an application for initial accreditation under §295.318 of this title will be reviewed at the same time for no additional approval fee. Each application for course or instructor approval must be made on a separate application form.

(b) Fees. The application fee for approval of each initial or refresher training course is $100 per mold training course, except as provided in subsection (a) of this section. There is no separate application fee for approval of an instructor.

(c) Application for course approval. An application must be submitted to the department in writing. Within 30 working days after receiving an application, the department shall acknowledge receipt of the application and notify the applicant of any deficiency in the application. The department will approve or deny the application upon receipt of the complete application. A complete application for training course approval shall include:

(1) the training program provider's name, business address and telephone number;

(2) the discipline and type of course (initial or refresher) for which approval is being sought, including the course length in training hours;

(3) a detailed outline of each course curriculum including the specific topics taught, the amount of time allotted to each topic, the amount and type of hands-on training, and the name(s) and qualifications of the individual(s) teaching the instruction program for each topic;

(4) a description of the facilities and equipment available for lecture and hands-on training;

(5) a copy of the course test blueprint (written documentation of the proportion of test questions devoted to each major topic in the course);

(6) a copy of all course materials (student manuals, instructor notebooks, handouts, and other course-related materials) in all languages taught;

(7) the names and qualifications of all course instructors. Instructors must meet the requirements under subsection (e) of this section; and

(8) a description and example of the photo identification cards and course certificates to be issued to students. Each certificate must have a unique certificate number and must include:

(A) the school's name, address, and telephone number;

(B) the student's name;

(C) a statement that the student successfully completed the course and the name and dates of the training course completed;

(D) an expiration date two years after the date of course completion;

(E) the signature of the course instructor; and

(F) the signature of the course director or the principal officer, owner, or chief executive officer of the training provider.

(d) Changes to training courses. An accredited training provider must receive department approval for changes to any of the items in subsections (c)(2)-(9) of this section. Accredited training providers must submit requests in writing and shall not offer training courses incorporating any changes until the department has granted approval.

(e) Application for instructor approval. Only state-approved instructors are permitted to provide instruction in courses required under this subchapter, except that guest speakers are permitted to provide limited instruction as provided under subsection (f) of this section. A training provider shall submit for approval a resume or other documentation to show the qualifications of each instructor conducting mold training courses. The department must approve all instructors before they are permitted to provide instruction. The training provider will notify the department of additions and deletions to its instructor roster within 15 working days of actual occurrence. Department approval of an instructor or a guest speaker for a discipline applies to that discipline only and does not convey approval for any other disciplines.

(1) Instructor qualifications. Instructors shall be qualified in at least one of the categories in subparagraphs (A)-(D) of this paragraph. Instructor qualifications must be fully documented and verifiable by the department. The categories include:

(A) at least two years of actual hands-on experience in mold-related activities for the subject that the instructor will teach, and a high school diploma and completion of at least one teacher education course in vocational or industrial teaching;

(B) graduation from an accredited college or university with a bachelor's degree or advanced degree in natural or physical sciences or a related field, with one year's hands-on experience in mold-related activities;

(C) at least three years teaching experience and completion of one or more teacher education courses in vocational or industrial teaching from an accredited two or four year college; or

(D) a vocational teacher with certification from the Texas Education Agency with one year's hands-on experience in mold-related activities.

(2) Instructor training. Each instructor shall meet the training requirements under §295.305(e)(1)-(2) of this title (relating to Credentials: General Conditions) for each discipline in which the instructor seeks department approval to teach. Instructors are not required to be separately licensed or registered.

(3) Professional references. Each instructor application shall include three professional references attesting to teaching experience and mold-related qualifications of the applicant. No more than two references will be accepted from an applicant's current company. References must be submitted on a form provided by the department and must be mailed directly to the department by the author.

(4) Complete applications. The department shall consider only complete applications for instructor approval including sufficient, verifiable references.

(f) Guest speakers. Training providers may utilize guest speakers to present training who have documentable and verifiable professional expertise on the subject about which they are speaking. Training providers are not required to obtain department approval for guest speakers but must maintain proof of each guest speaker's qualifications as described under §295.326 of this title (relating to Recordkeeping).

(g) Suspension and revocation of approval. The following criteria are grounds for suspending or withdrawing approval from a training course or instructor under §295.330 of this title (relating to Compliance: Reprimand, Suspension, Revocation, Probation):

(1) failure of an instructor or guest speaker to adhere to the standards and requirements of this subchapter;

(2) failure of a training course, instructor, or guest speaker to provide training that meets the requirements of the department or this subchapter;

(3) falsification or misrepresentation by an instructor of his/her qualifications;

(4) submittal by an accredited training provider to the department of false information for training course or instructor approval;

(5) misrepresentation by an accredited training provider of the extent of a department approved training course or instructor; and

(6) violation by an approved training course instructor or a guest speaker of other mold-related activity regulations in a manner that indicates a lack of ability, capacity or fitness to perform training duties and responsibilities.

§295.320. Training: Required Mold Training Courses.

(a) General provisions. Individual applicants for licensing or renewal must submit evidence acceptable to the department of fulfillment of specific training requirements.

(b) Assessment technician training. The assessment technician course shall consist of at least 24 training hours that includes lectures, demonstrations, audio-visuals and hands-on training, course review, and a written test of 100 multiple-choice questions. The course requirements in paragraphs (3), (5)-(8), and (10) of this subsection require hands-on training as an integral part of the course. The assessment technician course shall include:

(1) sources of indoor mold and conditions necessary for indoor mold growth;

(2) potential health effects;

(3) workplace hazards and safety, including personal protective equipment, and respirators;

(4) technical and legal considerations for mold assessment, including applicable regulatory requirements, the role of the mold assessment technician, and the roles of other professionals (including an assessment consultant);

(5) performance of visual inspections where mold might be present and determining sources of moisture problems, including exterior spaces (including crawlspaces and attics), interior components (including windows, plumbing, walls, and ceilings) and heating, ventilation, and air-conditioning (HVAC) systems (including return air and supply ducts);

(6) utilization of physical measurement equipment and tools, including moisture meters, humidity meters, particle counters, data-logging equipment, and visual and robotic inspection equipment;

(7) biological sampling strategies and methodologies, including sampling locations and techniques, and minimizing cross-contamination;

(8) sampling methodologies, including bulk, surface (including tape, swab, and vacuum sampling), and air sampling (including the differences between culturable and particulate sampling, sampling times, calibrating pumps, selecting media for culturable samples, and sampling for fungal volatile organic compounds);

(9) state-of-the-art work practices and new technologies;

(10) proper documentation for reports, including field notes, measurement data, photographs, structural diagrams, and chain-of-custody forms;

(11) an overview of mold remediation projects and requirements, including containment and air filtration; and

(12) clearance testing and procedures, including review of mold remediation protocols, work plans, visual inspections, and sampling strategies.

(c) Assessment consultant training. The assessment consultant course shall consist of at least 40 training hours that includes lectures, demonstrations, audio-visuals and hands-on training, course review, and a written test of 100 multiple-choice questions. The assessment consultant course shall include:

(1) all topics listed under subsection (b) of this section, including appropriate hands-on activities;

(2) workplace safety, including development of respiratory protection plans and programs, workplace safety plans, and medical surveillance programs;

(3) technical and legal considerations for mold assessment, including applicable regulatory requirements, the role of the assessment consultant, the roles of other professionals, recordkeeping and notification requirements, insurance, and legal liabilities;

(4) an overview of building construction, building sciences, moisture control, and water intrusion events;

(5) prevention of indoor air quality problems, including avoiding design and construction defects and improving maintenance and housekeeping;

(6) basics of HVAC systems and their relationship to indoor air quality (including pyschrometrics, filtration, ventilation and humidity control), HVAC inspection and assessment, and remediation of HVAC systems;

(7) survey protocols for effective assessment, covering the areas described under subsection (b)(5)-(8) of this section;

(8) interpretation of data and sampling results;

(9) interviewing building occupants, minimum requirements for questionnaires, and interpreting results;

(10) writing mold management plans and mold remediation protocols, including format and contents (including structural components, HVAC systems, and building contents), defining affected areas (including floor plans), identifying and repairing moisture sources and their causes, developing a scope of work analysis, specifying containment and air filtration strategies, determining post-remediation assessment criteria, and clearance criteria;

(11) post-remediation clearance testing and procedures, including review of mold remediation plans, visual inspections, sampling strategies, and quality assurance; and

(12) case studies.

(d) Remediation worker training. Remediation worker training shall consist of at least four training hours that includes lectures, demonstrations, audio-visuals, and hands-on training. The training shall include all course information and material required under this subsection. An individual must successfully complete worker training and submit an application for registration as a mold remediation worker prior to performing any work on a mold remediation project.

(1) The training must be provided by either:

(A) the licensed mold remediation contractor or company employing the individual receiving the training; or

(B) a mold training provider accredited by the department.

(2) The principal instructor for the training must be either:

(A) a licensed mold remediation contractor; or

(B) an individual who is approved by the department under §295.319 of this title to teach mold-related courses.

(3) The training shall adequately address the following areas and shall include hands-on training in the areas described in subparagraphs (C) and (E)-(F) of this paragraph:

(A) sources of indoor mold and conditions necessary for indoor mold growth;

(B) potential health effects and symptoms from mold exposure;

(C) workplace hazards and safety, personal protective equipment including respirators, personal hygiene, personal decontamination, confined spaces, and water, structural, and electrical hazards;

(D) technical and legal considerations for mold remediation, including applicable regulatory requirements, the role of the worker, and the roles of other professionals;

(E) an overview of how mold remediation projects are conducted, including containment and air filtration; and

(F) work practices for removing, cleaning, and treating mold.

(4) The person providing the training shall submit to the department, within five working days of a training session:

(A) the following items, on a form provided by the department:

(i) the name, address, telephone number, and license number of the person listed under paragraph (1) of this subsection who provided the training;

(ii) the date of the training;

(iii) the printed name, address, telephone number, number identifier, and signature of each individual who attended the training; and

(iv) the printed name and signature of the principal instructor;

(B) a group photo, taken at the end of the training, that identifies each individual who attended the training. Digital or scanned images will be accepted. The group photograph must be no smaller than a standard 3 1/2-inch by 4 1/4-inch print; and

(C) a statement indicating which individuals successfully completed the training and which individuals did not.

(5) The person providing the training shall provide the following to each individual who successfully completes the training:

(A) a training certificate. Each certificate must include:

(i) the name, address, telephone number, and license number of the person listed under paragraph (1) of this subsection who provided the training;

(ii) the date of the training;

(iii) the name, address, telephone number and number identifier of the individual;

(iv) the printed name and signature of the principal instructor; and

(v) a statement that the individual successfully completed the training;

(B) a current one-inch square photo of the individual's face on a white background, taken during the course, to be attached by the individual to an application for registration; and

(C) a copy of the registration application.

(6) The person providing the training must maintain a file for each training session that includes the date, the certificate numbers, and the names, addresses, and telephone numbers of students receiving training certificates. All information from the training must correspond to the information on each certificate.

(e) Remediation contractor training. The remediation contractor course shall consist of at least 40 training hours that includes lectures, demonstrations, audio-visuals and hands-on training, course review, and a written test of 100 multiple-choice questions. The course requirements in paragraphs (3) and (7)-(8) of this subsection require hands-on training as an integral part of the training. The course shall adequately address:

(1) sources of indoor mold and conditions necessary for indoor mold growth;

(2) potential health effects;

(3) workplace hazards and safety, personal protective equipment including respirators, personal hygiene, personal decontamination, confined spaces, and water, structural, and electrical hazards;

(4) worker protection, including development of respiratory protection plans and programs, workplace safety plans, and medical surveillance programs;

(5) technical and legal considerations for mold remediation, including applicable regulatory requirements, the role of the mold remediation contractor, the role of the mold remediation worker, the roles of other professionals, insurance, legal liabilities, and recordkeeping and notification requirements;

(6) building sciences, moisture control, and water intrusion events;

(7) an overview of how mold remediation projects are conducted and requirements thereof, including containment, and air filtration;

(8) work practices for removing, cleaning, and treating mold, including state-of-the-art work practices and new technologies;

(9) development of a mold remediation work plan from a protocol, including writing the work plan, detailing remediation techniques for the building structure, HVAC system, and contents, delineating affected areas from floor plans, developing appropriate containment designs, determining HEPA air filtration requirements, and determining dehumidification requirements;

(10) clearance testing and procedures, including a review of typical clearance criteria, visual inspection of the work area prior to clearance, and achieving clearance;

(11) contract specifications, including estimating job costs from a protocol and determining insurance and liability issues; and

(12) protecting the public and building occupants from mold exposures.

(f) Refresher training. The refresher courses for mold assessment technicians, mold assessment consultants, and mold remediation contractors shall be at least eight training hours in length. Refresher training for mold remediation workers shall be at least four training hours in length and shall be provided by a person specified under subsection (d)(1) of this section. Refresher training shall include a review of state regulations, state-of-the-art developments, and key aspects of the initial training course. All disciplines shall receive refresher training every two years.

(g) Course tests. Each training provider shall administer a closed-book written test consisting of 100 multiple-choice questions to students who have completed an initial or refresher training course, except that no examination is required of students in remediation worker training. Training providers may include demonstration testing as part of the test. A student must answer correctly at least 70% of the questions to receive a course-completion certificate. Training providers shall use tests provided or approved by the department.

§295.321. Minimum Work Practices and Procedures for Mold Assessment.

(a) Purpose. The purpose of a mold assessment is to determine the sources, locations and extent of mold growth in a building, to determine the condition(s) that caused the mold growth, and to enable the consultant to prepare a mold remediation protocol.

(b) Building occupants. A mold assessment consultant shall consider whether to recommend to a client that, before remediation begins, the client should inform building occupants of mold-related activities that will disturb or will have the potential to disturb areas of mold contamination.

(c) Sampling and data collection. If samples for laboratory analysis are collected during the assessment:

(1) sampling must be performed according to nationally accepted methods;

(2) preservation methods shall be implemented for all samples where necessary;

(3) proper sample documentation, including the sampling method, the sample identification code, each location and material sampled, the date collected, the name of the person who collected the samples, and the project name or number must be recorded for each sample;

(4) proper chain of custody procedures must be used; and

(5) samples must be analyzed by a laboratory licensed under §295.317 of this title (relating to Mold Analysis Laboratory: Licensing Requirements).

(d) Mold remediation protocol. An assessment consultant shall prepare a mold remediation protocol for each project and provide the protocol to the client before the remediation begins. The mold remediation protocol must specify:

(1) the rooms or areas where the work will be performed;

(2) the estimated quantities of materials to be cleaned or removed;

(3) the proposed methods for each type of remediation in each type of area;

(4) the proposed types of containment to be used during the project in each type of area; and

(5) the proposed clearance procedures and criteria for each type of remediation in each type of area.

§295.322. Minimum Work Practices and Procedures for Mold Remediation.

(a) Scope. These general work practices are minimum requirements and do not constitute complete or sufficient specifications for a mold remediation project. More detailed requirements developed by a remediation contractor for a particular project shall take precedence over the provisions of this section.

(b) Remediation work plan. A remediation contractor shall prepare a mold remediation work plan based on a mold remediation protocol and shall provide the mold remediation work plan to the client before the mold remediation begins.

(c) Personal protective equipment (PPE) requirements. An employer shall provide PPE, including respirators, to all employees who engage in remediation activities who will, or are anticipated to, disturb or remove mold contamination. Each employee who is provided PPE must receive training on the appropriate use and care of the provided PPE. The employer must document successful completion of the training before the employee performs regulated activities.

(1) When the mold affects a total surface area of 25 to 100 contiguous square feet for the project, the required minimum PPE is an N-95 respirator, gloves, and goggles/eye protection.

(2) When the mold affects a total surface area of more than 100 contiguous square feet, the required minimum PPE is a full-face respirator with high-efficiency particulate air (HEPA) filter, gloves, disposable full body clothing, headgear, and foot coverings.

(d) Containment requirements. Containment must be used on a mold remediation project when the mold affects a total surface area of 25 contiguous square feet or more for the project. Containment is not required if no person who is not licensed or registered under this subchapter occupies the building in which the remediation takes place at any time between the start date and stop date for the project as specified on the notification required under §295.325 of this subchapter (relating to Notifications). The containment, when constructed as described in the remediation work plan and under normal conditions of use, must prevent the spread of mold to areas outside the containment. If walk-in containment is used, supply and return air vents must be blocked, and air pressure within the walk-in containment must be lower than the pressure in building areas adjacent to the containment.

(e) Warning signs. Warning signs advising that a mold remediation project is in progress shall be displayed at all entrances to remediation areas adjacent to occupied areas of a building.

(f) Removal of containment. No person shall remove or dismantle any walk-in containment structures or materials from a project site prior to receipt by the licensed mold remediation contractor or remediation company overseeing the project of a written notice from a licensed mold assessment consultant that the project has achieved clearance as described under §295.324 of this title (relating to Post-Remediation Assessment and Clearance).

(g) Biocides. Biocides may be used only if they are registered by the United States Environmental Protection Agency (EPA) for the intended use and if the use is consistent with the manufacturer's labeling instructions. A person who applies a biocide to wood to control a wood-infesting organism must be licensed by the Texas Structural Pest Control Board as provided under the Texas Occupations Code, Chapter 1951 (relating to Structural Pest Control) unless exempt under the Texas Occupations Code, Chapter 1951, Subchapter B (relating to Exemptions).

(h) Anti-microbial agents. Anti-microbial agents may be used only if they are registered by the EPA for the intended use and if the use is consistent with the manufacturer's labeling instructions. A decision by a consultant or contractor to use such products must take into account the potential for occupant sensitivities and possible adverse reactions to chemicals that have the potential to be off-gassed from surfaces coated with such products.

§295.323. Mold Remediation of Heating, Ventilation and Air Conditioning (HVAC) Systems.

(a) Disinfectants, biocides and antimicrobial coatings. A licensee under this subchapter may apply a disinfectant, biocide or antimicrobial coating in an HVAC system only if it is registered by the EPA for the intended use and if the use is consistent with the manufacturer's labeling instructions. The licensee shall apply the product only after the building owner or manager has been provided a material safety data sheet for the product, has agreed to the application, and has notified building occupants prior to the application. The licensee shall follow all manufacturer's label directions when using the product.

(b) Other license requirements. Persons who perform air conditioning and refrigeration contracting (including the repair, maintenance, service, or modification of equipment or a product in an environmental air conditioning system, a commercial refrigeration system, or a process cooling or heating system) must be licensed by the Texas Department of Licensing and Registration, as provided under the Texas Occupations Code, Chapter 1302 (relating to Air Conditioning and Refrigeration Contractors). A person who performs biomedical remediation as defined under 16 TAC, §75.10(5) (relating to Definitions) must be licensed by the Texas Department of Licensing and Regulation in accordance with 16 TAC, Chapter 75 (relating to Air Conditioning and Refrigeration Contractor License Law) unless exempt under 16 TAC, §75.30 (relating to Exemptions) or 16 TAC, §75.100 (relating to Technical Requirements).

§295.324. Post-Remediation Assessment and Clearance.

(a) Clearance criteria. For a remediation project to achieve clearance, a licensed mold assessment consultant shall conduct a post-remediation assessment to determine that:

(1) the work area is free from all visible mold and wood rot; and

(2) all work has been completed in compliance with the remediation protocol and remediation work plan and meets clearance criteria specified in the protocol.

(b) Moisture sources. Post-remediation assessment shall, to the extent feasible, verify that all moisture sources previously identified as causes of the mold that necessitated the remediation project have been corrected.

(c) Sampling within containment. If walk-in containment is used at a project site, the post-remediation assessment shall be conducted while the walk-in containment is in place. Any air filtration equipment must be deactivated for at least four hours prior to the post-remediation assessment.

(d) Analytical methods. The assessment consultant shall either use direct microscopic examination or shall use a swab, a tape lift, or an equivalent methodology to collect one representative sample within each remediated area in order to determine whether the remediation project passes clearance. Where visual inspection reveals visible mold, or other deficiencies sufficient to fail clearance, analytical sampling need not be conducted. For an acceptable clearance, the fungal structures (including hyphae and conidia) and spores present in a sample shall not exceed 30 counts per square inch of surface sampled.

(1) If all remediated material has been removed from a project or containment area and is not available to sample, an adjacent area shall be examined or sampled to confirm that contamination was not spread during the remediation.

(2) If direct microscopic examination is used, the consultant shall retain in the project file, for each field counted, a printed copy of a photograph of the field and a record of the area of the field, to confirm that the total number of fungal structures and spores counted for a sample did not exceed 30. Digital photographs are acceptable for purposes of this paragraph.

(e) Passed clearance report. An assessment consultant who determines that remediation has been successful shall issue a written passed clearance report to the client at the conclusion of each mold remediation project. The report must include the following:

(1) a description of relevant worksite observations;

(2) all data collected at the worksite including temperature, humidity, and material moisture readings;

(3) the type, location, and results of samples collected;

(4) copies of all photographs the consultant took, including copies of photographs from any direct microscopic examinations; and

(5) a clear statement that clearance has been achieved.

(f) Final status report. If the mold assessment consultant determines that remediation has not been successful and ceases to be involved with the project before the project achieves clearance, the consultant shall issue a written final status report to the client and to the remediation contractor or company performing the project. The status report must

include the items listed in subsection (e)(1)-(4) of this section and any conclusions that the consultant has drawn.

§295.325. Notifications.

(a) General provision. A contractor or company shall notify the department of a mold remediation project when mold contamination affects a total surface area of 25 contiguous square feet or more. Notification shall be received by the department no less than five working days (not calendar days) prior to the anticipated start date of the activity and shall be submitted by United States Postal Service, commercial delivery service, hand-delivery, electronic mail (E-mail), or facsimile on a form specified by the department. The form must be filled out completely and properly. Blanks that do not apply shall be marked "N/A". The designation of "N/A" will not be accepted for identification of the work site, building description, building owner, individuals required to be identified on the notification form, or start and stop dates. A signature of the responsible person is required on each notification form. The contractor or company shall retain a confirmation that the notification was received by the department.

(b) Start-date change to later date. When mold remediation activity begins later than the date contained in the notice, the department shall be notified by telephone as soon as possible but prior to the original start date. A written amended notification is required immediately following the telephone notification and shall be faxed or overnight mailed to the department.

(c) Start-date change to earlier date. When mold remediation activities begin on a date earlier than the date contained in the notice, the department shall be provided with written notice of the new start date at least five working days before the start of work unless the provisions of subsection (e) of this section apply. The licensee shall confirm that the notice is received five working days before the start of work.

(d) Start-date/stop-date (completion date) requirement. In no event shall mold remediation begin or be completed on a date other than the date contained in the written notice except for operations covered under subsection (e) of this section. Amendments to start date changes must be submitted as required in subsections (b) and (c) of this section. An amendment is required for any stop dates that change by more than one workday for each week (seven calendar day period). The contractor or company shall provide schedule changes to the department no less than 24 hours prior to the new stop date. Changes less than five days in advance shall be confirmed with the appropriate department regional office by telephone, facsimile, or e-mail and followed up in writing to the department's central office at 1100 West 49th Street, Austin, Texas, 78756.

(e) Provision for emergency. In an emergency, notification to the department shall be made as soon as practicable but not later than the following business day after the license holder identifies the emergency. Initial notification shall be made to the department's central office either immediately by telephone, followed by formal notification on the department's notification form, or immediately by facsimile on the department's notification form. The contractor or company shall retain a confirmation that the notification was received by the department. Emergencies shall be documented. An emergency exists if a delay in mold remediation services in response to a water damage occurrence would increase mold contamination.

(f) Notification fees.

(1) The contractor or company shall remit to the department a fee of $100 for each initial notification of a mold remediation project. Amendments to a notification shall not require a separate fee.

(2) The department shall send an invoice for the required fee to the contractor or company after the department has received the notification. Payment must be remitted in the manner instructed on the invoice no later than 60 working days following the date on the notification invoice. Failure to pay the required fee after an invoice has been sent is a violation, and the department may seek administrative penalties as listed in §295.331 of this title (relating to Compliance: Administrative Penalty).

§295.326. Recordkeeping.

(a) Record retention. Records and documents required by this section shall be retained for a period of three years from the date of project completion unless otherwise stated. Such records and documents shall be made available for inspection by the department or any law enforcement agency immediately upon request. Licensees and accredited training providers who cease to do business shall notify the department in writing 30 days prior to such event to advise how they will maintain all records during the minimum three-year retention period. The department, upon receipt of such notification and at its option, may provide instructions for how the records shall be maintained during the required retention period. A licensee or accredited person shall notify the department that it has complied with the department's instructions within 30 days of their receipt or make other arrangements approved by the department. Failure to comply may result in disciplinary action against individual licensees.

(b) Mold remediation companies and contractors. A licensed mold remediation company shall maintain the records listed in paragraphs (1) and (2) of this subsection for each mold remediation project performed by the company and the records listed in paragraph (3) of this subsection for each remediation worker training session provided by the company. A licensed mold remediation contractor not employed by a company shall personally maintain the records listed in paragraphs (1) and (2) of this subsection for each mold remediation project performed by the contractor and the records listed in paragraph (3) of this subsection for each remediation worker training session provided by the contractor.

(1) A licensed mold remediation contractor shall maintain the following records and documents on-site at a project for its duration:

(A) a current copy of the mold remediation work plan and all mold remediation protocols used in the preparation of the work plan; and

(B) a listing of the names and license/registration numbers of all individuals working on the remediation project.

(2) A licensed mold remediation company shall maintain the following records and documents at a central location at its Texas office for three years following the stop date of each project that the company performs. A licensed mold remediation contractor not employed by a company shall maintain the following records and documents at a central location at his or her Texas office for three years following the stop date of each project that the contractor performs:

(A) all records and documents listed in paragraph (1) of this subsection;

(B) photographs of the scene of the mold remediation taken before and after the remediation;

(C) the written contract between the mold remediation company or remediation contractor and the client, and any written contracts related to the mold remediation project between the company or contractor and any other party;

(D) all invoices issued regarding the mold remediation;

(E) copies of all regulatory agency correspondence concerning a mold-related activity, including letters, notices, citations received and notifications; and

(F) copies of all certificates of mold remediation issued by the company or contractor.

(3) A licensed mold remediation contractor or remediation company who trains employees to meet the requirements under §295.320(d) of this title (relating to Training: Required Mold Training Courses) shall maintain copies of the required training documents at a central location at its Texas office.

(c) Mold assessment companies and consultants.

(1) A licensed mold assessment company shall maintain the following records and documents at a central location at its Texas office for the time period required under paragraph (2) of this subsection for each project that the company performs. A licensed mold assessment consultant not employed by a company shall maintain the following records and documents at a central location at his or her Texas office for the time period required under paragraph (2) of this subsection for each project that the contractor performs:

(A) the name and mold certificate number of each of its employees who worked on the project and a description of each employee's involvement with the project;

(B) the written contract between the mold assessment company or consultant and the client;

(C) all invoices issued regarding the mold assessment;

(D) copies of all regulatory agency correspondence concerning a mold-related activity, including letters, notices, and citations received;

(E) copies of all laboratory reports and sample analyses;

(F) Copies of all photographs required under §295.324 of this title (relating to Post-Remediation Assessment and Clearance);

(G) copies of all mold assessment reports, mold management plans, and protocols and changes prepared as a result of mold assessment activities;

(H) copies of all final status reports issued by the company or consultant;

(I) copies of all passed clearance reports issued by the company or consultant; and

(J) copies of any signed certificates of mold remediation provided to a mold remediation company or contractor by the mold assessment company or consultant.

(2) For each project, a licensed mold assessment company or consultant shall maintain all the records listed in paragraph (1) of this subsection for:

(A) three years from the date of the mold assessment report, management plan, or remediation protocol, if the company or consultant performs only the initial assessment for the project;

(B) three years from the date of the final status report, if a final status report is issued; or

(C) three years from the date on the signed certificate of mold remediation, if a certificate of mold remediation is signed.

(d) Mold analysis laboratories. A licensed mold analysis laboratory shall maintain copies of the results, including the sample identification number, of all analyses performed as part of a mold assessment or mold remediation for three years from the date of the sample analysis.

(e) Training providers. Accredited training providers shall comply with the following record-keeping requirements. The training provider shall maintain the records in a manner that allows verification of the required information.

(1) Training course materials. An accredited training provider must retain one copy of each instructional aid used in classroom training, including student manuals, instructor notebooks and handouts for three years from the date last used.

(2) Training records. The training provider shall maintain records for at least three years from the date of the class in accordance with §295.318(f)(8) and (9) of this title (relating to Mold Training Provider: Accreditation).

(3) Courses, instructors and guest speakers. An accredited training provider must retain for at least three years copies of resumes or other documentation to prove the qualifications of all instructors and guest speakers and the course and instructor approval documents issued by the department. Records must accurately identify the instructors and guest speakers that taught each particular course for each date that a course is offered together with the course student roster.

§295.327. Photographs; Certificate of Mold Remediation; Duty of Property Owner.

(a) Not later than one week after completion of a mold remediation project, the licensed mold remediation contractor or company shall provide the property owner with copies of required photographs of the scene of the mold remediation taken before and after the remediation.

(b) Not later than the 10th day after the project stop date, the licensed mold remediation contractor or company shall provide a certificate of mold remediation to the property owner on a form adopted by the Texas Commissioner of Insurance. The certificate must include the following:

(1) a statement by a licensed mold assessment consultant (not the licensed mold remediator) that based on visual, procedural, and analytical evaluation, the mold contamination identified for the project has been remediated as outlined in the mold remediation protocol; and

(2) a statement on the certificate that the underlying cause of the mold has been remediated, if the licensed mold assessment consultant determines that the underlying cause of the mold has been remediated so that it is reasonably certain that the mold will not return from that same cause.

(c) Copies of the completed certificate shall be retained in the business files of the assessment consultant/company and the remediation contractor/company.

(d) If a property owner sells the property, the property owner shall provide to the buyer a copy of each remediation certificate that has been issued for the property under this section.

§295.328. Complaints.

A person who believes that any provision of the Act or this subchapter has been violated may file a written complaint with the department. The department shall conduct an investigation, including for an anonymous complaint if the complainant provides sufficient information.

§295.329. Compliance: Inspections and Investigations.

(a) The department may inspect or investigate the business practices of any persons involved with mold-related activity for compliance with this subchapter.

(b) A department representative, upon presenting a department identification card, shall have the right to enter at all reasonable times any area or environment, including but not limited to any containment area, building, construction site, storage or office area, or vehicle to

review records, to question any person, or to locate, identify, or assess areas of mold growth for the purpose of inspection and investigation for compliance with this subchapter.

(c) A department representative in pursuance of official duties is not required to notify or seek permission to conduct inspections or investigations. It is a violation for any person to interfere with, deny, or delay an inspection or investigation conducted by a department representative. A department representative shall not be impeded or refused entry in the course of official duties by reason of any regulatory or contractual specification.

§295.330. Compliance: Reprimand, Suspension, Revocation, Probation.

(a) After notice of the opportunity for a hearing in accordance with subsection (d) of this section, the department may take any of the disciplinary actions outlined in subsection (c) of this section. If the department suspends a credential on an emergency basis, the department shall provide an opportunity for a hearing in accordance with subsection (d) of this section within 20 days.

(b) A person who is denied a credential for failure to meet the qualifications under this subchapter is ineligible to reapply until all qualifications are met. A suspension shall be for a period of not more than two years. A person whose application or credential has been revoked shall be ineligible to reapply for any mold-related credential for up to three years.

(c) The department may issue an administrative penalty as described in §295.331 of this title (relating to Compliance: Administrative Penalty), deny an application, suspend, suspend on an emergency basis, suspend with probationary terms, or revoke a credential of a person who:

(1) fails to comply with this subchapter;

(2) has fraudulently or deceptively obtained or attempted to obtain the credential, ID card or approval, including engaging in misconduct or dishonesty during the state licensing examination, such as cheating or having another person take or attempt to take the examination for that person;

(3) duplicates or allows another person to duplicate a credential, ID card or approval;

(4) uses a credential issued to another person or allows any other person to use a credential, ID card or approval not issued to that other person;

(5) falsifies records for mold-related activities that the department requires the person to create, submit, or maintain;

(6) is convicted of a felony or misdemeanor arising from mold-related activity.

(d) The contested-case hearing provisions of the Administrative Procedure Act (Texas Government Code, Chapter 2001) and the formal hearing procedures of the department in Chapter 1 of this title (relating to the Board of Health) shall apply to any enforcement action under this section. A person charged with a violation shall be notified of the alleged violation, the grounds upon which any disciplinary action is based, the proposed penalty, and the opportunity to request a hearing.

§295.331. Compliance: Administrative Penalty.

(a) If a person violates the Act, this subchapter or an order, the department may assess an administrative penalty.

(b) The penalty shall not exceed $5,000 per violation except as indicated. Each day a violation continues will be considered a separate violation for violations listed in subsection (d)(1)(A)-(B) and (d)(2)(A)-(B) of this section. The department may reduce or enhance penalties as warranted.

(c) In assessing administrative penalties, including reductions or enhancements, the department shall consider:

(1) whether the violation was committed knowingly, intentionally, or fraudulently;

(2) the seriousness of the violation;

(3) any hazard created to the public health and safety;

(4) the person's history of previous violations; and

(5) any other matter that justice may require, including demonstrated good faith.

(d) Violations shall be placed in one of the following severity levels.

(1) Critical violation. Severity Level I violations have or may have a direct negative impact on public health and safety. This category includes fraud and misrepresentation. The penalty for a Level I violation may be up to $5,000 per violation. Violations listed in subparagraphs (A) and (B) of this paragraph may be assessed at up to $5,000 per violation per day. Examples include but are not limited to:

(A) working without a valid credential, ID card or approval or with a credential or ID card that has been expired for more than one month;

(B) engaging in a conflict of interest as described in §295.307(a)(1)-(2) of this title (relating to Conflict of Interest);

(C) engaging in misconduct or dishonesty during the state licensing examination;

(D) submitting a forged or altered training certificate;

(E) offering training required under this subchapter without valid department approval of the course, instructor(s) or guest speaker(s); and

(F) providing training certificates for a course required by the department to persons who have not successfully completed the course.

(2) Serious violation. Severity Level II violations could compromise public health and safety. The maximum penalty for Level II violations is $2,500 per violation. Violations listed in subparagraphs (A) and (B) of this paragraph may be assessed at up to $2,500 per violation per day. Examples include but are not limited to:

(A) working with a credential or ID card that has been expired for one month or less;

(B) failing to disclose an ownership interest as required in §295.307(b) of this title;

(C) failing to submit a timely notification;

(D) failure to conduct a training course as specified under §295.320 of this title (relating to Training: Required Mold Training Courses); and

(E) failure of a credentialed person to maintain current required training.

(3) Significant violation. Severity Level III violations, while not having a direct negative impact on health and safety, could lead to more serious circumstances. The maximum penalty for Level III violations is $1,000 per violation. Examples include but are not limited to:

(A) failure to provide the department Consumer Mold Information Sheet as required under §295.306 of this title (relating to Credentials: General Responsibilities);

(B) failure to have a department-issued identification card at a job site;

(C) submitting an incorrect or improper notification;

(D) failure of a training provider to submit information to the department regarding training course schedules or to notify the department of cancellations within the specified time periods;

(E) failure of a training provider to submit course completion information within the time period specified in §295.319(f)(7) of this title (relating to Mold Training Provider: Accreditation);

(F) failure of a remediation company, remediation contractor, or training provider to submit worker training information within the time period specified in §295.320(d) of this title (relating to Mold Training Provider: Accreditation); and

(G) failure of a training provider to maintain the required trainee-instructor ratio in a training course.

§295.332. Compliance: Exception to the Administrative Penalty.

(a) The commissioner may choose not to impose an administrative penalty under §295.331 of this title (relating to Compliance: Administrative Penalty) if, not later than the 10th day after the date on a written notice of a violation as provided under §295.333 of this title (relating to Compliance: Notice; Opportunity for Hearing; Order), the person charged with the violation provides conclusive evidence satisfactory to the department that the circumstances giving rise to the violation have been corrected and all actual damages are paid.

(b) This section does not apply to a violation alleged under:

(1) the Texas Occupations Code, Chapter 1958, §1958.101 (relating to License Required; Rules);

(2) §295.305(a)-(b) of this title (relating to Credentials: General Conditions);

(3) the Texas Occupations Code, Chapter 1958, §1958.155 (relating to Conflict of Interest; Disclosure Required); or

(4) §295.307 of this title (relating to Conflict of Interest and Disclosure Requirement).

§295.333. Compliance: Notice; Opportunity for Hearing; Order.

(a) The commissioner shall impose an administrative penalty under this subchapter only after a person is given written notice of the opportunity for a hearing conducted in accordance with the Administrative Procedure Act (Texas Government Code, Chapter 2001) and the department's formal hearing procedures in Chapter 1 of this title (relating to the Board of Health).

(b) The written notice of violation must state the facts that constitute the alleged violation, the law or rule that has been violated, the proposed penalty, and the opportunity for a hearing.

(c) If a hearing is held, the commissioner shall make findings of fact and issue a written decision as to the occurrence of the violation and the amount of any penalty that is warranted.

(d) If a person fails to exercise the opportunity for a hearing, the commissioner, after determining that a violation occurred and the amount of penalty warranted, is authorized to impose a penalty and issue an order requiring the person to pay.

(e) Not later than the 30th day after the date the commissioner issues an order, the commissioner shall inform the person of the amount of any penalty imposed.

(f) The commissioner is authorized to consolidate a hearing under this section with another proceeding.

§295.334. Compliance: Options Following Administrative Order.

(a) Not later than the 30th day after the date the commissioner's decision or order concerning an administrative penalty assessed under §295.331 of this title (relating to Compliance: Administrative Penalty) becomes final as provided by the Texas Government Code, Chapter 2001, §2001.144, (relating Decisions; When Final) to the person against whom the penalty is assessed either shall pay the administrative penalty or shall file a petition for judicial review.

(b) A person who files a petition for judicial review can stay enforcement of the penalty either by paying the penalty to the commissioner for placement in an escrow account or by giving the commissioner a bond, in a form approved by the commissioner, that is for the amount of the penalty and that is effective until judicial review of the commissioner's decision or order is final.

§295.335. Compliance: Collection of Administrative Penalty; Judicial Review.

(a) At the request of the commissioner, the Texas Attorney General is authorized to bring a civil action to recover an administrative penalty imposed under §295.331 of this title (relating to Compliance: Administrative Penalty).

(b) Judicial review of a decision or order of the commissioner imposing a penalty is instituted by filing a petition with a district court in Travis County and is under the substantial evidence rule as provided by the Texas Government Code, Chapter 2001, Subchapter G (relating to Contested Cases: Judicial Review).

(c) If, after judicial review, the administrative penalty is reduced or is not upheld by the court, not later than the 30th day after the date of the determination, the commissioner shall:

(1) remit the appropriate amount, plus accrued interest, to a person who paid the penalty as provided under §295.334 of this title (relating to Compliance: Options Following Administrative Order); or

(2) execute a release of a bond provided under §295.334(b) of this title to the person who gave the bond.

§295.336. Compliance: Civil Penalty.

A person who violates the Act or this subchapter is liable for a civil penalty in an amount not to exceed $2,000 for the first violation or $10,000 for a second or later violation. The commissioner may request the Texas Attorney General or the district, county, or city attorney having jurisdiction to bring an action to collect a civil penalty under this section.

§295.337. Compliance: Injunctive Relief.

The commissioner may request the Texas Attorney General or the district, county, or city attorney having jurisdiction to bring an action for a restraining order, injunction, or other relief the court determines is appropriate if it appears to the department that a person is violating or has violated the Act or this subchapter.

§295.338. Civil Liability Exemption for Certain Property Owners or Governmental Entities.

(a) A property owner is not liable for damages related to mold remediation on a property if a certificate of mold remediation has been issued under §295.327 of this title (relating to Photographs; Certificate of Mold Remediation; Duty of Property Owner) for that property and the damages accrued on or before the date of the issuance of the certificate.

(b) A person is not liable in a civil lawsuit for damages related to a decision to allow occupancy of a property after mold remediation has been performed on the property if a certificate of mold remediation has been issued §295.327 of this title for the property, the property is owned

or occupied by a governmental entity, including a school, and the decision was made by the owner, the occupier, or any person authorized by the owner or occupier to make 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 January 16, 2004.

TRD-200400344
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 405. CLIENT (PATIENT) CARE

SUBCHAPTER H. BEHAVIOR MANAGEMENT - FACILITIES SERVING PERSONS WITH MENTAL RETARDATION

25 TAC §§405.156 - 405.169

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

The Texas Department of Mental Health and Mental Retardation (department) proposes the repeal of §§405.156-405.169 of Chapter 405, Subchapter H, governing behavior management - facilities serving persons with mental retardation.

The subject matter of the subchapter proposed for repeal is addressed in two new subchapters proposed in the January 23, 2004, issue of the *Texas Register*. The repeal of the existing subchapter and the proposal of two new subchapters is in response to recent and considerable interest at the federal and state levels by legislators and advocate/stakeholder groups, and by Texas and national media in the use of restraint in all institutional settings.

Proposed new §§415.401-415.413 of new Chapter 415, Subchapter I, governing behavior therapy in state mental retardation facilities describes policies and procedures that a state mental retardation facility (state MR facility) must implement to ensure that the health, safety, welfare, rights, and privileges of an individual are protected when a behavior therapy program is recommended by the individual's interdisciplinary team (IDT) to address inappropriate behavior exhibited by the individual.

Proposed new §§415.351-415.366 of new Chapter 415, Subchapter H, governing the use of restraint in state mental retardation facilities, describes policies and procedures that a state mental retardation facility (state MR facility) must implement to ensure that the health, safety, welfare, rights, and privileges of an individual residing in the state MR facility are protected during the use of restraint.

Cindy Brown, chief financial officer, has determined that for each year of the first five year period that the proposed repeal of the subchapter is in effect, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state government. It is not anticipated that the proposed repeal will have an adverse economic effect on small businesses or micro-businesses. It is not anticipated that there will be any additional economic cost to persons required to comply with the proposed repeal. It is not anticipated that the proposed repeal will affect a local economy.

Robert Kifowit, director, State Mental Retardation Facilities, has determined that, for each year of the first five-year period the proposed repeal is in effect, the public benefit expected is that rules describing dated policies and procedures for the use of restraint and behavior therapy programs in state mental retardation facilitates are replaced by rules that effectively protect the health, safety, welfare, rights, and privileges of an individual residing in a state MR facility.

Comments concerning the proposed repeal must be submitted in writing to Linda Logan, director, Policy Development, by mail to P.O. Box 12668, Austin, Texas 78711, by fax to 512/206-4744, or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The repeal is proposed under the Texas Health and Safety Code (THSC), §532.015(a), which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority; THSC, §591.004, which requires the board to ensure the implementation of the Persons with Mental Retardation Act (THSC, Title 7, Subtitle D); and THSC, §592.002, which requires the board to ensure the implementation of certain rights enumerated in THSC, Chapter 592.

The proposed repeals affect THSC, Title 7, Subtitle D, and Chapter 592.

§405.156. Purpose.
§405.157. Application.
§405.158. Definitions.
§405.159. General Principles Regarding Behavior Management.
§405.160. Plan for Behavioral Services.
§405.161. Facility Behavioral Services Director; Facility Behavior Intervention Committee.
§405.162. Initiation and Approval of Behavior Intervention Programs.
§405.163. Informed Consent.
§405.164. Use of Physical Restraint; Use of Protective Restraint; Use of Mechanical Restraint.
§405.165. Staff Training in Behavior Management.
§405.166. Enforcement.
§405.167. Exhibits.
§405.168. References.
§405.169. Distribution.

This 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 January 15, 2004.

TRD-200400253
Rodolfo Arredondo
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 206-5232

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 106. PERMITS BY RULE

The Texas Commission on Environmental Quality (commission) proposes the repeal of §§106.5, 106.201 - 106.203, 106.491, 106.493, 106.496, and 106.533. The commission also proposes an amendment to §106.50 and new §§106.491, 106.496, and 106.533. Repealed §106.5 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed rules are intended to more effectively focus commission resources, streamline the air quality permit by rule (PBR) process, update administrative and technical requirements for certain PBRs, and address unnecessary registration and fee requirements. Where applicable, the proposed rules also incorporate, or are consistent with, state and federal air, waste, and remediation laws. The proposed rules: 1) eliminate the concrete batch plant PBR and corresponding public notice requirements; these requirements and authorizations are no longer necessary, since the standard permit for concrete batch plants was issued September 1, 2000, and all outstanding concrete batch plant registrations under Chapter 106 have been resolved; 2) reduce the PBR registration fee for nonprofit organizations and provide for the non-applicability of fees for reviews associated with the remediation of sites; 3) eliminate the single-chambered incinerator PBR to prevent inappropriate control devices from being installed at grandfathered facilities; 4) improve flexibility for law enforcement agencies that are currently precluded from using PBRs to incinerate confiscated illegal drug evidence and clarify technical requirements; 5) minimize registration requirements, establish a notification procedure, and update technical requirements in the current PBR for trench burners and aboveground air curtain incinerators; and 6) provide for a rapid authorization mechanism for remediation projects at gasoline stations and dry cleaning facilities and establish technical requirements for all facilities performing remediation activities.

SECTION BY SECTION DISCUSSION

Subchapter A - General Requirements

The commission proposes to repeal §106.5, Public Notice, as this section concerns public notice for concrete batch plants permitted under Chapter 106, and with the creation of the concrete batch plant standard permit and the repeal of the concrete batch plant permits by rule (§§106.201 - 106.203), this section is no longer needed. The public notice requirements in §106.5 had been maintained to assure that proper procedures were followed for concrete batch plant PBR registrations received prior to the effective date of the standard permit. At this time, the commission has resolved all of those outstanding authorization requests; therefore, maintenance of this section is no longer needed. This change is not connected to Senate Bill 1272, 78th Legislature, 2003.

Subchapter B - Registration Fees for New Permits by Rule

Proposed amendments to §106.50, Registration Fees for Permits by Rule, would make the fee exceptions consistent with other current laws and rules and add certain entities to the lower fee category. Proposed new subsection (a)(1)(B) adds nonprofit organizations to those who must only submit $100 for a PBR registration review. The commission is proposing this change because nonprofit organizations have limited resources and a higher fee could be detrimental to their continued operation.

Proposed subsection (b) would facilitate the appropriate exceptions from PBR fees. Proposed subsection (b)(1) specifies that the fee does not apply to a certification submitted solely for the purpose of federally enforceable limit certifications. The current wording and requirements of paragraph (1) have raised many questions and caused mis-filings by the regulated community. This clarification is intended to resolve this confusion.

Certifications to establish enforceable emission type and quantity are accepted without a fee only for facilities that have previously claimed a standard exemption or PBR. These facilities must be currently operating without modification under an applicable standard exemption or PBR and meet all Chapter 106 requirements. This certification should not be confused with a registration for construction or modification through Form PI-7, Registration for Permit by Rule.

Proposed amendments to subsection (b)(2) would broaden coverage to all remediation projects under PBR. As a part of the commission's encouragement to clean up and remediate contaminated soil and water throughout the state, these activities are exempted from fee requirements. This exception is consistent with several state and federal programs and laws, including: 1) the commission's petroleum storage tank (PST) program which remediates and reimburses certain clean-up projects; 2) superfund and voluntary clean-up programs under Texas Health and Safety Code, §361.196 and §361.611, that exempt facilities from obtaining a permit, but require them to achieve compliance with all emissions and control requirements; and 3) the dry cleaning facility remediation program under Texas Health and Safety Code, Chapter 374, as created by House Bill 1366, 78th Legislature, 2003. The portion of remediation projects that are not part of any of the previously mentioned programs is estimated to be a small portion (less than 30%) of all remediation PBR registrations (typically registered under §106.533). It is the commission's intent to further encourage cleanup of soil and water throughout Texas and exempt all facilities claiming registration under §106.533 from paying a registration fee.

Finally, new subsection (b)(3) would specify that additional fees are not required for resubmittals of PBRs due to insufficient information or updates to recently submitted PBR registrations. This exception to additional fee submittal, which allows submittals within six months of a written commission response to the initial registration without additional fees, is consistent with other air permit fees and 30 TAC §116.114, Application Review Schedule.

Subchapter H - Concrete Batch Plants

The commission proposes to repeal Subchapter H, §106.201, Permanent and Temporary Concrete Batch Plants; §106.202, Temporary Concrete Batch Plants; and §106.203, Specialty Batch Plants; as these sections are obsolete and no longer necessary due to the issuance of the Concrete Batch Plant Standard Permit (September 1, 2000), in accordance with §116.602, Issuance of Standard Permits. The public notice section in §106.5 had been maintained to assure that proper procedures were followed for concrete batch plant PBR registrations received prior to the effective date of the standard permit. At this time, the commission has resolved all of those outstanding authorization requests; therefore, maintenance of these sections is no longer needed. This change is not related to Senate Bill 1272, 78th Legislature, 2003.

Subchapter V - Thermal Control Devices

Existing §106.491, Dual Chamber Incinerators, is proposed to be repealed and replaced with a new section due to reorganization and reformatting of the administrative and technical requirements of this PBR. A new §106.491 is proposed for better readability.

Proposed new §106.491, Dual-Chamber Incinerators, would address several streamlining issues, ensure that the dual chamber incinerator PBR is protective of public health and welfare, and be a usable tool for the regulated community. As with all PBRs, this proposal is not intended to cover all possible scenarios and facility operations, but it only addresses the most common and typical equipment expected to be available in the field. Any particular facility that does not meet the PBR general or specific conditions may apply for a case-by-case air permit under Chapter 116.

Proposed new §106.491 includes updates to the technical requirements regarding emission releases and parameters, as well as the identification of additional uses for this authorization mechanism. These changes would provide additional flexibility to the regulated community by expanding the scope of this PBR to allow, as needed, the destruction of commonly confiscated illegal drug evidence. This PBR was also evaluated for consistency with other waste regulations of the EPA and commission, and it also references appropriate federal air standards. The PBR would eliminate the need for certain operators to obtain an additional waste authorization under 30 TAC §330.51, Permit Application for Municipal Solid Waste Facilities. Finally, the new section would specify the minimum necessary compliance demonstration actions and records that are needed for practical enforceability.

Proposed new §106.491(a) would expand the scope of this PBR and allow the burning of illegal drugs confiscated by federal, state, or local law enforcement agencies. This would allow law enforcement agencies to directly own and operate an incinerator, or subcontract with third parties, to allow for the secure disposal of evidence. The reason this expansion is important is to allow law enforcement agencies the opportunity to minimize current disposal costs while still complying with applicable air regulatory standards. At this time, all of these customers are required to obtain a case-by-case new source review air quality permit or use third-party off-site vendors with hazardous waste incinerator permits. When off-site vendors are used, the evidence must be accompanied by numerous officers, resulting in a significant cost ultimately to the taxpayers.

Proposed new §106.491(b) would identify all of the general and specific design requirements for incinerators under this PBR, including temperature, residence time, and burn rate. All of these technical limits are consistent with the previous version of this PBR. Unlike the previous version of this PBR, this proposal would include: 1) a requirement that the incinerator be equipped with a continuous exhaust temperature monitor to establish a practicably enforceable compliance demonstration mechanism since a constant and minimum temperature is essential to the proper performance of this type of incinerator; 2) corresponding record-keeping requirements for this monitor; and 3) a requirement that registration claims specifically address the appropriate charge capacity of a given model of incinerator and the material types and amounts that are intended to be burned. This information is essential to determine if the model and design are appropriate and will likely meet emission standards for the intended use as each registration claim is reviewed by the commission.

Subsection (b) would also specify the minimum height of the incinerator stack to ensure effective emission dispersion and specify a minimum distance to a property line for acceptable air contaminant impacts. The stack height was based upon a review of past registrations, typical incinerator designs, and modeling results. Air dispersion models are tools used to estimate the downwind concentration of pollutants emitted by various pollution sources. The commission currently uses the Industrial Source Complex model, which is the EPA's preferred model for the new source review program. The model's predictions are conservative, based on the general assumptions used to develop the model as well as the engineering assumptions used to determine emission rates. In addition, it is generally assumed that all sources emit pollutants simultaneously at maximum rates, and during worst-case meteorological conditions. These assumptions are not expected to occur in actual operation of the sources modeled. The modeling results for this PBR evaluation indicated that impacts were very sensitive to downwash. Building downwash is an important function of estimating dispersion of emissions and predicting impacts. Buildings induce aerodynamic turbulence that can cause a pollutant emitted from a stack that is on or adjacent to the building to be mixed rapidly toward the ground (downwash), resulting in higher ground-level concentrations near the building than would otherwise occur. The downwash effect can be minimized by increasing stack height or parameters that affect plume rise, or by locating stacks away from the building.

Based on a health effects evaluation of speciated inhalable particulate matter using effects screening levels (ESLs) for the materials that are allowed to be burned (as identified in §106.491(c)(1)), and as predicted by the dispersion model, the appropriate distance limitation should be 200 feet from the point of air emissions (stack) to the property line. To ensure that all typical plant layouts would be covered by this evaluation, the commission reviewed multiple plant layouts including stand-alone units, stacks located in the center point of a structure, and stacks located on and near various structures to determine an appropriate distance with or without downwash effects. This evaluation resulted in a worst-case representative maximum ground level concentration that met all protectiveness guidelines at 200 feet from the source. No other changes are proposed for the design requirements of these facilities.

Proposed subsection (c) would outline the operational limitations of all incinerators under this PBR. This PBR would continue to authorize the disposal of waste materials generated on-site, including paper, wood, cardboard cartons, rags, garbage (animal and vegetable wastes as defined in 30 TAC §101.1(36), Garbage), and combustible floor sweepings. The commission is proposing to update the limitations on materials processed

by the incinerator by prohibiting polyvinyl chloride plastics to ensure compliance with state regulatory limits for hydrogen chloride as specified in 30 TAC §111.121(a)(2), Single-, Dual-, and Multiple-Chamber Incinerators. The commission is also prohibiting materials that contain fluorides in order to meet effects screening level guidelines. Based on limited information from law enforcement agencies, drug evidence is usually separated from any packaging, including materials containing polyvinyl chloride and fluoride plastics, prior to destruction. This subsection also specifically identifies and limits the types of drugs that law enforcement agencies can incinerate to marijuana, cocaine, opiates, and methamphetamines.

Proposed subsection (c)(2) would establish burn rates and emission limits for the various drugs that are allowed for destruction, including: 1) cocaine, opiates, and methamphetamines with a burn rate of no more than four pounds per hour (lb/hr) and ten pounds in any eight-hour period with emissions limited to less than 0.04 lb/hr for each of these compounds; and 2) marijuana with a 500 lb/hr burn rate and emissions limited to no more than one lb/hr of total inhalable particulate matter (PM_{10}). This emission limit classifies all particulate matter as the active ingredient tetrahydrocannibinol (THC), which is characterized as a dust or fume and not a gas. All of the proposed emission limits were based upon a comprehensive review, engineering judgment, standard emission estimation techniques, modeling, and ESL comparisons. Based upon existing PBR registrations, most incinerators using this PBR operate at 200 lb/hr of waste; however, law enforcement agencies typically would burn at maximum capacity. Therefore, the use of 500 lb/hr as the feed rate would represent the worst-case scenario. The emission rates for all contaminants were calculated using, when available, standard emission factors from *Compilation of Air Pollutant Emission Factors*, AP-42, Fifth Edition (when available), typical burn rates, the standard heat contents of the waste, and typical operating hours. The stack parameters were based upon typical incinerator designs used in previous PBR registrations. The proposal includes conservative emission limits since the commission does not have manufacturers' guarantees or field confirmation/emissions sampling results for drug destruction.

Proposed subsection (c)(3) limits the supplemental fuel and covers all other products of combustion emissions. All expected air emissions were evaluated for compliance with applicable state and federal air quality standards and guidelines. Products of combustion (sulfur dioxide (SO_2), nitrogen oxides (NO_x), and carbon monoxide (CO)) were conservatively estimated using a maximum amount of fuel, and their quantities and concentrations met all applicable standards.

The pollutants of concern for this PBR are those derived from the destruction of the particular waste material being burned, consisting of speciated PM_{10} or volatile organic compounds (VOC). Due to the proposed focus of this rulemaking, each confiscated drug was reviewed for potential air emissions and associated impact. Marijuana emission rates were based upon the assumptions of a 20% THC and 10% cannabinol content and a 99% destruction rate efficiency. Drugs emission rates were based on the assumptions of 100% individual constituent content and a 99% destruction rate efficiency (DRE).

Subsection (c)(4) would require that the manufacturer's recommended operating instructions be posted at the incinerator and would require that the unit be operated in accordance with these instructions. These requirements have not changed from the previous version of this PBR. Finally, subsection (c)(5) would limit opacity from the incinerator stack to 5% averaged over any six-minute period as determined by EPA Test Method (TM) 9 to establish a practicably enforceable compliance demonstration mechanism. This easy-to-determine compliance demonstration is used since minimal visible emissions should occur if the incinerator is properly operated. This opacity limit constitutes a reasonable measure of best available control technology standards of the air permits program.

Proposed §106.491(d) would identify all compliance and administrative requirements for these facilities. Specifically, §106.491(d)(1) would require that each incinerator be registered prior to construction by submitting a PI-7 Form, Registration of Permit by Rule, and supporting documentation. This registration will be processed and reviewed by the Air Permits Division and an acceptance or insufficient information response will be sent to each applicant. Subsection (d)(2) would also include a streamlining measure for the commission to minimize duplication of separate media authorizations. If registered under this PBR, facilities will not be required to obtain a separate and distinct authorization under §330.51. The commission will update and modify §330.4, Permit Required, in a future rulemaking to be consistent with this streamlining measure.

Proposed §106.491(d)(3)(A) would require a compliance demonstration when destroying confiscated drugs only. To provide flexibility and the opportunity for law enforcement to combine resources and save money, this requirement is limited to at least one sample for each model of incinerator under worst-case operational and sampling conditions. If the owner or operator of an incinerator can demonstrate that previous stack sampling (properly conducted and commission-approved) on the same model showed compliance with the speciated emission limits of this PBR, that approved report will be sufficient to demonstrate compliance and a stack test will not be required on an individual basis.

Proposed §106.491(d)(3)(B) would identify potential emission compliance demonstration, sampling, monitoring, or other requirements if the facility is subject to 40 Code of Federal Regulations (CFR) Part 60, New Source Performance Standards (NSPS), Subpart CCCC, Standards of Performance for Commercial and Industrial Solid Waste Incineration Units, for which construction is commenced after November 30, 1999 or for which modification or reconstruction is commenced on or after June 1, 2000, or 40 CFR Part 60, Subpart DDDD, Emission Guidelines and Compliance Times for Commercial and Industrial Solid Waste Incinerator Units, that commenced construction on or after November 30, 1999. Additionally, §106.491(d)(3)(C) references the state requirements for compliance demonstrations with particulate matter standards of §111.121 and §111.125, Single-, Dual-, and Multiple-Chamber Incinerators; and Testing Requirements. As with all compliance demonstrations, sampling and monitoring of facility performance and emission rates are the responsibility of the owner or operator of the facility. The commission evaluated emissions of criteria pollutants from typical combustion control devices and determined that the national ambient air quality standards (NAAQS) would be met. Therefore, the commission did not include rule language to require additional protectiveness demonstrations from products of combustion from the fuel (NO_2, SO_2, CO, and VOC).

Proposed §106.491(d)(4) would require proper installation, calibration, and monitoring of the incinerator temperature on a continuous basis. This monitoring is needed to demonstrate a constant minimum temperature of 1,400 degrees Fahrenheit, which is required to ensure a sufficient DRE. If the facility is subject to an NSPS subpart, additional monitoring, sampling, and recordkeeping is required in accordance with federal regulations which vary by type of waste materials burned, along with the construction date of the incinerator.

Proposed §106.491(d)(5) would identify the minimum record retention requirements of the commission to ensure practical enforceability of this PBR. Records must include the type and amount of waste burned; fuel usage amount and type (including sulfur content for fuel oil); monitoring and testing results; hours of operation; and routine maintenance of abatement systems sufficient to demonstrate that each of the requirements previously listed are met. Such records shall be retained for a minimum rolling two-year period and comply with §106.8.

The commission proposes to repeal §106.493, Direct Flame Incinerators, as this authorization mechanism is now inappropriate due to other changes in state statutes and regulations. Specifically, this PBR was originally adopted as Standard Exemption (SE) Number 88 (effective July 15, 1988) to allow grandfathered facilities to add thermal control devices and achieve some measure of air pollution abatement. At the time of its adoption, the SE met all air quality emission control efficiency and impact guidelines. However, on May 23, 2001, the commission issued §116.617, Standard Permits for Pollution Control Projects, (effective June 1, 2001) to authorize air emission abatement equipment additions at grandfathered or permitted facilities. This standard permit was intended to provide a consistent and timely mechanism for any abatement device installation not otherwise required by a permit or PBR review. At the time, §106.493 was not repealed and remained an available authorization mechanism for certain control projects at grandfathered facilities. More recently, the 76th through the 78th Legislatures passed several statutes regarding permitting (and associated air pollution control targets) for existing grandfathered facilities. Section 106.493 may conflict with these subsequent authorizations or requirements for grandfathered facility emission controls, including consideration of potential emission impacts and additional retrofit costs that may need to be incurred by the regulated community if this authorization mechanism remains available.

Existing §106.496, Trench Burners, is proposed to be repealed and replaced with a new section due to reorganization and reformatting of the administrative and technical requirements of this PBR. These formatting changes are proposed for better customer understanding and readability.

The proposal would address several streamlining issues and would ensure that the PBR for trench burners minimizes nuisance potential and is a usable tool for the regulated community. As with all PBRs, this proposal is not intended to cover all possible scenarios and facility operations, but only addresses the most common and typical equipment expected to be available in the field. Any particular facility that does not meet the PBR general or specific conditions may apply for a case-by-case air permit. The proposed rulemaking would update the technical requirements regarding materials, emission releases, and equipment parameters; expand the scope of the PBR to include aboveground units; and eliminate unnecessary registration for relocations of portable facilities. Finally, §106.496 would specify the minimum necessary compliance demonstrations and records needed for practical enforceability.

The commission proposes new §106.496, Air Curtain Incinerators. Proposed §106.496(a) would encourage recycling of materials, including those covered under this PBR and refers to 30 TAC §332.8, Air Quality Requirements, for composting, mulching, or other processing to produce useable materials. This new subsection would further outline the purpose of this PBR to cover air curtain incinerators (ACIs) or trench burners, which are devices used primarily to burn trees and brush from land-clearing operations or right-of-way maintenance. These units are also used to minimize material sent to landfills, such as flood debris cleanup. This PBR is limited to certain specified materials, including trees, clean lumber, and brush. The sites and operations that may use this PBR include only the infrequent burning of materials from land-clearing, right-of-way maintenance, emergency clean-up operations, noncommercial industrial sites, and, in limited instances, municipal solid waste sites.

New §106.496(a) would also expand the scope of this PBR to allow both traditional trenches equipped with fan manifolds to circulate combustion air and new aboveground units that have equivalent parameters. The proposed title of this section, Air Curtain Incinerators, is the term that is commonly used to describe facilities of this type and matches the EPA NSPS nomenclature for these facility types.

Proposed new §106.496(b) would define the common terms and scope used for this PBR. These terms include: "air curtain incinerator (ACI)," "clean lumber," "emergency cleanup," "land-clearing," "municipal solid waste sites," "noncommercial industrial sites," and "site."

The primary use of this PBR is to authorize devices used to burn trees and brush from land-clearing operations before construction can start. In limited cases, similar materials are collected and destroyed by local governments and private contractors. The air pollutant of greatest concern is total suspended particulate matter and the related potential nuisance that these facilities may cause, if not operated properly. In order to accurately estimate the particulate matter emissions, the commission staff reviewed four major federal publications: *Compilation of Air Pollutant Emissions Factors*, Fifth Edition, AP-42 February 17, 2003; *Evaluation of Emissions from the Open Burning Of Land-Clearing Debris*, Lutes, Christopher C. and Kariher, Peter H., EPA, EPA/600/SR-96/128, January 1997; *Development of Emissions Inventory Methods for Wildland Fires*, Battyre, William and Battyre, Rebecca, EPA Research Triangle Park, N.C. 27711, Final Report, February 2002, EPA Contract No. 68-D-98-046, Work Assign 5-03; and *Commercial and Industrial Solid Waste Incineration Units* from the December 1, 2000 issue of the *Federal Register* (65 FR 232). Using factors that considered both flaming and smoldering circumstances, the commission estimated particulate matter emissions from combustion. Empirical studies, as well as two site visits with portable particulate monitors, were relied upon to develop representative emission rates and a corresponding modeled impact analysis. The equivalent emission factor used for this analysis was 14.0 pounds PM_{10} per ton of material burned. After review of all available information, the commission determined that nuisance should be minimized to the greatest extent possible, and the particulate matter emissions will meet all regulatory standards if the facilities are operated within certain limitations.

Proposed new §106.496(c) would include limitations and requirements for locating and operating an ACI. The ACI must be operated at least 300 feet from the closest property line and any other facility with an air permit authorization under §116.110, Applicability. This buffer zone is needed under most representative situations to ensure that the concentration of particulate matter will meet state regulations under §111.155, Ground Level Concentrations, as well as minimize the potential for nuisance smoke or ash dust during intermittent periods of start-up and shutdown. The proposed PBR also includes a limitation on the size of the trench or the box, correlating to a maximum material throughput used in emission estimates and impact analysis, as well as matching typical units observed in the field. The dimensions proposed for trenches (35-foot fan manifold) and boxes (35-foot box) correlate to the maximum material throughput reviewed for this PBR (approximately seven tons per hour). Larger facilities may not meet the general emission limits of PBRs or particulate matter regulatory concentration limits. In addition, to ensure less than 25.0 tons per year particulate matter and meet the general limit for PBRs as specified in §106.4(a)(1), facilities may operate up to a maximum of 500 hours per rolling 12-month period. After review of all currently available information, the commission determined that the nuisance potential will be minimized and the particulate matter emissions will meet all regulatory standards if the ACIs are operated within the recommended operating requirements and limitations. However, the commission is seeking any additional empirical information on the particulate matter and PM_{10} emission rates and factors for ACI facilities.

The proposed PBR would include operational limits for both portable and permanent ACIs in §106.496(c)(2)(B). Both types may operate only infrequently for consistency with state and federal waste regulations. Temporary facilities, usually private entities performing land-clearing and development preparation, may not be located at a site for more than 180 consecutive calendar days, and must be removed from the site within a week of ceasing operation.

Permanent facilities may be authorized under this PBR if categorized as a municipal solid waste or noncommercial industrial site. A municipal solid waste site is a site that accepts on- or off-site generated solid waste for disposal or processing. This PBR would cover municipalities or local governmental entities using these facilities for right-of-way brush maintenance or emergency clean-up operations as needed on a periodic basis at a centralized site or at collection locations. This PBR would also cover other industrial manufacturing sites i.e., cardboard, sawmills, pallet manufacturers, that need to occasionally burn on-site generated brush, wood, or lumber. These industrial sites must be noncommercial, as limited by Chapter 330, and burn only on-site generated waste that results from the processing or manufacturing of products. This definition does not include industrial sites that accept off-site generated waste for disposal or destruction. This PBR is not intended to cover commercial industrial waste sites or other uses of ACIs. Due to state and federal regulatory limitations and pending EPA guidance, these types of facilities should apply for an air permit as well as applicable waste permit(s).

Proposed subsection (c)(3) would limit the daily operation of ACIs. Operation of ACIs under this PBR are limited to daylight hours when atmospheric dispersion conditions are the best. All ACIs must not begin operation earlier than one hour after sunrise, and burning must be completed on the same day not later than one hour before sunset. Material must not be added to the ACI in such a manner as to be stacked above the air curtain, and the ACI blower must remain on until enough material is consumed so that any remaining material in the trench will not cause smoke that exceeds the requirements of this section when the blower is turned off. Additionally, an operator must remain with the ACI at all times when it is operating, including when the blower is off and until all smoldering and smoke ceases. Material not being worked and material being stockpiled to be burned at a later date must be kept at least 75 feet from the trench to prevent unintentional fires. The commission determined that the nuisance potential will be minimized by adherence to these operating requirements and limitations.

Proposed new §106.496(c)(4) would prohibit visible emissions from ACIs, stockpiles, work areas, and in-plant roads associated with the facility from leaving the property for a period exceeding 30 seconds in any six-minute period as determined by EPA TM 22. This visible emissions method was chosen because it does not require annual opacity observer certification, is an easy method for operators to use to ensure compliance with air quality, and prevents nuisance conditions. Best management practices must also be used to ensure that the ACI blower is operated in a manner that would minimize smoke and prevent ash from becoming airborne.

The commission evaluated emissions of criteria pollutants from these combustion devices and determined that the NAAQS would be met. After review, particulate matter emissions were determined to be the pollutant of greatest concern. All other emissions of the products of combustion were determined to meet all applicable standards. Therefore, the commission did not include rule language to require additional protectiveness demonstrations from NO_2, SO_2, and CO.

Proposed new §106.496(c)(5) would note that authorization under this PBR covers all emissions from products of combustion.

Proposed new §106.496(c)(6) would require that, upon notification by a representative of the commission or any local air pollution control program having jurisdiction that the ACI is not complying with the conditions of this section, additional material must not be added to the ACI until the facility returns to compliance. This immediate response is necessary to resolve a potential nuisance condition as soon as possible upon notification by a delegated representative of the commission that a problem may exist.

Proposed new §106.496(d) would contain the requirements specific to ACI operations using a trench and air manifold system. The proposed PBR limits trench dimensions at all times to not more than 12 feet in width, 35 feet in length, and no less than ten feet in depth. These dimensions are included instead of the material throughput (tons per hour) in the current PBR. Due to the nature of these facilities, it is impractical for operators to demonstrate compliance with this throughput limit through detailed records. Instead, the commission evaluated the maximum trench size equivalent to a throughput of approximately seven tons per hour of material, upon which emission estimates and impacts analysis were based. These dimensions should also ensure that the combustion of the materials within the trench is maintained. The length of the trench must not exceed the length of the air blower manifold and the walls of the trench must be maintained such that they remain sufficiently vertical to maintain the air curtain, facilitating proper combustion. Also, this subsection allows ash to be left in the trench after removal of the ACI from the burn site, but the trench must be completely filled with

noncombustible material and covered with soil. These requirements, which represent best management practices, are specified to ensure proper combustion, minimize smoke and dust, and prevent fire hazards.

Proposed new §106.496(e) would include the requirements for ACIs using a manufactured aboveground fire box and blower system. To ensure proper design and operation, the proposed PBR would require that the interior dimensions of the firebox not exceed eight feet in width and 35 feet in length and be no less than six feet in depth, matching the equivalent throughput of materials. The length of the air blower manifold must be approximately equal to the length of the burning area, thus ensuring proper combustion. Also, the walls of the ACI must be maintained such that they remain sufficiently vertical to maintain the air curtain and the combustion of the materials within the ACI. These requirements, which represent best management practices, are specified to ensure proper combustion, minimize smoke and dust, and prevent fire hazards.

Proposed new §106.496(f) would include the requirements for handling and disposal of the ash generated as a result of the operation of an ACI. The ash must be removed from the ACI during burning as necessary to maintain efficient combustion, and must be done in such a manner as to minimize the ash becoming airborne. All material removed from the ACI must be completely extinguished before being disposed of or placed in contact with combustible material, and must be stored in a manner that does not constitute a fire hazard or allow the material to smolder or burn outside of the ACI. The ash generated from an ACI operated under this section must be disposed of by a specified method. If the ash is buried on-site, the ash must be deed recorded and a copy of the document must be provided to the executive director as required by §330.7, Deed Recordation. The ash may also be sent to a Type I landfill, if no hot coals are present and the ash is transported in a manner to prevent it from becoming airborne. Additionally, the ash may be beneficially used if the use is determined to be acceptable by the executive director in accordance with §330.8, Notification Requirements. These requirements, which represent best management practices, are specified to minimize dust and meet state waste regulatory requirements.

Proposed new §106.496(g) would identify additional ACI requirements. Paragraphs (1) - (3) cover associated air-related requirements. This PBR does not exempt ACIs from any local government regulations or other local government requirements, permits, registrations, or other authorizations. ACIs are also not exempt from compliance with any additional state air regulations, such as 30 TAC Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter; or 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds. Since some permanent ACIs are allowed under this PBR, 40 CFR Part 60, Subpart CCCC, Standards of Performance for Commercial and Industrial Solid Waste Incineration Units, for which construction is commenced after November 30, 1999 or for which modification or reconstruction is commenced on or after June 1, 2000, might apply, along with associated opacity readings, reporting, and recordkeeping.

Proposed new §106.496(g)(4) lists the most likely applicable waste permitting requirements. ACIs located at a landfill require separate authorization by the executive director in accordance with §330.4, Permit Required, due to unique state and federal waste laws for landfills, including a review for methane generation and migration for fire safety concerns. Subsection (g)(4) also requires that below-ground ACIs or trench burners at a municipal solid waste landfill be located in undisturbed soil not previously excavated, built up, or compacted to ensure that cross-contamination does not occur. For ACIs not located at a landfill, to minimize duplicative paperwork within the commission, compliance with this PBR will serve as a commission authorization to store, process, remove, or dispose of the ash resulting from the operation of ACIs as required by §330.4(a) since the materials authorized to be burned under this section, and the resulting ash from ACIs, are categorized as municipal solid waste as defined in §330.2, Definitions.

Proposed new §106.496(g)(5) would note that nothing in this PBR removes the responsibility of the owner or operator from obtaining any necessary authorization in accordance with 30 TAC Chapter 308, Criteria and Standards for the National Pollutant Discharge Elimination System.

Proposed new §106.496(h) would include administrative provisions for the operation of an ACI under this section. To minimize the number of registrations and associated fees, multiple ACI locations for a single facility at a given site may be combined into a single registration if all operating restrictions and distance limits are met. This subsection would also address registration and notification requirements. ACIs must be initially registered with the executive director using the Core Data Form and Form PI-7. Registration reviews will include a site approval by the regional office and a compliance history evaluation in accordance with 30 TAC Chapter 60, Compliance History. The owner or operator of a portable ACI that has previously been registered with the executive director and is being relocated to a new site other than a landfill, must notify the appropriate regional office and any local air pollution control agency having jurisdiction over the site. Notifications must be in writing using the Regional Standard Permit/Permit by Rule Relocation Form, include a return receipt, and be received by the regional office at least 14 calendar days prior to relocating to a site. Notifications are not subject to the requirements of §106.50 or Chapter 60. Re-registration would also be required for all ACIs when any notice of enforcement is issued by the commission to the owner or operator of an ACI facility or every five years, whichever occurs first. Additionally, to provide fast response to local circumstances, registration is not required for any ACI used for emergency clean-up operations, except for the 14-day prior notice requirement; however, the owner or operator must meet the notification requirements of the PBR.

Proposed new §106.496(h)(4) would include recordkeeping requirements to demonstrate compliance with this section and §106.8. These requirements ensure practicably enforceable mechanisms for demonstrating compliance. The ACI must be equipped with a run time meter, and a written record or log of the hours of operation of the ACI must be maintained at the site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. This run time record or log must be organized such that compliance with the requirements of this section can be readily determined. Records must be kept to demonstrate compliance with all operational or location requirements of this section. These records must include a copy of the return receipt demonstrating notification to the appropriate regional office and local air pollution control programs having jurisdiction and plot plans showing that distance limits are met. A copy of the PBR and any operating instructions must be kept at the burn site and made available at the request of personnel from the commission or any local air pollution control program having jurisdiction. Finally, to ensure that the correct facility is registered and

tracked throughout its lifetime in the State of Texas, the ACI must be clearly identified by having the regulated entity number or account number clearly visible in permanent ink or paint, or etched on the fan manifold or aboveground unit.

Subchapter X - Waste Processes and Remediation

Existing §106.533, Water and Soil Remediation, is proposed to be repealed and replaced with a new section which would reorganize and reformat the administrative and technical requirements of this PBR. These formatting changes are proposed for better customer understanding and readability.

Proposed new §106.533, Remediation, would authorize equipment that is used to reclaim or destroy chemicals that are removed from contaminated groundwater, water condensate in tank and pipeline systems, or soil. The purpose of this proposal is to address several streamlining issues and ensure that the stationary air contaminant sources associated with remediation projects have a usable PBR while ensuring protection of public health and welfare. The commission proposes updates to the technical requirements regarding emission releases and parameters. This PBR was also evaluated for consistency with other commission regulations for remediation. This proposal would specify the minimum compliance demonstration actions and records needed for practical enforceability. As with all PBRs, this proposal is not intended to cover all possible scenarios and facility operations, but only addresses the most common and typical equipment expected to be available in the field. Any particular facility that does not meet the PBR general or specific conditions may apply for a case-by-case air permit.

Proposed new §106.533 would be consistent with other related commission permitting programs and ensures that all stationary sources of air contaminants are covered in a single authorization.

Proposed new §106.533(b) would outline, in a concise format, the common terms and scope used for air authorizations associated with remediation projects to be consistent with air and remediation laws and rules. The scope of remediation facilities and activities covered under this PBR are outlined, as well as the boundaries of a site and affected property; off-site receptor; and scope of petroleum and dry cleaning compound contamination; all common terms over which questions and issues often arise during the review of these projects. This proposed subsection also defines ESLs that are used to determine acceptable emission releases for some remediation sites. The ESLs are used by the commission to evaluate the potential for effects to occur as a result of exposure to concentrations of constituents in the air. ESL updates, which are published periodically, were last revised October 1, 2003. The ESLs are based on data concerning health effects, odor nuisance potential, effects with respect to vegetation, and corrosion effects. The ESLs are not ambient air standards. If predicted or measured airborne levels of a constituent do not exceed the screening level, adverse health or welfare effects would not be expected to result. If ambient levels of constituents in air exceed the screening levels, it does not necessarily indicate a problem, but rather, triggers a more in-depth review, as would be performed under a regular air quality permit. In defining remediation for purposes of this PBR, the commission proposes clarification that this authorization covers pilot tests as well as treatment. These terms make it clear that the scope of this PBR is limited, and does not cover containment of emergency spills that are under the jurisdiction of the Railroad Commission of Texas, Texas General Land Office, EPA, or the commission. These upset conditions, with regard to the air emissions resulting from containment and immediate emergency response/treatment, are covered under the commission's air quality general rules and requirements in Chapter 101. Immediate emergency containment and removal usually occurs as soon as the spill is identified to prevent further contamination of soil or water and is typically completed within 72 hours. However, if emergency treatment is not specified by the initial governing agency, such as the Railroad Commission of Texas, the EPA, or commission, or non-emergency treatment is needed, once a facility is constructed or installed at a site, a commission air authorization is required in accordance with Texas Health and Safety Code, §382.0518; and §116.110. For those remediation facilities and activities that have insignificant air contaminant emissions, the use of this PBR is an authorization option.

Proposed new §106.533(c) would outline general requirements and limitations for the use of this PBR. The use of this PBR is limited to the location of the original soil or water contamination, and is not intended to cover the operation of a commercial or municipal collection site which may have very complex types and quantities of emissions. These larger commercial or municipal facilities are encouraged to obtain a flexible air quality permit under Chapter 116.

This subsection would also list the general equipment technical requirements for facilities with air contaminants, including elevated vents, visible emissions restrictions, nuisance prevention, best management practices, appropriate air pollution abatement equipment, and coordination with the commission's PST remediation and PST reimbursement programs. All of these limitations ensure minimization of pollutants that may be released into the atmosphere, proper dispersion, and appropriate and effective controls as well as consistency with requirements of applicable state and federal remediation programs. In particular, the visible emissions limitations are included to prevent contribution of dust emissions to the ambient air in unnecessary quantities, prevent potential nuisance conditions, and meet the particulate matter emission standards of §111.155 and the NAAQS. It is recognized that facility operators can only be responsible for best management practices for materials disturbed during remediation and not other facilities at the site, or off-site generated PM emissions.

A set of seven most probable scenarios for the cleanup of petroleum fuels, typical oil and gas materials, and dry cleaning compounds based on the various control options was developed and modeled to calculate predicted ground level concentrations at the minimum receptor distances. The modeling results were compared with the screening levels for benzene, gasoline, diesel fuel, crude oils, natural gas condensates, and several common dry cleaning compounds. All of these compounds meet state guidelines and standards as listed in the proposed rules. To ensure that all emissions from the remediation are authorized, the proposed rules include emission limits during pilot testing as well as treatment. Owners and operators are expected to reasonably anticipate needed control devices during pilot tests and use this equipment during these activities to minimize emissions and meet PBR limits. Where applicable, most commission remediation programs require these controls to be used during the pilot tests. The overall emission limits were evaluated for all listed control devices, as well as uncontrolled fugitive releases. Remediation activities such as land-farming and bio-remediation are considered to be uncontrolled. The commission evaluated emissions of criteria pollutants from typical combustion control devices and determined that the NAAQS would be met. Therefore, the commission did not include rule language to require

additional protectiveness demonstrations from products of combustion from the fuel (NO_2, SO_2, CO).

Proposed new §106.533(d) would outline the requirements specific to sites contaminated with petroleum compounds. These sites include fuel dispensing locations, usually gas stations, and are almost always associated with remediation projects processed by the PST program and often reimbursed by the commission. It also includes fuel transfer stations for diesel locomotives and aircraft fueling. Subsection (d) also covers other petroleum-contaminated sites, such as tank farms, transfer stations, oil and gas production facilities, and affected property along pipelines. To ensure protection of public health and welfare, air emissions are limited to very small amounts. The proposed PBR was evaluated for impacts of gasoline, diesel, and kerosene-based aviation fuels, as well as common pipeline compounds, with specific emphasis on the potential benzene portion of these materials. Emissions are limited to values at or below their respective ESL guidelines. This subsection would propose to limit emissions in two circumstances: 1) for locations with an off-site receptor within 100 feet (a common occurrence); and 2) for locations with a receptor at 100 feet or beyond. In the case of less than 100 feet, an impacts evaluation determined that controls are preferred. When controlled, total petroleum hydrocarbon and benzene emissions should be one lb/hr and 0.1 lb/hr or less, respectively. In the case of non-fuel dispensing sites, petroleum liquids could contain a substantial amount of sulfur, so in these cases, hydrogen sulfide emissions are also limited to 0.1 lb/hr. In the case of uncontrolled remediation, the impacts evaluation showed that dispersion was less and emissions should be further limited to approximately 10% of the values in the controlled scenario. When located at least 100 feet from off-property structures, emissions may be greater for certain compounds in accordance with the conditions of 106.262. Since §106.262 does not have a specific listing for petroleum compounds, total petroleum hydrocarbons are limited to one lb/hr based on the impacts evaluation performed by the commission. All other specific air contaminants may have proportionally greater emissions based on the distance to the nearest off-property receptor as outlined in 106.262. This general PBR is often used as a reference for speciated air contaminant emission limits instead of repeating these stipulations in each PBR. Finally, this subsection also reminds owners and operators of the unique sampling and testing requirements under the PST remediation and PST reimbursement program.

Proposed new §106.533(e) would list the requirements specific to sites contaminated with dry cleaning compounds. These sites are usually a result of small commercial enterprises with nearby businesses and off-site receptors. The 78th Legislature, 2003, passed House Bill 1366 to facilitate the cleanup of dry cleaning sites. Although these proposed rules are not a direct result of this legislation, the commission has attempted to be consistent with its intent in this PBR. The statute is being codified and implemented by the commission in a separate rulemaking. To allow for administrative flexibility and minimize paperwork, these proposed rules note that additional technical and administrative requirements for the remediation of dry cleaning sites may be found in Texas Health and Safety Code, §§374.001 - 374.253.

To ensure protection of public health and welfare, air emissions associated with dry cleaning sites are limited to very small amounts. Since these locations are frequently located within 100 feet of an off-site receptor, the impacts evaluation reviewed the most common compounds found at dry cleaning sites. The proposed PBR limits emissions for these compounds to rates consistent with the general PBRs for speciated compounds for all distances, and matches the evaluation methods described for petroleum sites. For locations with an off-site receptor within 100 feet (a common occurrence), an impacts evaluation determined that controls are preferred. When controlled, the proposed PBR includes limits consistent with §106.261 and §106.262, and a maximum emission limit of 0.04 lb/hr or the limit in §106.261 or §106.262, whichever is larger. In the case of uncontrolled remediation, the impacts evaluation showed that dispersion was less and emissions should be further limited to approximately 10% of the values in the controlled scenario, with a maximum limit of 0.04 lb/hr of any air contaminant or the limit in §106.261 or §106.262, whichever is larger. In any case, the emission limit will not be required to be less than 0.04 lb/hr. Since many of the compounds used by dry cleaners in the past contained chlorinated compounds, thermal control devices (that would result in hydrochloric acid emissions) are not allowed, and only carbon absorption systems were evaluated and included in the proposal.

Proposed new §106.533(f) would list the requirements for all other remediation projects. The contamination at these sites can vary widely and result in both organic and inorganic air emissions. Each site under this PBR will have unique types and concentrations of air contaminants, and the emissions control devices may also vary widely. To ensure protection of public health, the technical requirements of paragraph (1) are limited by the conditions of the most stringent of §106.261, §106.262, or lower values for some compounds not currently addressed by these PBRs. Based on the impacts evaluation performed for this PBR and consistent with impacts evaluation guidelines for air permitting, the commission determined that compounds with an ESL of 2 micrograms per cubic meter ($\mu g/m^3$) or less should have emissions less than or equal to 0.01 lb/hr and if the ESL is between 2 and 100 $\mu g/m^3$, emissions may be allowed up to 0.04 lb/hr. In any case, the emission limit will not be required to be less than 0.01 or 0.04 lb/hr, respectively. Based on the overall emission limits for individual air contaminants in §106.262, the proposed PBR has a maximum potential release of five tons per year of emissions. Paragraph (3) also requires a minimum distance of 100 feet to the nearest off-property structure to ensure acceptable impacts, as noted in the requirements of §106.261 and §106.262. As noted in paragraph (2), if a control device is used to achieve these emission limits, it should be properly operated and compliance demonstrated in accordance with subsection (g) of this PBR.

Proposed new §106.533(g) would cover all of the abatement devices and systems typically used at remediation projects. This list has been expanded from the available options in §106.533. The specified control devices include: 1) direct-flame combustion device (incinerator, furnace, boiler, heater, or other enclosed direct-flame device); 2) flare; 3) catalytic oxidizer; 4) internal combustion engine; and 5) carbon adsorption system (CAS). Each device listed has three different categories of requirements: design; operation; and compliance demonstrations. Most compliance testing requirements are required by other commission programs (PST, etc.), and have been coordinated with those programs to minimize duplicative and redundant requirements. When using catalytic oxidizers, internal combustion engines, and CAS devices, initial sampling is required within two hours of facility startup. This compliance demonstration is required to ensure that the abatement systems are operating within expected parameters, confirm the pilot test readings, and establish worst-case hourly emission rates for the remediation project.

Proposed new §106.533(h) would identify the compliance demonstration methods applicable to sites with fugitive emissions (typically uncontrolled) as a photo-ionization detector (PID) or a flame ionization detector (FID) used on a weekly basis. These monitors measure concentration of air contaminants (parts per million volume (ppmv)), which will be compared to an equivalent ESL limit for each air contaminant. These measurements should occur as close as possible to the remediation activity, but no further away than the closest property line.

Proposed new §106.533(i) would describe all other state and federal regulatory requirements and obligations typically applicable to remediation projects and facilities. Common programs such as Voluntary Cleanup, Superfund, and PST are referenced along with reminders that all other local, state, and federal laws and requirements must be met. Due to the passage of House Bill 1366, additional rules and requirements will be codified by the commission in 30 TAC Chapter 337. These requirements may address additional technical or administrative conditions and limitations, or may eliminate certain administrative requirements to streamline the cleanup of dry cleaning sites. Those requirements, if adopted, may supersede some or all conditions of this section and chapter and will be addressed in a separate rulemaking. This subsection would also list federal air quality requirements that may be applicable to remediation sites. Title 40 CFR Part 63, National Emissions Standards for Hazardous Air Pollutants (HAP), Subpart GGGGG, Site Remediation, has been promulgated by the EPA and will affect a small portion of remediation projects by limiting emissions of hazardous air contaminants. Subpart GGGGG specifically exempts gasoline station cleanup. In addition, sources must meet all three of the following criteria to trigger this maximum achievable emissions technology (MACT) standard, including: 1) the site is a major source of HAPs; 2) a non-remediation MACT activity is performed at the site; and 3) a remediation activity is conducted at the site. It is expected that less than 10% of all remediation projects authorized under this PBR will be applicable to this MACT standard.

Proposed new §106.533(j) would include administrative provisions for the operation of remediation facilities. To minimize the number of registration reviews, the commission is proposing that facilities need only notify the appropriate regional office and any local air pollution control agency having jurisdiction over the site. Notifications must be in writing using the Regional Standard Permit/Permit by Rule Relocation Form, include a return receipt, and be received by the regional office prior to activities occurring at the site. These notifications should also be sent to any local air pollution control program with jurisdiction over the site, and the appropriate remediation program coordinator. Notifications are not subject to the requirements of §106.50 or Chapter 60. The notification of any particular remediation project is streamlined through this proposal, as owners and operators initially notify the commission air programs when initiating pilot tests, follow-up with detailed emissions expectations and controls for initial treatment, and update only when the concentration of emissions decreases to allow changes or elimination of control devices. This proposal is intended to simplify the associated paperwork for remediation projects under the PBR.

To ensure a practical enforcement mechanism that is consistent with remediation programs, proposed new §106.533(j)(2) would also include recordkeeping requirements to demonstrate compliance with the conditions of this PBR and §106.8. In many cases, this information is required by the commission to verify control effectiveness and progress of the remediation project. These records must be organized and compiled in such a way that the requirements of this PBR can be readily determined. Records must be kept to demonstrate compliance with all operational or location requirements of this section. These records must include a copy of the return receipt demonstrating notification to the appropriate regional office and local air pollution control programs having jurisdiction, and plot plans showing that distance limits are met. A copy of this section and any operating instructions must be kept at the remediation site, or at the nearest manned location, and made available at the request of personnel from the commission or any local air pollution control program having jurisdiction.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Analyst with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rules are in effect, there will be fiscal implications which are not anticipated to be significant for the agency or other units of state and local government due to implementation of the proposed rules. The commission anticipates that there will be no mandatory compliance costs for affected units of government due to implementation of this rulemaking. Several compliance options are proposed in these rules; however, units of government would only realize increased costs if they decided to purchase optional equipment that meets existing or amended PBR regulations.

The proposed rules are intended to update and repeal several existing agency PBRs, in order to streamline air quality PBR processes; update administrative and technical requirements; and address unnecessary registration and fee applicability. No significant additional costs or duties are anticipated for the commission to implement the proposed rules. However, revenues collected by the commission from PBR fees are anticipated to be reduced by at least $82,000 per year due to implementation of the proposed rules. This reduction equates to savings to owners and operators of equipment regulated by the PBRs as amended by this rulemaking. A small percentage of this savings is anticipated to be realized by units of local government.

This rulemaking repeals the general public notice requirements and PBR regulations for concrete batch plants currently included in Chapter 106. Public notice requirements, technical requirements, and operational permit requirements for these facilities are covered by the standard permit for concrete batch plants. The commission anticipates no fiscal implications for units of state and local government due to the proposed rules for concrete batch plants.

The proposed rules are also intended to repeal §106.493. The commission determined that standard permits are more appropriate authorization mechanisms for these incinerators. This PBR was developed to allow grandfathered facilities that add thermal control devices to achieve some measure of air pollution abatement. However, §106.493 may conflict with subsequent grandfathered facility permit regulations mandated by the 76th through the 78th Legislatures. The commission anticipates that there will be increased costs to owners or operators that apply for authorization to operate this type of equipment in the future. Under the current PBR, the registration fee is $450. If the rules are approved, owners and operators will have to apply for a standard permit. The permit fee in this case will increase to $900, which is a $450 increase per permit. Based on an average of 15 applications for this PBR per year, the total registration fee increase due to implementation of the proposed rules will be approximately $6,750 (15 x $450). Additionally, these sites will have to provide for public notice, which usually costs between

$500 to $5,000 per permit application. Based on 15 claims per year, this increased cost due to public notice would range from $7,500 to $75,000. The commission anticipates that no units of state or local government will be affected by the proposed changes to this PBR. All of the affected sites are anticipated to be large businesses.

In addition to increased registration fees and public notice costs, owners and operators of direct flame incinerators that apply for permit amendments, or seek authorizations for new facilities via a standard permit, will be required to purchase, install, and operate more effective pollution abatement systems to meet the stricter permit requirements of a standard permit. Pre-existing sites will not have to upgrade their equipment, unless modifications are made to affected abatement equipment covered by the original PBR. Prices for abatement systems that meet current best available control technology standards for facilities requiring a new source review permit can be as high as approximately $400,000, depending on flow rate needed, retention time, and temperature requirements. Abatement equipment required by the standard permit under §116.617 would probably cost approximately $200,000 more than systems currently authorized by §106.493. This increased cost could be reduced to a great degree by modifying the control device and replacing refractory materials only. Depending on the types of refractory materials used, the cost of the modification may be as low as $5,000 - $10,000.

This rulemaking also amends four other sections within the Chapter 106 PBR rules. The amendment of §106.50 concerns fees charged for PBR authorizations, §106.491 covers dual-chamber incinerators, §106.496 concerns air curtain incinerators, while §106.533 affects remediation at gasoline stations and dry cleaning facilities.

The proposed amendments to §106.50 would allow nonprofit organizations to qualify for a reduced fee when required to register for a PBR, and would exempt remediation activities from PBR fees. The proposed rules would reduce the PBR fee for nonprofit organizations, such as the Society for Prevention of Cruelty to Animals seeking a PBR to use animal incinerators, from $450 down to $100 per PBR application. The commission anticipates that approximately 20 nonprofit organizations will benefit from this fee reduction annually, resulting in savings to affected nonprofit organizations, and revenue losses to the commission of up to $7,000 per year.

The commission proposes to discontinue all PBR registration fees (which range from $100 to $450) for PBR remediation activities. Only new sites, or existing sites that apply for a new authorization, would be affected by this rule change. The commission anticipates that the total cost savings to businesses performing these cleanups, and revenue loss to the agency, will be approximately $20,000. This savings would depend on the number of firms that apply for affected remediation PBRs following implementation of the proposed rules. The commission estimates that there are approximately 400 existing sites that could potentially benefit from the proposed rules; however, very few are anticipated to be units of local government. The commission anticipates that the majority of entities that would benefit by these proposed rules would be small and micro-businesses involved in the cleanup of these sites. The proposed rules would replace §106.491 with updated rule language to improve flexibility for the regulated community. The primary purpose for proposing new §106.491 is to provide more options for the disposal of illegal drug evidence seized by law enforcement agencies in Texas. Currently, law enforcement agencies are required to store confiscated illegal drug evidence until such time as they are able to contract with a private company to destroy these materials in an incinerator or boiler that is permitted for hazardous materials burning. Law enforcement agencies are currently not allowed to own or operate their own incinerators under this PBR to perform this disposal. Every disposal activity requires the law enforcement agency or the responsible disposal contractor to submit a case-by-case new source review permit. This provision can be very time-consuming. The proposed rules would allow law enforcement agencies the option of owning and operating an incinerator or to subcontract with a third party to secure disposal of evidence using dual-chamber incinerators that would qualify to be authorized under a PBR instead of a permit. This is anticipated to provide a more flexible and timely alternative for disposing of seized illegal drugs. Additionally, there would be a reduction in permit fees and public notice costs for the entity applying for the PBR (law enforcement agency or contractor). The one-time PBR fees would be reduced to $100 or $450 ($100 for units of government and $450 for contractors) instead of a minimum of $900, plus there would be no public notice costs (which can range from $500 - $5,000 per permit). Another potential cost savings would be reduced chain-of-custody and security at the disposal sites, if disposal is performed at the law enforcement agency. The total cost savings from reduced permit fees/public notice costs is unknown at this time, because the commission does not know how many law enforcement agencies or contractors would choose to apply for this updated PBR.

The proposed rules will require the new incinerator models that are used to destroy drugs to be tested to demonstrate compliance with updated regulations. An incinerator stack may have to be taller than existing models, and continuous temperature monitors will be required to ensure compliance with emission regulations. The commission estimates the new incinerators will cost $40,000 up to $1 million, depending on size, temperature, and other technical specifications and available abatement systems. This cost is similar to existing incinerators used to destroy confiscated drugs. However, the incinerators that are chosen by law enforcement agencies could reasonably be expected to be at the lower end of the cost range. Within 180 days, all facilities processing confiscated drugs must provide sampling to the commission to demonstrate compliance with the emission limits of the PBR. It is estimated that once testing is completed on a certain incinerator model, this could be used to demonstrate compliance for similar models used by other facilities. The commission estimates that the testing costs will range between $10,000 to $25,000 per test. The owner/operator may conduct a test or the manufacturer may test and establish data in lieu of testing for that particular model, in which case the purchasers of that model would not be required to conduct compliance tests. The continuous exhaust monitors will cost between $1,000 to $6,000, with minimal annual operating costs. Law enforcement agencies and subcontractors would only be affected by these costs if they voluntarily choose to seek authorization to dispose of seized illegal drugs under the updated PBR. Otherwise, they could continue to operate under existing regulations. The costs for incinerator purchase, testing, and monitoring would be offset to some degree by the elimination of costs associated with using off-site vendors to destroy confiscated drug evidence.

The commission proposes to repeal §106.496 and replace it with updated rule language that is intended to update technical requirements regarding emission releases and equipment parameters to ensure consistency with waste permitting restrictions,

expand the scope of the PBR to include aboveground units, and eliminate unnecessary registration for relocation of portable facilities. Additionally, these rules specify the minimum necessary compliance demonstrations and records needed for practical enforceability. The primary fiscal impacts anticipated as a result of updates to this PBR are the following: 1) facilities would be allowed to use aboveground systems; 2) run time meters would be required on new equipment or new authorizations; and 3) the registration of each new site would be eliminated.

The proposed new §106.496 authorizes facilities to use aboveground systems instead of the traditional fan manifold, which is placed over an open below-ground trench. Both of these are devices that are used primarily to burn trees and brush from land-clearing operations or right-of-way maintenance. Aboveground units are slightly more efficient and more versatile because of the ability to easily move to another location. This section does not require the use of aboveground units; it only provides for the option. The commission estimates that the cost of an aboveground unit would probably be approximately 25% greater than fan manifold units (approximately $50,000 to $100,000 more per unit). The installation of run-time meters is not expected to cost more than $200 per facility. The commission estimates that the majority of the affected equipment is already equipped with these meters.

The commission anticipates that the proposed rules will result in cost savings to owners and operators of affected air curtain incinerators (previously trench burners) due to reduced registration costs. Currently, the commission requires a separate registration for each new site. Since this equipment is portable, the commission receives approximately 600 registrations per year with an average fee of $100 per registration. The new PBR would require an initial registration only, and subsequent sites would only need a notification sent to the appropriate commission regional office. Re-registration (and fee) would only be required if a notice of enforcement is issued, or every five years, whichever occurs first. The commission estimates that the number of registrations for this PBR will be reduced from 600 to 60 per year. This will result in a cost savings for the businesses and revenue loss to the agency of approximately $55,000 per year. The commission anticipates that perhaps 50 of the yearly 600 registration requests are submitted by units of local government. The cost saving for units of local government are not anticipated to be significant due to the reduced number of registrations that are required to be submitted to the commission.

The proposed rules would repeal §106.533 and replace it with updated rule language to ensure consistency with state and federal remediation regulations, eliminate some registration requirements, ensure the protection of public health, minimize the potential for nuisance, and provide for a reasonable demonstration of compliance. Proposed §106.533 would require updates to emission limitations. These changes are anticipated to result in increased costs, depending on the type and amount of contamination. The proposed PBR would also include numerous compliance demonstrations via stack sampling, and readings by PID and FID, in conjunction with a flow meter. The PID and FID equipment would have to perform weekly control device checks, which is estimated to result in increased annual costs ranging from $3,000 to $10,000 per site. For example, this equipment will be used for sampling on specific control devices, internal combustion engines, and CAS. However, most of these sites already perform these tests, so the commission anticipates that there will not be significant increased costs due to this requirement. These amendments would affect all sites using equipment affected by the updated PBR. The commission anticipates that no units of state or local government would be affected by these proposed rules.

The current remediation PBR restricts remediation activities at gasoline stations and dry cleaning facilities to having a minimum distance of 100 feet from other structures. The revisions would eliminate this distance limit, thus allowing more remediation projects for gasoline stations and dry cleaning facilities to meet the PBR requirements, instead of being required to obtain a case-by-case air permit. For those sites that would now be eligible for the PBR instead of the air permit, the permit fees would be reduced to $100 instead of a minimum of $900, plus there would be no public notice costs, which can range from $500 - $5,000 per permit. This would only apply to new or amended sites that apply for the PBR following implementation of the proposed rules. There are currently over 400 gasoline stations and approximately 1,000 dry cleaning sites that are being remediated statewide. The commission anticipates that the majority of new or amended sites would be eligible to apply for the PBR, in lieu of a permit, due to implementation of the proposed rules. There may be a very small number of refueling sites that would be owned and operated by units of government.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of, and compliance with, the proposed rules would be the potential increased environmental protection since the proposed rules are intended to ensure that facilities are using the most up-to-date emission controls, and the requirements to demonstrate compliance with agency regulations.

Cost savings are anticipated for individuals and businesses resulting from the enforcement of, or compliance with, the proposed rules, though the savings are not considered significant. For those owners and operators that choose to pursue compliance options that are proposed under §106.491 and §106.496, there will be potential increased equipment and monitoring costs in order to comply with these optional compliance regulations. Additionally, there will be costs for grandfathered facilities that apply for a permit amendment that is currently authorized under the §106.493 PBR, or that seek authorizations for new sites via a standard permit. All of these increased costs could be significant; however, they are optional and only would affect individuals and businesses if they choose to pursue these compliance options.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses that are affected by the proposed rules, which are intended to update, and in some cases repeal, several existing agency PBRs found in Chapter 106.

Cost savings are anticipated for small and micro-businesses resulting from the enforcement of, or compliance with, the proposed rules, though the savings are not considered significant. For those owners and operators that choose to pursue compliance options proposed under §106.491 and §106.496, there will be potential increased equipment and monitoring costs in order to comply with these optional compliance regulations. All of these increased costs could be significant; however, they are optional and only affect small businesses and micro-businesses if they choose to pursue these compliance options.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed these proposed rules 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 rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule." 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. These proposed rules eliminate obsolete rules; address the need for a reduced PBR registration fee for nonprofit organizations and the nonapplicability of fees for reviews associated with the Voluntary Cleanup Program and Superfund projects; eliminate a PBR to prevent inappropriate control devices from being installed at grandfathered facilities; address the problem of law enforcement agencies that are currently precluded from using a PBR to incinerate confiscated illegal drug evidence; minimize registration requirements by replacing the current PBR for trench burners; and address the need for a rapid authorization mechanism for remediation projects at gasoline stations and dry cleaning facilities that have less than a distance of 100 feet to the nearest off-property structure by replacing the current PBR. Certain aspects of this rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure. However, the proposed rules generally tend to improve regulatory flexibility and reduce costs to regulated facilities and are therefore unlikely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. Because this rulemaking will 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, the rulemaking does not fit the definition of a major environmental rule.

In addition, Texas Government Code, §2001.0225, only applies 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 proposed rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements. The commission invites public comment regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed rules. Promulgation and enforcement of the rules will not burden private real property. The proposed rules will not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the proposed rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found the rules are 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 action for consistency and determined that the proposed rules do not impact any CMP goals or policies. The proposed rules are intended to more effectively focus commission resources, streamline the air quality PBR process, update administrative and technical requirements for certain PBRs, and address unnecessary registration and fee applicability of PBRs. The commission invites public comment regarding the CMP.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on February 26, 2004 at 2:00 p.m. in Building F, Room 2210, at the commission's central office, 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 with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2003-030-106-AI. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tnrcc.state.tx.us/oprd/rules/propadop.html*. Comments must be received by 5:00 p.m. on March 1, 2004. For further information, please contact Debra Barber, Office of Environmental Policy, Analysis, and Assessment, at (512) 239-0412.

The commission is specifically soliciting comments, including technical information and empirical data, regarding the limits in proposed §106.491.

The commission is requesting comments by law enforcement on the size and type of incinerator, operating parameters, expected or monitored emissions, compliance demonstrations, and registration requirements for proposed §106.491.

The commission is seeking any additional empirical information on the PM and PM_{10} emission rates and factors for ACI facilities

under proposed §106.496. If sampling or monitoring data is received and reviewed by the commission, the commission may be able to consider revisions to the proposed standard permit.

The commission is seeking comments on the inclusion of other appropriate control devices that may be commonly used in the field to specify in §106.533. The commission is specifically soliciting comments on the common availability of thermal control devices equipped with scrubbers to control chlorinated compound emissions to a 95% DRE for remediation at dry cleaner sites.

The commission is requesting feedback on the relative accuracy and cost of the sampling methods and instruments, particularly PIDs and FIDs, for character and quantity of emissions for compliance demonstrations under §106.533.

SUBCHAPTER A. GENERAL REQUIREMENTS

30 TAC §106.5

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

STATUTORY AUTHORITY

The repeal is proposed under THSC, Texas Clean Air Act (TCAA), §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.057, which authorizes the commission to exempt from permitting, changes within any facility which would not make a significant contribution of air contaminants to the atmosphere; §382.051, which authorizes the commission to issue permits for construction of facilities which emit air contaminants; and §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which would not make a significant contribution of air contaminants to the atmosphere.

The proposed repeal implements TCAA, §§382.011, 382.012, 382.017, 382.057, 382.051, and 382.05196.

§106.5. Public 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 January 15, 2004.

TRD-200400245
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 239-5017

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SUBCHAPTER B. REGISTRATION FEES FOR NEW PERMITS BY RULE

30 TAC §106.50

STATUTORY AUTHORITY

The amendment is proposed under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.057, which authorizes the commission to exempt from permitting, changes within any facility which would not make a significant contribution of air contaminants to the atmosphere; §382.051, which authorizes the commission to issue permits for construction of facilities which emit air contaminants; and §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which would not make a significant contribution of air contaminants to the atmosphere.

The proposed amendment implements TCAA, §§382.011, 382.012, 382.017, 382.057, 382.051, and 382.05196.

§106.50. Registration Fees for Permits by Rule.

(a) A registrant who submits a permit by rule (PBR) registration for review by the commission shall remit one of the following fees with the PI-7 registration form:

(1) $100 for:

(A) small businesses, as defined in Texas Government Code, §2006.001; [~~and~~]

(B) non-profit organizations; and

(C) [~~(B)~~] municipalities, counties, and independent school districts with populations or districts of 10,000 or fewer residents, according to the most recently published census; or

(2) (No change.)

(b) This fee does not apply to:

(1) a certification [~~PI-7 registration~~] submitted solely for the purpose of establishing a federally enforceable emissions limit under §106.6 of this title (relating to Registration of Emissions); [~~or~~]

(2) a remediation project conducted under §106.533 of this title (relating to Remediation); or [~~Water and Soil Remediation) which is reimbursable by the commission.~~]

(3) resubmittal of previously reviewed registrations, if received within six months of a written response on the original action.

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

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

Filed with the Office of the Secretary of State on January 15, 2004.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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SUBCHAPTER H. CONCRETE BATCH PLANTS

30 TAC §§106.201 - 106.203

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

STATUTORY AUTHORITY

The repeals are proposed under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.057, which authorizes the commission to exempt from permitting, changes within any facility which would not make a significant contribution of air contaminants to the atmosphere; §382.051, which authorizes the commission to issue permits for construction of facilities which emit air contaminants; and §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which would not make a significant contribution of air contaminants to the atmosphere.

The proposed repeals implement TCAA, §§382.011, 382.012, 382.017, 382.057, 382.051, and 382.05196.

§106.201. Permanent and Temporary Concrete Batch Plants.

§106.202. Temporary Concrete Batch Plants.

§106.203. Specialty Batch Plants.

This 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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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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SUBCHAPTER V. THERMAL CONTROL DEVICES

30 TAC §§106.491, 106.493, 106.496

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

STATUTORY AUTHORITY

The repeals are proposed under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.057, which authorizes the commission to exempt from permitting, changes within any facility which would not make a significant contribution of air contaminants to the atmosphere; §382.051, which authorizes the commission to issue permits for construction of facilities which emit air contaminants; and §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which would not make a significant contribution of air contaminants to the atmosphere.

The proposed repeals implement TCAA, §§382.011, 382.012, 382.017, 382.057, 382.051, and 382.05196.

§106.491. Dual Chamber Incinerators.
§106.493. Direct Flame Incinerators.
§106.496. Trench Burners.

This 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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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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30 TAC §106.491, §106.496

STATUTORY AUTHORITY

The new sections are proposed under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.057, which authorizes the commission to exempt from permitting, changes within any facility which would not make a significant contribution of air contaminants to the atmosphere; §382.051, which authorizes the commission to issue permits for construction of facilities which emit air contaminants; and §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which would not make a significant contribution of air contaminants to the atmosphere.

The proposed new sections implement TCAA, §§382.011, 382.012, 382.017, 382.057, 382.051, and 382.05196.

§106.491. Dual-Chamber Incinerators.

(a) Applicability. This section authorizes dual-chambered incinerators that burn only waste generated on-site, or illegal drugs confiscated by federal, state, or local law enforcement agencies. Incinerators used in the processing or recovery of materials or to dispose of pathological waste as defined in §106.494 of this title (relating to Pathological Waste Incinerators), hospital waste, infectious waste, hazardous waste, or radioactive waste are not authorized by this section.

(b) Design requirements. The incinerator must meet the following design requirements.

(1) The incinerator shall be equipped with an afterburner automatically controlled to operate with a minimum temperature of 1,400 degrees Fahrenheit, equipped with a continuous exhaust temperature monitor, and designed and operated with a minimum gas retention time of 0.5 seconds.

(2) The manufacturer's rated capacity (burn rate) shall be 500 pounds per hour or less. Each claim under this section shall address the model of incinerator and specify the types and amounts of waste to be destroyed for determination of a specific unit's appropriate capacity.

(3) Stacks shall comply with the following:

(A) height at least 15 feet from the ground;

(B) height at least six feet above the peak of the highest structure within 150 feet;

(C) located at least 200 feet from nearest property line; and

(D) have unobstructed vertical discharge when the incinerator is operated. Properly installed and maintained spark arresters are not considered obstructions.

(c) Operational limits. The incinerator shall meet the following operational conditions.

(1) This facility shall be used solely for the disposal of waste materials generated on-site and only one of the following:

(A) paper, wood, cardboard cartons, rags, garbage (animal and vegetable wastes as defined in Chapter 101 of this title (relating to General Air Quality Rules)), and combustible floor sweepings; containing overall not more than 10% treated papers, plastic, or rubber scraps. Plastics containing polyvinyl chloride or polyvinyl fluoride are prohibited. Neither garbage content nor moisture content shall exceed 50% and noncombustible solids shall not exceed 10% of total weight; or

(B) drugs confiscated by law enforcement, limited to marijuana, cocaine, opiates, and methamphetamines.

(2) The incinerator shall be operated with the following limits:

(A) cocaine, opiates, and methamphetamines are limited to a burn rate of no more than four pounds per hour (lb/hr) and ten pounds in any eight-hour period. Emissions shall not exceed 0.04 lb/hr for each of these compounds; and

(B) marijuana is limited to a burn rate of no more than 500 lb/hr. Emissions shall not exceed 1.0 lb/hr total inhalable particulate matter (PM_{10}).

(3) Fuel for the incinerator shall be limited to sweet natural gas, liquid petroleum gas, Number 2 fuel oil with less than 0.5% sulfur by weight, or electric power. Products of fuel combustion (sulfur dioxide, nitrogen oxides, and carbon monoxide) and volatile organic compounds are authorized, if the facility is operated in compliance with this section.

(4) The manufacturer's recommended operating instructions shall be posted at the incinerator, and the unit shall be operated in accordance with these instructions. The incinerator shall be operated in accordance with manufacturer's specifications and maintained in good working order.

(5) Visible emissions shall not exceed an opacity of 5.0% averaged over any six-minute period as determined by the United States Environmental Protection Agency Test Method 9.

(d) Compliance and administrative requirements.

(1) Registration. Before construction begins, the facility shall be registered with the commission's Office of Permitting, Remediation, and Registration using Form PI-7, Registration for Permit by Rule.

(2) Waste regulations. Compliance with this section serves as a commission authorization under §330.51 of this title (relating to Permit Application for Municipal Solid Waste Facilities).

(3) State and federal air compliance demonstrations.

(A) Emission limits. Within 180 days of operation, all facilities processing confiscated drugs must provide sampling to demonstrate compliance with the emission limits of this section. Similar facility sampling may be used if the owner or operator provides documentation, including model number, burn rate, materials burned, and all relevant operating conditions, that demonstrates the previously-sampled incinerator is equivalent to the facility to be authorized under this section.

(B) Federal requirements. Registrations shall address the applicability of 40 Code of Federal Regulations (CFR) Part 60, New Source Performance Standards (NSPS), Subpart CCCC, Standards of Performance for Commercial and Industrial Solid Waste Incineration Units, for which construction is commenced after November 30, 1999; or for which modification or reconstruction is commenced on or after June 1, 2000; or 40 CFR 60, Subpart DDDD, Emission Guidelines and Compliance Times for Commercial and Industrial Solid Waste Incinerator Units, that commenced construction on or after November 30, 1999. If determined to be applicable, commercial and industrial solid waste incinerators shall demonstrate compliance with these federal regulations, including initial stack sampling, opacity readings, reporting, and recordkeeping.

(C) State air regulations. Upon the request of the executive director, a designated representative of the commission, or a local air pollution control agency with jurisdiction over the site, compliance with §111.121 and §111.125 of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators; and Testing Requirements) shall be demonstrated.

(4) Monitoring. Incinerator operators/owners shall install, calibrate, maintain, and operate a monitoring device that continuously measures and records the temperature of the exhaust gas of the incinerator, in addition to any monitoring required by an appropriate NSPS subpart.

(5) Recordkeeping. Records shall be kept of the type and amount of waste charged/burned; type and amount of fuel usage, including sulfur content for fuel oil; monitoring and testing results; hours of operation; and routine maintenance of abatement systems sufficient to demonstrate each of the requirements listed previously are met. Such records shall be retained for a minimum rolling two-year period and comply with §106.8 of this title (relating to Recordkeeping).

§106.496. Air Curtain Incinerators.

(a) Applicability. The commission encourages the recycling of the materials specified in this section. Composting, mulching, or other processing to produce a useable material can be authorized by §332.8 of this title (relating to Air Quality Requirements). This section authorizes any air curtain incinerator used for the burning of trees, clean lumber, and brush from land-clearing, right-of-way maintenance, emergency clean-up operations, noncommercial industrial sites, and municipal solid waste sites, if operated in accordance with this section.

(b) Scope and terms. The following terms apply only to this section.

(1) Air curtain incinerator (ACI)--An incinerator that operates by forcefully projecting a curtain of air across an open chamber or pit

in which combustion occurs. Incinerators of this type can be constructed above or below ground and with or without refractory walls and floor.

(2) Clean lumber--Wood or wood products that have been cut or shaped and includes wet, air-dried, and kiln-dried wood products. Clean lumber does not include wood products that have been painted, pigment-stained, or pressure-treated by compounds such as chromate, copper arsenate, pentachlorophenol, or creosote.

(3) Emergency cleanup--The removal and disposal of wastes resulting from events such as high winds, floods, and other events of nature that are necessary to protect public health and safety.

(4) Land-clearing--The removal of trees, brush, and other vegetative matter from agriculture, forest management, or land development.

(5) Municipal solid waste sites--Landfills that may burn on- or off-site generated waste as specifically authorized by the executive director under §330.4 of this title (relating to Permit Required).

(6) Noncommercial industrial sites--Locations at which on-site generated waste resulting from the processing or manufacturing of products may be burned. This definition does not include sites that accept off-site generated waste for disposal or destruction.

(7) Site--One or more contiguous or adjacent properties that are under common control of the same person, or persons under common control.

(c) Operational limits.

(1) Distance limitations. The ACI must be operated at least 300 feet from the closest property line and any other facility with an air permit authorization under §116.110 of this title (relating to Applicability).

(2) Facility locations. ACIs may not be operated at a given site more than the following.

(A) All facilities may operate up to a total of 500 hours in any rolling 12-month period.

(B) Portable facilities temporarily located at a site may operate up to 180 consecutive calendar days or 500 hours, whichever occurs first. The ACI must be removed from the site after ceasing operation.

(C) Permanent facilities may process materials for municipal solid waste or noncommercial industrial sites only.

(3) Daily operation.

(A) Daily burning must not commence earlier than one hour after sunrise.

(B) Burning must be completed on the same day, not later than one hour before sunset.

(C) Material must not be added to the ACI in such a manner as to be stacked above the air curtain.

(D) An operator must remain with the ACI at all times when it is operating.

(E) The ACI blower must remain on until enough material is consumed so that any remaining material in the trench will not cause smoke that exceeds the requirement of this section when the blower is turned off.

(F) Material not being worked, and material being stockpiled to be burned at a later date, must be kept at least 75 feet from the trench.

(4) Visible emissions.

(A) Visible emissions from an ACI, stockpiles, work areas, and any in-plant roads associated with the facility must not leave the property for a period exceeding 30 seconds in any six-minute period as determined by United States Environmental Protection Agency Test Method 22.

(B) Best management practices must be used to ensure that the ACI blower is operated in a manner to minimize smoke and ash becoming airborne.

(5) Emissions from products of combustion. Products of combustion (sulfur dioxide, nitrogen oxides, and carbon monoxide) and volatile organic compounds are authorized if the facility is operated in compliance with this section.

(6) Compliance. Upon notification by a representative of the commission or any local air pollution control program having jurisdiction that the ACI is not complying with the conditions of this section, additional material must not be added to the ACI until the facility returns to compliance.

(d) Trench burning. An ACI operation using a trench and air manifold system must meet the following conditions.

(1) At all times, trench dimensions must not exceed 12 feet in width, 35 feet in length, and be no less than ten feet in depth, such that the combustion of the materials within the trench is maintained.

(2) The length of the trench must not exceed the length of the air blower manifold.

(3) The walls of the trench must be maintained such that they remain sufficiently vertical to maintain the air curtain.

(4) Upon removal of the ACI from the burn site, ash may be left in the trench, subject to the conditions of this section, and the trench must be completely filled with incombustible material and covered with soil.

(e) Fire box burning. An ACI operation using a manufactured aboveground container and blower system must meet the following requirements.

(1) The interior dimensions of the firebox must not exceed eight feet in width, 35 feet in length, and be no less than six feet in depth.

(2) The walls of the ACI must be maintained such that they remain sufficiently vertical to maintain the air curtain and the combustion of the materials within the ACI.

(3) The air blower manifold length must be equal to the length of the burning area.

(f) Ash processing.

(1) Handling. All ash generated as a result of the operation of an ACI must be handled in accordance with the following requirements:

(A) ash must be removed from the ACI during burning as necessary to maintain efficient combustion;

(B) ash must be removed from the ACI in such a manner as to minimize the ash becoming airborne; and

(C) all material removed from the ACI must be completely extinguished before being disposed of or placed in contact with combustible material, and must be stored in a manner that does not constitute a fire hazard or allow the material to smolder or burn outside of the ACI.

(2) Disposal. The ash generated from an ACI operated under this section must be disposed of by one of the following methods:

(A) buried on-site in an ACI trench, if deed recorded and a copy of the document is provided to the executive director as required by §330.7 of this title (relating to Deed Recordation);

(B) sent to a Type I landfill, if the ash is containerized and no hot coals are present; or

(C) beneficially used, if the use is determined to be acceptable by the executive director in accordance with §330.8 of this title (relating to Notification Requirements).

(g) Other requirements.

(1) Local restrictions. This section does not exempt ACIs from any local government regulations or other local government requirements, permits, registrations, or other authorizations required by local authorities.

(2) State air regulations. This section does not exempt ACIs from compliance with any additional state air regulations.

(3) Federal air requirements. Registrations for permanent ACIs shall address the applicability of 40 Code of Federal Regulations (CFR) 60, Subpart CCCC, Standards of Performance for Commercial and Industrial Solid Waste Incineration Units. If determined to be applicable, commercial and industrial solid waste incinerators shall demonstrate compliance with these federal regulations, including initial stack sampling, opacity readings, reporting, and recordkeeping.

(4) State waste regulations.

(A) Landfill sites:

(i) ACIs located at a landfill require separate authorization by the executive director in accordance with §330.4 of this title (relating to Permit Required); and

(ii) below-ground ACIs must be located in undisturbed soil not previously excavated, built up, compacted, or used in any type of active landfill operation.

(B) Ash disposal. For materials authorized to be burned under this section and the resulting ash from ACIs, categorized as municipal solid waste as defined in §330.2 of this title (relating to Definitions), compliance with this section serves as a commission authorization to store, process, remove, and/or dispose of the ash resulting from the operation of ACIs as required by §330.4(a) of this title.

(5) State water regulations. Nothing in this section removes the responsibility of the owner/operator from obtaining any necessary authorization under Chapter 308 of this title (relating to Criteria and Standards for the National Pollutant Discharge Elimination System).

(h) Administrative.

(1) Multiple locations at a single site. Multiple ACI locations for a single facility at a given site may be combined into a single registration if all operating restrictions are complied with for individual ACI locations at the site.

(2) Registration.

(A) ACIs must be initially registered with the executive director using the core data form and Form PI-7.

(B) Re-registration is required when any notice of enforcement is issued by the commission, or delegated representative, to the owner or operator of an ACI facility or every five years, whichever occurs first.

(C) Any ACI used for emergency clean-up operations does not require registration, but the owner or operator must meet the notification requirements of this section except for the 14-day prior notice requirement.

(D) Registration reviews will include site approval and a compliance history evaluation in accordance with Chapter 60 of this title (relating to Compliance History).

(3) Notification. Notifications are not subject to the requirements of §106.50 of this title (relating to Registration Fees for Permits by Rule) or Chapter 60 of this title.

(A) The owner or operator of an ACI that has previously been registered with the executive director in accordance with this section and is being relocated to a new site, other than a landfill, must notify the appropriate regional office and any local air pollution control agency having jurisdiction over the site.

(B) Notifications must be in writing using the regional standard permit/permit by rule relocation form, include a return receipt, and be received by the regional director at least 14 calendar days prior to locating at the site.

(4) Records. To demonstrate compliance with this section and §106.8 of this title (relating to Recordkeeping), owners or operators of ACIs must, at a minimum, meet the following requirements.

(A) The ACI must be equipped with a run time meter. A written record or log of the hours of operation of the ACI must be maintained at the site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. This run time record or log must be organized such that compliance with the requirements of this section can be readily determined.

(B) Records must be kept to demonstrate compliance with all operational or location requirements of this section. These records must include a copy of the return receipt demonstrating notification to the appropriate regional office and local air pollution control programs having jurisdiction, and plot plans showing distance limits are met.

(C) A copy of this section and any operating instructions must be kept at the burn site and made available at the request of personnel from the commission or any local air pollution control program having jurisdiction.

(D) The ACI shall be clearly and permanently marked with the regulated entity (preferred) or account identification number on the fan manifold or aboveground 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.

Filed with the Office of the Secretary of State on January 15, 2004.

TRD-200400249
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 239-5017

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SUBCHAPTER X. WASTE PROCESSES AND REMEDIATION

30 TAC §106.533

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

STATUTORY AUTHORITY

The repeal is proposed under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.057, which authorizes the commission to exempt from permitting, changes within any facility which would not make a significant contribution of air contaminants to the atmosphere; §382.051, which authorizes the commission to issue permits for construction of facilities which emit air contaminants; and §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which would not make a significant contribution of air contaminants to the atmosphere.

The proposed repeal implements TCAA, §§382.011, 382.012, 382.017, 382.057, 382.051 and 382.05196.

§106.533. Water and Soil Remediation.

This 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 January 15, 2004.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 239-5017

♦ ♦ ♦

30 TAC §106.533

STATUTORY AUTHORITY

The new section is proposed under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.057, which authorizes the commission to exempt from permitting, changes within any facility which would not make a significant contribution of air contaminants to the atmosphere; §382.051, which authorizes the commission to issue permits for construction of facilities which emit air contaminants; and §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which would not make a significant contribution of air contaminants to the atmosphere.

The proposed new section implements TCAA, §§382.011, 382.012, 382.017, 382.057, 382.051, and 382.05196.

§106.533. Remediation.

(a) Applicability. Equipment used to extract, handle, process, condition, reclaim, or destroy contaminants for the purpose of remediation is permitted by rule, provided that all the following conditions of this section are satisfied.

(b) Scope. The following terms apply to this section.

(1) Affected property--The entire area, including on-site and off-site and including all environmental media, that contains releases of chemicals of concern.

(2) Affected sources--Include, but are not limited to, stockpiles of contaminated/remediated materials/soils and surface impoundments.

(3) Dry cleaning compounds--Include the following chlorinated and non-chlorinated dry cleaning solvents used in the cleaning of garments or other fabrics:

(A) perchloroethylene, also known as tetrachloroethylene, and its degradation products, including trichloroethylene, 1,2-dichloroethylene, and vinyl chloride;

(B) petroleum-based solvents such as Stoddard Solvent, naphtha, and other petroleum distillates;

(C) hydrocarbons and synthetic hydrocarbons such as DF-2000™ fluid, EcoSolv™, PureDry™, or the equivalent;

(D) silicone-based solvents containing decamethylcyclopentasiloxane; and

(E) other nonaqueous solvents such as carbon tetrachloride, dipropylene glycol tertiary butyl ether, 1,1,1-trichloroethane, and 1,1,2-trichloro-1,1,2-trifluoroethane.

(4) Effects screening levels (ESLs)--Used by the commission to evaluate the potential for effects that may occur as a result of exposure to concentrations of constituents in the air. ESL updates, published periodically, were last revised October 1, 2003.

(5) Facility--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source. Once a remediation facility is at a site, all remediation equipment and related sources are covered by this section. Facilities include, but are not limited to, control devices, tanks, containers, liquid separators, material transfer systems, vacuum pumps, and associated components and connecting piping.

(6) Off-site receptor--Any recreational area, residence, commercial/industrial facility, or other structure not occupied or used solely by the owner or operator of the facilities or the owner of the property upon which the facilities are located. Measurements of distances to determine compliance with this distance restriction shall be taken toward structures that are in use as of the date that a notification is filed with the commission.

(7) Petroleum compounds--Solids, liquids, or gases produced from natural formations of crude oil, tar sands, shale, coal and natural gas; or refinery fuel products (which may contain additives).

(8) Remediation--An act or process taken to reduce or eliminate contaminants in the environment. This process may include, but is not limited to, assessment or treatment activities such as air, soil, or water sampling, or pilot tests, treatment, or post-clean-up activities that use facilities.

(9) Site--One or more contiguous or adjacent properties that are under common control of the same person, or persons under common control.

(c) General requirements. The following general requirements apply to this section.

(1) Applicability. This section covers only remediation performed at the affected property or site where the original contamination occurred, or at a nearby site secondarily affected by the contamination. This section does not cover any treatment facility where materials are brought in from another site. Such treatment facilities are subject to §116.110 of this title (relating to Applicability) and must obtain an air new source review permit.

(2) Contaminants. The identification of the contaminants at a site shall be accomplished using the methodology specified by the applicable remediation program and the United States Environmental Protection Agency (EPA) or commission-approved method.

(3) Controls. The selection of appropriate equipment for remediation and control of a site, at a minimum, shall meet the methodology approved by the applicable remediation program (e.g., Petroleum Storage Tank (PST) Program, Voluntary Cleanup Program, Superfund, etc.).

(4) Elevated vents. The height of any vents associated with the remediation shall be at least ten feet above ground level.

(5) Nuisance. The handling, processing, and stockpiling of any materials associated with facilities under this section shall not cause a nuisance as defined in §101.4 of this title (relating to Nuisance).

(6) Operations. Wherever this section specifies that an action be performed periodically (e.g., weekly), the requirement applies only when the equipment is in operation for that period.

(7) Spills. Air emissions resulting from emergency containment and removal of soil or water from spills must comply with Chapter 101 of this title (relating to General Air Quality Rules) and are not authorized by this section.

(8) Visible emissions. The handling, processing (screening, crushing, etc.), groundwater air stripping, and stockpiling of contaminated soil and the handling, stockpiling, in-situ chemical oxidation of groundwater and soils and conditioning (adding moisture) of remediated soil shall be controlled such that there are no visible emissions leaving the property for a period exceeding 30 seconds in any six-minute period as determined by EPA Test Method 22.

(d) Requirements for sites contaminated only with petroleum compounds. For the remediation of sites contaminated only with petroleum compounds, the following requirements shall be met.

(1) For locations with an off-site receptor within 100 feet:

(A) if a control device meeting the conditions of subsection (g) of this section is used, the total emissions from all point sources must meet the following emission limits:

(i) total petroleum hydrocarbons shall not exceed 1.0 pound per hour (lb/hr);

(ii) the benzene component shall not exceed 0.1 lb/hr; and

(iii) the hydrogen sulfide component (for non fuel-dispensing sites) shall not exceed 0.1 lb/hr; and

(B) if remediation is uncontrolled, the total emissions from all point sources must meet the following emission limits:

(i) the total petroleum hydrocarbons shall not exceed 0.1 lb/hr;

(ii) the benzene component shall not exceed 0.01 lb/hr; and

(iii) the hydrogen sulfide component (for non fuel-dispensing sites) shall not exceed 0.01 lb/hr.

(2) For locations with equal to or greater than 100 feet to the nearest off-site receptor, emissions from all point sources are limited to the following:

(A) total petroleum hydrocarbons are limited to 1.0 lb/hr;

(B) the benzene component must meet the emissions and distance requirements of §106.262 of this title (relating to Facilities (Emission and Distance Limitations));

(C) the hydrogen sulfide component (for non fuel-dispensing sites) must meet the emissions and distance requirements of §106.262 of this title;

(3) For all sites regulated by this section and as required by the agency's PST remediation and/or reimbursement requirements, sampling and lab analysis of influent and effluent vapors must be performed at least monthly to demonstrate compliance with the control equipment efficiency and/or emission rate limits of this section, and with any related PST requirements, unless an alternative evaluation method is approved by the applicable agency remediation program.

(e) Requirements for sites contaminated only with dry cleaning compounds. For the remediation of sites contaminated only with dry cleaning compounds, the following requirements shall be met.

(1) For locations with an off-site receptor within 100 feet, emissions of each individual compound from all point sources shall meet the following emission limits:

(A) if a control device meeting the requirements of subsection (g) of this section is used, §106.261 of this title (relating to Facilities (Emission Limitations)) or §106.262 of this title (assuming 100 feet), whichever is more stringent;

(B) if remediation is uncontrolled, 10% of the values determined by subparagraph (A) of this paragraph;

(C) the maximum allowable emission rate limit for any individual compound shall be 0.04 lb/hr, regardless of control method unless §106.261 or §106.262 of this title specify a higher emission rate.

(2) For locations with equal to or greater than 100 feet to the nearest off-site receptor, emissions of each individual compound from all point sources shall meet the emissions and distance requirements of §106.261 and §106.262 of this title. The maximum emission rate limit for any individual compound shall be 0.04 lb/hr, regardless of control method unless §106.261 or §106.262 of this title specify a higher emission rate.

(3) If a control device is needed to meet the emission limits of this section, only a carbon adsorption system that meets the requirements of subsection (g) of this section shall be used.

(4) Additional technical and administrative requirements for the remediation of dry cleaning sites may be found in Texas Health and Safety Code, §§374.001 - 374.253.

(f) Requirements for all other sites. For the remediation of sites not covered by subsections (d) or (e) of this section, the following requirements shall be met.

(1) The site-wide emission rates are limited to the following requirements.

(A) Hourly emissions of each individual organic and inorganic compound from all point sources (other than products of combustion) shall meet the most stringent of the following:

(i) §106.261 of this title;

(ii) §106.262 of this title; or

(iii) if not specifically listed in §106.262 of this title and the ESL list effective date October 1, 2003 has a short-term ESL for the compound of less than or equal to 100 micrograms per cubic meter ($\mu g/m^3$) but greater than or equal to 2 $\mu g/m^3$, emissions may not exceed 0.04 lb/hr. If the short-term ESL for the compound is less than 2 $\mu g/m^3$, emissions may not exceed 0.01lb/hr.

(B) Total annual emissions of each organic or inorganic compound are limited to five tons per year.

(2) If a control device is needed to meet the emissions limits of this section, the device must satisfy the appropriate conditions listed under subsection (g) of this section.

(3) All emission points and area sources associated with the remediation shall be located at least 100 feet from any off-site receptor.

(g) Control devices. When a control device is used at a site, the device must satisfy one of the following conditions. If a thermal control device is used, the products of fuel combustion (nitrogen oxides, sulfur dioxide, carbon monoxide, volatile organic compounds (VOC), or total inhalable particulate matter) are authorized if the facility is operated in compliance with this section.

(1) Direct-flame combustion. The vapors may be burned in a direct-flame combustion device (incinerator, furnace, boiler, heater, or other enclosed direct-flame device) that meets the following requirements.

(A) Design requirements. Each direct-flame combustion device shall be automatically controlled to maintain a minimum temperature of 1,400 degrees Fahrenheit or higher in the combustion chamber (secondary chamber, if dual-chambered) and have a gas retention time of 0.5 second or greater.

(B) Operational restrictions. The temperature of the device must be maintained at a minimum of 1,400 degrees Fahrenheit.

(C) Compliance demonstrations. Continuous temperature monitors to record the temperature of the combustion chamber (secondary chamber, if dual-chambered) shall be installed and maintained. Records of temperature data shall be maintained.

(2) Flare. The vapors may be burned in a flare that meets the following requirements.

(A) Design requirements.

(i) The flare shall be equipped with a flare tip designed to provide good mixing with air, flame stability, and meet the most stringent of either §106.492 of this title (relating to Flares); or 40 Code of Federal Regulations (CFR) §60.18, General Control Device Requirements.

(ii) The flare shall be equipped with a continuously burning pilot or other automatic ignition system that assures gas ignition and provides immediate notification of appropriate personnel when the ignition system ceases to function.

(B) Operational restrictions. Under no circumstances shall liquids be burned in the flare.

(C) Compliance demonstrations. Visible emissions shall not be permitted for more than five minutes in any two-hour period.

(3) Catalytic oxidizer. The vapors may be burned in a catalytic oxidizer that meets the following requirements.

(A) Design requirements. The design destruction efficiency of the catalytic oxidizer shall be at least 90% for the contaminants at the site.

(B) Operational restrictions. The appropriate catalyst shall be used depending on type of contaminants in accordance with the manufacturer's guidelines.

(C) Compliance demonstrations. An evaluation of oxidizer effectiveness shall be made initially (within two hours of startup), and at least weekly, using a portable flame ionization detection (FID) or photo-ionization detector (PID) in conjunction with a flow meter to determine the quantity of carbon compounds in the inlet and outlet of the catalytic oxidizer and to demonstrate compliance with the emission rate limits of this section. The FID or PID instrument chosen must be capable of properly detecting the types of contaminants present. Records of oxidizer performance shall be maintained.

(4) Internal combustion engine. The vapors may be burned in an internal combustion engine that meets the following requirements.

(A) Design requirements. The design destruction efficiency of the internal combustion engine shall be at least 99% for the contaminants at the site.

(B) Operational restrictions. Chlorinated or sulfur compounds should not be burned in these facilities.

(C) Compliance demonstrations. An evaluation of engine effectiveness shall be made initially (within two hours of startup) and at least weekly, using a PID or FID in conjunction with a flow meter to determine the quantity of carbon compounds in the inlet gas stream and the engine exhaust, and to demonstrate compliance with the emission rate limits of this section. The FID or PID instrument chosen must be capable of properly detecting the types of contaminants present. Records of engine performance shall be maintained.

(5) Carbon adsorption system. The vapors may be routed through a carbon adsorption system (CAS) consisting of at least two activated carbon canisters that are connected in series. The system shall meet the following additional requirements.

(A) Design requirements. Prior to the use of a CAS at a site, there shall be a demonstration that activated carbon is an appropriate choice for control of the contaminants at the site.

(B) Operational restrictions. The CAS system should be operated to minimize breakthrough and maintain compliance with the emission limits of this section. When the VOC breakthrough is detected in the outlet of the initial canister, the waste gas flow shall be switched to the second canister immediately. Within four hours of detection of breakthrough, a fresh canister shall be placed as the new final polishing canister. Sufficient fresh activated carbon canisters shall be maintained at the site to ensure fresh polishing canisters are installed within four hours of detection of breakthrough.

(C) Compliance demonstrations.

(i) The CAS shall be sampled initially (within two hours of startup) and periodically to determine breakthrough. Breakthrough is defined as a measured VOC concentration of 50 parts per million by volume (ppmv) in the outlet of the initial canister. The sampling point shall be at the outlet of the initial canister, but before the inlet to the second or final polishing canister. Sampling shall be performed while venting maximum emissions to the CAS (e.g., during loading of tank trucks, during tank filling, during process venting). The CAS shall be monitored on a weekly basis or 20% of the design carbon replacement interval, whichever is less.

(ii) An FID or PID instrument capable of properly detecting the types of contaminants present shall be used for VOC sampling.

(iii) At dry cleaning remediation sites, additional sampling to determine total organics and speciated chlorinated compounds is required initially (within two hours of startup) and at least monthly.

(h) Fugitive emissions and uncontrolled remediation. In the cases where emission releases are not directly emitted from a control device or stack which can be sampled, compliance must be demonstrated by the use of a PID or FID initially and at least on a weekly basis. The FID or PID instrument chosen must be capable of properly detecting the types of contaminants present. The concentration measured must be equal to or less than the specific air contaminant's ESL. Measurement should occur as close as possible to the remediation activity, but no further away than the nearest property line.

(i) Other regulatory requirements.

(1) Voluntary Cleanup Program. A state or local permit is not required for remediation conducted on a site as part of a voluntary cleanup. A voluntary cleanup shall be coordinated with ongoing federal and state hazardous waste programs. The persons conducting a voluntary cleanup shall comply with any federal or state standard, requirement, criterion, or limitation that the remediation would otherwise be subject if a permit were required (see Texas Health and Safety Code, §361.611).

(2) Superfund Cleanup Program. A state or local permit is not required for remediation conducted on a site as part of a Superfund project. A Superfund project shall be coordinated with ongoing federal and state hazardous waste programs. The persons conducting a cleanup shall comply with any federal or state standard, requirement, criterion, or limitation that the remediation would otherwise be subject if a permit were required (see Texas Health and Safety Code, §361.196).

(3) Local restrictions. This section does not exempt these facilities from any local government regulations or other local government requirements, permits, registrations, or other authorizations required by local authorities.

(4) State regulations. This section does not exempt remediation equipment from any additional state regulations.

(5) Federal air regulations. Compliance with all applicable federal requirements must be satisfied, including air standards and requirements for hazardous air pollutants under 40 CFR Part 63, National Emission Standards for Hazardous Air Pollutants for Source Categories, Subpart GGGGG, Remediation. To be applicable to this standard, also known as the maximum achievable control technology (MACT) standard, sources must meet all of the following criteria:

(A) the site is not a gasoline dispensing location;

(B) the site is a major source of hazardous air pollutants;

(C) a non-remediation MACT activity is performed at the site; and

(D) a remediation activity is conducted at the site.

(j) Administrative requirements.

(1) Notification. Before starting remediation (pilot test or treatment), the facility shall notify the commission in writing using the Standard Permit/Permit by Rule Relocation Form.

(A) The notification is not subject to the requirements of §106.50 of this title (relating to Registration Fees for Permits by Rule).

(B) Notifications must be sent to the appropriate commission regional office, any local air pollution control program with jurisdiction, and appropriate remediation program. Notifications must include a return receipt of delivery.

(C) Pilot test notifications shall be received by the executive director prior to commencement of activities.

(D) Updated or additional notification shall be received by the executive director prior to commencement of treatment activities and shall contain specific information concerning the basis (measured or calculated) for the expected emissions from the facility. The notification shall also explain details as to why the control device can be expected to perform as represented.

(E) Any remediation project that changes or eliminates a represented control device during the lifetime of the project must update the executive director by filing an amended notification as soon as practicable after the change and after confirmation with the appropriate remediation program.

(2) Records. To demonstrate compliance with this section and with §106.8 of this title (relating to Recordkeeping), owners and operators of remediation equipment must, at a minimum, meet the following requirements.

(A) Records required by this section shall be maintained at the site or at the nearest staffed location, and made available upon request to personnel from the commission or any local agency having jurisdiction.

(B) The following minimum records of sampling or monitoring shall be maintained:

(i) sample time and date;

(ii) monitoring results (ppmv);

(iii) corrective action taken, including the time and date of the action;

(iv) process operations occurring at the time of sampling;

(v) records of compliance with the emission rate limits of this section;

(vi) a record of the demonstration that the chosen control method is an appropriate choice for the site; and

(vii) record of the return receipt demonstrating notification to the appropriate regional office and local air pollution control programs having jurisdiction.

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

Filed with the Office of the Secretary of State on January 15, 2004.

TRD-200400251
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 239-5017

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION AND PLACEMENT
SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.23

The Texas Youth Commission (TYC) proposes an amendment to §85.23, concerning Classification. The amendment to the section revises one of the Type B-Violent Offender classifying offenses to be consistent with TYC rule violations. Specifically, the TYC Category I rule violation known as "chunking bodily fluids," which can be found in §95.3 as published in this issue of the *Texas Register*, is now included in the list of offenses classified as Type B-Violent.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. McCullough also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the use of accurate, clear and current policy among TYC facilities. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. No private real property rights are affected by adoption of this amendment.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to modify any order of the commission affecting a child, except an order of final discharge, as often as conditions indicate.

The proposed amendment affects the Human Resource Code, §61.034.

§85.23. Classification.

(a) (No change.)

(b) Explanation of Terms Used.

(1) (No change.)

(2) Classifying offense--the offense on which classification is based. It is the most serious of the relevant offenses documented in the youth's record. Relevant offenses are:

(A) (No change.)

(B) following a Level [~~level~~] I hearing, the offense(s) found at the hearing except when the hearing is for a youth classified as a sentenced offender, in which case, the youth's classification continues to be sentenced offender.

(3) - (5) (No change.)

(c) (No change.)

(d) Classifications.

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

(3) Type B-Violent Offender. A type B violent offender is a youth whose classifying offense is the commission, attempted commission, conspiracy to commit, solicitation, solicitation of a minor to commit, or engaging in organized criminal activity to commit one of the offenses listed in this paragraph and who has not been sentenced to commitment in TYC. TYC adopts the Texas Penal Code definition (Title 5) for each offense [~~listed in (A-V) of this subsection~~] in its entirety except where TYC policy limits the applicability to the specific subsections or under the conditions named.

(A) - (P) (No change.)

[~~(Q) harassment by persons in secure correctional facilities, 22.11, all~~]

(Q) [~~(R)~~] coercing, soliciting or inducing gang membership, 22.015, felony only

(R) [~~(S)~~] arson, 28.02, all

(S) [~~(T)~~] robbery, 29.02, all

(T) [~~(U)~~] aggravated robbery, 29.03, all

(U) [~~(V)~~] burglary, 30.02, only with intent to commit any other type A or type B violent offense

(V) [~~(W)~~] intoxication assault, 49.07, all

(W) [~~(X)~~] intoxication manslaughter, 49.08, all

(X) [~~(Y)~~] intentionally participating with at least two (2) other persons in conduct at a contract program or TYC operated facility that threatens imminent harm to persons or property and substantially obstructs the performance of facility operations or a program therein.

(Y) [~~(Z)~~] intentionally, knowingly, or recklessly causing bodily injury to a:

(i) TYC employee;

(ii) contract program employee;

(iii) volunteer; or

(iv) person who is providing contract services at a contract program or TYC operated facility.

(Z) intentionally causing a person to come into contact with the blood, seminal fluid, vaginal fluid, urine, and/or feces of another with the intent to harass, alarm or annoy.

(4) - (8) (No change.)

(e) (No change.)

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

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Neil Nichols
Interim Executive Director
Texas Youth Commission
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For further information, please call: (512) 424-6014

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37 TAC §85.25

The Texas Youth Commission (TYC) proposes an amendment to §85.25, concerning Minimum Length of Stay. The amendment to the section will add references to other rules which can have an impact on a youth's minimum length of stay.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. McCullough also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the use of accurate, clear and current policy among TYC facilities. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. No private real property rights are affected by adoption of this amendment.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed amendment affects the Human Resource Code, §61.034.

§85.25. Minimum Length of Stay.

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

(d) Minimum Length of Stay.

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

(5) General Offenders must complete a minimum length of stay of nine (9) months on initial commitment. General offenders on recommitment, or returning as a result of a Level I due process hearing for a non-felony, non-high risk offense have no minimum length of stay. (See subsection (c)(3) of this section [~~rule~~]).

(6) (No change.)

(e) - (f) (No change.)

(g) Restrictions.

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

(4) For other procedures affecting minimum length of stay refer to (GAP) §95.7 of this title (relating to Reclassification Consequence), (GAP) §95.9 of this title (relating to Parole Revocation Consequence), and (GAP) §95.11 of this title (relating to Disciplinary Transfer/Assigned Minimum Length of Stay/Demotion of Phase Consequence).

(h) (No change.)

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

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Neil Nichols
Interim Executive Director
Texas Youth Commission
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CHAPTER 95. YOUTH DISCIPLINE
SUBCHAPTER A. DISCIPLINARY PRACTICES

37 TAC §95.3

The Texas Youth Commission (TYC) proposes an amendment to §95.3, concerning Rules of Conduct. The amendment to the section will make minor changes and grammatical clarifications to the definitions of several TYC rule violations. Failure of a youth to report personal knowledge of a rule violation has been added as a rule violation.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be to ensure that the definitions of TYC rule violations continue to be in keeping with the original intent. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule affects the Human Resource Code, §61.034.

§95.3. Rules of Conduct.

(a)-(e) (No change.)

(f) Category I Rule Violations. A category I rule violation is an act of misconduct that constitutes a crime, involves harm to the youth or others, or threatens facility safety, security, and order. These are the baseline rules which, when crossed, result in the most severe consequences. These consequences include referral to criminal court, disciplinary movement, reclassification, multi-phase demotion, and/or assignment of a disciplinary minimum length of stay. Category I rule violations are as follows:

(1) Violate any law [~~of Texas or the United States~~]--youth violates any city or county ordinance, or any state or federal law [~~of Texas or the United States not otherwise listed as a Category I or II rule violation~~].

(2) (No change.)

(3) Attempted Escape--youth, with specific intent to escape, commits an act amounting to more than planning [~~mere preparation~~], but fails to effect the intended escape.

(4)-(5) (No change.)

(6) Failure to Report--youth assigned to minimum or home level restriction fails to report to a pre-scheduled appointment with a parole staff [~~as required by the youth's most recent case plan~~].

(7) (No change.)

(8) Assault on Staff/Volunteer (Offensive Contact)--youth intentionally or knowingly causes physical contact with a staff or volunteer when the youth knows or should reasonably believe that the staff or volunteer will regard the contact as offensive or provocative (includes hitting without injury, spitting, touching of staff's buttocks or breasts, etc.) Staff is defined as a TYC employee, contract program employee, or any person who is providing contract services at a contract program or TYC-operated facility.

(9)-(11) (No change.)

(12) Injury to Self--[~~by means of intentional or reckless conduct,~~] a youth intentionally or knowingly engages in bodily harm to self.

(13) Possession of a Weapon [~~weapon~~]--youth is found to be in possession of a weapon or item(s) which can be used as a weapon, or has been made, or adapted for use as a weapon.

(14) Possession or Use of Unauthorized Substance or Intoxicant--youth is found to be using or possessing any unauthorized [~~controlled~~] substance or intoxicant. This also includes tobacco for youth in a residential placement.

(15) Refusing a Drug Screen--youth refuses to take a drug screen when requested to do so by staff, or youth tampers with or contaminates the urine sample provided for a drug screen.

(16) (No change.)

(17) Participation in a Riot--youth intentionally participates with two (2) or more persons in conduct that threatens imminent harm to persons or property and substantially obstructs the performance of facility operations or programs. Incident must take place in a TYC facility or contract program.

(18) (No change.)

(19) Inappropriate Sexual Contact--youth engages in inappropriate sexual contact including [~~kissing or~~] touching or fondling the anus, buttocks, breast, or genitals of another for sexual stimulation. This also includes kissing.

(20)-(21) (No change.)

(22) Chunking Bodily Fluids--with the intent to harass, alarm, or annoy another person, a youth causes a person to contact the blood, seminal fluid, vaginal fluid, urine, and/or feces of another person. Does not include saliva.

(23)-(25) (No change.)

(26) Attempting, Aiding, or Abetting[~~, or Failing to Report~~] Commission of a Category I Rule Violation--youth attempts to commit a category I rule violation, or assists or helps another youth to commit a category I rule violation[~~, or keeps secret the knowledge of a category I rule violation being planned or committed~~].

(27) Failing to Report Category I Rule Violation--youth fails to report personal knowledge of facts concerning a rule violation by another youth, which are not known to staff.

(g) Category II Rule Violations. A category II rule violation is an act of misconduct that reflects a youth's immaturity, lack of responsibility, and intractability which, if unchecked, could lead to more serious category I violations. It is willful behavior that breaks rules for which minor consequences, called on-site disciplinary consequences, may be levied. Minor consequences include loss of privileges, restriction, or confiscation of contraband. Category II rule violations are as follows:

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

(3) Contraband [~~(Except Drugs/Weapons)~~]--youth possesses an item(s) that is considered improper for children to see or possess or that may threaten the safety, security, or order of the facility. Consult (GAP) §91.7 of this title (relating to Youth Personal Property) for definition of contraband.

(4)-(12) (No change.)

(13) Attempting, Aiding, or Abetting[~~, or Failing to Report~~] Commission of a Category II Rule Violation--youth attempts to commit a category II rule violation, or assists or helps another youth to commit a category II rule violation[~~, or keeps secret the knowledge of a category II rule violation being committed or planned~~].

(14) Failing to Report Category II Rule Violation--youth fails to report personal knowledge of facts concerning a rule violation by another youth, which are not known to staff.

(15) [~~(14)~~] Breaching Group Confidentiality--youth discloses or discusses information provided to him/her [~~him~~] in a correctional therapy group session to another person not present in that group session.

(16) [~~(15)~~] Violating Security Program/Rules--youth is not complying with the standardized program or rules of the security unit while in the security unit.

(17) [~~(16)~~] Improper Use of Telephone/Mail--youth uses the mail or telephone system for communication which is prohibited under (GAP) §93.13 of this title (relating to Use of Telephone) or (GAP) §93.15 of this title (relating to Youth Mail).

(18) [~~(17)~~] Failure to do Proper Housekeeping--youth does not complete the daily chores of cleaning his/her living environment to the expected standard.

(19) [~~(18)~~] Gang Related Activity--youth engages in a behavior or activity associated with an organized group or gang including, but not limited to, tagging, displaying gang hand signals, using gang slang language, and/or possessing gang writing/symbols of any kind including on clothing.

(20) [~~(19)~~] Lying/Falsifying Documentation/Cheating--youth lies or withholds information from staff, falsifies a document and/or cheats in an assignment or test.

(21) [~~(20)~~] Threat of Escape--by word, gesture, or conduct, a youth expresses an intention to escape a residential placement assignment.

(h) (No change.)

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

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Neil Nichols
Interim Executive Director
Texas Youth Commission
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For further information, please call: (512) 424-6014

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37 TAC §§95.7, 95.9, 95.11

The Texas Youth Commission (TYC) proposes amendments to §95.7 Reclassification Consequence; §95.9 Parole Revocation Consequence; and §95.11 Disciplinary Transfer/Assigned Minimum Length of Stay/Demotion of Phase Consequence. The amendments to §95.7 Reclassification Consequence and §95.9 Parole Revocation Consequence will clarify that the minimum length of stay assigned as a result of a Level I due process hearing may later be reduced based on the youth's behavior and progress toward goals. A further revision to §95.9 updates the names of certain TYC rule violations to better reflect their definitions in the Penal Code. The amendment to §95.11 Disciplinary Transfer/Assigned Minimum Length of Stay/Demotion of Phase Consequence will clarify that youth on parole status may not receive demotions to their Resocialization phases as the result of a Level II due process hearing. A new subsection lists the category I rule violations which qualify a youth on parole status for disciplinary transfer to medium restriction or assignment of a disciplinary minimum length of stay. This new subsection also establishes the possible outcomes if extenuating circumstances are found during a Level II due process hearing for a youth on parole status.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. McCullough also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the efficient and consistent enforcement of TYC policy. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendments are proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to order a child's confinement under conditions it believes best designed for the child's welfare and the interests of the public, and to order reconfinement as often as conditions indicate to be desirable.

The proposed rules affect the Human Resource Code, §61.034.

§95.7. Reclassification Consequence.

(a)-(d) (No change.)

(e) Additional Disposition Options. If a youth currently assigned to a TYC operated institution is found in a Level [~~level~~] I hearing to have engaged in a high risk offense. Other dispositions may be made by the hearing examiner, but only if such conduct meets the criteria and is specifically requested in the initial hearing request for the Level I [~~level 1~~] reclassification hearing. If extenuating circumstances are found by the hearing examiner according to the Level [~~level~~] I hearing, other eligible dispositions may be assessed if the hearing examiner decides that such dispositions are appropriate despite the finding of extenuation to the reclassifying conduct. Disposition options are as follows:

(1) Aggression Management Program. A placement in the Aggression Management Program (AMP) may be requested for a youth who is currently assigned to a TYC operated institution under (GAP) §95.21 of this title (relating to Aggression Management Program). All policy and program requirements of (GAP) §95.21 of this title will apply to the assignment in AMP.

(2) Behavior Management Program.

(A) A placement in the Behavior Management Program (BMP) may be requested for certain youth under (GAP) §95.17 of this title (relating to Behavior Management Program). All policy and program requirements of (GAP) §95.17 of this title [~~, Behavior Management Program~~] will apply to the assignment in BMP.

(B) (No change.)

(f) Restrictions.

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

(3) The minimum length of stay assigned under this policy may be reduced based on the youth's behavior and progress toward goals.

§95.9. Parole Revocation Consequence.

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

(d) Criteria and Disposition.

(1) Parole will be revoked if it is found at a Level [~~level~~] I hearing that a youth has:

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

(C) committed one (1) of the following category I rule violations as defined in (GAP) §95.3 of this title (relating to Rules of Conduct), and has previously been classified for a high-risk offense:

(i) Violate any Law; [~~of Texas or the United States.~~]

(ii) Escape, Attempted Escape, or Abscond; [~~.~~]

(iii) Injury to Self;

(iv) Possession of a Weapon; [~~.~~]

(v) Possession or Use of Unauthorized Substance or Intoxicant;

(vi) Refusing a Drug Screen;

(vii) Participation in a Riot; or [~~.~~]

(viii) (No change.)

(2) Parole of a general offender or a violator of CINS probation is revoked if it is found at a Level [~~level~~] I hearing that the youth has committed one (1) of the category I rule violations listed above; and

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

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

(5) If criteria for revocation are not established at a Level [~~level~~] I hearing, the youth's parole is not revoked, but lesser disciplinary consequences may be imposed for any rule violation(s) proved at the hearing.

(e) Restrictions.

(1) A Level [~~level~~] I hearing is required in order to revoke a youth's parole status.

(2)-(4) (No change.)

(5) The minimum length of stay assigned under this policy may be reduced based on the youth's behavior and progress toward goals.

§95.11. Disciplinary Transfer/Assigned Minimum Length of Stay/Demotion of Phase Consequence.

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

(c) Criteria and Disposition for Disciplinary Transfer, Disciplinary Assigned Minimum Length of Stay, and Demotion of One or More Behavior Phases for Youth on Institutional Status.

(1) If it is found at a Level [~~level~~] II hearing that the youth has failed on two (2) or more occasions to comply with [~~the conditions of release under supervision and/or~~] a written reasonable request of staff that is either present in the Individual Case Plan (ICP) or is validly related to previous high risk behavior, a youth may receive only one of the following consequences [~~be~~]:

(A)-(C) (No change.)

(2) If it is found at a Level [~~level~~] II hearing that the youth has committed any other category I rule violation, the youth may receive one or more of the following consequences [~~be~~]:

(A) transferred to a placement of equal or more restriction than the youth's most recent permanent placement; and/or

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

[~~(3) An assigned disciplinary minimum length of stay under this policy shall only be for offenses that meet criteria and shall not exceed six (6) months.~~]

[~~(4) If the hearing manager determines there are extenuating circumstances incidental to the violation(s) proved at a level II hearing, the youth shall not be transferred or assigned a disciplinary minimum length of stay, but the hearing manager shall notify the administrator responsible for the program to which the youth is assigned so an appropriate disciplinary action may be taken.~~]

(d) Additional Disposition Options for Youth on Institutional Status. Pursuant to a Level [~~level~~] II hearing herein, certain youth in TYC institutions or secure contract programs, who are assessed a disposition under this rule may also be assessed placement in the below disciplinary programs [~~other eligible dispositions~~], but only if specific criteria have been met and if specifically requested (with notice to the youth) in the Level [~~level~~] II hearing request pursuant to this policy. [~~If extenuating circumstances are found by the hearing manager pursuant to a level II hearing herein, other eligible dispositions may be assessed if the hearing manager decides that such dispositions are appropriate despite the finding of extenuation in the present level II hearing. Disposition options are listed.~~]

(1) Aggression Management Program. A placement in the Aggression Management Program (AMP) may be requested for a youth who is currently assigned to a TYC operated institution under requirements of (GAP) §95.21 of this title (relating to Aggression Management Program). All policy and program requirements of (GAP) §95.21 of this title will apply to the assignment in AMP.

(2) Behavior Management Program.

(A) A placement in the Behavior Management Program (BMP) may be requested for certain youth under requirements of (GAP) §95.17 of this title (relating to Behavior Management Program). All policy and program requirements of (GAP) §95.17 of this title will apply to the assignment in a BMP.

(B) (No change.)

(e) Criteria and Disposition for Disciplinary Transfer and Disciplinary Assigned Minimum Length of Stay for Youth on Parole Status. A youth on parole status may be transferred into a placement of medium restriction and/or assigned a minimum length of stay only if it is found at the Level II hearing that the youth has committed one of the following category I rule violations as defined in (GAP) §95.3 of this title (relating to Rules of Conduct):

(1) Violate any Law;

(2) Escape, Attempted Escape, or Abscond;

(3) Injury to Self;

(4) Possession of a Weapon;

(5) Possession or Use of Unauthorized Substance or Intoxicant;

(6) Refusing a Drug Screen;

(7) Participation in a Riot; or

(8) Two (2) or More Failures to Comply with Written Reasonable Request.

(f) If the hearing manager determines there are extenuating circumstances incident to the violation(s) proved at a Level II hearing, the youth shall not be assigned a disciplinary length of stay. However, if more than one disposition option was requested (with appropriate and specific notice to the youth), such dispositions may be assessed if the hearing manager determines that such dispositions are appropriate despite the finding of extenuation.

(g) [~~(e)~~] Restrictions.

(1) A youth on parole status shall not be moved or transferred into a placement of high restriction under this rule.

(2) An assigned disciplinary minimum length of stay under this policy shall only be for offenses that meet criteria and shall not exceed six (6) months.

(3) [~~(2)~~] When local authorities make a written request to defer an allegation to their jurisdiction for prosecution, TYC will cancel the directive, unless a due process hearing will be scheduled on other allegation(s). A due process hearing on any allegation(s) shall be scheduled within seven (7) days (excluding weekends and holidays).

(4) [~~(3)~~] A Level [~~level~~] II hearing should be held prior to a disciplinary transfer. When good cause compels a pre-hearing movement of the youth, the hearing shall be held within three (3) consecutive days after the movement.

(5) [~~(4)~~] A youth assigned a disciplinary minimum length of stay may remain in the current program or be transferred and remain in the new placement until the assigned disciplinary length of stay and other program completion criteria are completed.

(6) [~~(5)~~] The [~~assigned disciplinary~~] minimum length of stay assigned under this policy may be reduced based on the youth's behavior and progress toward 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.

Filed with the Office of the Secretary of State on January 13, 2004.

TRD-200400209

Neil Nichols
Interim Executive Director
Texas Youth Commission
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 424-6014

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37 TAC §95.21

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

The Texas Youth Commission (TYC) proposes the repeal of §95.21, concerning Aggression Management Program. The repeal of the section will allow for a significantly revised rule to be published in its place. The revised rule can be found in this same issue of the *Texas Register*.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the publication of an updated rule to replace this section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The repeal is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule affects the Human Resource Code, §61.034.

§95.21. Aggression Management Program.

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

Filed with the Office of the Secretary of State on January 13, 2004.

TRD-200400207
Neil Nichols
Interim Executive Director
Texas Youth Commission
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 424-6014

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37 TAC §95.21

The Texas Youth Commission (TYC) proposes new §95.21, concerning Aggression Management Program. The new section will make significant revisions to program admission, progression and completion requirements.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be improved program design and clearly defined staff responsibilities There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this section.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.075, which provides the Texas Youth Commission with the authority to order a child's confinement under conditions it believes best designed for the child's welfare and the interests of the public.

The proposed section affects the Human Resource Code, §61.034.

§95.21. Aggression Management Program.

(a) Purpose. The purpose of this rule is to establish the admission and release criteria and the standards of treatment for seriously aggressive youth in the Aggression Management Program (AMP). The program is designed to safely manage and treat youth whose aggressive behavior has been unresponsive to less restrictive interventions and who continue to pose a significant danger to other youth and staff. The AMP is a highly structured program delivered in a self-contained unit that provides behavior modification and a system of graduated reintegration into the general population. Placement in the AMP is a major disciplinary consequence.

(b) Explanation of Terms Used.

(1) Aggressive behavior--is defined as an imminent, credible act, threat of an act, or inciting others to act in a manner that involves assaultive touching of another resulting in bodily injury or offensive contact (spitting, chunking, etc.). Imminent refers to an event that can happen immediately if the youth has the opportunity to engage in an assaultive act.

(2) In-Room Restriction--is confinement in the youth's room. The youth is restrained by handcuffs when out of the room, and is out of the room only to participate in personal hygiene or in large muscle exercise, if safety permits.

(3) Treatment team--is composed of the AMP primary service worker (PSW), program administrator (PA), psychologist, teacher, juvenile correction officer (JCO) supervisor and other staff as needed.

(4) Individual review team (IRT)--consists of the director of clinical services (chair) and the assistant superintendent. Additional members may be appointed as needed. AMP staff shall not be a member of the IRT.

(c) Authorized Facilities.

(1) The McLennan County State Juvenile Correctional Facility (MCSJCF) in Mart, Texas is the only facility authorized to administer the AMP.

(2) TYC contract programs shall not develop or administer an AMP.

(d) Applicability. Females or sentenced offenders eligible for transfer to the Institutions Division of the Texas Department of Criminal Justice (TDCJ), or youth in non-secure contract care facilities, or youth with a mental health contraindication are not eligible for placement in the AMP.

(e) Eligibility Criteria.

(1) A Level I or II hearing has been held and a finding made that the youth engaged in one of the following offenses:

(A) assault resulting in substantial bodily injury (involving more than a passing discomfort or fleeting pain); or

(B) an assault causing bodily injury on three separate occasions over a 90-day period and the second and third assaults were each committed after a Level I or II hearing disposition had been made for the previous assault; or

(C) intentionally participated in a riot that caused bodily injury or property damage of over $500.00; or

(D) used or attempted to use either an object defined as a weapon by the Penal Code or an object that could be used as a weapon, which placed the victim in fear of imminent bodily injury.

(2) The youth is on Phase B0.

(f) Admission Decision Process.

(1) The local AMP Admission Review Committee at the MCSJC facility is composed of at least the assistant superintendent, AMP psychologist, and the AMP program administrator. The facility psychiatrist shall review admission decisions for youth with a psychiatric history.

(2) The AMP Admission Review Committee shall approve admission to the AMP based on the following considerations:

(A) a current mental health assessment that indicates there is no therapeutic contraindication to placement in the AMP; or

(B) less restrictive interventions have been attempted without successfully reducing the behavior and the AMP represents the least restrictive available and appropriate intervention.

(g) Priority For Admission.

(1) If a bed is available, priority for admission is given to:

(A) youth with the most dangerous and chronic aggressive behavior;

(B) youth with greater frequency of weapon use; or

(C) a directive from the executive director or designee.

(2) If a bed is not immediately available, the youth is placed on a waiting list. Youth will be admitted to the AMP from the waiting list based on:

(A) date of referral;

(B) end date of the BMP; or

(C) a directive from the executive director or designee.

(h) Youth in Behavior Management Program (BMP) Pending Admission to AMP.

(1) If the disposition at the Level I or II hearing held pursuant to this policy resulted in a recommendation for transfer to the AMP, but bed space is not available, the youth will be placed in BMP at the youth's current placement pending admission to AMP with an assigned maximum length of stay.

(2) If the youth completes the maximum length of stay in the BMP prior to a bed becoming available in the AMP, the youth shall not be admitted to AMP as a result of the conduct determined at the Level I or II hearing that resulted in the current assignment to BMP.

(3) The AMP Admission Review Committee has discretion to disapprove admission to the AMP if a youth has substantially completed a placement in BMP without an incidence of aggression.

(i) Program Requirements.

(1) Within seven (7) calendar days, an assessment will be completed for each youth admitted to AMP in accordance with TYC's Case Management Standards.

(2) Within 72 hours of admission, the youth will receive orientation to the AMP in accordance with TYC's Case Management Standards.

(3) Within ten (10) calendar days of the youth's admission, the initial treatment team review shall be completed.

(4) Within seven (7) calendar days of the initial treatment team review, the AMP PSW shall develop an Individual Case Plan (ICP) including program goals and objectives for each youth.

(j) Program Components. Program Structure is designed to maximize the safety and security of youth and staff.

(1) Physical Structure.

(A) Youth are confined to single cell rooms with locked doors at all times unless otherwise provided for in this policy or if they engage in aggressive conduct.

(B) Mechanical restraints are used for youth on stage I while not confined to their rooms and stages II/III while in the infirmary.

(C) Daily Schedule--A structured daily schedule is maintained and posted to provide a predictable and safe environment.

(2) Academics.

(A) All youth are expected to participate in an educational program for a minimum of four (4) hours per day with an additional two (2) hours of individualized schoolwork to be completed in their rooms.

(B) All special education services are provided in accordance with admission, release, and dismissal (ARD) committee decisions. For youth who are eligible to participate in special education services, an ARD meeting is held within 30 days of admission to the AMP to review the Individual Education Plan (IEP). Subsequent ARD meetings and evaluations are completed in compliance with state and federal regulations and TYC Special Education Operating Guidelines.

(C) Youth with Limited English Proficiency are provided with appropriate adaptations to the educational program as recommended by the Language Proficiency Assessment Committee (LPAC).

(3) Individual Counseling.

(A) Youth in the AMP receive weekly individual counseling by the PSW in accordance with TYC's Case Management Standards.

(B) Youth will receive counseling by the AMP psychologist in accordance with TYC's Case Management Standards.

(4) Group Therapy.

(A) Youth on stages 4 and 5 participate in Core Group focusing on the completion of Resocialization Program requirements and transition issues. The PSW conducts the Core Groups on the AMP unit.

(B) Scheduled Behavior Groups are offered to all youth on stages 2-5 and are conducted daily by the juvenile correctional officer (JCO).

(5) Medical and Psychological Services. Youth are seen by medical and/or psychiatric staff, as needed, and treatment is provided as ordered. The AMP psychologist continually assesses the youth's mental status, provides individual counseling, and provides consultation to the treatment team.

(6) Behavior Management.

(A) Youth are expected to follow a prescribed schedule and commit no rule violations. See (GAP) §95.3 of this title (relating to Rules of Conduct).

(B) Youth earn privileges in the AMP based on progress through the AMP stages and resocialization phases.

(C) Behavior requiring In-Room Restriction will follow procedures in (GAP) §97.40 of this title (relating to Security Program).

(7) Physical Exercise.

(A) Large muscle exercise will be offered to youth daily and will be offered in an exercise yard if safety and weather permit.

(B) On stages IV and V, the youth will participate in physical exercise on the general campus as safety permits.

(8) Family Notification, Involvement and Visitation. Youths' families will be encouraged to be involved in the youths' treatment. All families receive an orientation to the AMP, and are offered the opportunity to have input into the youth treatment plan and to contact the youth by letters and visitation. Refer to (GAP) §87.5 of this title (relating to Family Involvement).

(9) Youth Rights. Certain basic rights are recognized for each youth in TYC, with the exception of phone usage. Youth will be allowed phone usage pursuant to (GAP) §93.11 of this title (relating to Access to Attorneys and Courts), and as provided for each AMP stage listed below.

(k) Program Progress. The AMP is comprised of five (5) stages. A review of the youth's progress for each stage is made weekly by the treatment team.

(1) Stage I. Youth on stage I require the most external control. Youth spend the majority of time confined to their rooms. When out of the room, youth are in handcuffs and shackles.

(A) Completion Requirements: Completion of 15 consecutive days without an aggressive act or the credible threat of one.

(B) Phone Access. One (1) five-minute per week pre-paid/collect call and one (1) Tex-an call per month.

(C) Weekday Services and Activities.

(i) At least two (2) 30-minute per week individual therapy sessions provided by the PSW in accordance with TYC Case Management Standards.

(ii) At least 30 minutes per week of individual and/or group therapy by the AMP psychologist or appropriate designee in the absence of the AMP psychologist.

(iii) At least six (6) hours daily of academic services will be provided to the youth. Up to two (2) hours of academic services may be provided in the AMP classroom.

(iv) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(D) Weekend Services and Activities.

(i) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(ii) One (1) hour each day of games and recreation out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(2) Stage II. Youth on stage II continue to spend the majority of the day confined to their rooms but may be out of their rooms for activities without the use of mechanical restraints.

(A) Completion Requirements:

(i) Completion of 30 consecutive days on this stage without an aggressive act or the credible threat of one; and

(ii) Successful completion of 3 of 5 indicators for the Main Objective for Phase C1 as outlined in The ABCs of Phase Assessment. Indicators related to the definition of a Life Story and Offense Cycle are required with one (1) additional indicator of the Main Objective; and

(iii) Successful completion 3 of the 5 Sub-Objectives for Phase C1. The Empathy and Thinking Errors Sub-Objectives are required along with any other sub-objective except the Layout; and

(iv) Achievement of Phase B1 as outlined in The ABCs of Phase Assessment; and

(v) Completion of Phase A1 as outlined in The ABCs of Phase Assessment.

(B) Phone Access. Up to two (2) five-minute per week pre-paid/collect phone calls and one (1) Tex-an call per month.

(C) Weekday Services and Activities.

(i) At least two (2) 30-minute per week individual therapy sessions provided by the PSW in accordance with TYC Case Management Standards.

(ii) At least 30 minutes per week of individual and/or group therapy by the AMP psychologist or appropriate designee in the absence of the AMP psychologist.

(iii) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(iv) At least six (6) hours daily of academic services will be provided to the youth. Four (4) hours of academic services will be provided in the AMP classroom.

(v) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(D) Weekend Services and Activities.

(i) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(ii) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(iii) Up to two (2) hours each day of games and recreation out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(3) Stage III. Youth on stage III have additional time out of their rooms to participate in activities without the use of mechanical restraints.

(A) Completion Requirements:

(i) Completion of 30 consecutive days on this stage without an aggressive act or the credible threat of one; and

(ii) Successful completion of the Main Objectives and Sub-Objectives for Phase A1, B1, C1 with the Layout being the last Sub-Objective completed; and

(iii) Successful completion of a treatment team approved school transition plan in preparation for transition to the educational program in the campus school.

(B) Phone Access. Up to three (3) five-minute per week pre-paid/collect phone calls and one (1) Tex-an call per month.

(C) Weekday Services and Activities.

(i) At least one (1) 60-minute or two (2) 30-minute per week individual therapy sessions provided by the PSW in accordance with TYC Case Management Standards.

(ii) At least 30 minutes per week of individual and/or group therapy by the AMP psychologist or appropriate designee in the absence of the AMP psychologist.

(iii) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(iv) At least six (6) hours daily of academic services will be provided to the youth. Four (4) hours of academic services will be provided in the AMP classroom.

(v) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(vi) May eat meals out of the room with up to three (3) other youth as safety permits.

(D) Weekend Services and Activities.

(i) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(ii) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(iii) Up to four (4) hours each day of games and recreation out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(iv) May eat meals out of the room with up to three (3) other youth as safety permits.

(4) Stage IV. Youth on stage IV attend campus school and are working on issues related to transitioning to regular campus programming.

(A) Completion Requirements:

(i) Completion of 30 consecutive days on this stage without an aggressive act or the credible threat of one

(ii) Successful completion of 3 of the 4 indicators for Phase C2 Main Objective. The required indicators (#1, 3 and 4) include:

(I) accurately discuss significant life events and feelings from birth through commitment to TYC; and

(II) identify significant unmet needs and how they developed; and

(III) complete workbook assignments from the Changing Course Workbook for Resocialization.

(iii) Successful completion of 3 of the 5 Sub-Objectives for Phase C2 including at least indicator 1 for the Empathy and Thinking Errors Sub-Objectives and one (1) other Sub-Objective with the exception of the Layout.

(iv) Attend campus school for half a day, following school rules and completing all school assignments and an additional two (2) hours in the AMP classroom.

(v) Attainment of Phase A2 as outlined in the ABCs of Phase Assessment.

(vi) Attainment of Phase B2 as outlined in the ABCs of Phase Assessment.

(vii) Successful completion of a treatment team approved Campus Transition Plan in preparation for participation in general campus activities.

(B) Phone Access. Up to three (3) five-minute per week pre-paid/collect phone calls and one (1) Tex-an call per month.

(C) Weekday Services and Activities.

(i) At least one (1) 60-minute or two (2) 30-minute per week individual therapy sessions provided by the PSW in accordance with TYC Case Management Standards.

(ii) At least two (2) 30-minute bi-weekly individual and/or group therapy sessions by the AMP psychologist or appropriate designee in the absence of the AMP psychologist.

(iii) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(iv) Five (5) hours per week of Core Group conducted by the PSW in accordance with TYC Case Management Standards.

(v) Four (4) hours daily of academic services will be provided to the youth in the campus school. Two (2) hours daily of academic services will be provided in the AMP classroom.

(vi) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(vii) One (1) hour structured activity per day with an assigned general campus dorm as safety permits.

(viii) May eat meals out of the room with up to three (3) other youth as safety permits.

(ix) The appropriate education staff will communicate daily to the AMP staff the youth's progress and problem areas in the campus school. The AMP staff will communicate daily to the appropriate education staff the youth's progress and problem areas in AMP.

(D) Weekend Services and Activities.

(i) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(ii) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(iii) Up to four (4) hours each day of games and recreation out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(iv) May eat meals out of the room with up to three (3) other youth as safety permits.

(5) Stage V. Youth on stage V are participating in the program of an assigned general population dorm.

(A) Completion Requirements:

(i) Completion of 30 consecutive days in this stage without an aggressive act or the credible threat of one.

(ii) Successful completion of all Main Objectives and Sub-Objectives for Phase A2, B2, and C2 to include the Life Story Layout as the last Sub-Objective. Phase objectives must meet the criteria in The ABCs of Phase Assessment.

(iii) Attend school in the main campus school for the entire school day and complete all school assignments.

(iv) Participate in all general campus programming and activities, as safety permits, with the exception of the general campus Core Group.

(v) Complete a treatment team approved plan for transition to a regular campus program. The plan will identify high-risk situations and the strategies the youth is to use to deal with the high-risk situations without the use of aggression.

(B) Phone Access. Up to three (3) five-minute per week pre-paid/collect phone calls and one (1) Tex-an call per month.

(C) Weekday Services and Activities.

(i) At least one (1) 60-minute or two (2) 30-minute per week individual therapy sessions provided by the PSW in accordance with TYC Case Management Standards.

(ii) At least two (2) 30-minute bi-weekly individual and/or group therapy sessions by the AMP psychologist or appropriate designee in the absence of the AMP psychologist.

(iii) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(iv) Five (5) hours per week of Core Group conducted by the PSW in accordance with TYC Case Management Standards.

(v) Fourteen (14) hours each day to participate in a full school day in the campus school and to participate in programming in the assigned dorm.

(vi) May eat meals out of the room with up to three (3) other youth as safety permits.

(vii) The appropriate education staff will communicate daily to the AMP staff the youth's progress and problem areas in the campus school. The AMP staff will communicate daily to the appropriate education staff the youth's progress and problem areas in AMP.

(D) Weekend Services and Activities.

(i) Participate in weekend activities on assigned dorm as youth's behavior and safety permit.

(ii) If youth cannot participate in weekend activities on assigned dorm, the following must occur:

(I) Fifty-minutes per day of Behavior Group provided by an appropriate staff in accordance with TYC Case Management Standards.

(II) One (1) hour each day of large muscle exercise out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(III) Up to four (4) hours each day of games and recreation out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(IV) Up to four (4) hours each day of games and recreation out of the room or in the enclosed outdoor recreation area as the youth's behavior and weather permit.

(V) May eat meals out of the room with up to three (3) other youth as safety permits.

(6) Resocialization Phases.

(A) The highest Resocialization Phases the youth may earn is A4, B2, and C2.

(B) Youth may work on Phase C3 objectives but may only earn the following:

(i) Main Objective.

(I) Presents an Offense Cycle for the committing offense.

(II) Completes workbook exercises.

(ii) Sub-Objectives.

(I) Thinking Errors--Identifies the Thinking Errors used in each step of the Offense Cycle and identifies how the use of each Thinking Error allowed the avoidance of responsibility for the behavior or avoidance of unpleasant feelings. (Indicators 1 and 2)

(II) Empathy--Discusses how empathy might prevent similar behavior in the future. (Indicator 1)

(III) Values--Evaluates behaviors in relation to stated personal values. (Indicator 1)

(IV) Positive Skills--Reports personal strengths and discusses how personal weaknesses relate to the Offense Cycle and discusses impact of the committing offense to the victim, extended victims, community, self and others. (Indicators 1 and 2)

(l) Progress Reviews.

(1) Treatment Review Team

(A) The treatment team reviews the youth's ICP, progress through the program and evaluates the completion of stage requirements and the effectiveness of treatment strategies on a weekly basis and reviews resocialization requirements on a monthly basis.

(B) The treatment team makes decisions regarding stage and phase promotion based on achievement of established criteria:

(i) Stage Promotion. Youth meeting the established stage criteria must be promoted.

(ii) Stage Demotion. Treatment team decisions to assign the youth to a lower stage may only be done for acts of aggressive behavior and the treatment team may demote only one (1) stage. Demotions of two (2) or more stages require a Level II hearing.

(iii) Phase promotion and demotion is in accordance with the ABCs of Phase Assessment and TYC's Case Management Standard related to Phase Assessment.

(2) Individual Case Plan Review. Each youth's treatment objectives, progress and intervention strategies are reviewed monthly by the treatment team, and the AMP PSW develops a new ICP in accordance with TYC's Case Management Standards.

(3) Independent Review Team.

(A) The IRT reviews all youth not making satisfactory progress through the AMP. The team assesses youth who have been on stage I for more than 30 days, on stages II to V for more than 45 days or who have not achieved stage V within nine (9) months of admission to review the justification and documentation of the reasons the youth has failed to progress in the program stages and to determine if appropriate interventions are being provided the youth.

(B) Based on the review, the IRT makes recommendations to the treatment team for inclusion in the youth's ICP.

(C) The IRT reviews the youth's case at least every 45 days thereafter until the youth progresses to the next stage and quarterly thereafter for youth in the program longer than nine (9) months.

(4) Mental Health Review.

(A) Youth will be evaluated on a regular basis by the AMP psychologist for presence of a mental health disorder that contraindicates continued admission in the AMP.

(B) Youth will be released from the AMP at any time for mental health reasons based on the recommendation of the psychologist or psychiatrist and the approval of the director of clinical services at MCSJCF.

(C) Youth with neurological and/or mental health disorders may be temporarily admitted to the Corsicana Stabilization Unit (CSU) pursuant to (GAP) §87.67(c)(3) of this title (relating to Corsicana Stabilization Unit) for diagnostic purposes to determine appropriate placement in AMP or CSU.

(m) Program Completion and/or Release.

(1) Youth must be released from AMP when the following events occur:

(A) the completion of stage V; or

(B) youth developed mental health disorder that contraindicates the youth's continued stay in the AMP must be released from the program.

(2) Youth will not be released to the returning facility. The youth's release placement shall be determined by the CPU placement procedures.

(3) If transportation is not available to the assigned facility upon the completion of stage 5, the youth will be transferred to MCSJCF's general population.

(n) Program Monitoring and Youth Rights.

(1) To ensure the program is being implemented according to provisions of this policy, the superintendent or assistant superintendent will visit the AMP daily and the director of clinical services will visit the AMP weekly. In the absence of the superintendent and the assistant superintendent, the ADO will visit the AMP, and in the absence of the director of clinical services, the designated psychologist will visit the AMP.

(2) The administrative assistant to the superintendent shall visit the AMP daily to ensure that the youth has access to or use of the complaints resolution system. In the absence of the administrative assistant, the superintendent will designate an informed staff the duties of ensuring that the youth has access to the complaints resolution system.

(3) The youth will be offered the opportunity to a face-to-face interview with the assistant superintendent weekly.

(o) Appeal. Any decision that affects the youth's length of stay in the AMP may be appealed to the executive director. See (GAP) §93.53 of this title (relating to Appeal to Executive Director). The pendency of an appeal shall not preclude implementation of 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 January 13, 2004.

TRD-200400206
Neil Nichols
Interim Executive Director
Texas Youth Commission
Earliest possible date of adoption: February 29, 2004
For further information, please call: (512) 424-6014

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 310. HOME REGISTRATION

10 TAC §§310.10, 310.20, 310.30, 310.40

The Texas Residential Construction Commission (the "commission") has withdrawn the new sections adopted on an emergency basis at Title 10, Part 7, Chapter 310, §§310.10, 310.20, 310.30, and 310.40, relating to Home Registration which appeared in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10585).

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TRD-200400189
Susan Durso
General Counsel
Texas Residential Construction Commission
Effective date: January 12, 2004
For further information, please call: (512) 463-9524

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10 TAC §§310.10, 310.20, 310.30, 310.40

The Texas Residential Construction Commission (the "commission") has withdrawn from consideration the new sections proposed at Title 10, Part 7, Chapter 310, §§310.10, 310.20. 310.30, and 310.40, relating to Home Registration which appeared in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10589).

Filed with the Office of the Secretary of State on January 12, 2004.

TRD-200400188
Susan Durso
General Counsel
Texas Residential Construction Commission
Effective date: January 12, 2004
For further information, please call: (512) 463-9524

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the 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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 17. MARKETING AND PROMOTION

The Texas Department of Agriculture (the department) adopts amendments to §§17.51-17.52, §17.54, §17.56, and §17.304, and new §17.59, concerning the department's GO TEXAN membership and GO TEXAN Partner Program rules. Sections 17.52, 17.54 and 17.56 are adopted with changes made to the proposal published in the December 5, 2003 issue of the *Texas Register* (28 TexReg 10850) for purposes of clarification. Sections 17.51, 17.59 and 17.304 are adopted without changes and will not be republished. The amendments and new section are adopted to establish a GO TEXAN membership category for nonagricultural products, in accordance with Texas Agriculture Code, §12.0175, as amended by House Bill 1858, 78th Regular Session, 2003 (HB 1858), and to establish additional eligibility criteria for the GO TEXAN membership and GO TEXAN Partner programs. The adoption of new §17.59 will serve to increase sales and business opportunities for non-agricultural products produced in Texas because of the department's promotional and marketing programs. Amendments, other than those relating to the promotion of non-agricultural products, will ensure that public awareness for the program is enhanced and that efficiencies continue to be incorporated into the program.

The amendments to §17.51 provide a definition for "Other Products" and modify the definitions for "Produced in Texas" and "Producer". The amendments to §17.52, §17.54, §17.56 clarify that the department, in the evaluation of an applicant or participant in the GO TEXAN membership program may consider whether the applicant or participant, or their products, enhance the integrity, image, or commercial appeal of the program. The amendments to §17.304 provide that as a requirement for participation in the GO TEXAN Partner Program, the applicant must disclose certain criminal history information of any owners having a 10% or more interest in the applicant's business, and provide for the forfeiting of funds awarded to a successful applicant for failure to continue to comply with disclosure of any criminal conviction information required to be reported to the program. New §17.59 establishes a membership category for non-agricultural products, including eligibility requirements, an application process, and restrictions on use of the GO TEXAN promotional mark.

No comments were received on the proposal.

SUBCHAPTER C. TAP, TASTE OF TEXAS, VINTAGE TEXAS, TEXAS GROWN, NATURALLY TEXAS AND GO TEXAN AND DESIGN MARKS

4 TAC §§17.51, 17.52, 17.54, 17.56, 17.59

The amendments to §17.51-17.52, §17.54 and §17.56 and new §17.59 are adopted under the Texas Agriculture Code, §12.0175, as amended by HB 1858, which authorizes the department to establish by rule programs to promote and market agricultural products and other products, grown, processed or produced in the state and to charge a membership fee for participation in such programs.

§17.52. Application for Registration To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design Mark.

(a) No person shall use, employ, adopt, or utilize the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark, unless prior application for registration or licensing has been made to the department and permission to make such use, employment, adoption, or utilization has been granted.

(b) Unless permission is otherwise granted by the department, the GO TEXAN and Design mark may only be used by registrants and licensees to certify and promote the following Texas agricultural products:

(1) agricultural products produced in Texas;

(2) agricultural food products processed in Texas, regardless of origin, and unprocessed agricultural food products grown in Texas. A food service company, including a restaurant, is not eligible for membership unless it processes a packaged product for resale, in which case, the mark may only be used to promote the specific program-eligible products. Food service companies or restaurants may not use the mark in any general fashion to promote the business or its services;

(3) wine which is:

(A) at least 75% by volume, derived from grapes grown and fermented in the State of Texas; and

(B) fully produced and finished within the State of Texas;

(4) Texas-grown nursery, floral, and forestry products;

(5) leather, textile, or apparel products approved by the commissioner as being:

(A) composed of 50% or greater natural fibers derived from crops or livestock grown or raised within the State of Texas, the identity of the fibers having been preserved throughout processing so as to be verifiable by satisfactory documentation as having originated in Texas; or

(B) composed of 50% or greater natural fibers, regardless of where grown or raised, which have been processed into leather, textile, or apparel products within the State of Texas in a manner which substantially changes their form, and, if composed of natural fibers derived from crops or livestock grown or raised outside the State of Texas, the natural fibers must be of a type commercially produced within the State of Texas;

(6) horticulture product(s);

(7) lamb or goat meat(s). In order to be certified as "GO TEXAN" lamb or goat meat(s), lamb or goat meat(s) must be from a lamb or goat that has been fed in Texas for at least 30 days and:

(A) be from a lamb or goat that has been slaughtered in Texas; or

(B) be from a lamb or goat slaughtered and fabricated in Texas;

(C) for purposes of this paragraph, "fabricated" shall be defined as the process of taking a carcass and cutting the carcass into wholesale or retail cuts of meat;

(8) livestock or poultry feed(s), feed supplement(s) and pet food(s);

(9) fish, shellfish, or other aquatic species in their raw form or processed form;

(10) natural fiber(s);

(11) natural wood(s);

(12) processed food product(s);

(13) processed natural fiber and natural wood product(s);

(14) wildlife processed for food or by-products;

(15) equine species; and

(16) Texas processed agricultural product(s).

(c) The Texas Agricultural Product, Taste of Texas, Vintage Texas, Texas Grown, and Naturally Texas marks shall only be used by program members to identify products meeting the requirements for membership for those programs prior to May 23, 1999 as follows:

(1) for the TAP mark, for products identified in subsection (b)(1) of this section;

(2) for the Taste of Texas mark, for products identified in subsection (b)(2) of this section;

(3) for the Vintage Texas mark, for products identified in subsection (b)(3) of this section;

(4) for the Texas Grown mark, for products identified in subsection (b)(4) of this section; or

(5) for the Naturally Texas mark, for products identified in subsection (b)(5) of this section.

(d) Applications submitted under this section shall be made in writing on a form prescribed by the department. Application forms may be obtained by contacting the Texas Department of Agriculture Marketing and Promotion Division at P.O. Box 12847, Austin, Texas 78711, phone (512) 463-7624.

(e) Applications shall be submitted to the assistant commissioner for Marketing and Promotion, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711.

(f) If approved, applicants shall remit the required registration fee within 30 days of notification of approval.

(g) Upon receipt of the registration fee, the department shall mail to the registrant or licensee a certificate of registration, which shall expire on August 31 following the year of issuance. The department shall also enclose copies of the mark, suitable for reproduction. If the certificate is for less than one full year, registration fees will be assessed on a pro rata basis.

(h) Other than the use of the mark, no registrant or licensee shall use any statement of affiliation or endorsement by the State of Texas or the department in the selling, advertising, marketing, packaging, or other commercial handling of TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN products.

(i) Registrants and licensees shall indemnify and hold harmless the commissioner, the State of Texas, and the department for any claims, losses, or damages arising out of or in connection with that person's advertising, marketing, packaging, manufacture, or other commercial handling of TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN products.

(j) Any permission under the certificate of registration granted to a registrant to use the mark shall be nonexclusive and nontransferable for the products listed in the application.

(k) Registrants shall do nothing inconsistent with the ownership of the mark in the department, and all use of the mark by any registrant shall inure to the benefit of and be on behalf of the department. Further the registrants shall not have any right, title, or interest in the mark, other than the right to use the mark in accordance with the certificate of registration. Registrants must agree not to attack the title of the department to the mark, or attack the validity of the certificate of registration or the permission granted by the department.

(l) The nature and quality of the goods sold by registrants in connection with the mark shall conform to any standards which may be set from time to time by the department. Registrants shall cooperate with the commissioner by permitting reasonable inspection of the registrant's operation and supplying the commissioner with specimens of use of the mark upon request. Registrants shall not use the mark on goods sold or marketed as products from another country or state, or as products from a city or region outside of Texas, unless prior written authorization is received from the department.

(m) Registrants and licensees shall comply with all applicable laws and regulations and obtain all appropriate governmental approval pertaining to the selling, advertising, marketing, packaging, manufacturing, or other commercial handling of the products covered by the certification of registration.

(n) Registrants shall use the mark only in the form and manner, and with appropriate legends, as prescribed from time to time by the commissioner. Registrants shall affix on all product(s) bearing the mark the following legal notice: GO TEXAN and Design is a certification mark of the Texas Department of Agriculture.

(o) The department shall have the sole right and discretion to bring infringement or unfair competition proceedings involving the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design marks.

(p) The department may consider in its evaluation of an applicant or registrant any information regarding an applicant or member that could impair the department's efforts to promote the development of markets for Texas agriculture and other products.

(q) The consideration of information as provided in subsection (p) of this section may include consideration of any information that may not enhance the integrity and positive image of the program,

including, but not limited to, a review of criminal information, as allowed by applicable laws and regulations.

§17.54. Denial of Application to Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design Mark.

An application for registration or license to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark may be denied if:

(1) application is not made in compliance with 17.52 of this title (relating to Application for Permission To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark;

(2) the applicant cannot provide adequate assurances that the product for which application is made qualifies and will continue to qualify for the program(s) in which it is enrolled;

(3) the product is of a quality markedly inferior to that representative of similar products produced in Texas;

(4) the applicant has misused the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark prior to the date of application; or

(5) applicant's use of the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark would either:

(A) impair or frustrate the department's efforts to expand or encourage development of the markets for Texas agricultural and other products; or

(B) fail to enhance the integrity and image of the program, as determined by the department; or

(6) for reasons of policy, as determined by the department.

§17.56. Termination of Registration To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design marks.

(a) Registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark may be revoked at any time if the mark is misused.

(b) Misuse of the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark includes, but is not limited to:

(1) use of the mark in the selling, advertising, marketing, packaging, or other commercial handling of a product for which registration to use the mark has not been granted by the department;

(2) use of the mark in the selling, advertising, marketing, packaging, or other commercial handling of a product which is of a quality markedly inferior to that representative of similar products produced in Texas; or

(3) use of the mark would either:

(A) impair or frustrate the department's efforts to expand or encourage development of the markets for Texas agricultural and other products; or

(B) fail to enhance the integrity and image of the program, as determined by the department

(4) use of the mark in a manner violating any rule promulgated by the commissioner.

(c) Proceedings for the revocation of registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark shall be conducted in the manner provided for contested cases by the Administrative Procedure Act, Texas Government Code, Chapter 2001, and Chapter 1 of this title (relating to General Practice and Procedure).

(d) A proceeding for revocation of registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, or GO TEXAN and Design mark shall not preclude the commissioner from pursuing any other remedies, including, where applicable, the penal and injunctive remedies provided for by law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 16, 2004.

TRD-200400350
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: February 5, 2004
Proposal publication date: December 5, 2003
For further information, please call: (512) 463-4075

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SUBCHAPTER G. GO TEXAN PARTNER PROGRAM RULES

4 TAC §17.304

The amendments to §17.304 are adopted under the Texas Agriculture Code (the Code), §46.012, which authorizes the department to adopt rules to administer the Code, Chapter 46, relating to the GO TEXAN Partner Program, including rules for the use of the GO TEXAN logo. .

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 January 16, 2004.

TRD-200400351
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER Q. SYSTEM BENEFIT FUND

16 TAC §§25.451, 25.454, 25.457

The Public Utility Commission of Texas (commission) adopts amendments to §25.451, relating to Administration of the System Benefit Fund, §25.454, relating to the Rate Reduction Program, and §25.457, relating to Implementation of the System Benefit Fee by the Municipally Owned Utilities and Electric Cooperatives, with changes to the proposed text as published in the August 1, 2003 issue of the *Texas Register* (28 TexReg 5965). The amendments refine the program to better meet the purposes set out in the Public Utility Regulatory Act (PURA) §39.903 for the System Benefit Fund (SBF). The amendments are intended to insure that the low-income discount rules and practices are consistent and enforceable, improve the administration of the System Benefit Fund and Rate Reduction Program, and provide for the creation of a customer-based eligibility matching process for the Rate Reduction Program. The amendments are adopted under Project Number 27711.

The commission received written comments on the proposed amendments on September 2, 2003 and reply comments on September 9, 2003. On October 31, 2003, commission staff filed a draft of the Low-income Discount Procedural Guide (the Guide) in Project Numbers 27711 and 28056, *Rulemaking to Modify P.U.C. Subst. R. 26.412 Regarding Lifeline and Link Up Services for Low Income Discount Administration (LIDA)*. On November 7, 2003, a joint workshop for Project Numbers 27711 and 28056 was held at the commission to discuss the draft of the Guide, its purpose and correlation with the amended rules, and any questions, comments and suggestions from parties. Input from representatives of electric and telecommunications utilities was received at the workshop. The commission received written comments on the Guide on November 12, 2003. The commission also accepted supplemental comments on the proposed amendments on November 12, 2003. Parties submitting written comments on the rule included CPL Retail Energy, WTU Retail Energy, and Direct Energy, LP (jointly the Centrica REPs); Entergy Solutions Select Ltd. and Entergy Solutions Essentials Limited (jointly the Entergy REPs); First Choice Power; Green Mountain Energy Company (GMEC); Reliant Resources, Incorporated; the Texas Energy Association for Marketers (TEAM), consisting of Entergy Solutions, Cirro Energy, Gexa Energy and Texas Commercial Energy and TXU Energy Retail Company LP (hereinafter jointly referred to as REP Coalition or Coalition); Texas Legal Services Center (TLSC) and Texas Ratepayers' Organization to Save Energy (TX ROSE); GMEC; and San Patricio Electric Cooperative (San Patricio). The comments and reply comments on the Proposal for Publication, supplemental comments, and comments on the Guide that pertain to proposed amendments, are addressed below.

The commission had requested a response to a preamble question, as well as any comments on the rules. Parties responded with comments on the preamble question, comments on specific sections of the rules, and general comments on the rules.

Preamble Question:

Should the Low-Income Discount Procedural Guide be approved by the Executive Director or the Commissioners?

The REP Coalition stated that the Commissioners should adopt the Guide, rather than the Executive Director, and that there should be a minimum comment period of ten days. The REP Coalition found that this would discourage frequent changes which could be burdensome to the market. The REP Coalition agreed that administrative details may be appropriate for the Guide, but found that substantive matters would need to be addressed in the rule.

TLSC and TX ROSE stated that the answer to the preamble question hinged on the contents of the Guide. TLSC and TX ROSE emphasized that the purpose of the Guide must be purely procedural. TLSC and TX ROSE stated that a hybrid procedure could be adopted to approve the Guide in which the first draft would be adopted by the commission and minor changes could be adopted by the Executive Director. TLSC and TX ROSE found that the initial Guide should be published in the *Texas Register* for comments, that a procedure for amending the Guide should be established, and that all changes should be noticed and provided for comment with opportunity for objection. TLSC and TX ROSE stated that if a change was perceived by any party to affect the rights of customers that the matter would need to be docketed for consideration by the commission. Additionally, TLSC and TX ROSE commented that matters solely affecting REPs do not have the same protection since REPs have agreed to abide by the customer protection rules to maintain certification status. In reply comments, the REP Coalition stated that this implication was incorrect and that REPs are afforded the same rights under the Administrative Procedural Act (APA) as any other group.

In comments on the Guide, the REP Coalition restated that the Guide should be approved by the commission, and TLSC and TX ROSE restated that the initial Guide should be approved by the commission.

Commission response

The Guide will serve several purposes, but its main purpose is to serve as a stand-alone document that includes all of the program requirements for participants in the Rate Reduction Programs. To the extent that the Guide includes details about participants' program requirements, such as the format for the exchange of files in the matching process, the commission does not believe that APA procedures are required, but it will afford interested parties an opportunity to comment on the initial Guide. Any changes in substantive requirements for participants will be established in commission rules, which will be modified through an APA rulemaking process. The corresponding changes to the Guide, such as the incorporation of new requirements adopted in a commission-approved rule and the calculation of new discount factors will be made by the Executive Director, without a comment period. The commission notes that the calculation of the factors will be the most frequent reason for change and that it is purely a ministerial function, based on the rule, the commission's decisions on the discount percentage, and commission-approved changes in the price to beat (PTB).

§25.451, *Administration of the System Benefit Fund.*

TLSC and TX ROSE supported the changes to the amended administrative provisions of the rule, but disagreed with the deletion of §25.451(e)(3) and (4) of the current rule, which outline the process which estimates the revenue requirement for the rate discount, targeted energy efficiency programs, and customer education. TLSC and TX ROSE found that the decisions resulting from the past legislative session are not a reasonable basis for wholesale revision of the method for establishing the revenue requirement, and that PURA §39.903 has remained unchanged.

In reply comments, the REP Coalition agreed with TLSC and TX ROSE that the method for establishing the revenue requirement should remain the same and that §25.451(e)(3) and (4) of the current rule should be retained. The REP Coalition stated that

this is a substantive issue which should be addressed in the rule, consistent with the APA requirements.

Commission response

The commission does not agree with the comments to the extent that they assume the revised §25.451(e) discontinues consideration of the specific programs identified in the current rule when determining the revenue requirement. The commission emphasizes that the revision of §25.451(e) is not intended to remove these programs from inclusion in the revenue requirement, should they be funded at a later date; the revision was intended to encompass all purposes to be funded by the SBF in a more concise manner. The commission clarifies that the revenue requirement will include purposes required by future legislative appropriations, and refines the description of the revenue requirement in §25.451(e) to clarify the intent of the language.

The commission modifies references throughout §25.451 to specify the applicability of the subsections to REPs, have been made in response to the concern of San Patricio, located in *General Comments*, that entities to which each section or subsection apply are clearly addressed.

Additional changes have been made to §25.451 to either clarify the intent of the language, remove unnecessary language, or improve organization. The changes are as follows:

(1) Section 25.451(a) clarifies the purpose of this section to include "setting" the revenue requirement, and removes "establishment of" the revenue requirement. Since the revenue requirement has already been established, it is more accurate to state that future changes would set the requirement at a different amount.

(2) Section 25.451(b) clarifies that this section applies to areas in which customer choice has been implemented, or the commission has issued an order requiring that the rule be applied. With this clarification, this section will apply where customer choice has been implemented and where the commission has issued an order to include a group of customers in the Rate Reduction Program, as it has done in the case of certain customers of Mutual Energy SWEPCO. In addition, the commission makes a corresponding change in §25.454(b).

(3) The commission modifies the organization of §25.451(d), (g), (h), and (i).

(4) The commission clarifies §25.451(d)(3) (§25.451(d)(2) as adopted) in order to explain more clearly the review that is performed to determine the system benefit fee.

(5) The commission clarifies §25.451(d)(3) (§25.451(d)(2) as adopted) to state that each transmission and distribution utility (TDU) is required to file an updated rate schedule for inclusion in the TDU's tariff manual when a new fee is implemented.

(6) The commission clarifies §25.451(d)(4) (§25.451(d)(3) as adopted) to state that the average fee may not exceed $0.65 per MWh. This clarification is necessary because the fee assessed by the TDU, in the commission approved rate schedule, differs by customer class.

(7) The commission refines §25.451(f) to explain more clearly how the electric sales estimate is derived.

(8) The commission removes references to January 1, 2002 from §25.451(g) and (g)(1) (§25.451(g) as adopted). This language is no longer necessary because January 1, 2002 has past.

(9) The commission clarifies the language in §25.451(g)(1), (g)(2), (g)(3) and (g)(4) (§25.451(g), (g)(1), (g)(2), and (g)(3) as adopted) to clarify the intent of the subsection and add administrative flexibility.

(10) The commission modifies §25.451(g) to include (g)(4), containing language previously found in proposed §25.451(i)(2). The commission also modifies this language to more clearly explain the information to be provided.

(11) The commission removes from §25.451(h)(3) (§25.451(h)(2)), language which it finds duplicative of the remittance requirement, and language which it finds unnecessary for the intent of this subsection.

(12) The commission reorganizes and clarifies the language in §25.451(i)(1) (§25.451(i) as adopted) to explain the intent of the subsection more clearly.

(13) The proposed rule in §25.451(j), set out deadlines for commission and Comptroller action on reimbursement requests. The commission has concluded that the rule should not include deadlines but, rather, goals. The commission and Comptroller have been prompt in processing reimbursements, and there does not appear to be a compelling reason to include timing requirements. The commission therefore modifies §25.451(j) to restate deadlines as goals, to allow for administrative flexibility.

(14) The commission clarifies §25.451(j), §25.451(j)(2), §25.451(j)(3), §25.451(j)(4), and §25.451(k) to more clearly explain the intent of the language.

(15) The commission clarifies §25.451(j)(1) to state that REPs should report the number of customers who actually received discounts, as opposed to the number of customers listed by LIDA as eligible. This revision should ensure that the correct number is reported, because there may be a gap between the customers who are listed by LIDA as eligible, and the customers who are actually billed by that REP for that billing period.

§25.454, *Rate Reduction Program.*

The REP coalition suggested that the term "discount credit" in §25.454(c)(1), was redundant and should be replaced with "discount factor." In supplemental comments, the REP Coalition also suggested clarifying that the discount must be provided by any REP.

Commission response

The commission agrees and has changed the definition in the proposed amendments accordingly. References throughout §25.454 and §25.457 to "discount credit" have been removed and replaced with "discount factor." The commission also clarifies §25.454(c)(1) to clearly state that the discount must be provided by any REP.

The REP Coalition commented that the definition of the Guide in §25.454(c)(4), should clarify that it will not expand the obligations and responsibilities of Low-income Discount Program participants beyond the scope provided by the substantive rules. The REP Coalition, TLSC, and TX ROSE emphasized that the Guide should not include substantive requirements and should be limited and directly related to obligations and responsibilities delineated in the substantive rules.

Commission response

The commission recognizes the concern of participants that the Guide be purely administrative and procedural. The commission has amended this section to clarify the purpose of the Guide, and

has amended applicable sections in the rule, to ensure that all substantive issues have been addressed within the rule. The commission has made changes throughout §25.454 specifically to address parties' concerns. Nevertheless, the Guide will be used to prescribe additional details of program requirements that are set out in the rule, such as the format for files that are provided in the automatic enrollment process. Section 25.454(c)(4) and (h) have been amended to describe the Guide and the relationship between the Guide and the rules.

The REP Coalition suggested that the definition of rate reduction in §25.454(c)(5) be "The total amount credited to the consumption portion of an eligible customer's electric bill."

Commission response

The commission declines to make this change as it finds the current language more accurately reflects the method of calculating and reflecting the rate reduction on the eligible customers' bills.

The REP Coalition commented that the proposed amendments to §25.454(d)(2)(B) delete the description of the method used to calculate the discount. The REP Coalition recommended that this language be retained as it directly affects the benefit delivered to eligible customers. The REP Coalition noted that PURA §39.903 requires that the commission "adopt rules for a retail electric provider to determine a reduced rate for eligible customers…." In supplemental comments, the REP Coalition also requested that the commission specify within the rule the difference in applying the discount factor to current bills and to retracts/rebills.

Commission response

The commission declines to retain the language as suggested because the rule now requires REPs to use the discount factors calculated and posted to the commission's website by the commission staff. Given this change, the commission concludes that the rule provides adequate detail concerning the calculation of the discount factor. The rule does prescribe that the discount factors are calculated based on the PTB or provider of last resort (POLR) rate for each TDU service area and the percentage set by the commission, as set out in the rule. The rule also prescribes that the discount factors will reflect seasonal variations in these rates. It is not necessary that the rule address the calculation of the factors in greater detail, because REPs will have access to discount factors calculated by the commission staff, based on the rule, which will be located on the commission website. The rule also includes directions for the REPs on how to calculate the rate reduction on bills for current billing cycles and on retracts/rebills.

The REP Coalition stated that proposed §25.454(d)(2)(C) requires REPs to implement changes to a discount factor within 30 calendar days of the date the commission issues its order, but does not include procedures for promptly notifying REPs of such changes. The REP Coalition suggested that the rule require the commission to post the revised discount on the website and distribute the order to REPs via the commission's listserve system. Additionally, the REP Coalition suggested that the 30 calendar days start the day that the commission provides notice of the change. In supplemental comments, the REP Coalition added that the term "baseline rate" has not been defined in the rule and noted that the subsection does not clearly require REPs to implement changes resulting from commission approved changes in POLR or PTB rates.

Commission response

The commission has modified the proposed rule to state that each REP has 30 days from the date the commission posts the changes to the discount factor on the website, and has added a clarification in §25.454(d)(2) that this information will be posted on the commission's website. While notice is routinely provided when discount changes occur, the commission concludes that it is each REP's responsibility to follow the filings at the commission, monitor the Open Meetings, check the website for updates, and to notify commission staff of email and personnel changes.

The commission agrees with the REP Coalition with respect to the use of the term "baseline" and replaces the term baseline with "PTB or POLR" to remove confusion of the term baseline.

In supplemental comments, the REP coalition stated that the requirement in §25.454(d)(3)(A), for REPs to maintain a current record of the commission-posted discount factors, is unclear and should be deleted because the REPs will use the factors posted by the commission.

Commission response

The commission agrees and has deleted this requirement.

TLSC and TX ROSE commented that each customer should be billed in a format that reflects the receipt of the reduction as a separate item on each customer's bill and that if the REP discontinues the discount, the REP should be required to notify the customer in two billings of the reason for the change. In reply comments, the REP Coalition disagreed that any requirement for notice be the burden of the REP because the identification of the customer's eligibility is made by LIDA, and thus any requirement for notice should be fulfilled by LIDA.

Commission response

The commission has already addressed the issue of itemizing the discount on the bill under §25.454(d)(3)(C). The commission has addressed the issue of notification under §25.454(f)(2)(F) by adding the requirement to LIDA's duties.

In supplemental comments, the REP Coalition stated that the current requirement for REPs to print the discount amount on a separate line item is sufficient. The REP Coalition found that the language as proposed in §25.454(d)(3)(C) would require REPs to reprogram their billing systems, and would likely confuse customers by wrapping the information to a separate line. The REP Coalition recommended changing the language in this section so that the language requirement for the line item is that it includes "LITE-UP Discount."

Commission response

The commission agrees with the REP Coalition that "LITE-UP Discount" will be sufficient to notify the customer of the discount. This will be uniform terminology, and should minimize the cost to the REP. The commission also clarifies the language of §25.454(d)(3)(C) to more clearly explain the intent of the subsection.

The REP Coalition commented that the method for processing automatic enrollments, currently found in §25.454(e)(1), should be retained and revised to reflect the exchange of information between LIDA and the REPs. The REP Coalition also commented that the details of the self-certification process currently found in §25.454(e)(2) should be retained. The REP Coalition found that the specific discount eligibility periods applicable to customers enrolled by different methods, and any extension of such eligibility period for re-enrollment, should not be subject to change outside of a rulemaking process. Additionally, the REP Coalition

stated that the effective date of the customer's enrollment in the program, and the time periods for processing a self-certification application, should be specifically stated in the rule because they impact the rights of customers and obligations of LIDA.

The REP Coalition had no objection to the change in proposed §25.454(e)(3)(A) (§25.454(e)(5)(A) as adopted) and §25.454(e)(3)(B) (§25.454(e)(5)(B) as adopted) of the self-certification enrollment period to seven months but suggested that the commission clarify, either in the rule or the Guide, that the customer's eligibility begins when LIDA places the Electric Service Identifier (ESI ID) on the monthly file.

TLSC and TX ROSE noted that the current expectation that the customer will receive the discount within 60 days is only established in the application, and noted that commission internal correspondence has demonstrated that the staff will informally intervene when timelines are not met. TLSC and TX ROSE stated that the initial date of registration should be the date that LIDA receives a completed enrollment form or the date of automatic enrollment data transfer from the Texas Department of Human Services (TDHS). TLSC and TX ROSE also stated that LIDA should maintain enrollment procedures, which would provide that all applications received by the 15th of the month would be verified and transferred to the appropriate REP by the first of the following month. TLSC and TX ROSE found that the Guide could establish shorter timeframes, if appropriate safeguards are put in place. TLSC and TX ROSE also suggested that LIDA be required to review the applications within three days of receipt. TLSC and TX ROSE suggested that LIDA verify incomplete information by telephone to facilitate enrollment or return the application to the customer, with a postage paid envelope and additional instructions for completion. TLSC and TX ROSE found that the Guide should establish procedures for LIDA to remove customers who opt out of automatic enrollment from the rate reduction program.

In reply comments, the REP Coalition acknowledged the TLSC and TX ROSE suggestion for a schedule of delivery of lists to REPs, but urged the commission to consider a different schedule. The REP Coalition found that a schedule which revolves around the second business day before the end of the month, would work better, and would allow REPs to have the file in time for the next month's cycle of billing. Additionally, the REP Coalition supported a mechanism to allow customers to opt out of the discount. In supplemental comments, the REP Coalition stated that the data that LIDA will use for automatic enrollment should be clarified as customer-specific data.

Commission response

The commission agrees that the proposed language in §25.454(e) and §25.454(f), as initially proposed, lacked specificity, and has amended §25.454(e) and §25.454(f) to detail the roles of LIDA and the REPs in the enrollment processes. The commission also clarifies proposed §25.454(e)(3) (§25.454(e)(5) as adopted) to detail the length of the eligibility period. The commission declines to specify the time periods for processing a self-enrollment application, the time period in which the customer will match to a REP, the effective date of the customer's enrollment, and the method by which LIDA will verify incomplete information, because these are administrative issues to be worked out between the commission and LIDA.

The commission agrees with the REP Coalition that it would be beneficial to the customers for their eligibility start date to be the day that the customer is first placed on a REP's file, rather than the date the customer is entered into LIDA's system. However, it is unknown at this time whether or not the contracted LIDA will be able to accommodate such a change, and therefore the commission finds that the issue of the eligibility start date must be addressed in the Guide.

The suggestion of TLSC and TX ROSE that customers be provided with a postage paid envelope is also an administrative detail that need not be included in the rule. The commission has added the phrase "customer-specific data" to §25.454(e)(1), consistent with the REP Coalition's comments.

TLSC and TX ROSE noted that they were disturbed that the recent Request for Proposals for a new LIDA suggested requirements that the contractor may be required to review documentation for self-certified customers. TLSC and TX ROSE noted that if this requirement is for audit purposes based on a sample, then the requirement should not be an issue, but if the commission is considering substituting certification by the customer, with certification by LIDA, in which LIDA would review pay stubs, etc., the references to "self-certification" should be abolished.

TLSC and TX ROSE also opposed the proposed changes that shorten the customer's term of enrollment and found that the changes introduced a "hassle factor" into the program. TLSC and TX ROSE stated that when the rule was originally adopted, parties were sensitive to setting up a system that provided benefits to eligible customers without spending unreasonable amounts on operation and management.

TLSC and TX ROSE suggested that the commission evaluate the costs and benefits of verifying proof of income and of doubling the amount of renewal activity in the program. TLSC and TX ROSE further commented that income verification was considered too expensive by working groups involved in the original rulemaking. TLSC and TX ROSE found that income verification costs range from $60 to $150 per application. TLSC and TX ROSE found that the long-term nature of poverty is the reason that the 13-month enrollment was originally recommended. TLSC and TX ROSE also found that the amount of the benefit is considerably less than TDHS benefits, and that the increased cost of TDHS operations could be partially underwritten by federal monies. In contrast, TLSC and TX ROSE noted that if less money is available in the SBF due to administrative expenses, less money is available for paying the discount. Additionally TLSC and TX ROSE stated that increased transaction costs at the state level also result in increased transaction costs for the REPs which will ultimately be factored into overhead and electricity pricing.

Commission response

The commission clarifies proposed amendments to §25.454(e)(2)(E) (now §25.454(e)(3)) to explain the intended use of the requested documentation. The commission modifies §25.454(e)(2), (3) and (4), and other subparts as necessary to refer to the process as self-enrollment instead of self-certification, in response to the concern of TLSC and TX ROSE that the term "self-certification" is not accurate. The commission notes that the current rule allows for an auditing process, in which LIDA can request pay stubs, tax returns, etc. The commission believes that it is important to the integrity of the program to require that documentation be submitted in connection with self-enrollment, so that LIDA may review the documentation to verify customers' eligibility before enrolling them in the program.

When the rule was originally adopted, emphasis was placed on customer ease and minimal administration costs. However,

the fact that some customers were receiving the discount after their TDHS benefits expired has led to a re-evaluation of the current processes. It is difficult to conduct a precise cost-benefit analysis of the increased administration costs, because the commission does not know precisely how many customers will be affected and does not know what the costs will be for postage, materials and labor for increased re-enrollment efforts and verification. However, the average discount per customer in September 2003 was $17.59; therefore assuming it may cost $1.20 for postage and materials for each re-enrollment notice, ensuring that discounts are being given to the correct customers, through increased re-enrollment efforts costs less than 7.0% of one month's discount. Beyond the question of the costs and benefits, the commission believes that it has a responsibility to ensure that only the eligible electric customers are receiving the discount. One of the statutory SBF programs was not funded by the legislature during the current biennium, and a reduction in the level of funding for the Rate Reduction Discount program was required. The commission believes that continued public acceptance of the program is dependent upon operating it in a fiscally responsible manner.

The REP Coalition had no objection to the change of the automatic enrollment period, but suggested that proposed §25.454(e)(3)(B) (now §25.454(e)(5)(B) as adopted) be clarified to specify the length of the continued eligibility once a customer no longer receives TDHS benefits. The REP Coalition also noted that the section refers to TDHS benefits as defined in "subsection (c) of this section;" however, there is no definition of "TDHS" benefits in subsection (c).

Commission response The commission clarifies §25.454(e)(3)(B) (now §25.454(e)(5)(B) as adopted) to state that the period of continued eligibility once a customer no longer receives TDHS benefits is no more than 60 days and has removed the reference in subsection (c) to a definition of TDHS benefits.

TLSC and TX ROSE noted that the current informal dispute resolution process has worked well. However, they noted that the Guide may establish criteria that adversely affect the rights of customers, and, therefore, an appeals process must be in place. TLSC and TX ROSE also noted that in all cases affecting statutorily created benefits, an individual is constitutionally entitled to be notified of a disqualification in benefits by the administering governmental entity. TLSC and TX ROSE also stated that should a REP discontinue the rate reduction, the customer should be notified within two billings of the reasons for change. TLSC and TX ROSE noted that there is not an informal appeals or hearing process available at the commission and that no notices are issued by LIDA since LIDA does not currently have the job of denying benefits to households. Additionally, TLSC and TX ROSE stated that the rules as presently written only define market expectations and fail to recognize customers' legal rights and expectations. TLSC and TX ROSE found that the consumer protection rules define and establish customer expectations in many respects, but that low-income customers are not provided with specific expectation as to how their applications will be processed. TLSC and TX ROSE found that should the commission change from self-certification to external certification by LIDA, procedural and due process safeguards would need to be established, such as an appeals process, a definition of household income, whether or not it is monthly, or averaged annual levels, and whether household exemptions are allowed.

Commission response

In response to the TLSC and TX ROSE concern that notification be sent to the customers, the commission modifies §25.454(f)(2)(F) to require LIDA to notify self-enrolled customers of the determination of their eligibility and to notify self-enrolled and automatically enrolled customer of the expiration of their eligibility, and opportunities for re-enrollment. The commission has added §25.454(e)(4) to specify opportunities for re-enrollment. The commission also added §25.454(e)(6) to address TLSC and TX ROSE's concerns that there is no informal appeals or fair hearing process. The added subsection (e)(6) provides customers adequate opportunities to contest the termination of the discount or the denial of eligibility for the discount, consistent with the suggestions of TLSC and TX ROSE.

Regarding §25.454(f), the REP Coalition commented that the rule must define the roles and responsibilities of entities involved in the administration of the Low-Income Discount Program. The REP Coalition found that the proposed rule defers the description of key roles to the Guide, which denies the market participants procedural protections mandated by the APA.

The following changes were also recommended by the REP Coalition:

(1) The REP Coalition found that the proposed rule maintains the current low-income discount process which requires REPs to provide discounts based on the enrollment lists provided by LIDA. The REP Coalition noted that these lists have contained several errors causing REPs to dedicate resources to rectifying the errors of others. The REP Coalition appreciates efforts to decrease the errors but requests direction in the rule to deal with such situations in the future. The REP Coalition suggests that should future lists fail to include eligible customers, LIDA be required to extend the customer's eligibility by the number of months in which the error existed and to report such occurrences to the commission, for performance considerations.

(2) The REP Coalition suggested that the transition from the old matching process to the new matching process may result in customer inquiries. The REP Coalition suggested that the rule specify that LIDA is the appropriate entity to interact with customers and respond to inquiries and complaints, and that REPs should be responsible for providing customer information to LIDA. Furthermore, the REP Coalition found that responsibilities described in proposed §25.454(f)(2) and (3), should clarify that LIDA is primarily responsible for dealing with consumers concerning the program, as proposed §25.454(f)(3)(E) (§25.454(f)(3)(F) as adopted) places too much burden on the REPs. In supplemental comments, the REP Coalition emphasized that LIDA should have the designated primary role of problem resolution and that REPs should only be expected to assist in such efforts.

(3) The REP Coalition found the proposed requirement for REPs to monitor "high usage customers" in §25.454(f)(3)(B) (§25.454(f)(3)(C) as adopted) is vague and burdensome, and imposes responsibilities of LIDA on the REPs. The REP Coalition also suggested that the new matching system should adequately ensure that commercial premises are not sent to LIDA.

(4) The REP Coalition recommended that the provision stating that LIDA send eligibility records to REPs on a monthly basis be refined to require that the lists be provided by a scheduled date each month. The REP Coalition stated that as long as the rule requires that a deadline be set and followed, the specific date may be included in the Guide. The REP Coalition requested

that the list be made available no later than the second to last business day of the month.

TLSC and TX ROSE supported the provisions requiring REPs to monitor high usage to screen out ineligible customers that may be receiving the discount. TLSC and TX ROSE noted that this requirement could also be used to refer high-usage customers to a low-income weatherization program. TLSC and TX ROSE found that high usage should be defined in the rule, and recommended that each REP be required to investigate the upper tenth percentile of LITE-UP usage, and usage below the tenth percentile that is inconsistent with residential load profiles. TLSC and TX ROSE found that REPs should be required to file reports to the commission on their findings and referrals of customers to weatherization programs.

In reply comments, the REP Coalition opposed the recommendations of TLSC and TX ROSE that they be required to actively monitor and publicly report whether or not high-usage customers are properly classified, and to refer them to weatherization programs. The REP Coalition emphasized that the classification is designated by the TDU. The REP Coalition found that REPs do not have field staff with capabilities to inspect high-usage customers. The REP Coalition stated that this appears to be an intrusion on low-income customer's privacy, and that it is not the responsibility of REPs to refer customers to weatherization programs on an unsolicited basis.

In supplemental comments, the REP Coalition stated that REPs routinely examine unusually high meter reads received from TDUs for quality assurance and that the TDUs populate transactions with a premise code as part of the enrollment process, and that the REPs do not modify these codes. The REP Coalition, therefore, stated that it does not support this unnecessary monitoring and reporting, and supports the elimination of §25.454(f)(3)(B) (§25.454(f)(3)(C) as adopted).

Commission response

The commission recognizes the REP Coalition's concern that specific roles of market participants be detailed within the rule. The commission has amended proposed §25.454(f) to clarify such roles. The commission modifies the responsibilities of LIDA in §25.454(f)(2) to include information retrieval and matching for purposes of enrollment, customer notification of eligibility decisions, confidentiality of information, problem resolution and the transition of the matching process. The commission modifies the responsibilities of REPs in §25.454(f)(3) to include providing and retrieving customer information for enrollment and assisting in problem resolution. The commission modifies §25.454(f)(4) to specify the continued responsibilities of the Electric Reliability Council of Texas (ERCOT) in the enrollment and problem resolution process until the new matching process is fully implemented. The commission also clarifies existing language within §25.454(f) to more clearly reflect the intent of the subsection.

The additional suggestions by the REPs were considered as follows:

(1) The commission does not believe that extending a customer's eligibility period is an appropriate remedy for the possibility that future errors in the lists provided by LIDA will continue to burden REPs with rectifying errors they did not cause. The extra month in which the customer would receive the discount could yield a different monetary amount than the customer was actually eligible for; and delaying the discount until the end of the customers' eligibility will not help customers during the period in which they are actually low-income, which is when the program is intended to provide assistance.

(2) The commission agrees that LIDA should be the primary point of customer contact for customer inquiries and problems and has clarified the language in proposed §25.454(f)(2)(G), added §25.454(f)(2)(H) (as adopted), and clarified proposed §25.454(f)(3)(E) (§25.454(f)(3)(F) as adopted) to address this concern. This clarification specifies that LIDA is the primary contact for customer inquiries and problems, and that REPs will assist LIDA in resolving issues and problems when LIDA does not have sufficient information. The commission emphasizes, however, that REPs should help each customer as much as possible with general questions.

(3) The commission acknowledges that monitoring high-usage customers may be burdensome for REPs, and has therefore modified §25.454(f)(3)(B) (§25.454(f)(3)(C) as adopted) to require this information only upon commission request, as discussed in further detail below.

(4) The commission finds that a monthly deadline is appropriate, and has added modified language in proposed §25.454(f)(2)(E) to specify that the information will be made available to REPs on a date prescribed by the commission. The commission notes that it is apparent the selected LIDA will need to play a role to finalize such a deadline. The REP Coalition suggested that the deadline be the second to last day of every month, while the current deadline is the first of each month. The commission believes that this issue is better suited for inclusion in the Guide.

The commission clarifies proposed §25.454(f)(3)(B) (§25.454(f)(3)(C) as adopted) to state that 3000 kWh will be considered high usage and that this information will only be required upon commission request. The commission finds that 3000 kWh is an appropriate consumption level for checking a customer's residential status. This number was decided upon because 1000 kWh is generally considered an average customer usage, but it is common for residential customers to have usage of 2000-2500 kWh. The commission notes, however, that if the suggested process of matching residential information by customer name is implemented, the current risk of enrolling group homes or other businesses should be averted. Therefore, the commission concludes that this information should only be required by commission request. Such commission requests may be made if the information provided to LIDA appears to include customers who are not residential. The commission does not agree with the suggestion of TLSC and TX ROSE that REPs should monitor the upper tenth percentile of LITE-UP customer usage, or that REPs should refer high-usage customers to a weatherization program because such requirements would be unduly burdensome for REPs.

The REP Coalition stated that the criteria to determine whether a customer is eligible for the discount should be addressed in the rule. The REP coalition suggested language be added to §25.454(f)(2)(B). The current requirement for §25.454(f)(2)(B) states that LIDA shall "Retrieve the database of clients from TDHS on a monthly basis." The REP Coalition suggested the addition of the following language: "and remove from such lists persons who are not electric customers. For the purposes of this rule, an electric customer is any individual that is deemed by law to have the capacity to contract with a REP for the provision of electric service."

TLSC and TX ROSE also address the fact that households which receive the discounts must be defined by rule. Under the current

practice, the listed customer's household has been enrolled into the program by virtue of the fact that a family member receives benefits from TDHS. TLSC and TX ROSE stated that almost all persons receiving TDHS benefits qualify based on *household income*, and some members of the household may be disqualified because of immigration status. TLSC and TX ROSE find that this could deem an entire family ineligible if an undocumented wage earner is the customer whose name appears on the electric bill.

TLSC and TX ROSE noted that PURA §39.903(1) defines a low-income customer as an electric customer whose household income is not more than 125% of the federal poverty level or who receives food stamps or medical assistance. TLSC and TX ROSE stated that this leaves very little discretion to the commission to restrict or expand the definition of who is eligible for the low-income rate discount and that the definition clearly allows customers to qualify under other provisions; therefore, the commission cannot impose additional eligibility criteria on customers. TLSC and TX ROSE proposed that an electric customer may apply on behalf of an eligible household and that for self-certification purposes, an eligible household (income) should "be defined to include regularly expected recurring income from all sources for the listed customer and non-listed adults residing in the same dwelling unit."

In reply comments, the REP Coalition stated that there is a reasonable basis for the commission to conclude the use of the term "electric customer" in PURA §39.903(l) refers to the person responsible for the electric bill, because PURA §31.002(16) defines a "retail customer" as the person who purchases electricity, and because §25.471(d)(4) defines a customer to be the "person who is currently receiving retail electric service from a REP in the person's own name or the name of the person's spouse." The REP Coalition notes that once the commission makes the policy decision on who should receive the discount, reasonable requirements should apply to the administration and delivery of the discount. The REP Coalition found that there is no point in pursuing the proposed matching process involving REP data if matches will not be based on customer specific criteria.

Commission response

PURA §39.903(l)(1) states: "For the purposes of this section, a 'low-income electric customer' is an electric customer: (1) whose household income is not more than 125 percent of federal poverty guidelines; or (2) who receives food stamps from the TDHS or medical assistance from a state agency administering a part of the medical assistance program." Because the statute specifies "electric customer," refining the matching process to match by electric customer instead of electric premise is consistent with the concept in the statute that the discount is to be provided to customers. The commission previously adopted a matching system that was primarily based on matching residences (premises receiving electric service) with addresses listed for TDHS beneficiaries, but it is not precluded from modifying that system to rely on matching customers. Relying on premises matches has resulted in some cases where it seems clear that the address used by a TDHS beneficiary was not the actual place of residence, so that the discount was provided to persons who did not meet the statutory criteria. Matching for the actual customer, through the new matching process, will be more effective in ensuring that the discount is applied to the correct customer. This is necessary in order to make sure that funds are spent for the purpose for which they are appropriated, namely, to provide discounts to low- income customers. The commission notes that the self-enrollment process still exists and is available to any customer who is eligible based on household income.

In reply comments on §25.452(f)(3) as proposed, the REP Coalition stated that requirements such as standardized reporting dates for REPs and uniform data fields for customer addresses are substantive and should be addressed in the rule.

Commission response

The commission has addressed these concerns in §25.454(f)(3)(A) by specifying the data fields which shall be sent by the REPs, and has added language which specifies that the information will be provided on a date to be prescribed by the commission. The commission notes that the REP Coalition has requested an earlier date for enrollment notification than originally contemplated, and that a new matching process may require longer processing than the current process; therefore, staff, REPs, and LIDA shall finalize a standard reporting date for REPs. This reporting date will be located in the Guide.

All parties requested the consideration of a pilot program to examine the changes in the system prior to implementation. The REP Coalition emphasized the need for a smooth transition.

Commission response The commission agrees that a pilot or transition period is necessary and plans for the old matching process to continue until it is determined that the new matching process correctly matches the appropriate customers. A transition process is necessary, and in that process staff will work with the selected LIDA and REPs to ensure continuation of the discounts and the introduction of the new processes with minimum impacts on REP systems and on customers. The commission modifies the rule to include §25.454(f)(4)(B) to require ERCOT to continue providing information on residential premises, until the transition to the new matching process is completed. The commission also modifies §25.454(f)(2) to include subsection (f)(2)(J) which addresses LIDA's role in the transition.

In supplemental comments on §25.454(f)(3)(F) (§25.454(f)(3)(G) as adopted), the REP Coalition stated the requirement that the REPs provide the commission with copies of materials given to customers about the rate reduction program contains no requirement of when REPs are required to submit this information. The REP Coalition requested that the subsection be amended to specify that the requirement is necessary upon commission request.

Commission response

The commission agrees with this comment and has modified §25.454(f)(3)(F) (§25.454(f)(3)(G) as adopted) accordingly.

The REP Coalition requested that in §25.454(g), the proposed rule be revised to ensure that if confidential customer information were to be provided by REPs to LIDA, it would be protected from public disclosure, and that REPs would be indemnified against liability or harm associated with misuse or misdirection of customer information by LIDA

Commission response

The commission has modified §25.454(g) as proposed, to include a new paragraph (2) to address the REP Coalition's concern regarding customer data. The REP Coalition has agreed to draft a standard confidentiality agreement to be used between LIDA and the REPs. Commission staff will work with the REPs,

LIDA, and other interested persons on the final standard confidentiality agreement to be utilized for this purpose. The commission also clarifies §25.454(g), (g)(1) and (g)(2) (§25.454(g)(3) as adopted) to more clearly reflect the intent of the section.

TSLC and TX ROSE requested a subsection to specifically address customer protections and enrollment processes because customer rights and expectations should be defined by rule.

Commission response

The customer protection and enrollment process information suggested for this subsection related specifically to issues addressed throughout the rule; therefore, a separate subsection is not needed. The concerns of TLSC and TX ROSE regarding customer protections and enrollment processes have been addressed in various subsections of §25.454.

The commission notes modified references throughout §25.454 to specify the applicability of the subsections to REPs, have been made in response to the concern of San Patricio, located in *General Comments*, that entities to which each section or subsection apply are clearly addressed.

Additionally, the commission clarifies the language in §25.454(c)(3), §25.454(d), §25.454(d)(3) and §25.454(d)(3)(D) to more clearly express the intent of the language.

§25.457, *Implementation of the System Benefit Fee by the Municipally Owned Utilities and Electric Cooperatives.*

The REP Coalition commented in §25.454(c)(1), that the term "discount credit" was redundant and should be replaced with "discount factor." This comment also affects §25.457.

Commission response

The commission replaces references to "discount credit" throughout §25.457 with "discount factor."

The commission modifies references throughout §25.457 to specify the applicability of the subsections to REPs, have been made in response to the concern of San Patricio, located in *General Comments*, that entities to which each section or subsection apply are clearly addressed.

Additional changes have been made to §25.457 to either clarify the intent of the language or remove unnecessary language. The changes are as follows:

(1) The commission modifies §25.457(f) to more clearly explain the process for determining the required revenue and resulting system benefit fee which will be imposed on the retail customers of an MOU or Coop. Additionally, the commission modifies this subsection to include language previously located in §25.457(i) which is more appropriately addressed in this subsection.

(2) The commission adds §25.457(g) as adopted to include language previously found in §25.457(f) detailing the annual reporting requirements of an MOU or a Coop. The commission also modifies the existing language to more clearly explain the annual reporting requirements of an MOU or a Coop.

(3) The commission modifies §25.457(g) (§25.457(h) as adopted) to clarify the intent of the language and ensure consistency with §25.454.

(4) The commission removes §25.457(h) because the language is of language now contained in §25.457(f) and is therefore unnecessary.

(5) The commission modifies §25.457(i) to more clearly express the intent of the subsection, and removes language from the subsection which is repetitive of information now contained in §25.457(f), and therefore is unnecessary.

General Comments

GMEC supported the comments of the REP Coalition and also suggested that the preamble discussion of the costs of implementing the LITE-UP discount delivery process is flawed. GMEC argued that the primary cost to REPs associated with any new LITE-UP process will be the same regardless of the number of customers, and will therefore have a disproportionate effect on smaller REPs, and greater impact on competitive REPs compared to affiliated REPs.

Commission response

The commission disagrees that the primary cost to REPs associated with any new LITE-UP process will be the same regardless of the number of customers and will therefore necessarily have a disproportionate effect on smaller REPs. On May 21, 2003, a workshop was held to discuss the proposed modifications of the LITE-UP information exchange processes. On May 28, 2003, all REPs were requested to submit information on their ability to meet the proposed modifications discussed in the workshop. On June 11, 2003, TXU Energy Retail Company LP, POLR Power/Mutual Energy SWEPCO, Reliant Resources Incorporated, Utility Choice, LLC, Entergy Solutions, and Republic Power, LP, filed information in response to this request. Gexa Energy and GMEC submitted responses by email. The range of estimates from the REPs that submitted information was broad.

The commission agrees that, from a conceptual basis, it is likely that changing the matching process may affect smaller REPs more on a cost-per-customer basis than larger REPs. However, it is important to recognize that the cost of implementing the new matching process is not an absolute cost that will apply equally to each REP. The information provided to the commission in response to its request for implementation cost information has shown the new matching process does not generally trend either toward disproportionate effects on smaller or larger REPs. The commission has no way to ensure that the financial effect on individual REPs will not, in some cases, differ on a cost-per-customer basis from the economic effect on other REPs. The implementation costs need to be weighed against the nature of the program and the benefit that is expected from changes in the matching process. The discount program is a statutory program in which REPs that serve residential customers are obliged to participate. The changes are being made because of concerns about the integrity of the current matching process, and the commission concludes that the changes must be made, for that reason. It is the commission's understanding that the REPs' various estimates of the cost of implementing a new matching system are essentially based on a conceptual design of the new process. The changes to the program outlined in this rulemaking are essential to ensuring the integrity of the rate reduction program, and the estimates of financial impact on REPs do not reveal disproportionate effects. As a detailed design of the new process is developed, the commission will continue to consult with REPs about the feasibility and cost of the new process.

TLSC and TX ROSE stated that each customer should receive the discount in the period that they are certified by LIDA, without interruption, and that REPs should maintain billing records to assure that when a continuing customer changes service addresses, the change will not result in an interruption of the rate

reduction. TLSC and TX ROSE found that the Guide could address such transfer protocols.

Additionally, TLSC and TX ROSE noted that a problem that currently occurs in the LIDA database is that there are instances where enrollment for a household is duplicated because of a customer moving to or from a premise, or a switch in REPs being in process. The problem is created by the inability of the current system to track this activity. This inability also creates a lag time when customers have to re-enroll, which was supposed to take less than 30 days, but is often taking 60-90 days. TLSC and TX ROSE propose the following solutions to this problem:

(1)*Alternative One*: TLSC and TX ROSE proposed that a REP could communicate changes to LIDA by updating the REPs' records when a LITE-UP customer moves in or out, or switches, and report that information to LIDA. TLSC and TX ROSE stated that for a move-in and move-out, the REP could provide LIDA with both the old and new addresses, and that in the case of a customer switching REPs, LIDA could send a customer's ESI ID to ERCOT to obtain the new REP of record. Once this information is obtained, LIDA could then contact the new REP of record with the information. TLSC and TX ROSE noted that the rule would have to authorize the REP to change the status of an ESI ID independent of direction from LIDA.

(2)*Alternative Two*: ERCOT and LIDA could exchange transaction records. TLSC and TX ROSE suggested that LIDA could forward the records of all ESI IDs receiving the discount to ERCOT. ERCOT could then use this information to query their database to identify all move-in/move-out and switching transactions processed for those ESI IDs. With this information, LIDA could forward updated information to the REPs. TLSC and TX ROSE acknowledged that the shortcoming of this concept is that LIDA could only discontinue discounts from premises where moves or switches have occurred. This would not move the discount to the customers' new premise because ERCOT would not have information on where the customer had moved.

(3)*Alternative Three*: LITE-UP Eligibility Status could be included in the Texas Standard Electronic Transaction (TX SET) 814_04. TLSC and TX ROSE suggested that LITE- UP eligibility could be maintained by the TDU in the same data set that transfers critical care status. REPs and LIDA would be required to forward the LITE-UP eligibility information to the TDU. TLSC and TX ROSE noted that this would allow data to be automatically provided which could reduce the number of transactions needed to track eligibility, and would require only a low level of effort to maintain. However, this process would require the participation of TDUs and a standard process to communicate changes to LIDA would have to be developed.

The REP Coalition, in reply comments, disagreed with the comments of TLSC and TX ROSE regarding this matter and stated that they are opposed to Alternatives One, Two and Three. The REP Coalition stated that under Alternative One, REPs would be responsible for maintaining customers' eligibility independent of LIDA. Then, LIDA would have to develop the capability to process REP data and communicate changes to ERCOT, and ERCOT would have to extract switch information and send it to LIDA. This process would maintain ERCOT's role in the LITE-UP process, which is a role that the proposed processes are trying to eliminate. The REP Coalition stated that the process of Alternative Two is defined in the current rule, but has never been implemented. This process also maintains ERCOT's role; however, eliminating ERCOT's role is one of the goals of the new matching process. The REP Coalition stated that Alternative Three would add TDUs to the process and would require development of standard processes for communicating record changes to LIDA. Additionally, unless the benefit outweighs the cost to the market, and the new flag could be included in TX SET changes, the alternative is not viable. The REP Coalition also pointed out that the flag would reside with the premise, not with the customer. The REP Coalition found that the alternatives offered by TLSC and TX ROSE are technically problematic and would be unnecessary if the new matching process is implemented. While a flag may be created for a mass transfer, tracking routine premise movement would be problematic because of the inability of the current systems to track individual customers.

Commission response

The commission agrees that the inability of the current system to track customer moves and switches has presented problems; moves and switches create the possibility of a gap in the discount for eligible customers. The new process should eliminate the possibility of duplicate discounts because the electric customer will be the basis of the matching as opposed to the premise. The new process should also eliminate the gap caused by switches because two REPs will be allowed to claim a customer for one month, allowing the customer to receive a discount on the final bill from the losing REP and on the initial bill from the gaining REP. The commission believes that the proposed matching process will work more effectively and will not result in significant gaps as a result of a customer move. This is an issue that can be monitored in the implementation of the new process, and adjustments can be made if the commission's expectations are not realized. The commission believes that the REP Coalition has pointed out legitimate problems with the alternatives suggested by TX ROSE and TLSC; the commission is not adopting these alternatives at this time.

In supplemental comments, San Patricio stated that certain provisions of §§25.451, 25.454 and 25.457 are inconsistent. San Patricio noted there are places in the rules that refer to the "TDU, MOU, or Coop" to describe an entity that provides transmission and/or distribution service; however, other provisions refer only to a TDU. It was San Patricio's understanding that the provisions should also apply to MOUs and Cooperatives. San Patricio also stated that there are similar inconsistencies with regard to the use of the term "REP" and "REP, and MOU or Coop."

Commission response The commission notes the confusion and modifies §§25.451, 25.454, and 25.457 to ensure that the entities to which each section or subsection apply are clearly addressed.

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.903 which requires the commission to review and approve system benefit fund accounts, projected revenue accounts, proposed non- bypassable fees, to adopt rules providing for enrollment of customers eligible to receive reduced rates under PURA §39.903(h), to adopt rules for a retail electric provider to determine a reduced rate, and to adopt rules providing for reimbursement.

Cross Reference to Statutes: Public Utility Regulatory Act §§39.106, 39.262, 39.352, 39.901, 39.903, 40.053, 40.057, 41.053, and 41.057.

§25.451. Administration of the System Benefit Fund.

(a) Purpose. The purpose of this section is to implement the system benefit fund, including its administration, setting its revenue requirement, fee collection, reporting procedures, and review and approval of the fund pursuant to the Public Utility Regulatory Act (PURA) §39.901 and §39.903.

(b) Application. This subchapter applies to retail electric providers (REPs), and transmission and distribution utilities (TDUs) in an area where customer choice has been implemented, or an area for which the commission has issued an order applying the system benefit fund or rate reduction. This section applies to municipally owned electric utilities (MOUs) and electric cooperatives (Coops) no sooner than six months preceding the date on which an MOU or a Coop implements customer choice in its certificated service area.

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

(1) Fiscal year--The State of Texas fiscal year, beginning September 1 of one calendar year, and ending on August 31 of the subsequent calendar year.

(2) System Benefit Fund--A fund with the Texas Comptroller of Public Accounts (Comptroller) to be administered by the commission, into which all fee collections are deposited and from which all disbursements of the fund are withdrawn.

(3) System benefit fee--A nonbypassable fee set by the commission to finance the System Benefit Fund. The fee shall be charged to electric retail customers based on the amount of kilowatt hours (kWh) of electric energy used, as measured at the meter and adjusted for voltage level losses.

(d) System benefit fee. The commission shall set the amount of the system benefit fee for the next fiscal year at or before the last open meeting scheduled for July of each year.

(1) The amount of the fee shall be based on the total revenue requirement as determined in subsection (e) of this section and the projected retail sales of electricity in megawatt hours (MWh) in the state as determined in subsection (f) of this section.

(2) The commission may, at any time during the fiscal year, review the revenues, fund balance, and projected disbursements, revise the system benefit fee amount, and issue an order for the remainder of the year to accomplish the purposes of PURA §39.901 and §39.903. The TDUs shall implement the new fee in billings to the REPs within 30 calendar days of the date such order is issued. Whenever the fee is changed, the TDUs shall file with the commission an updated rate schedule for inclusion in the TDU's tariff manual, reflecting the new fee.

(3) The average fee may not exceed $0.65 per MWh.

(e) Revenue requirement. The revenue requirement shall be an amount of revenue necessary to fund the purposes outlined in PURA §39.903 consistent with legislative appropriations and expected fund revenue, operating costs of the Rate Reduction Program, a necessary fund reserve balance, and any other purpose required by statute or legislative appropriations.

(f) Electric sales estimate. The TDUs, and when applicable, the MOUs and Coops, upon request by the commission, shall provide information on total retail electric sales in their service areas for the preceding calendar year, by April 1 of each year.

(g) Remittance of fees. Each TDU, MOU, or Coop collecting the system benefit fee from the REPs, MOUs, or Coops in its service area, shall remit the fees to the Comptroller on a monthly basis.

(1) Remittance of funds to the Comptroller shall comply with the Comptroller's rules governing payments and the method for making them.

(2) Payments to the System Benefit Fund pursuant to PURA §39.352(g) shall be remitted to the Comptroller at the time of the filing of the annual report pursuant to §25.107 of this title (relating to Certification of Retail Electric Providers (REPs)).

(3) The collecting utility shall account for all system benefit fees received from the REPs, MOUs, or Coops in its service area separately from any other account in its records.

(4) Each TDU, MOU, or Coop collecting and remitting the system benefit fee to the Comptroller shall file with the commission at the time the money is remitted a report, on a commission- prescribed form, stating for each service territory the amount of the system benefit fee billed, the amount remitted to the Comptroller, and electric energy sold, in MWh. The report shall contain monthly amounts and year-to-date totals.

(h) Billing requirements. A TDU, an MOU, or a Coop shall send billing statements to the REPs indicating the amount of system benefit fee owed for the specified period. The billing and payments between the TDU and the REPs shall be governed by §25.214 of this title (relating to Terms and Conditions of Retail Distribution Service Provided by Investor Owned Transmission and Distribution Utilities), and between MOUs and Coops and the REPs by §25.215 of this title (relating to Terms and Conditions of Retail Distribution Service Provided by MOUs and Coops).

(1) The REP shall remit to the TDU, an MOU, or a Coop an amount equal to the kWh of electric energy consumed by its customers in the utility's service area times the fee approved by the commission for that period.

(2) For those retail customers who switch to on-site generation pursuant to PURA §39.262(k), the system benefit fee shall be based on the amount of actual power delivered to them by a TDU.

(i) Reporting and auditing requirements. Each REP, and each MOU or Coop when applicable, providing rate reductions to eligible customers shall keep records of such rate reductions for at least three years from the date the rate reduction is first provided to a customer to permit the commission or its agent to audit rate reduction reimbursements. Reports filed under subsections (g) and (j) of this section and records relating to the identification of eligible customers shall also be subject to audit upon commission request.

(j) Reimbursement for rate reductions. Each REP, or MOU or Coop, when applicable, shall submit to the commission a monthly activity report and request for reimbursement on a form prescribed by the commission. The commission's goal for the processing of a request for reimbursement is, not later than five business days after receipt of the monthly report, to prepare and deliver to the comptroller an authorization for reimbursement to the REP, MOU, or Coop. The Comptroller's goal for the processing of payments is to transfer the funds by the close of the next business day, following receipt of an authorization from the commission. The monthly activity report submitted by the REPs, MOUs, or Coops shall contain the following:

(1) The number of low-income customers that were provided rate discounts during the reporting period;

(2) The amount of reimbursement requested;

(3) The aggregate electric energy consumption in kWh for all low-income customers enrolled in the program for the reporting period;

(4) The total amount of rate reductions provided to the low-income customers in the reporting period; and

(5) The amount of the system benefit fee billed by and remitted to the TDU.

(k) Transfer of funds to other state agencies. Payment transfers to other state agencies pursuant to this rule shall be governed by statute, the Appropriations Act, and any procedures established by the Comptroller.

§25.454. Rate Reduction Program.

(a) Purpose. The purpose of this section is to define the low-income electric rate reduction program, establish the rate reduction calculation, and specify enrollment options and processes.

(b) Application. This section applies to retail electric providers (REPs) as defined in Public Utility Regulatory Act §39.106, that provide electric service in an area that has been opened to customer choice, or an area for which the commission has issued an order applying the system benefit fund or rate reduction. This section also applies to municipally owned electric utilities (MOUs) and electric cooperatives (Coops) on a date determined by the commission, but no sooner than six months preceding the date on which an MOU or a COOP implements customer choice in its certificated area unless otherwise governed by §25.457 of this title (relating to Implementation of the System Benefit Fee by Municipally Owned Utilities and Electric Cooperatives).

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

(1) Discount factor--The amount of discount an eligible low-income customer must be provided by any REP, or MOU or Coop when applicable, in the customer's area, expressed as cents per kilowatt-hour (kWh).

(2) Discount percentage--The percentage of discount established by the commission and applied to the lower of the price to beat (PTB) or provider of last resort (POLR) rate in a particular service territory.

(3) Low-Income Discount Administrator (LIDA)--A third-party vendor with whom the commission has a contract to administer the rate reduction program.

(4) Low-Income Discount Procedural Guide--A written reference Guide which compiles the regulatory and statutory requirements for and roles of participants in the rate reduction program, including LIDA, REPs, the Electric Reliability Council of Texas (ERCOT), the Texas Department of Human Services (TDHS), and customers. The Guide sets out the discount factors and administrative information relating to the rate reduction program, including the required data formats and deadlines for transmitting information to LIDA, other program participants, and the commission. The initial version of the Guide will be approved by the commission, but it may be updated to reflect statutory or commission-approved changes in rules and program requirements, discount factors and POLR or price to beat rates, or to modify the format or timing of the provision of information by REPs and LIDA with the approval of the Executive Director.

(5) Rate reduction--The total discount to be deducted from a customer's electric bill. This reduction is derived from the discount factor and total consumption in accordance with subsection (d)(3) of this section.

(6) REP--For the purposes of this section, a retail electric provider and an MOU or Coop that provides retail electric service in an area that has been opened to customer choice.

(d) Rate reduction program. All eligible low-income customers as defined in §25.5 of this title (relating to Definitions) are to receive a rate reduction, as determined by the commission pursuant to this section, on their electric bills from their REP.

(1) The commission shall periodically establish a discount percentage. The discount percentage shall not be less than 10% and may, if there are funds sufficient to support a higher level, be set as high as 20%.

(2) The commission staff shall calculate and post on the commission website (www.puc.state.tx.us) the discount factor for an eligible low-income customer in accordance with this subsection.

(A) The discount factor shall be separately calculated for each transmission and distribution utility service area and shall be recalculated when the PTB or POLR rate changes or the commission revises the discount percentage.

(B) The discount factor shall be calculated by applying the discount percentage to the lower of the POLR rate or the standard residential PTB rate. The discount amount shall reflect any seasonal variation in the lower of the PTB or the POLR rate.

(C) If the discount factor changes for any area because of a change to the discount percentage or a change to the PTB or POLR rate for any area, REPs shall implement the resulting change in the discount factor in their billings to customers within 30 calendar days of the date the commission posts the revised discount factor to its website.

(3) Rate reduction. All REPs shall provide the rate reduction to eligible low-income customers.

(A) The discount factors posted on the commission's website shall be used to calculate the rate reduction for each eligible low-income customer's bill.

(B) The rate reduction shall be calculated by multiplying the customer's total consumption (kWh) for the billing period by the discount factor (in cents/kWh) in effect during the billing cycle in which the bill is rendered. If an eligible customer is rebilled, the discount that was in effect during the affected billing cycle will be applied.

(C) The customer's discount amount shall be clearly identified as a line item on the electric portion of the customer's bill, including the description "LITE-UP Discount."

(D) REPs are entitled to reimbursement under §25.451(j) of this title (relating to Administration of the System Benefit Fund) for rate reductions they have provided to eligible low-income customers.

(e) Customer enrollment. Eligible customers will be enrolled in the rate reduction program through automatic enrollment or self-enrollment.

(1) Automatic enrollment is an electronic process to identify customers eligible for the rate reduction by matching client data from TDHS with customer-specific data from REPs.

(A) TDHS shall provide client information to LIDA in accordance with subsection (f)(1) of this section.

(B) REPs shall provide customer information to LIDA in accordance with subsection (f)(3) of this section.

(C) LIDA shall compare the customer information from TDHS and REPs, create files of matching customers, enroll these customers in the rate reduction program, and notify the REPs of their eligible customers.

(2) Self-enrollment is an alternate enrollment process available to eligible electric customers who are not automatically enrolled and whose combined household income does not exceed 125% of federal poverty guidelines or receive food stamps or medical assistance from TDHS. The self- enrollment process shall be administered by LIDA. LIDA's responsibilities shall include:

(A) Distributing and processing self-enrollment applications, as developed by the commission, for the purposes of initial self-enrollment, and for re-enrollment of self-enrolled and automatically enrolled customers;

(B) Maintaining customer records for all applicants;

(C) Providing information to customers regarding the process of enrolling in the low-income discount program; and

(D) Determining customers' eligibility by matching customer information submitted through self-enrollment forms with customer data provided by REPs and reviewing proof of income documentation submitted by customers.

(3) In determining customers' eligibility in the self-enrollment process, LIDA shall require that customers submit with a self-enrollment form proof of income in the form of copies of tax returns, pay stubs, letters from employers, or other pertinent information and shall audit statistically valid samples for accuracy.

(4) The following procedures govern a customer's re-enrollment.

(A) A self-enrolled customer may re-enroll by submitting a completed self-enrollment form.

(B) A customer who was formerly, but is no longer, automatically enrolled may re-enroll through self-enrollment.

(C) LIDA shall send a customer who is eligible to re-enroll a self- enrollment form which specifies a date for submitting the completed form that is not more than 30 days after the date the form is mailed. If the customer submits a completed form before the date specified on the form and LIDA determines that the customer is eligible for re-enrollment, the customer shall receive the rate reduction without interruption.

(D) If a customer does not return a properly completed form before the time specified by LIDA, the customer's rate reduction may be interrupted until LIDA determines that the customer is eligible.

(5) The eligibility period of each customer will be determined by the customer's method of enrollment.

(A) The eligibility period for self-enrolled customers is seven months from the date of enrollment.

(B) Automatically enrolled customers will continue to be eligible as long as the customers receive TDHS benefits. Once a customer no longer receives TDHS benefits, the customer will continue to receive the rate reduction benefit for a period, of no more than 60 days, during which the customer may self-enroll.

(6) A customer who believes that a self-enrollment application has been erroneously denied may request that LIDA review the application, and the customer may submit additional proof of eligibility.

(A) A customer who is dissatisfied with LIDA's action following a request for review under this paragraph may request an informal hearing to determine eligibility by the commission staff.

(B) A customer who is dissatisfied with the determination after an informal hearing under subparagraph (A) of this paragraph may file a formal complaint pursuant to §22.242(e) of this title (relating to Complaints).

(f) Responsibilities. In addition to the requirements established in this section, program responsibilities for LIDA may be established in the commission's contract with LIDA; program responsibilities for tasks undertaken by TDHS may be established in the memorandum of understanding between the commission and TDHS.

(1) TDHS shall:

(A) assist in the implementation and maintenance of the automatic enrollment process by providing a database of customers receiving TDHS benefits as detailed in the memorandum of understanding between TDHS and the commission; and

(B) assist in the distribution of promotional and informational material as detailed in the memorandum of understanding.

(2) LIDA shall:

(A) receive customer lists from REPs on a monthly basis through data transfer;

(B) retrieve the database of clients from TDHS on a monthly basis;

(C) conduct the self-enrollment, automatic enrollment, and re-enrollment processes;

(D) establish a list of eligible customers, by comparing customer lists from the REPs with TDHS databases and identifying customer records that reasonably match;

(E) make available to each REP, on a date prescribed by the commission on a monthly basis, a list of low-income customers eligible to receive the rate reduction;

(F) notify customers that have applied for the rate reduction through the self-enrollment process of their eligibility determination and notify automatically enrolled and self-enrolled customers of their expiration of eligibility, and opportunities for re-enrollment in the rate reduction program;

(G) answer customer inquiries regarding the rate reduction program, and provide information to customers regarding enrollment for the rate reduction program and eligibility requirements;

(H) resolve customer enrollment problems, including issues concerning customer eligibility, the failure to provide discounts to customers who believe they are eligible, and the provision of discounts to customers who do not meet eligibility criteria;

(I) protect the confidentiality of the customer information provided by the REPs and the client information provided by TDHS; and

(J) continue the matching process implemented prior to the adoption of amendments to this section using TDHS and ERCOT data until a new matching process is in operation, based on customer information submitted by REPs.

(3) A REP shall:

(A) provide residential customer information to LIDA through data transfer on a date prescribed by the commission on a

monthly basis. The customer information shall include, to the greatest extent possible, each full name of the primary and secondary customer on each account, billing and service addresses, primary and secondary social security numbers, primary and secondary telephone numbers, Electric Service Identifier (ESI ID), service provider account number, and premise code;

(B) retrieve from LIDA the list of customers who are eligible to receive the rate reduction;

(C) upon commission request, monitor high-usage customers to ensure that premises are in fact residential and maintain records of monitoring efforts for audit purposes. A customer with usage greater than 3000 kWh in a month shall be considered a high-usage customer;

(D) apply a rate reduction to the electric bills of the eligible customers identified by LIDA within the first billing cycle in which it is notified of a customer's eligibility, if notification is received no later than seven days before the end of the billing cycle, or, if not, apply the rate reduction within 30 calendar days after notification is received from LIDA;

(E) notify customers twice a year about the availability of the rate reduction program, and provide self-enrollment forms to customers upon request;

(F) assist LIDA in working to resolve issues concerning customer eligibility, including the failure to provide discounts to customers who believe they are eligible and the provision of discounts to customers who may not meet the eligibility criteria; this obligation requires the REP to employ best efforts to avoid and resolve issues, including training call center personnel on general LITE-UP processes and information, and assigning problem resolution staff to work with LIDA on problems for which LIDA does not have sufficient information to resolve; and

(G) provide to the commission copies of materials regarding the rate reduction program given to customers during the previous 12 months upon commission request.

(4) ERCOT. ERCOT shall provide information to, and receive information from, LIDA including:

(A) information regarding the REP of record, transactional history, or other pertinent information for the purposes of problem resolution; and

(B) information on each residential premise in the ERCOT territory, including premise address, ESI ID and REP of Record, until a new matching process is in operation, based on customer information submitted by REPs.

(g) Confidentiality of information. All data transfers shall be conducted under the terms and conditions of confidentiality agreements to protect customer privacy and competitively sensitive information.

(1) The data acquired from TDHS is subject to a TDHS confidentiality agreement and shall only be used for the purposes of enrolling customers in the rate reduction program, providing rate reductions to customers, resolving problems, and other purposes directly related to the program.

(2) All data transfers from REPs to LIDA shall be conducted under the terms and conditions of a standard confidentiality agreement to protect customer privacy and REP's competitively sensitive information. The data acquired from REPs shall be used only for the purposes of enrolling customers into LITE-UP, providing rate reductions to customers, resolving problems, and other purposes directly related to the program.

(3) LIDA shall treat information relating to customer eligibility for the rate reduction as proprietary and confidential data and may not use it for any other purpose.

(h) Low-Income Discount Procedural Guide. In the event of conflicts between the language of the Guide and the language of this section, this section shall prevail.

§25.457. Implementation of the System Benefit Fee by the Municipally Owned Utilities and Electric Cooperatives.

(a) Purpose. The purpose of this section is to implement the system benefit fee and associated programs as they relate to the service areas of municipally owned utilities (MOUs) and electric cooperatives (Coops).

(b) Applicability. This section applies to an MOU and Coop, no sooner than six months preceding the date on which an MOU or Coop implements customer choice in its certificated service area.

(c) Implementation of fee collection. Not earlier than six months before customer choice begins, and not later than the day of implementation of customer choice in its service territory, an MOU or a Coop shall impose on its customers, including its transmission and distribution customers who choose to receive a single bill from the MOU or Coop, a system benefit fee, as determined by the commission pursuant to §25.451(d) of this title (relating to the Administration of the System Benefit Fund).

(d) Billing requirements. Each retail electric provider (REP), MOU, and Coop that provides rate reduction discounts in the service area of an MOU or a Coop shall comply with the billing requirements in §25.451(h) of this title.

(e) Remittance of funds. The system benefit fee collected by an MOU or a Coop shall be remitted to the Texas Comptroller of Public Accounts (Comptroller) pursuant to §25.451(g) of this title.

(f) Area revenue requirements. The commission shall calculate the amount available for low- income discounts for the service area of each MOU and Coop based on the projected system benefit fee revenue from the service area of the MOU or Coop and any reduction in the fee for education or low-income programs approved by the commission. The commission shall, on a request by an MOU or a Coop, reduce the system benefit fee, imposed on the requesting entity's retail customers, by the amount expended by the requesting MOU or Coop, or their retail customers, for local, low-income programs and local programs that educate customers about the retail electric market in a neutral and non-promotional manner. The qualifying low-income programs must reduce the cost of electricity to the recipients of such programs and be targeted at customers whose total household income does not exceed 125% of federal poverty guidelines. The amount available for low-income discounts shall be established and may be revised by the commission in the following manner:

(1) By calculating a share of the total revenue in the System Benefit Fund that is spent on each of the programs as described in Public Utility Regulatory Act (PURA) §39.903(e) in the preceding 12 months for all service areas; and

(2) By applying the share of total spending on programs pursuant to PURA §39.903(e)(1) to the projected payments of each MOU or Coop into the System Benefit Fund, reduced by any adjustment for authorized education or low-income programs.

(g) Annual reports. Upon request by the commission and annually on a schedule established by the commission, an MOU or a Coop shall provide to the commission the following:

(1) The total in kWh of electric power sold to its retail customers in a recent 12-month period specified by the commission;

(2) The total amount spent on qualifying, local, low-income programs, for which the reduction is being sought, in such a recent 12-month period;

(3) The total amount spent on qualifying, local, educational programs, for which the reduction is being sought, in such a recent 12-month period;

(4) The total amount projected to be spent on qualifying, local, low-income programs, for which reduction is being sought, in a future 12-month period specified by the commission; and

(5) The total amount projected to be spent on local, qualifying, educational programs, for which reduction is being sought, in such a future 12-month period.

(h) Discount factor and rate reduction. An MOU or a Coop shall establish a discount factor, consistent with the area revenue requirements established by the commission under subsection (f) of this section, for its low-income customers. The discount factor will be calculated on the basis of the standard retail service package established under PURA §40.053 or §41.053, as appropriate. Each REP, MOU, or Coop that bills retail customers for electric power and energy shall apply a rate reduction to the bills of eligible low-income customers based on the discount factor established by the MOU or Coop and calculated in accordance with §25.454(d)(3)(B) of this title (relating to the Rate Reduction Program). The rate reduction will be clearly identified as a line item on the electric portion of the customer's bill.

(i) Reimbursement. Each REP, and MOU or Coop that provides rate reduction discounts in the service area of an MOU or Coop is entitled to reimbursement under §25.451(j) of this title for the rate reductions they have provided to eligible low-income customers and shall file a monthly activity report in order to request reimbursement.

(j) Monthly reporting requirements. If an MOU or a Coop continues to bill customers pursuant to PURA §40.057(c) or §41.057(b), as appropriate, then the MOU or Coop shall file with the commission two reports. One report will identify the amount of system benefit fee collected and paid by the reporting entity's retail customers pursuant to §25.451(i)(1) of this title; the other report shall identify the amount of system benefit fee paid by the transmission and distribution only customers pursuant to §25.451(i)(2) of this title. Both reports shall be filed with the commission at the time the system benefit fee is paid pursuant to §25.451(g) of this title.

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 January 16, 2004.

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Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.412

The Public Utility Commission of Texas (commission) adopts amendments to §26.412, relating to Lifeline Service and Link Up Service Programs, with changes to the text as proposed in the September 12, 2003 issue of the *Texas Register* (28 TexReg 7916). These amendments integrate the administration of low-income telephone discounts into the functions of the Low-Income Discount Administrator (LIDA) responsible for low-income electric discounts. Based on the experience gained during the last year from administering the low-income electric discounts, the commission has determined that amending §26.412 will benefit retail telephone customers and the Low-Income Discount Programs overall. Project Number 28056 is assigned to this project.

The amendments clarify the existing automatic enrollment process for low-income telephone discounts and ensure that this process is incorporated by the LIDA into its administration of low- income electric discounts and that qualified customers will be enrolled more expeditiously into both electric and telephone discount programs. The amendments also reference the Low-Income Discount Procedural Guide (the Guide) that is being proposed in association with this amended rule to ensure that the administrative details of this rule are appropriately implemented. The Guide allows the rule to provide broad direction while permitting process changes and refinements by the LIDA and the participating telecommunications carriers as required to meet statutory obligations and the needs of customers.

On October 13, 2003, the commission received comments regarding the proposed amendments from the Office of Public Utility Counsel (OPC), Southwestern Bell Telephone Company, doing business as SBC Texas (SBC), Sprint, and Verizon Southwest (Verizon).

Preamble question and general comments

In addition to the proposed rule, the commission requested response to the following question:

Does the commission have the legal authority to develop a low-income discount program implementation guide as opposed to placing operating procedures in this rule? Please provide citations as to the commission's legal authority and whether there would be any enforceability issues with an implementation guide.

None of the parties specifically addressed the commission's question although all parties discussed concerns related to the Guide referenced in the proposed amendments.

OPC commended the commission on its previous revisions to the rule which resulted in automatic enrollment of qualified Lifeline customers, and a subsequent increase in subscribership, which furthered the goal of universal service.

SBC stated in its comments that it did not object to any of the proposed rule revisions, but submitted its opinion that all parties should be provided adequate opportunity to review the proposed Guide and provide formal comments, either in writing or a workshop, before the Guide is approved by the commission.

Sprint stated that although it did not object to LIDA certifying eligible customers it could not endorse the proposed rule because the references to the Guide have resulted in a lack of critical detail. Sprint noted that §26.412(c)(1) does not provide any details

regarding the contents of the Guide and used the example of §26.412(e)(2)(A)(ii) which references the receipt by carriers of a monthly updated list of eligible customers. Sprint stated that it cannot comment as to the suitability of this monthly update because the timeframe and any other particulars are to be established in the Guide. Sprint asserted that further details, such as the period for discontinuing customers, the amount of Lifeline support, details of the LIDA automatic enrollment procedures and for customers' Link Up qualifications are also to be found in the Guide.

Verizon stated that it was not opposed to the proposed rule but reserved the right to comment upon the Guide as it is developed.

Commission response

The commission notes that a joint workshop for both Project Number 28056 and Project Number 27711, *Rulemaking to Modify the Electric Low-Income Discount Rules*, was held on November 7, 2003, to address the draft of the Guide and any concerns regarding the proposed rule amendments. Written comments were received on November 12, 2003, pertaining to the Guide. A discussion of these comments as they relate to the proposed rule amendments will be addressed in this preamble. The workshop and comments specific to the draft of the Guide will be addressed separately from the proposed rule amendments in both Project Number 28056 and Project Number 27711.

With regard to the concerns expressed by Sprint in reference to specific aspects of the rule as amended, the commission believes that its adoption of the 60-day period in the rule, as discussed below, addresses this concern. The balance of Sprint's concerns are either already addressed in the rule (such as the amount of the support and means to recover it and the qualifications for both Lifeline and Link Up subscribers) or are being addressed in the Guide because of their administrative nature.

Recommended revisions to proposed §26.412(c)(1)(C)(ii)

OPC expressed its concern that the reference to the Guide in the proposed amendments, and the establishment of a response period for affected customers within such a document, fails the requirements of the Administrative Procedure Act (APA) because parties affected by the response period are unable to rebut the requirement. OPC recommended the commission establish this response period within proposed §26.412(c)(1)(C)(ii). As previously noted, Sprint also recommended adoption of a specific period in the proposed amendments to the rule.

Commission response

The commission agrees with the concern of OPC and Sprint regarding the period referenced in §26.412(c)(1)(C)(ii) and §26.412(c)(1)(C)(iii) and has revised the proposed amendments to establish a period of 60 days.

Recommended revisions to proposed §26.412(f)

OPC urged the commission to consider the privacy of potential Lifeline customers and recommended that the Texas Department of Human Services (TDHS) require applicants to sign a statement that allows their names to be delivered to LIDA. OPC recommended that such a requirement be added as an amendment to proposed §26.412(f), regarding the Memorandum of Understanding between the commission and TDHS.

OPC also stated that it did not believe that §26.412(f)(i) adequately addressed outreach. OPC noted that the requirement that participating telecommunications carriers advertise the availability of Lifeline in directories and bill notices does not reach potential beneficiaries of the Link Up discount, who do not have existing telephone service. Further, OPC recommended that the commission adopt the federal requirement which includes an annual newsprint media advertisement.

Commission response

Although the commission appreciates OPC's concern with regard to §26.412(f), and the privacy of TDHS clients eligible for Lifeline and Link Up services, it believes that the confidentiality agreements between the telecommunications carriers and TDHS and those similar measures required by the contract for the LIDA will adequately address this matter. Therefore, the commission declines to adopt language which will impose an additional burden upon TDHS and likely result in a further roadblock for the automatic enrollment of qualified TDHS clients.

The commission also appreciates OPC's concern regarding the innate difficulties of automatic enrollment as it pertains to qualified TDHS clients without existing telephone service. OPC stated that its suggestion for an amendment to address this concern was related to §26.412(f)(i). The commission notes that §26.412(f) does not currently contain such a paragraph and that §26.412(f), related to the commission's Memorandum of Understanding with TDHS, is not appropriate for the amendment as recommended by OPC. However, the commission believes that the creation of a central clearinghouse for low-income telephone and electric subscribers, as well as a toll free statewide telephone number through which consumers may obtain information about enrollment into these discount programs, will go far in furthering Lifeline enrollment and provide a standard source of information and assistance for those seeking Link Up discounts for installation of service. The commission is not persuaded that an additional annual newsprint advertisement requirement will further Lifeline or Link Up enrollment. Therefore, the commission declines to adopt this additional requirement in this section.

November 7, 2003 workshop comments

On November 7, 2003, a joint workshop in Project Numbers 27711 and 28056 was held at the commission to discuss the draft Guide, its purpose and correlation with the rule, and any questions, comments, and suggestions from parties. Input was received at the workshop from representatives of electric and telecommunications utilities, including OPC, SBC, Sprint, Verizon, the Texas Statewide Telephone Cooperative, Incorporated (TSTCI) and JSI Solutions, Incorporated (JSI), representing the smaller incumbent local exchange carriers, and Texas Legal Services Center (TLSC) and Texas Ratepayer Organization to Save Energy (Texas ROSE).

Written comments, received on November 12, 2003, from SBC, Sprint, TSTCI, and Verizon, and on November 14, 2003, from OPC, primarily discussed the draft Guide as it relates to the Lifeline and Link Up discounts, with one recommendation for the proposed amendment to §26.412(c)(1).

TSTCI stated that the commission should be responsible for approval of the Guide and any future revisions to the Guide. TSTCI maintained that the proposed amendment to §26.412(c)(1), which makes the Guide the responsibility of the commission's Executive Director, should be revised accordingly.

Verizon also recommended that the Guide and any subsequent revisions should be approved by the commission, concurring in TSTCI's position that §26.412(c)(1) be revised accordingly.

Commission response

The commission adopts changes to the language proposed for §26.412(c)(1) to address the concerns of TSTCI and Verizon. The initial Guide and future revisions thereto will be subject to the final approval of the commission. However, the Guide may be updated to reflect statutory or commission approved changes in rules or program requirements, or to modify format or timing in the provision of information by participating carriers or LIDA, with the approval of the commission's Executive Director. In this way, the commission believes that the Guide will remain adaptive to the needs of the participants.

Miscellaneous changes

Three additional changes have been incorporated for the sake of consistency with those being made in Project Number 27711, *Rulemaking to Modify the Electric Low-Income Discount Rules*. First, the term "self-certification" has been replaced with the term "self- enrollment". Second, a new subsection (k) has been added to provide self-enrolling low-income customers with an opportunity for additional review if their application has been denied by LIDA and to conform to the procedures being implemented for low-income electric customers. Finally a new subsection (l) has been added to clarify that the language of the section prevails in any instance when there is a conflict with language in the Guide.

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §17.004(f) which requires the commission to adopt rules to provide automatic enrollment of eligible utility customers for lifeline telephone service; PURA §55.015 which requires the commission to adopt rules regarding the receipt of lifeline service; PURA §56.021 which requires the commission to adopt rules to establish a state universal service fund and to reimburse a telecommunications carrier providing lifeline service out of the fund.

Cross Reference to Statutes: Public Utility Regulatory Act §§17.004(f), 55.015, 56.021, and 58.051.

§26.412. Lifeline Service and Link Up Service Programs.

(a) Scope and purpose. Through this section the commission seeks to extend Lifeline Service and Link Up Service to all qualifying customers, establish a procedure for Lifeline Automatic Enrollment and Lifeline Self-Enrollment, and define the responsibilities of participating telecommunications carriers, qualified customers, the Texas Department of Human Services (TDHS), and the Low-Income Discount Administrator (LIDA) Program. This section applies to designated eligible telecommunications carriers as defined by §26.418 of this title (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds) and designated eligible telecommunications providers as defined by §26.417 of this title (relating to Designation as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF)), collectively referred to in this section as participating telecommunications carriers.

(b) Lifeline Service and Link Up Service. Each participating telecommunications carrier shall provide Lifeline Service and Link Up Service as provided by this section. A customer with an income at or below 125% of the federal poverty guidelines, or receiving benefits from any of the following programs qualifies for Lifeline and Link Up Services: Medicaid, food stamps, Supplemental Security Income (SSI), federal public housing assistance, or Low Income Energy Assistance Program (LIHEAP). A customer eligible for Lifeline Service is automatically eligible for Link Up Service. However, a customer may qualify for and receive Link Up Service independently of Lifeline Service. Nothing in this section shall prohibit a customer otherwise eligible to receive Lifeline Service and/or Link Up Service from obtaining and using telecommunications equipment or services designed to aid such customer in utilizing qualifying telecommunications services.

(c) Lifeline Service Program. Lifeline Service is a retail local service offering available to qualifying low-income customers. Participating telecommunications carriers provide qualifying customers with a waiver of the federal subscriber line charge (SLC) and an additional discount up to $7.00 per monthly bill, for which participating telecommunications carriers are reimbursed from federal and state universal service funds.

(1) Provision of Lifeline Service. Lifeline Service shall be provided according to the following requirements and the terms of the Low-Income Discount Procedural Guide (the Guide). The Guide compiles the regulatory and statutory requirements for, and roles of, participants in the rate reduction program, including participating telecommunications carriers, TDHS, the LIDA, and customers, and sets out administrative information, including the required data formats and deadlines for transmitting information to the LIDA, other program participants, and the commission. The initial version of the Guide will be approved by the commission, but it may be updated to reflect statutory or commission-approved changes in rules and program requirements, or to modify the format or timing of the provision of information by participating telecommunications carriers and the LIDA, with the approval of the Executive Director.

(A) Designated Lifeline services. The participating telecommunications carriers shall offer the services or functionalities enumerated in Title 47, Code of Federal Regulations, §54.101(a)(1)-(9) (relating to Supported Services for Rural, Insular and High Cost Areas).

(B) Toll blocking. The participating telecommunications carriers shall offer toll blocking to all qualifying low-income customers at the time such customers subscribe to Lifeline Service. If the customer elects to receive toll blocking, that service shall become part of the customer's Lifeline Service and the customer's monthly bill will not be increased by otherwise applicable toll blocking charges.

(C) Disconnection of service.

(i) Disconnection prohibition. Participating telecommunications carriers may not disconnect Lifeline Service for non-payment of toll charges.

(ii) Discontinuance of Lifeline Discounts for customers automatically enrolled. The eligibility period for automatically enrolled customers is the length of their enrollment in TDHS benefits plus a period of 60 days for renewal. Automatically enrolled customers will have an opportunity to renew their TDHS benefits or self enroll with LIDA upon the expiration of their automatic enrollment.

(iii) Discontinuance of Lifeline Discounts for customers who have self-enrolled. Individuals not receiving benefits through TDHS programs, but who have met Lifeline income qualifications in subsection (b) of this section, are eligible to receive the Lifeline Discount for seven months, which includes a period of 60 days during which the customer may renew their eligibility with LIDA for an additional seven months.

(D) Service deposit prohibition. If the qualifying low-income customer voluntarily elects toll blocking from the participating telecommunications carrier, the carrier may not collect a service deposit pursuant to §26.24 of this title (relating to Credit Requirements and Deposits) in order to initiate Lifeline Service.

(2) Lifeline support.

(A) Lifeline support amounts. Lifeline support amounts per qualifying low-income customer shall be provided to participating telecommunications carriers pursuant to Title 47, Code of Federal Regulations, §54.403 (relating to Lifeline Support Amount) and according to any applicable provisions of the Guide. Tribal Land discounts will be provided pursuant to Title 47, Code of Federal Regulations, §54.403(a)(4).

(i) Federal Subscriber Line Charge Waiver. A participating telecommunications carrier shall grant a waiver of the monthly federal subscriber line charge (SLC) at the rate tariffed by the incumbent local exchange carrier serving the area of the qualifying low-income customers. If the participating telecommunications carrier does not charge the federal SLC, it shall reduce its lowest tariffed residential rate for supported services by the amount of the SLC tariffed by the ILEC serving the area of the qualifying low-income customer.

(ii) Federal approved $1.75 reduction. A participating telecommunications carrier shall give a qualifying low-income customer a federal approved reduction of $1.75 in the monthly amount of intrastate charges paid pursuant to Title 47, Code of Federal Regulations, §54.403 (relating to Lifeline Support Amount).

(iii) Additional state reduction with federal matching. A participating telecommunications carrier shall give a qualifying low-income customer the following:

(I) an additional state-approved reduction of up to a maximum of $3.50 in the monthly amount of intrastate charges; and

(II) a further federally approved reduction equal to one-half the amount of the reduction in subclause (I) of this clause up to a maximum of $1.75.

(B) Recovery of support amounts. Participating telecommunications carriers shall be entitled to recover the support amount required by subparagraph (A) of this paragraph pursuant to Title 47, Code of Federal Regulations, §54.407 (relating to Reimbursement for offering Lifeline). Participating telecommunications carriers are entitled to recover the support amount described in subparagraph (A)(i), (ii) and (iii)(II) of this paragraph through the Federal Universal Service Fund (USF). The support amount described in subparagraph (A)(iii)(I) of this paragraph can be recovered through the Texas Universal Service Fund (TUSF).

(d) Link Up Service Program. This is a program certified by the Federal Communications Commission (FCC), pursuant to Title 47, Code of Federal Regulations, §54.411, that provides a qualifying low-income customer with the following assistance:

(1) Services.

(A) A qualifying low-income customer may receive a reduction in the participating telecommunications carrier's customary charge for commencing telecommunications service for a primary single line connection at the customer's principal place of residence. The reduction shall be half of the customary charge or $30, whichever is less.

(B) A qualifying low-income customer may receive a deferred schedule for payment of the charges assessed for commencing service, for which the customer does not pay interest. Interest shall be waived for connection charges of up to $200 that are deferred for a period not to exceed one year. Charges assessed for commencing service include any charges that the carrier customarily assesses to connect subscribers to the network. These charges do not include any permissible security deposit requirements. Deferred payment of these charges will not be subject to late fees or additional service fees.

(2) Qualifying low-income customer choice. A qualifying low-income customer is eligible for both of the services set forth in paragraphs (1)(A) and (B) of this subsection.

(3) Limitation on receipt. A participating telecommunications carrier's Link Up Service shall allow a qualifying low-income customer to receive the benefit of Link Up Service on subsequent occasions only for a principal place of residence with an address different from the residence address at which the Link Up Service was provided previously.

(e) Obligations of the customer and the participating telecommunications carrier.

(1) Obligations of the customer. Customers who meet the low-income requirement for qualification but do not receive benefits under the programs listed in subsection (b) of this section may provide the LIDA with self-enrollment for Lifeline and/or Link Up Service benefits. Customers receiving benefits under the programs listed in subsection (b) of this section and who have telephone service will be subject to the Lifeline automatic enrollment procedures as provided by the LIDA pursuant to the terms of the Guide unless they provide the LIDA with a request to be excluded from Lifeline Service. Customers receiving benefits under the programs listed in subsection (b) of this section and who do not have telephone service must initiate a request for service from a participating telecommunications carrier providing local service in their area.

(2) Obligations of participating telecommunications carriers.

(A) Lifeline Service.

(i) A participating telecommunications carrier shall provide Lifeline Service to all eligible customers identified by the LIDA within its service area in accordance with this section and the Guide.

(I) A participating telecommunications carrier shall identify those customers on the initial database provided by the LIDA to whom it is providing telephone service and shall begin reduced billing for those qualifying low-income customers in accordance with the terms of the Guide.

(II) The eligible customer shall not be charged for changes in telephone service arrangements that are made in order to qualify for Lifeline Service, or for service order charges associated with transferring the account into Lifeline Service. If the eligible customer changes the telephone service or initiates new service, the participating telecommunications carrier shall begin reduced billing at the time the change of service becomes effective or at the time new service is established.

(ii) Upon receipt of the monthly update provided by the LIDA pursuant to the terms of the Guide a participating telecommunications carrier shall begin reduced billing for those qualifying low-income customers subscribing to services within the timeframe established by the Guide.

(iii) The LIDA shall provide a self-enrollment form by direct mail at the customer's request. The LIDA shall maintain customers' self-enrollment forms and provide a database of self-enrolling customers to all participating telecommunications carriers.

(B) Link Up Service. Participating telecommunications carriers shall provide Link Up Service to all qualifying low-income customers in accordance with this section and the terms of the Guide.

(f) Memorandum of Understanding. Pursuant to a Memorandum of Understanding (MOU) between the commission and the TDHS to facilitate automatic enrollment of eligible customers in Lifeline, and pursuant to the terms of the Guide, the commission and the TDHS will undertake obligations to insure an efficient automatic enrollment process in cooperation with the LIDA and all participating telecommunications carriers.

(g) Tariff requirement. Each participating telecommunications carrier shall file a tariff to implement Lifeline Service and Link Up Service, or revise its existing tariff for compliance with this section and with applicable law.

(h) Reporting requirements.

(1) On September 1st of each year all participating telecommunications carriers shall file with the commission a report detailing how many customers were enrolled through the Lifeline Automatic Enrollment Program, through the self-enrollment process, and how many customers received Link Up in the preceding year.

(2) Texas Universal Service Fund (TUSF). Participating telecommunications carriers providing Lifeline Service pursuant to this section shall report information as required by the commission or the TUSF administrator, including but not limited to the following information.

(A) Initial reporting requirements. Participating telecommunications carriers shall provide the commission and the TUSF administrator with information demonstrating that its Lifeline Service plan meets the requirements of this section.

(B) Monthly reporting requirements. Participating telecommunications carriers shall report monthly to the TUSF administrator the total number of qualified low-income customers to whom Lifeline Service was provided for the month by the participating telecommunications carrier.

(C) Other reporting requirements. Participating telecommunications carriers shall report any other information required by the commission or the TUSF administrator, including any information necessary to assess contributions to and disbursements from the TUSF.

(3) Federal Lifeline Service Program. Participating telecommunications carriers shall file the following information with the administrator of the Federal Lifeline Program:

(A) information demonstrating that the participating telecommunications carrier's Lifeline Service plan meets the criteria set forth in Title 47, Code of Federal Regulations, Subpart E (relating to Universal Service Support for Low-Income Consumers);

(B) the number of qualifying low-income customers served by the participating telecommunications carrier;

(C) the amount of state assistance; and

(D) other information required by the administrator of the Federal Lifeline Program.

(i) Notice of Lifeline and Link Up Services. A participating telecommunications carrier shall provide notice of Lifeline and Link Up Services in any directory it distributes to its customers and shall provide an annual bill message advising customers of the availability of Lifeline and Link Up Services. In any instance where the carrier provides bilingual (English and Spanish) information in its directory and annual bill messages, the carrier must also provide its notice regarding Lifeline and Link Up Service in a bilingual format.

(j) Confidentiality agreements. Participating telecommunications carriers must execute a confidentiality agreement with TDHS pursuant to the terms of the Guide prior to receiving the LIDA's eligibility database. The agreement will specify that client information is released by TDHS to carriers for the sole purpose of providing Lifeline and/or Link Up Service to eligible customers and that the information cannot be released by the carrier or used by the carrier for any other purpose.

(k) Opportunity for contest.

(1) A customer who believes that their self-enrollment application has been erroneously denied may request that LIDA review the application, and the customer may submit additional information as proof of eligibility.

(2) A customer who is dissatisfied with LIDA's action following a request for review under paragraph (1) of this subsection may request an informal hearing to be conducted by the commission staff.

(3) A customer dissatisfied with the determination after an informal hearing under paragraph (2) of this subsection may file a formal complaint pursuant to §22.242(e) of this title (relating to Complaints).

(l) Low-Income Discount Procedural Guide. In the event of conflicts between the language of the Guide and the language of this section, the section shall prevail.

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 January 16, 2004.

TRD-200400372
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: September 12, 2003
For further information, please call: (512) 936-7223

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TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 131. PRACTICE AND PROCEDURE

SUBCHAPTER A. BYLAWS AND DEFINITIONS

22 TAC §131.20

The Texas Board of Professional Engineers adopts an amendment to §131.20, relating to Committees, without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10011) and will not be republished.

The adopted amendment adds the Policy Advisory Opinion Committee to the board's standing committee rule. The purpose of this committee is to prepare policy advisory opinions for

the board as required by §1001.601 and §1001.602 of the Occupations Code.

No comments were received regarding the board's adoption of the amended section.

The amendment is adopted pursuant to the pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state.

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 January 16, 2004.

TRD-200400304
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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Proposal publication date: November 14, 2003
For further information, please call: (512) 440-7723

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SUBCHAPTER H. LICENSING
DIVISION 1. PROFESSIONAL ENGINEER LICENSE

22 TAC §131.133

The Texas Board of Professional Engineers adopts an amendment to §131.133, relating to Professional Designations that adds a category of inactive licensed engineer as provided in Senate Bill 277, 78th Legislature. The amended section is adopted without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10012) and will not be republished.

Approximately 2,000 license holders do not renew licenses in Texas each year because they are no longer practicing engineering. The amendment provides for a licensed engineer to not practice, yet to remain licensed without having to meet the continuing education required of active licensed professional engineers. It also removes the requirement to pay the annual $200 professional license fee. The provisions of this amendment are consistent with other similar licensing organizations. The amendment also provides for reactivation requirements including payment of the professional fee and meeting specified continuing education program requirements.

No comments were received regarding the board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; and pursuant to the Texas Engineering Practice Act, Occupations Code §1001.355 of the Act, which delegates to the board the authority to create an inactive status and determine reactivation requirements.

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 January 16, 2004.

TRD-200400305
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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For further information, please call: (512) 440-7723

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22 TAC §131.139

The Texas Board of Professional Engineers adopts new §131.139, relating to the Continuing Education Program (CEP), with changes to the proposed text as published in the November 7, 2003, issue of the *Texas Register* (28 TexReg 9668). The text of the rule will be republished.

The adopted new section sets forth the requirements and conditions for the Continuing Education program required by Section 17 of SB277, 78th Regular Session of the Texas Legislature, 2003. The adopted new section is structured after the national CEP model. The adopted new section sets the CEP requirements for license renewal, defines acceptable activities for CEP credit, describes requirements for reporting CEP credits, lists exemptions from the CEP policy, describes the CEP requirements for activating an inactive or retired license, and describes noncompliance.

The adopted new section has been drafted to recognize the legislative intent to allow self determination of CEP activities and content by the license holder and builds on this intent by establishing a method of accounting and reporting CEP credits. The adopted new section has been developed to enhance the professional development of license holders while not imposing inappropriate requirements on their professional activities. The list of acceptable activities, equivalent CEP time values, methods for determination of credit, and exemptions is standard compared to the national CEP model and a review of CEP systems of other states. The inclusion of an audit process enhances the continuing education program by maintaining a strict record retention requirement while reducing the reporting requirement for license holders for every renewal cycle.

The board has received numerous comments during the public comment period regarding the board's adoption of the amended section. The board has received: 3 comments concerning adding an exemption for license holders over the age of 65; 5 comments concerning PDH credit allowed for presentations at associations or societies; 10 comments concerning the financial burden and activity availability for small business and sole proprietorships; 3 comments concerning fractional hours and PDH credits; 3 comments concerning raising the PDH limits for societies and associations; 2 comments concerning raising the PDH limit and counting multiple administrations of a course for teaching; 3 comments concerning exemptions for active and reserve military as well as associated DOD civilians;

1 comment concerning an exemption for working overseas; 3 comments concerning clarification of reporting requirements; 1 comment concerning carrying forward PDH for ethics; 2 comments concerning a time limit for makeup of unacceptable PDH credits; 4 comments concerning lowering the number of required PDH/year; 1 comment concerning clarification of language for inactive status exemption; 3 comments concerning raising the PDH limit for self-study; 2 comments concerning raising the PDH hours granted for a patent; and 1 comment against CEP altogether. Over 200 other general questions or comments have been received by the board.

The board has adopted the rule as proposed with the following non-substantive changes: clarification of the exemption for military personnel; clarification of association, society, or organization presentations; and increase of credits for patents.

The new section is adopted pursuant to the Texas Occupations Code, Chapter 1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state (formerly Texas Engineering Practice Act, Tex. Rev. Civ. Stat. Ann. art. 3271a, §8); and the Texas Occupations Code, Chapter 1001.210, which authorizes the creation and administration of a continuing education program for engineering license holders.

§131.139. Continuing Education Program.

(a) Each license holder shall meet the Continuing Education Program (CEP) requirements for professional development as a condition for license renewal.

(b) Terms used in this section are defined as follows:

(1) Professional Development Hour (PDH)--A contact hour (clock hour) of CEP activity. PDH is the basic unit for CEP reporting.

(2) Continuing Education Unit (CEU)--Unit of credit customarily used for continuing education courses. One continuing education unit equals 10 hours of class in an approved continuing education course.

(3) College/Unit Semester/Quarter Hour--Credit for course in ABET-approved program or other related college course.

(4) Course/Activity--Any qualifying course or activity with a clear purpose and objective which will maintain, improve, or expand the skills and knowledge relevant to the license holder's field of practice.

(c) Every license holder is required to obtain 15 PDH units during the renewal period year.

(d) A minimum of 1 PDH per renewal period must be in the area of professional ethics, roles and responsibilities of professional engineering, or review of the Texas Engineering Practice Act and Board Rules.

(e) If a license holder exceeds the annual requirement in any renewal period, a maximum of 15 PDH units may be carried forward into the subsequent renewal period. Professional Development Hours must not be anticipated and cannot be used for more than one renewal period.

(f) PDH units may be earned as follows:

(1) Successful completion or auditing of college credit courses.

(2) Successful completion of continuing education courses, either offered by a professional or trade organization, university or college, or offered in-house by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(3) Successful completion of correspondence, on-line, televised, videotaped, and other short courses/tutorials.

(4) Presenting or attending seminars, in-house courses, workshops, or professional or technical presentations made at meetings, conventions, or conferences sponsored by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(5) Teaching or instructing as listed in paragraphs (1) through (4) of this subsection.

(6) Authoring published papers, articles, books, or accepted licensing examination items.

(7) Active participation in professional or technical societies, associations, agencies, or organizations, including:

(A) Serving as an elected or appointed official;

(B) Serving on a committee of the organization;

(C) Serving in other official positions.

(8) Patents Issued.

(9) Engaging in self-directed study.

(g) All activities described in §131.139(f) of this title shall be relevant to the practice of a technical profession and may include technical, ethical, or managerial content.

(h) The conversion of other units of credit to PDH units is as follows:

(1) 1 College or unit semester hour--15 PDH

(2) 1 College or unit quarter hour--10 PDH

(3) 1 Continuing Education Unit--10 PDH

(4) 1 Hour of professional development in course work, seminars, or professional or technical presentations made at meetings, conventions, or conferences--1 PDH

(5) 1 Hour of professional development through self-directed study (Not to exceed 5 PDH)--1 PDH

(6) Each published paper, article, or book--10 PDH

(7) Active participation in professional or technical society, association, agency, or organization (Not to exceed 5 PDH per organization)--1 PDH

(8) Each patent issued--15 PDH

(9) Other activities shall be credited at 1 PDH for each hour of participation in the activity.

(i) Determination of Credit

(1) The Board shall be the final authority with respect to whether a course or activity meets the requirements of these rules.

(2) The Board shall not pre-approve or endorse any CEP activities. It is the responsibility of each license holder to assure that all PDH credits claimed meet CEP requirements.

(3) Credit for college or community college approved courses will be based upon course credit established by the college.

(4) Credit for seminars and workshops will be based on one PDH unit for each hour of attendance. Attendance at programs presented at professional and/or technical society meetings will earn PDH units for the actual time of each program.

(5) Credit for self-directed study will be based on one PDH unit for each hour of study and is not to exceed 5 PDH per renewal period. Credit determination for self-directed study is the responsibility of the license holder and subject to review as required by the board.

(6) Credit determination for activities described in subsection (h)(4) of this section is the responsibility of the license holder and subject to review as required by the board.

(7) Credit for activity described in subsection (h)(7) of this section requires that a license holder serve as an officer of the organization, actively participate in a committee of the organization, or serve in other official positions. PDH credits are not earned until the end of each year of service is completed.

(8) Teaching credit is valid for teaching a course or seminar for the first time only.

(j) The license holder is responsible for maintaining records to be used to support credits claimed. Records required include, but are not limited to:

(1) a log showing the type of activity claimed, sponsoring organization, location, duration, instructor's or speaker's name, and PDH credits earned; and

(2) attendance verification records in the form of completion certificates or other documents supporting evidence of attendance.

(k) The license holder must submit CEP certification and a list of each activity, date, and hours claimed that satisfy the CEP requirement for that renewal year with the renewal application and fee.

(l) CEP records for each license holder must be maintained for a period of three years by the license holder.

(m) CEP records for each license holder are subject to audit by the board or its authorized representative.

(1) Copies must be furnished, if requested, to the Board or its authorized representative for audit verification purposes.

(2) If upon auditing a license holder, the Board finds that the activities cited do not fall within the bounds of educational, technical, ethical, or professional management activities related to the practice of engineering; the board may require the license holder to acquire additional PDH as needed to fulfill the minimum CEP requirements.

(n) A license holder may be exempt from the professional development educational requirements for one of the following reasons listed in paragraphs (1)-(4) of this subsection:

(1) New license holders by way of examination shall be exempt for their first renewal period.

(2) A license holder serving on active duty and deployed outside the United States, its possessions and territories, in or for the military service of the United States for a period of time exceeding one hundred twenty (120) consecutive days in a year shall be exempt from obtaining the professional development hours required during that year.

(3) License holders experiencing physical disability, illness, or other extenuating circumstances as reviewed and approved by the board may be exempt. Supporting documentation must be furnished to the board.

(4) License holders who list their status as "Retired" or "Inactive" and who further certify that they are no longer receiving any remuneration from providing professional engineering services in Texas shall be exempt from the professional development hours required.

(o) A license holder may bring an inactive license to active status by obtaining all delinquent PDH units. However, if the total number required to become current exceeds 30, then 30 shall be the maximum number required.

(p) Noncompliance:

(1) If an engineer does not certify that CEP requirements have been met for a renewal period, the license shall be considered expired and subject to late fees and penalties.

(2) A determination by audit that CEP requirements have been falsely reported shall be considered to be misconduct and will subject the license holder to disciplinary action.

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 January 16, 2004.

TRD-200400312
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: February 5, 2004
Proposal publication date: November 7, 2003
For further information, please call: (512) 440-7723

DIVISION 2. REGISTRATION OF FIRMS

22 TAC §131.144

The Texas Board of Professional Engineers adopts new §131.144, relating to Firm Registration Compliance, without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10013) and will not be republished.

This adopted rule relates to the implementation of a statutory requirement to allow firms to voluntarily comply with firm registration requirements within 30 days of written notice from the board and not be assessed an administrative penalty for lacking firm registration. This provision does not apply to those firms who have registered and let that registration lapse.

No comments were received regarding the board's adoption of the new section.

The new section is adopted pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Chapter 1001 of the Occupations code, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; and pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Chapter 1001.405 of the Occupations code, which delegates to the board the authority to adopt rules to allow a 30 day grace period for firm registrations.

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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Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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For further information, please call: (512) 440-7723

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SUBCHAPTER J. COMPLIANCE AND ENFORCEMENT

22 TAC §131.167

The Texas Board of Professional Engineers adopts amendments to §131.167, relating to Disciplinary Actions, without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10014) and will not be republished.

In the adopted amendments, the board includes newly mandated statutory requirements relating to ability to require restitution as part of an informal conference settlement, conditions of probation for probated suspended licenses, and disciplinary actions for practicing while on inactive status and falsifying continuing education documentation. In addition, the rule and suggested sanction tables used by the board in determining disciplinary actions and administrative penalties have been updated to correct references to statute for the recently re-codification of the Texas Engineering Practice Act.

No comments were received regarding the board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Chapter 1001 of the Occupations code, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; and pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Subchapters J, K, and L of the Occupations code, which delegates to the board the authority to enforce the Act and take disciplinary action against those who violate the Act.

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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Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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For further information, please call: (512) 440-7723

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22 TAC §131.168

The Texas Board of Professional Engineers adopts amendments to §131.168, relating to Actions Against Non License Holders, without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10016) and will not be republished.

In the adopted amendments, the board modifies the existing rule to make it consistent with proposed changes to Subchapter K: Complaints.

No comments were received regarding the board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Chapter 1001 of the Occupations Code, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; and pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Subchapters J, K, and L of the Occupations Code, which delegates to the board the authority to enforce the Act and take action against those who violate the Act.

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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Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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For further information, please call: (512) 440-7723

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SUBCHAPTER K. COMPLAINTS

22 TAC §§131.171 - 131.173

The Texas Board of Professional Engineers adopts the repeal of §§131.171-131.173 under Subchapter K: Complaints, without changes to the proposal as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10016) and will not be republished. The board is re-proposing this Subchapter in its entirety with new statutory mandates concurrently with this repeal.

No comments were received regarding the board's adoption of the repeal.

The repeals are adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and

bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; and pursuant to the Texas Engineering Practice Act, §1001.252 Occupations Code, which requires the board to specify by rule the process of complaint investigation and disposition.

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 January 16, 2004.

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Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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For further information, please call: (512) 440-7723

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22 TAC §§131.171 - 131.177

The Texas Board of Professional Engineers adopts new board rules §§131.171-131.177 under Subchapter K: Complaints, relating to the receipt, investigation, resolution and reporting of complaints, without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10017) and will not be republished.

The new rules also prescribe the board's statutory authority to hire technical consultants to assist in the investigation and resolution of complaints. In conjunction with the adopted new rules, the board has adopted repeal of the existing rules, §§131.171-131.173, relating to Complaints.

As a result of the Sunset process, Chapter 1001 had several amendments relating to the receipt and processing of complaints and the adopted new rules serve to address these statutory mandates. The new rules prescribe the form of a complaint, the process for the board to receive a complaint, and the prioritization of complaints to ensure public safety concerns are addressed in advance of other complaints. In addition the new rules set forth the board's investigative authority and process and ability to obtain technical consultants and grant them immunity when acting in the official capacity of the board. The new rules address the final resolution of a complaint including the board's authority to pursue disciplinary action as prescribed in board rules §131.167, relating to Disciplinary Actions and §131.168, Actions Against Non-License Holders. The new rules also set forth the complaint reporting requirements mandated by the statute.

No comments were received regarding the board's adoption of the new sections.

The new rules are adopted pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Chapter 1001 of the Occupations code, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; and pursuant to the Texas Engineering Practice Act, Title 6, Subtitle A, Chapter 1001.252 of the Occupations code, which requires the board to specify by rule the process of complaint investigation and disposition.

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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Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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For further information, please call: (512) 440-7723

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SUBCHAPTER M. POLICY ADVISORY OPINIONS

22 TAC §§131.301 - 131.307

The Texas Board of Professional Engineers adopts a new Subchapter M relating to Policy Advisory Opinions containing new §§131.301-131.307, without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10019) and will not be republished.

These new sections set forth the process and procedures the board will follow to issue and maintain advisory opinions regarding the interpretation and application of Chapter 1001, Occupations Code, as required by §1001.601 and §1001.602.

The adopted sections define an advisory opinion and set forth procedures for requesting an opinion from the board. The prescribed process allows for the executive director to receive and make preliminary determination on the nature of the advisory request. Advisory requests shall then be presented to a new standing committee formed specifically to review and prepare advisory opinions for the board as adopted in amendments to §131.20, relating to Committees. The provisions require the board to involve stakeholders and other resources as necessary to develop and prepare an opinion. Once a draft opinion is prepared, the new sections require the board to publish the draft opinion on the board website and in the *Texas Register* for comment. After a 30 day comment period, the policy advisory committee will consider comments and revise the draft opinion as necessary and prepare a final opinion recommendation for the full board. The new sections allow the full board to adopt the opinion or refer it back to the committee for further action. Notice of adoption will be published in the *Texas Register*. The adopted rules require the board to classify the advisory opinions and make them available on the agency website. And, finally, the new sections require the board to complete this process within 180 days as required by statute.

The board received comments regarding the procedure for reconsidering or revising an issued opinion in response to the board notice to adopt the new rules. In discussion, the board believes the proposed rules allow for this action and therefore adopt without changes.

The new sections are adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; and pursuant to the Texas Engineering Practice Act, Occupations Code §1001.601 and §1001.602 of the Act, which requires the board to issue advisory opinions and make them available on the agency website.

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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Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
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For further information, please call: (512) 440-7723

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §501.51, §501.52

The Texas State Board of Public Accountancy adopts an amendment to §501.51 concerning Preamble and General Principles and §501.52 concerning Definitions in Subchapter A regarding General Provisions without changes to the proposed text as published in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10651). The text of the rules will not be republished.

The amendment to §501.51 was changed in subsection (e) to numerically list the services to which the board's rules apply and to add internal auditing and forensic accounting to that list of services. Subsection (e) was further changed to delete the statement that licensees practicing outside the United States should comply with that country's standards. New subsection (h) was added to provide an interpretive comment specifically stating that outsourced internal audit services are client practice engagements. The amendment to §501.52 adds a new paragraph (21) to the rule which states that the practice of public accountancy is defined in the Public Accountancy Act. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §§501.51 and 501.52 in Subchapter A and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 501 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment to §501.51 will function by making it clear that outsourced internal audit services are considered by the board to be client practice engagements. The amendment to §501.52 will function by creating a new subsection (21) that directs readers to the statutory definition of the practice of public accountancy.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these adoptions.

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 January 15, 2004.

TRD-200400256
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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Proposal publication date: November 28, 2003
For further information, please call: (512) 305-7848

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SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §§501.71, 501.73, 501.75 - 501.77

The Texas State Board of Public Accountancy adopts amendments to §501.71 concerning Receipt of Commissions and Other Compensation, §501.73 concerning Integrity and Objectivity, §501.75 concerning Confidential Client Communications, §501.76 concerning Records and Work Papers and §501.77 concerning Acting through Others in Subchapter C regarding Responsibilities to Clients without changes to the proposed text as published in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10654). The text of the rules will not be republished.

The amendment to §501.71 adds a new subsection (f) that refers to §501.73 for payment of commissions. The amendment to §501.73 adds a new subsection (f) that makes reference to the section on Other Professional Standards. The amendment to §501.75 deletes "court proceedings" because it is restrictive and replaces "peer" reviews with "quality" reviews. The amendment to §501.76 in subsection (f), increases the record keeping period for attest services to five years. Failure to maintain such records has been added as a violation of this section. New subsection (g) recommends licensees obtain documentation of delivery of records to a client. The amendment to §501.77 adds "including non-CPA owners and employees" to subsection (a). These amendments are the result of rule

review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §§501.71, 501.73, 501.75, 501.76, and 501.77 in Subchapter C and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 501 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment to §501.71 will function by creating a new subsection (f) that refers readers to §501.73 for payment of fees. The amendment to §501.73 will function by creating a new subsection (f) that directs readers to other sections for other possible issues. The amendment to §501.75 will function by making the rule easier for readers to understand. The amendment to §501.76 will function by having documents and working papers retained for longer periods. The amendment to §501.77 will function by clarifying that it applies to non-CPA owners and employees.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these adoptions.

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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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Proposal publication date: November 28, 2003
For further information, please call: (512) 305-7848

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SUBCHAPTER D. RESPONSIBILITIES TO THE PUBLIC

22 TAC §§501.80, 501.81, 501.85

The Texas State Board of Public Accountancy adopts amendments to §501.80 concerning Practice of Public Accountancy, §501.81 concerning Firm License Requirements and §501.85 concerning Complaint Notice in Subchapter D concerning Responsibilities to the Public without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10657). The text of the rules will not be republished.

The amendment to §501.80 adds a new subsection (c) to the rule, which states that the section incorporates the definitions of the practice of public accountancy, professional services, and accounting work found in other sections and the Act. The amendment to §501.81 adds a new subsection (f) to the rule that requires a licensee who is employed by an unlicensed entity that offers the client practice of public accountancy services to use the disclaimer in subsection (c). The amendment to §501.85 simplifies the board's address by changing Roman Numeral III to 3. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §§501.80, 501.81 and 501.85 in Subchapter D and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 501 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment to §501.80 will function by incorporating other named definitions found in other cited sections into this section. The amendment to §501.81 will function by creating a better understanding as to when licensees employed by unlicensed firms must use the disclaimer. The amendment to §501.85 will function by simplifying the Board's address.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these adoptions.

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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

22 TAC §§501.90 - 501.93

The Texas State Board of Public Accountancy adopts amendments to §501.90 concerning Discreditable Acts, §501.91 concerning Reportable Events, §501.92 concerning Frivolous Complaints and §501.93 concerning Responses in Subchapter

E regarding Responsibilities to the Board/Profession without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10658). The text of the rules will not be republished.

The amendment to §501.90 adds a new part to paragraph (5) of the rule. The new part states that a final conviction, imposition of deferred adjudication or community supervision for a crime involving moral turpitude, alcohol abuse or controlled substances is a discreditable act. New paragraph (19) adds a reference to Board Rule 519.16 and also states that any crime involving moral turpitude, alcohol abuse or controlled substances directly relates to the practice of public accountancy and defines moral turpitude as a crime involving grave infringement of the moral sentiment of the community. The amendment to §501.91 moves "any crime of which fraud or dishonesty is an element" from subparagraph (A) to (C). It also moves language regarding the qualifications, functions or duties of a public accountant from subparagraph (B) to subparagraph (D). The remaining part of subparagraph (B) is re-written to include only crimes of moral turpitude. Subparagraph (C) adds crimes involving alcohol abuse and controlled substances to the list of crimes that must be reported to the Board. The amendment to §501.92 adds a "registration" holder to the rule, as a person who must comply with this section. The amendment to §501.93 adds "faxing" and "facsimile" to the methods the Board may use to communicate with its licensees. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §§501.90, 501.91, 501.92 and 501.93 in Subchapter E and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 501 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment to §501.90 and §501.91 will function by clearly stating that crimes involving moral turpitude, alcohol abuse or controlled substances will continue to be investigated and prosecuted by the Board as discreditable acts. The amendment to §501.92 will function by removing an inapplicable term. The amendment to §501.93 will function by adding the use of facsimiles as a means to communicate with its licensees.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these adoptions.

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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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CHAPTER 511. CERTIFICATION AS A CPA
SUBCHAPTER B. CERTIFICATION BY EXAMINATION

22 TAC §511.22

The Texas State Board of Public Accountancy adopts an amendment to §511.22 concerning Initial Filing of the Application of Intent without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10660). The text of the rule will not be republished.

The amendment to §511.22 will make modifications needed to implement the computer-based Uniform CPA Examination. The amendment will make some minor editorial corrections, insert an acronym for the lengthy name of a law, substitute notarized copy for certified copy, and clarify the documentation that is required to comply with a federal statute. This amendment is the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §511.22 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment will function by making the rule easier to understand and provide clearer information about federally required documentation.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, §901.302 which authorizes applications of intent, and the Federal Responsibility and Work Opportunity Reconciliation Act of 1996 and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is 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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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22 TAC §511.29

The Texas State Board of Public Accountancy adopts new rule §511.29 concerning Examination Candidate Data with a change to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10662). The non-substantive change is in subsection (a) in which the acronym (NASBA) was moved to the correct location within the rule.

The new rule §511.29 will assist in implementing the computer based Uniform CPA Examination. With exam candidates' authorization, the board will provide candidate data to NASBA so it may maintain a national database of eligible exam candidates. This new rule is the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The new rule will function by vetting exam candidates through a national database, and eligible exam candidates will be able to take the Uniform CPA Examination at any approved testing center in the United States.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, §901.301 which authorizes the board to contract with another entity to conduct the Uniform CPA Examination and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

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

§511.29. Examination Candidate Data.

(a) The board shall provide candidate data to the National Association of State Boards of Accountancy (NASBA) for the sole and specific purpose of maintaining the national candidate database of individuals eligible for the Uniform CPA Examination.

(b) In compliance with §901.160(c)(1) of the Public Accountancy Act (Chapter 901 of the Occupations Code - Vernon's 2003), the Board shall obtain authorization from the candidate for the sharing of data with NASBA.

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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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SUBCHAPTER C. EDUCATIONAL REQUIREMENTS

22 TAC §511.52, §511.56

The Texas State Board of Public Accountancy adopts an amendment to §511.52 concerning Recognized Colleges and Universities and §511.56 concerning Educational Qualifications under the Act without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10662). The text of the rules will not be republished.

The amendment to §511.52 deletes an associate degree as one of the criteria. The preamble submitted with the proposal for rule §511.56 erroneously stated that the amendment increased the hours of accounting coursework required from 20 hours to 30 semester hours. The correct reason for the amendment is as follows: The amendment to §511.56 deletes the requirement in subsection (b)(3) that 20 of the 30 semester hours of accounting courses include accounting core courses. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §511.52 and §511.56 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment to §511.52 will function by making the rule clearer as to which categories of colleges or universities are eligible for consideration. The amendment to §511.56 will function by not requiring that 20 of the 30 semester hours of accounting courses include core courses.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, § 901.254 which authorizes the board to determine accounting concentration by board rule and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is 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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Rande Herrell
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SUBCHAPTER D. CPA EXAMINATION

22 TAC §§511.70, 511.72, 511.83, 511.84, 511.87, 511.91, 511.93

The Texas State Board of Public Accountancy adopts an amendment to §511.70 concerning Grounds for Disciplinary Action of Candidates, §511.72 concerning Uniform Examination, §511.83 concerning Granting of Credit by Transfer of Credit, §511.84 concerning Partial Examination after Transfer of Credit, §511.87 concerning Loss of Credit, §511.91 concerning Board Responsibilities Regarding Requested Accommodations for Disabilities, and §511.93 concerning Applicant's Responsibility for Requesting Accommodations for Disabilities in Subchapter D regarding CPA Examination without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10663). The text of the rules will not be republished.

The amendments to §511.70 and §511.72 (except for one clarification statement in §511.70 regarding using devices, materials or documents), are non-substantive editorial changes necessary to recognize and implement the change from a written Uniform CPA Examination conducted at a few board selected, controlled and supervised examination centers to a computer-based Uniform CPA Examination conducted at several testing centers under the supervision and control of testing center vendors that were selected by and are under contract to NASBA, which has contracted with the board to administer the examination.

The amendment to §511.83 creates a pre-January 1, 2004 window of time in which an exam candidate may earn partial credit that may be transferred with a grade of at least 50, creates a post-January 1, 2004 opportunity to transfer credit earned with a grade of at least 75 and creates in both instances the requirement that the other jurisdiction awarded credit to the candidate and that the credit has not expired.

The amendment to §511.84 creates deadlines by which a candidate allowed conditional credit for transfer of credit must pass the remaining subjects or forfeit the conditional credit. A candidate with credit earned between September 1, 1989 and November 2, 2000 has the next six consecutive examinations in which to pass all parts of the exam. A candidate with credit earned between November 2, 2000 and January 1, 2004 has the next six written or computer examinations in which to pass all parts of the exam. A candidate who earns credit after January 1, 2004 has the next 18 months in which to pass all parts of the exam.

The amendment to §511.87 has several editorial changes for clarification.

The amendment to §511.91 eliminates the statement that all examination facilities will be physically accessible to disabled applicants because the computer-based examination testing centers will not be selected by or under the control of the board and because new section §511.104 states that all testing centers will conform to the standards of the Americans with Disabilities Act of 1990.

The amendment to §511.93 shifts the deadline for applying for accommodation from the application for examination deadline to the time of filing an Application of Intent or an Examination Application.

These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §511.70, §511.72, §511.83, §511.84, §511.87, §511.91, §511.93 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendments will function by updating the board's rules to incorporate computer-based examination.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, §901.301 which authorizes the board to contract with an entity to conduct uniform CPA examinations, §901.306 which authorizes the board to use the services of NASBA, §901.310 which authorizes the board to promulgate rules regarding conditional credit, §901.312 which authorizes the board to accept partial examination credit from another state and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these adoptions.

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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22 TAC §511.97

The Texas State Board of Public Accountancy adopts new rule §511.97 concerning Examination of Applicant Approved with Accommodation without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10666). The text of the rule will not be republished.

New §511.97 lists a dozen types of accommodations that the board may authorize, establishes procedures and a deadline for applicants notifying the board of two possible testing dates and for the board to notify the applicant's testing center of the accommodations required, clarifies that the applicant may not make additional accommodation requests of the testing center, and requires the board to absorb the additional costs for any approved accommodations. This new rule is the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The new rule will function by creating a rule that explains accommodations.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, § 901.301 which authorizes the board to promulgate rules regarding the manner in which the examination is conducted and the Americans with Disabilities Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is 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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Rande Herrell
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SUBCHAPTER E. VENDOR REQUIREMENTS

22 TAC §§511.102 - 511.107

The Texas State Board of Public Accountancy adopts new rules §511.102 concerning CPA Examination Availability, §511.103 concerning Examination Scheduling, §511.104 concerning Test Center Locations, §511.105 concerning Test Center Check-In, §511.106 concerning Compliance with Test Center Rules and §511.107 concerning No-Show, Late Arrival and Late Cancellation in new Subchapter E regarding Vendor Requirements without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10667). The text of the rules will not be republished.

New §511.102 identifies the months in 2004 and 2005 during which the examination will be available on designated days and times.

New §511.103 defines the method and availability of access by candidates to schedule the Uniform CPA Examination.

New §511.104 identifies where a list of test center locations may be obtained by anyone and that the test centers will conform to the standards of the Americans with Disabilities Act of 1990.

New §511.105 makes the test vendor and the exam candidate aware of the test center check-in policies.

New §511.106 informs exam candidates that they must comply with test center rules and procedures or face possible future exclusion from examinations, and states that the board will be informed of a candidate's removal and exclusion.

New §511.107 contains the policy to be applied to candidates that do not appear at the exam, that arrive late at the exam or that cancel the examination too near the exam date.

The new rules will function by implementing rules regarding exam candidates and the computer-based examination.

These new rules are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

No comments were received regarding adoption of these rules.

The new rules are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, §901.301 which authorizes the Board to contract with another entity and to promulgate rules regarding application for the exam and conduct of the exam and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

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

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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Rande Herrell
General Counsel
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SUBCHAPTER F. EXPERIENCE REQUIREMENTS

22 TAC §511.123

The Texas State Board of Public Accountancy adopts an amendment to §511.123 concerning Reporting Work Experience in Subchapter F regarding Experience Requirements without changes to the proposed text as published in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10669). The text of the rule will not be republished.

The amendment to §511.123 will identify the full-time and part-time work experience requirements and describes the contents of the statement that is required from a candidate's supervising CPA. The amendment is the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §511.123 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment will function by clearly identifying the full-time and part-time work experience requirements and describing the contents of the statement that is required from a candidate's supervising CPA.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, §901.256 which authorizes the board to promulgate rules defining work experience and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is 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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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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SUBCHAPTER H. CERTIFICATION

22 TAC §§511.161, 511.165, 511.168, 511.173, 511.176

The Texas State Board of Public Accountancy adopts amendments to §511.161 concerning Qualifications for Issuance of a Certificate, §511.165 regarding Certificate, §511.168 concerning Reinstatement of a Certificate or of a Registration, §511.173 regarding Filing Complaints and §511.176 concerning Certification Hearings in Subchapter H regarding Certification without changes to the proposed text as published in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10669). The text of the rules will not be republished.

The amendment to §511.161 contain minor editorial changes. The amendment to §511.165 deletes the timing of the issuance of certificates twice a year to allow the board flexibility to accommodate computer-based testing which is scheduled to commence in April 2004. The amendment to §511.168 deletes references to complying with continuing professional education requirements and payment of all fees and penalties, inserts a reference to compliance with §901.405 of the Act and renumbers the remaining subsections. The amendment to §511.173 adds criminal convictions or deferred adjudication for crimes involving fraud, moral turpitude, alcohol abuse and controlled substances to the list of reasons justifying a hearing on a candidate's eligibility. The amendment to §511.176 makes some editorial changes and adds crimes involving alcohol abuse and controlled substances to the list of crimes that directly relate to the practice of public accountancy. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §§511.161, 511.165, 511.168, 511.173 and 511.176 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment to §511.161 will function by making the rule easier to understand. The amendment to §511.165 will function by giving the board the flexibility to issue certificates at times it considers appropriate. The amendment to §511.168 will function by trimming the rule of unnecessary language and making it easier to read. The amendment to §511.173 allows for the investigation of candidates convicted or placed on deferred adjudication for specified types of crimes. The amendment to §511.176 will function by adding crimes involving alcohol abuse and controlled substances to the list of crimes that directly relate to the practice of public accountancy, corrects a statutory citation and makes the rule easier to read.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is affected by these adoptions.

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
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22 TAC §511.171

The Texas State Board of Public Accountancy adopts the repeal of §511.171 concerning Consent Revocation without changes to the proposed text as published in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10672).

The proposed repeal of §511.171 will repeal a rule that allowed certificate holders to voluntarily surrender their certificates but did not address the reexamination requirement for reinstatement of a surrendered certificate. This repeal is the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The repeal will function by replacing this rule with another rule that more clearly describes a procedure for voluntary surrender of a certificate and set forth the requirements for waiver of the reexamination requirement.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is 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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22 TAC §511.171

The Texas State Board of Public Accountancy adopts new rule §511.171 concerning Voluntary Surrender of Certificate without changes to the proposed text as published in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10673). The text of the rule will not be republished.

The new rule §511.171 will allow a certificate holder who is not under investigation by the Board to voluntarily surrender his certificate and avoid annual CPE reporting requirements until he seeks reinstatement of his certificate. The rule allows for reinstatement of a certificate without re-application and re-examination if certain requirements are satisfied. This new rule is the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 511 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The new rule will function by allowing CPAs to voluntary revoke their certificates with the possibility of having their certificate reinstated without retaking the examination.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is 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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CHAPTER 515. LICENSES

22 TAC §§515.1 - 515.4, 515.9

The Texas State Board of Public Accountancy adopts amendments to §§515.1 concerning License, 515.2 concerning Initial License; 515.3 concerning License Renewal for Individuals and Firm Offices; 515.4 concerning License Cancellation; and 515.9 concerning Collection of License Fees Following Disciplinary Action without changes to the proposed text as published in the November 28, 2003 issue of the *Texas Register* (28 TexReg 10674). The text of the rules will not be republished.

The amendment to §515.1 and §515.2 replaces "practice unit" with "office". The amendment to §515.3 replaces "Practice Units" with "Firm Offices", replaces "practice unit's" with "firm's office license", replaces "practice unit's" with "firm's office" in three locations, and replaces "quality review" with "peer review" in two locations. The amendment to §515.4 replaces "practice units'" with "firm office's" and replaces "practice unit's" with "office". The amendment to §515.9 deletes the term "temporary permit" in several places because temporary practice is now addressed in another section. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §§515.1, 515.2, 515.3, 515.4 and 515.9 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 515 in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendments will function by making the rules clearer and easier to read.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

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

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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22 TAC §515.5

The Texas State Board of Public Accountancy adopts the repeal §515.5 concerning Reinstatement of a License without changes to the proposal as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10675).

The repeal of §515.5 will repeal a rule that is being substantially re-written. This repeal is the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 515 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The repeal will function by removing a rule and replacing it with a rewritten and improved new rule.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act, §901.405 of the Act which changes the renewal fees and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

No other article, statute or code is 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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22 TAC §515.5

The Texas State Board of Public Accountancy adopts new rule §515.5 concerning Reinstatement of a License without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10676). The text of the rule will not be republished.

The new rule §515.5 is necessary to comply with recently amended §901.405 of the Act regarding license reinstatement fees. The Act and the new rule create different license renewal fees for licenses that have been expired 90 days or less, expired for more than 90 days but less than one year, expired more than one year but less than two years, expired more than two years, and for expired licenses of persons who have been residing and practicing in another state for two years. This new rule is

the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 515 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The new rule will function complying with the recently amended §901.405 of the Act regarding license reinstatement fees.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

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

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CHAPTER 519. PRACTICE AND PROCEDURE

22 TAC §519.16

The Texas State Board of Public Accountancy adopts new rule §519.16 concerning Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board with a minor change to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10677). The non-substantive change is in subsection (d) in which a grammatical mistake of using the word "an" was changed to "a".

The new rule §519.16 will implement §901.1565 of the Act by listing all misdemeanors that may subject a certificate or registration holder to discipline by the Board.

The new rule educates certificate or registration holders and the public regarding criminal conduct that subjects certificate or registration holders to discipline by the Board.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and under HB 1218.

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

§519.16. Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board.

(a) Because a licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers conviction or placement on deferred adjudication or community supervision for any crime involving dishonesty or fraud to relate directly to the practice of public accountancy and may subject the licensee to discipline by the board. The board has determined that misdemeanor offenses that involve dishonesty or fraud directly relate to the practice of accounting pursuant to Sections 53.021, 53.022, 53.023 and 53.025 of the Occupations Code. The following non-exclusive list of misdemeanor offenses may involve dishonesty or fraud:

(1) Theft;

(2) Theft of Service;

(3) Tampering with Identification Numbers;

(4) Theft of or Tampering with Multichannel Video or Information Services;

(5) Manufacture, Distribution, or Advertisement of Multichannel Video or Information Services Device;

(6) Sale or Lease of Multichannel Video or Information Services Device;

(7) Possession, Manufacture, or Distribution of Certain Instruments Used to Commit Retail Theft;

(8) Forgery;

(9) Criminal Simulation;

(10) Trademark Counterfeiting;

(11) Stealing or Receiving Stolen Check or Similar Sight Order;

(12) False Statement to Obtain Property or Credit;

(13) Hindering Secured Creditors;

(14) Credit Card Transaction Record Laundering;

(15) Issuance of Bad Check;

(16) Deceptive Business Practices;

(17) Rigging Publicly Exhibited Contest;

(18) Misapplication of Fiduciary Property or Property of Financial Institution;

(19) Securing Execution of Document by Deception;

(20) Fraudulent Destruction, Removal, or Concealment of Writing;

(21) Simulating Legal Process;

(22) Refusal to Execute Release of Fraudulent Lien or Claim;

(23) Breach of Computer Security;

(24) Unauthorized Use of Telecommunications Service;

(25) Theft of Telecommunications Service;

(26) Publication of Telecommunications Access Device;

(27) Insurance Fraud;

(28) False Alarm or Report;

(29) Engaging in Organized Criminal Activity;

(30) Violation of Court Order Enjoining Organized Criminal Activity;

(31) Unlawful Use of Criminal Instrument;

(32) Unlawful Access to Stored Communications;

(33) Burglary of Vehicles;

(34) Burglary of Coin-Operated or Coin Collection Machines;

(35) Coercion of Public Servant or Voter;

(36) Improper Influence;

(37) Gift to Public Servant by Person Subject to His Jurisdiction;

(38) Offering Gift to Public Servant;

(39) Perjury;

(40) False Report to Peace Officer or Law Enforcement Employee;

(41) Tampering With or Fabricating Physical Evidence;

(42) Tampering With Governmental Record;

(43) Fraudulent Filing of Financing Statement;

(44) False Identification as Peace Officer;

(45) Misrepresentation of Property;

(46) Record of a Fraudulent Court; and

(47) Bail Jumping and Failure to Appear.

(b) Because a licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers conviction or placement on deferred adjudication or community supervision for any crime involving moral turpitude to relate directly to the practice of public accountancy and may subject the licensee to discipline by the board. The board has determined that misdemeanor offenses that involve moral turpitude directly relate to the practice of accounting pursuant to Sections 53.021, 53.022, 53.023 and 53.025 of the Occupations Code. The following non-exclusive list of misdemeanors offenses may involve moral turpitude:

(1) Prostitution;

(2) Promotion of Prostitution;

(3) Indecent Exposure;

(4) Public Lewdness;

(5) Obscenity;

(6) Obscene Display or Distribution;

(7) Sale, Distribution, or Display of Harmful Material to Minor;

(8) Employment Harmful to Children; and

(9) Abuse of a Corpse.

(c) Because a licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers conviction or placement on deferred adjudication or community supervision for any crime involving alcohol abuse or controlled substances to relate directly to the practice of public accountancy and may subject a licensee to discipline by the board. The board has determined that misdemeanor offenses that involve alcohol abuse or controlled substances directly relate to the practice of accounting pursuant to Sections 53.021, 53.022, 53.023 and 53.025 of the Occupations Code. The following non-exclusive list of misdemeanors offenses may involve alcohol abuse or controlled substances:

(1) Possession of less than 28 grams of a controlled substance listed in penalty group 3 under the Texas Penal Code;

(2) Possession of less than 28 grams of a controlled substance listed in penalty group 4 under the Texas Penal Code;

(3) Manufacture, delivery or possession of a controlled substance listed in a schedule of controlled substances, but not listed in a penalty group under the Texas Penal Code;

(4) Manufacture, delivery or possession of a controlled substance analogue;

(5) Possession or delivery of marihuana;

(6) Possession or delivery of drug paraphernalia;

(7) Possession or transport of chemicals with the intent to manufacture a controlled substance; and

(8) Any misdemeanor involving intoxication under the influence of alcohol or a controlled substance.

(d) Because a licensee is often placed in a position of trust with respect to client funds, and the public in general, and the business community in particular, rely on the veracity, integrity and honesty of licensees in the preparation of reports and provision of other accounting services, the board considers repeated violations of any criminal law to relate directly to the practice of public accountancy.

(e) A conviction or placement on deferred adjudication or community supervision for a violation of any state or federal law that is equivalent to an offense listed in subsections (a) through (d) of this section is considered to directly relate to the practice of accounting and may subject a licensee to discipline by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 15, 2004.

TRD-200400273
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Effective date: February 4, 2004
Proposal publication date: November 28, 2003
For further information, please call: (512) 305-7848

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22 TAC §519.17

The Texas State Board of Public Accountancy adopts new rule §519.17 concerning Administrative Penalty Guidelines without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10679). The text of the rule will not be republished.

The new rule §519.17 implements §901.522(c) of the Act by providing administrative penalty guidelines.

The new rule educates certificate or registration holders and the public regarding the range of administrative penalties imposed against certificate or registration holders who violate the Act or Board rules.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and under HB1218.

No other article, statute or code is 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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Rande Herrell
General Counsel
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CHAPTER 521. FEE SCHEDULE

22 TAC §521.2, §521.14

The Texas State Board of Public Accountancy adopts an amendment to §521.2 concerning Examination Fees and §521.14 concerning Eligibility Fee without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10680). The text of the rules will not be republished.

The amendments to §521.2 and §521.14 will correct the name of the exam subject.

The amendments will function by correcting the name of the exam subject.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by these adoptions.

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 January 15, 2004.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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22 TAC §521.5, §521.11

The Texas State Board of Public Accountancy adopts an amendment to §521.5 concerning Temporary Firm Practice Permit Fee and §521.11 concerning Fee for a Replacement Certificate without changes to the proposed text as published in the November 28, 2003, issue of the *Texas Register* (28 TexReg 10681). The text of the rules will not be republished.

The amendment §521.5 will add "firm practice" to the rule caption and to the rule text. The amendment to §521.11 raises the fee for a replacement certificate to $50.00. These amendments are the result of rule review conducted pursuant to §2001.039 of the Government Code. 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). The Board has reviewed §521.5 and §521.11 and has determined that the reasons for adopting continue to exist, however, changes were necessary as described in this preamble. The Board published a Notice of Intention to Review Title 22, TAC, Part 22, Chapter 521 in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1234). No comments were received following publication of the notice.

The amendment to §521.5 will function by making the rule caption and text more descriptive and clearer and §521.11 will function by allowing the state to recoup its costs to replace lost certificates.

No comments were received regarding adoption of these rules.

The amendments are adopted under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §2001.039 of the Government Code Chapter 2001 (Administrative Procedure Act) that requires that each state agency review and consider for readoption each rule adopted by that agency.

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

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 January 15, 2004.

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Rande Herrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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PART 38. TEXAS MIDWIFERY BOARD

CHAPTER 831. MIDWIFERY

SUBCHAPTER B. DOCUMENTATION

22 TAC §831.11

The Texas Midwifery Board (board), with the approval of the Texas Board of Health, adopts an amendment to §831.11, concerning the documentation of midwives. Section 831.11 is adopted with changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10028).

The section is amended to ensure that fee increases mandated by the 2003 Texas Legislature are billed and collected starting with the 2004 midwifery documentation cycle, for both annual renewals and two year renewals starting in 2005. The amendment is necessary to implement House Bill 2292, 78th Legislature (2003) which added Health and Safety Code, §§12.0111 and 12.0112; and House Bill 2985, 78th Legislature (2003), which added Occupations Code, Chapter 101, Subchapter G, relating to fees.

The board is authorized by the Texas Midwifery Act (the Act), Occupations Code, §203.152, to adopt rules concerning fees for documentation of midwives. The amendment increases the documentation fees, including initial documentation, annual renewal, late fees, and fees for renewal after a lapse of documentation, and provide for the same requirements for two-year renewals. The amendment also ensures that legislatively mandated fees for the Office of Patient Protection may be collected.

The board received one public comment during the comment period on the proposed amendment. The commenter was an individual who was neither for nor against the rule.

Comment: One commenter requested that granny midwives with 50 years or more of service be granted honorary midwifery licenses.

Response: The board disagrees, because the Texas Midwifery Act does not authorize the board to exempt midwives from the documentation requirements established in the statute. No change was made as a result of the comment.

The board made minor editorial changes due to staff comments to clarify the rule related to two year renewals in the amendment to §831.11, and to ensure the collection of fees for the Texas Online Authority as required by legislative mandate.

Change: Concerning §§831.11(a), 831.11(b), 831.11(c), 831.11(f) and 831.11(g), the word "annual" was deleted when it occurred and language clarifying a renewal period for a two year term of documentation was added, as mandated by recent legislation.

Change: Concerning §831.11(f)(2), language was added clarifying that the same number of continuing education hours are required for a renewal period with a two year term of documentation as for two renewal periods, each with a one year term of documentation.

Change: Concerning §831.11, subsection (p) was added regarding the collection of subscription fees and convenience fees for Texas Online, as mandated by recent legislation.

The amendment is adopted under the Occupations Code, §203.152, which provides the board with the authority to adopt rules prescribing fees for midwifery documentation, subject to the approval of the board; and the Health and Safety Code, §12.001, which provides the Texas Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the commissioner of health.

§831.11. Documentation.

(a) Purpose. This section details requirements for the documentation and redocumentation after revocation, suspension, or the surrender of documentation of midwives in Texas.

(b) Provisions. This section establishes:

(1) requirements and procedures for initial documentation;

(2) requirements and procedures for redocumentation;

(3) conditions for denial, revocation, suspension, or surrender of documentation;

(4) guidelines for reissuance of documentation after revocation, suspension, or surrender of documentation;

(5) guidelines for documentation of persons with criminal convictions; and

(6) a state midwifery roster.

(c) Applicability. In order for an individual to legally practice midwifery in Texas, she/he must be currently documented with the Midwifery Program. Documentation shall be valid for a renewal period of one year prior to March 1, 2005, one or two years between March 1, 2005, and March 1, 2006, and two years starting March 1, 2006, except for initial documentation. A midwife's initial documentation shall be valid from the date issued until March 1 of the following year.

(d) Initial documentation. An individual may apply for documentation as a midwife at any time during the year by submitting the following to the Midwifery Program:

(1) a completed documentation application form;

(2) proof of:

(A) satisfactory completion of a mandatory basic midwifery education course approved by the Midwifery Board and the North American Registry of Midwives (NARM) exam or any other comprehensive exam approved by the Midwifery Board;

(B) certified professional midwife (CPM) certification by NARM and satisfactory completion of a continuing education course covering the current Texas Midwifery Basic Information and Instructors Manual; or

(C) satisfactory completion of a basic midwifery education course accredited by the Midwifery Education Accreditation Council (MEAC); a continuing education course covering the current Texas Midwifery Basic Information and Instructors Manual; and the North American Registry of Midwives (NARM) exam or any other comprehensive exam approved by the Midwifery Board;

(3) proof of current cardiopulmonary resuscitation (CPR) certification for health care providers by the American Heart Association (formerly a C certificate) or equivalent certification for the professional rescuer from the Red Cross;

(4) proof of current certification for neonatal resuscitation, §§1-4, from the American Academy of Pediatrics, effective March 1, 1999;

(5) proof of satisfactory completion of training in the collection of newborn screening specimens or an established relationship with another qualified and appropriately credentialed health care provider who has agreed to collect newborn screening specimens on behalf of the applicant; and

(6) a nonrefundable $275 application fee.

(e) Initial documentation after interim of more than four years. A midwife seeking initial documentation who has not documented within four years of completing a basic midwifery education course approved by the Midwifery Board or accredited by MEAC shall provide proof of having completed at least 40 contact hours of approved continuing midwifery education within the year preceding the application, which shall be based upon a review of:

(1) the current Texas Midwifery Basic Information and Instructors Manual; and

(2) the current Midwives Alliance of North America (MANA) Core Competencies and Standards of Practice.

(f) Redocumentation. Documented midwives must apply for redocumentation during the last January of each renewal period. Documentation expires March 1 of the second or last year of the renewal period. The Midwifery Program will send renewal applications to documented midwives during the last December of each renewal period. However, each midwife is solely responsible for compliance with the requirements for redocumentation, and nonreceipt of the renewal application mailed by the Midwifery Program shall not constitute an acceptable excuse for failure to comply. A midwife's application for redocumentation must include the following:

(1) a completed redocumentation application form;

(2) proof of completion of at least ten contact hours of approved continuing midwifery education since March 1 of the previous one year renewal period, or at least 20 contact hours of approved midwifery education since March 1 of the previous two year renewal period;

(3) proof of current CPR certification for health care providers by the American Heart Association (formerly a C certificate) or equivalent certification for the professional rescuer from the Red Cross;

(4) proof of current certification for neonatal resuscitation, §§1-4, from the American Academy of Pediatrics, effective March 1, 1999; and

(5) a nonrefundable $275 application fee for each year included in the renewal period.

(g) Late redocumentation. A midwife who fails to apply for redocumentation by March 1 of the end of a renewal period in which the midwife is currently documented, as evidenced by a valid United States Postal Service or recognized commercial carrier postmark, may apply for late redocumentation on or before March 31 of that year. Applications for late redocumentation must include the following:

(1) each of the items listed in subsection (f) of this section; and

(2) an additional nonrefundable $125 late filing fee.

(h) Redocumentation after interim of less than four years. A midwife originally documented in Texas on or after January 1, 1995, who since that time has not been documented for a period of less than four years may redocument by:

(1) providing proof of having completed 20 contact hours of approved midwifery continuing education, including a continuing education course covering the current Texas Midwifery Basic Information and Instructor Manual, during the 12 months preceding the application for redocumentation;

(2) paying all redocumentation fees not paid during the interim plus a processing fee of $100; and

(3) meeting the initial documentation requirements in subsections (d)(1) and (d)(3)-(5) of this section.

(i) Redocumentation after interim of more than four years. A midwife documented in Texas on or after January 1, 1995, who has not been documented for a period of more than four years may redocument by:

(1) providing proof of having completed at least 40 contact hours of approved continuing midwifery education within the year preceding the application, which shall be based upon a review of:

(A) the current Texas Midwifery Basic Information and Instructor Manual; and

(B) the current Midwives Alliance of North America (MANA) Core Competencies and Standards of Practice;

(2) paying all redocumentation fees not paid during the interim plus a processing fee of $200; and

(3) meeting the initial documentation requirements in subsections (d)(1) and (d)(3)-(5) of this section.

(j) Grounds for denial of application for documentation or redocumentation and for disciplinary action. The Midwifery Board may deny an application for initial documentation or redocumentation and may take disciplinary action against any person based upon proof of the following:

(1) violation of the Act or rules adopted under the Act;

(2) submission of false or misleading information to the Midwifery Board, the board, or the department;

(3) conviction of a felony or a misdemeanor involving moral turpitude;

(4) intemperate use of alcohol or drugs while engaged in the practice of midwifery;

(5) unprofessional or dishonorable conduct that may reasonably be determined to deceive or defraud the public;

(6) inability to practice midwifery with reasonable skill and safety because of illness, disability, or psychological impairment;

(7) judgment by a court of competent jurisdiction that the individual is mentally impaired;

(8) disciplinary action taken by another jurisdiction affecting the applicant's legal authority to practice midwifery;

(9) submission of a birth or death certificate known by the individual to be false or fraudulent, or other noncompliance with Health and Safety Code, Chapter 191, or 25 TAC, Chapter 181 (relating to Vital Statistics);

(10) noncompliance with Health and Safety Code, Chapter 244, or 25 TAC, Chapter 137 (relating to Birthing Centers);

(11) failure to practice midwifery in a manner consistent with the public health and safety; or

(12) demonstrated lack of personal or professional character in the practice of midwifery.

(k) Surrender of documentation.

(1) A midwife may surrender his or her documentation prior to its expiration for the current period by mailing the original documentation acknowledgment letter back to the Midwifery Program together with a signed statement of his or her intent to surrender same.

(2) Surrender of documentation by a midwife after receipt of notification from the Midwifery Program that a complaint against the midwife is being investigated shall not deprive the Midwifery Board of jurisdiction in any disciplinary action which may result from said investigation.

(3) The Midwifery Board may enter any disciplinary order authorized by the Act or this subchapter to resolve a complaint against a midwife who has surrendered his or her documentation after receipt of notification from the Midwifery Program that a complaint is being investigated.

(l) Redocumentation after disciplinary action or surrender.

(1) A person whose documentation to practice midwifery in this state has been revoked or suspended by the Midwifery Board or who has surrendered his or her documentation after having received notice that the Midwifery Program is investigating a complaint may not apply for reissuance of documentation until the applicant has complied with all requirements imposed by the Midwifery Board in connection with the revocation, suspension, or surrender. If the Midwifery Board denies the application for reissuance of documentation, an applicant may request a hearing in accordance with the provisions of the Administrative Procedure Act (APA), Government Code, Chapter 2001, applicable state and federal statutes, the Rules of Practice and Procedures of the State Office of Administrative Hearings (SOAH) and this chapter. The decision of the hearing examiner shall be final.

(2) The Midwifery Board may reissue documentation to a midwife who surrendered his or her documentation while an investigation or disciplinary action was pending only if the Midwifery Board finds that:

(A) the applicant is competent to resume practice; and

(B) the Midwifery Program has no evidence of current or continuing violations by the applicant of the Act or this subchapter.

(m) Documentation of persons with criminal conviction.

(1) The Midwifery Board may refuse to issue documentation to any individual who has been initially convicted of a felony or a misdemeanor involving moral turpitude, or whose probation imposed pursuant to such conviction has been revoked by the court.

(2) The Midwifery Board shall consider the following factors:

(A) the nature and seriousness of the crime or the reason the applicant's probation was revoked;

(B) any relationship between the crime and the practice of midwifery;

(C) whether documentation might offer the applicant an opportunity to engage in the same or similar criminal activity as that for which the applicant was previously convicted; and

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of midwifery.

(3) the Midwifery Board, in determining the present fitness of a person who has been convicted of a felony or a misdemeanor involving moral turpitude, shall consider:

(A) the age of the applicant when the crime was committed;

(B) the amount of time that has elapsed since the applicant's conviction;

(C) the applicant's conduct and work history prior to and following the conviction;

(D) evidence of the applicant's progress toward rehabilitation while incarcerated, on probation, or following release; and

(E) other evidence of the person's present fitness, including letters of recommendation from:

(i) prosecutorial, law enforcement, probation, and correctional officers;

(ii) the sheriff or chief of police in the community where the applicant resides; and

(iii) other persons.

(n) Midwifery roster. The Midwifery Program shall maintain a roster of all individuals currently documented to practice midwifery in the state. A copy of the roster shall be provided to each county clerk and local registrar of births on request. The Midwifery Program shall provide information on new and/or late documentees to individual county clerks and local registrars of births during the course of a year as needed.

(o) For all applications and renewal applications, the department is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(p) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

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 January 16, 2004.

TRD-200400361
Debra Evans
Chair
Texas Midwifery Board
Effective date: February 5, 2004
Proposal publication date: November 14, 2003
For further information, please call: (512) 458-7236

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 139. ABORTION FACILITY REPORTING AND LICENSING

The Texas Department of Health (department) adopts amendments to §§139.1-139.8, 139.21-139.25, 139.31-139.33, and 139.41-139.60, and the repeal of §139.34, concerning the regulation of abortion facilities. Sections 139.2, 139.6, 139.22, 139.23, 139.31-139.32, 139.41, 139.43, 139.50-139.52 and 139.58-139.59 are adopted with changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10051). Sections 139.1, 139.3-139.5, 139.7-139.8, 139.21, 139.24-139.25, 139.33, 139.42, 139.44-139.49, 139.53-139.57, and 139.60, and the repealed §139.34 are adopted without changes, and therefore the sections will not be republished.

The amendments are adopted based upon the department's review of 25 Texas Administrative Code, Chapter 139, as required by Government Code, §2001.039 and as required by legislation that affects the regulation of non-exempt abortion facilities.

Specifically, the amendment to §139.1 clarifies the reporting requirements for an abortion facility and defines exemptions for licensing requirements for abortion facilities. The amendment to §139.2 adds definitions, clarifies others, and deletes some definitions. The definitions were renumbered as necessary to reflect the changes. Amendments to §§139.3 and 139.4 add and delete language to better enable the department to enforce the requirements of these sections and for clarification purposes. The amendment to §139.5 adds probation to types of possible enforcement action that may be taken by the department, and updates language to reflect current statutes. The amendment to §139.6 deletes the requirement that violations not be disclosed that would pose a health risk until plans of correction have been submitted, changes "survey" to "inspection", and reflects current statutes. The amendment to §139.7 clarifies the intent of the section by adding "licensed" to abortion facilities, and deletes the requirement that the issuance of the unique license number may not coincide with the deadlines established by advertisers. The amendment to §139.8 deletes the requirement concerning facility quality assurance committee records.

The amendments to §§139.21, 139.22, and 139.23 add requirements for two-year licensure, a process for ordering probation as a sanction, and for an annual assessment fee to cover additional costs for Health and Safety Code, Chapter 171. Requirements for the first annual license, current letter from the state comptroller's office, and active military exception are deleted, simplifying the licensure process. The amendment to §139.24 adds the word "licensed" to "abortion facility," and substitutes the words "pre-inspection" and "inspection" for "pre-survey" and "survey" for clarification. The amendment also deletes the requirement to submit a license application for relocation of a facility; and adds a requirement for policies to address the preservation and release of medical records in the event a facility closes.

The amendment to §139.25 deletes language for first annual license to reflect changes to initial licensing procedures. The amendment to §139.31 replaces the word "survey" with "inspection"; adds the word "licensed" to "abortion facility"; adds the requirement that all on-site inspections will be unannounced; deletes specific department survey procedure language; and changes inspection processing times from five to 14 calendar days. Other changes are for clarity, and portions are deleted to reflect current departmental procedure.

The amendments to §§139.32 and 139.33 and the repeal of §139.34 add and delete language in order to clarify the department's enforcement process.

The amendments to §§139.41 - 139.45 add and delete language for clarification. Specific language is added to reflect new legislative requirements and to ensure compliance with existing governmental requirements. Language requiring compliance concerning the prohibition of illegal remuneration for securing or soliciting patients or patronage is deleted from this section because regulations prohibiting solicitation are now located in Occupations Code, Chapter 102. New language for compliance with this is added to §139.60. The amendments to §139.46 add "midlevel provider" and delete "physician extender" to reflect current terminology, delete the requirement that laboratory staff have a high school education, and change the wording for anesthesia staff to reflect current terminology.

Amendments to §§139.47 -139.49 change language to reflect current definitions, to reflect current standards of practice, and to delete obsolete language and policies.

The amendments to §139.50 add requirements for the facility to comply with the Health and Safety Code, Chapter 171. Additional language is added for clarification.

The amendments to §139.51 add language to meet requirements as described in Health and Safety Code, §§171.014 and 171.015 concerning informational materials and information relating to public and private agencies.

The amendment to §139.52 expands requirements for patient education/information services to ensure compliance with Health and Safety Code, §§171.011 and 171.012, concerning informed consent, and deletes obsolete language.

The amendment to §139.53 adds new language, and renumbers the section based on the separation of surgical and medical abortion requirements. Amendments also incorporate use of current terminology.

The amendment to §139.54 reflects the changed designation of licensed abortion facilities and certain staff positions. The amendment to §139.55 clarifies requirements for entry of information and retrieval of records by the facility, and clarifies requirements concerning documentation by facility in the patient's clinical record.

Language added to §139.57 and §139.58 defines medical record retention requirements and incorporates the term "licensed abortion facility." The amendment to §139.59 adds and deletes language to reflect current standards of practice for anesthesia services and to enable the department to better enforce this section. Training, knowledge, and staffing requirements are added.

The amendment to §139.60 includes language to reflect current standards of practice and revised statutory citations. Additional requirements were added in the areas of medical services and first aid, parental notice, and the facility's duty to assure staff compliance with current state and federal laws.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist. However, revisions to the sections are necessary.

The department published a Notice of Intention to Review for §§139.1-139.8, 139.21-139.25, 139.31-139.34 and 139.41-139.60 in the *Texas Register* in the July 18, 2003, issue (28 Tex Reg 5667). No comments were received due to publication of this notice.

The following comments were received concerning the proposed sections. Following each comment is the department's response and any resulting change(s).

Comment: Concerning the rules in general, some commenters made very general comments opposing the rules, and other commenters made non-specific comments supporting the rules. Many commenters requested the department review all the proposed rules and delete any language that was more restrictive than Health and Safety Code, Chapters 245 and 171.

Response: Health and Safety Code, Chapter 245, gives the department broad authority to develop minimum standards for abortion facilities. The department did review the proposed rules to ensure that the rules were consistent with the regulatory authority granted under Health and Safety Code, Chapters 245 and 171, and some changes were made, as discussed later in this preamble.

Comment: Concerning the rules in general, a commenter requested the department adopt a rule requiring abortion facilities to provide a copy of a minor's medical record to the minor's parents.

Response: The department disagrees. Parents of married minors and those minors who have had their legal disabilities removed are not entitled to obtain such a minor's medical record. The department does not have the authority to adopt a rule that requires abortion facilities to provide a copy of every minor's medical record to the minor's parents. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter requested that the department reconsider the proposed change in the definition of an abortion facility. The commenter believes that the definitions in Health and Safety Code, Chapter 245, give the department authority to enforce the chapter in all types of abortion facilities, not just licensed abortion facilities.

Response: The legislature exempted ambulatory surgical centers and certain physician's offices from licensure as abortion facilities under Health and Safety Code, Chapter 245. The department's authority under Health and Safety Code, Chapter 245, applies only to nonexempt facilities. However, the department's rules for abortion facilities have not made the department's interpretation clear. In the light of recent controversy and litigation over this issue, the department feels that a clarification is necessary at this time. The phrase "licensed abortion facility" was added throughout the proposed rules for purposes of distinguishing between the licensed and exempt facilities. The department has also made this change in §139.31(c)(4), and §139.32(k) and (l) in these final rules.

Comment: Concerning the rules in general, many commenters requested the department not adopt a detailed checklist for use by the facilities to document informed consent prior to an abortion procedure. Some commenters requested the department adopt a detailed checklist.

Response: The department disagrees with commenters who requested it not adopt a checklist. The department believes it is important that there be assurance that the woman is informed of each of the required elements of the Woman's Right to Know Act on the certification form. Therefore, the form has been revised to include a space where the woman will place her initials to acknowledge that the information listed on the form was provided.

Comment: Concerning the rules in general, one commenter requested that the department adopt a rule that required all abortion facility personnel to be subjected to a security check.

Response: The department disagrees. The statute does not authorize the adoption of a rule requiring security or criminal history checks of facility personnel. No changes were made as a result of this comment.

Comment: Concerning §139.2, one commenter recommended the department add a definition for nurse practitioner.

Response: The department agrees and has added the requested definition in renumbered §139.2(37).

Comment: Concerning §139.2(12), one commenter recommended the language in the definition of "Certified registered nurse anesthetist (CRNA)" be changed. The commenter suggested replacing the phrase "currently registered with" with the phrase "currently authorized by" and replacing the phrase "advanced nurse practitioner" with the phrase "certified registered nurse anesthetist".

Response: The department agrees and has made the recommended changes.

Comment: Concerning §139.6, one commenter requested that the department change the language pertaining to providing the woman with the toll-free telephone number from "at the time of the initial onsite consultation with the facility" to "at the time of the initial onsite consultation."

Response: The department disagrees. The language in Health and Safety Code, §245.042(d), specifies that the "facility shall provide to a woman, at the time the woman initially consults the facility, a written statement indicating the number of the toll-free telephone line maintained under subsection (c)." No change was made as a result of the comment.

Comment: Concerning §139.21(i), one commenter recommended that the rule authorizing the department to assess a reasonable and necessary annual fee to defray costs be revised to clearly state that this fee would only reflect costs which were not related to the production and distribution of the Woman's Right to Know materials. The commenter believed the assessment of a fee to cover the costs of the materials required by Health and Safety Code, Chapter 171, would be unconstitutional.

Response: The department disagrees. Health and Safety Code, §245.007, expressly grants the department authority to set fees in amounts reasonable and necessary to defray the cost of administering Health and Safety Code Chapter 171. No change was made as a result of the comment.

Comment: Concerning §139.41(a)(8), which would require that a woman's identification be copied or that an affidavit be provided, many commenters stated the rule exceeds the requirements of Family Code, Chapter 33, and recommended the rule be deleted. There were also many commenters who supported the rule as proposed. One commenter noted that the statement in proposed §139.41(a)(8)(A) "...indicating that she does not have appropriate identification...", is not the same as the wording on the attached affidavit which states, "...I do not own identification."

Response: The department disagrees with commenters who recommend deletion of the rule. The department believes that retention of a copy of the identification presented is an appropriate method of documenting facilities' compliance with the parental notification requirements of Family Code, Chapter 33. The department agrees with the commenter regarding the wording of the affidavit, and the language in the affidavit form has been revised for consistency with §139.41(a)(8)(B).

Comment: Concerning §139.43(6), one commenter requested the department add the American Safety and Health Institute to the organizations listed in the paragraph that provide certification in basic life support.

Response: The department agrees and has added the name of the organization as requested.

Comment: Concerning §139.43(8), one commenter requested that the department specify that the required training on child abuse to be completed by all personnel must be the training which is developed jointly by the department and the Department of Protective and Regulatory Services.

Response: The department agrees, and has included this clarifying language in the final rule.

Comment: Concerning proposed §139.50(b)(2), many of the commenters stated that the proposed rule exceeded the language and intent of HSC, Chapter 171, by requiring that every woman receive a copy of the department's A Woman's Right to Know booklet which is now in relettered §139.50(a)(3). There were also many commenters who supported the rule as proposed.

Response: The department disagrees with the commenters who opposed the rule as proposed. The Merriam-Webster Collegiate Dictionary, Tenth Edition, defines the word "provide" as "to supply or make available." The rule only requires that the facility provide the woman with a copy of the department's A Woman's Right to Know booklet. The woman makes the decision to either accept the booklet or refuse it. Additional language has been included in the final rule to clarify that the woman must also be given the option of viewing the material on the Internet in §139.50(a)(5).

Comment: Concerning proposed §139.50(b)(3), many of the commenters stated that the proposed rule exceeded the language and intent of HSC, Chapter 171, by requiring that every woman receive a copy of the Woman's Right to Know resource directory. There were also many commenters who supported the rule as proposed.

Response: The department disagrees with the commenters who opposed the rule as proposed. The Merriam-Webster Collegiate Dictionary, Tenth Edition, defines the word "provide" as "to supply or make available." The rule only requires that the facility provide the woman with a copy of the department's Woman's Right to Know resource directory in relettered §139.50(a)(4). The woman makes the decision to either accept the resource directory or refuse it. Additional language has been included in the final rule to clarify that the woman must also be given the option of viewing the material on the Internet in §139.50(a)(5).

Comment: Concerning §139.51, one commenter requested that the department add to the rule a requirement which would prohibit the abortion facility from charging any fees before the 24-hour waiting period was over.

Response: The department disagrees. The department has no statutory authority to regulate the fees charged by any licensed facility. No change was made as a result of the comment.

Comment: Concerning §139.51(5), one commenter stated that it is important for a woman know that a sonogram is part of her medical record and that she has the right to see it. The commenter requested the department add the words "including her sonogram" to the rule.

Response: The department agrees and has added the requested language.

Comment: Concerning §139.52 in general, one commenter requested that the department restore the rule proposed for deletion that required the facility to "establish that the patient understands the nature and consequences of the procedure and recognizes alternatives to abortions."

Response: The department disagrees. This rule was amended because the determination of a patient's understanding is subjective, and not measurable, so there was no mechanism by which the facility could demonstrate compliance with the rule. No change was made as a result of the comment.

Comment: Concerning §139.52(a)(1), which requires that the woman sign the department's certification form prior to the abortion procedure, one commenter requested that the department add a requirement that the patient must receive a copy of the "consent form".

Response: The department does not believe the addition of this language is necessary. The form required in the rule is a certification form, not a consent form. The certification form is considered part of the clinical record, and if the patient requests a copy of the form, the facility will be expected to provide it. No change was made as a result of the comment.

Comment: Concerning Figure: 25 TAC, §139.52(a)(1), one commenter requested that the department change the term "unborn child" to "human fetus" on the certification form.

Response: The department disagrees as the term "unborn child" is the term used in HSC, Chapter 171. No change was made as a result of the comment.

Comment: Concerning §139.52(a)(4), many of the commenters requested that the proposed rule relating to taking all reasonable steps to maintain the life of the unborn child be deleted because the vast majority of abortions are performed in the first trimester, well before viability, and there is no such requirement in Texas law. There were also many commenters who supported the rule as proposed.

Response: The department believes that the determination of viability is a medical practice issue. Clarifying language has been added to the rule to allow the physician to determine at what point it would be medically appropriate to advise the patient of the physician's responsibilities to maintain the life and health of the child if born alive.

Comment: Concerning §139.53(b)(3)(A), one commenter requested the word "prescribing" be substituted for the word "providing" in the rule.

Response: The department disagrees based on the consensus of medical physician consultants, and language used in medical literature describing early medical abortion. No change was made as a result of the comment.

The department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the sections.

Change: Concerning the Spanish version form for the toll-free telephone number in §139.6(a)(2), the wording was not changed, but the last statement was indented to be consistent with the English version of the form in §139.6(a)(1).

Change: Concerning §139.22(g), the department has included language that reflects the authorization provided by Texas Government Code, §2054.111, to collect subscription and convenience fees for processing initial and renewal applications through TexasOnline.

Change: Concerning §139.23(d)(5)(B)(iv), the word "that" was inserted after the word "ensure" for clarity.

Change: Concerning §139.32(e)-(g), the department changed the word "center" to "facility" to reflect the terminology used throughout the chapter.

Change: Concerning §139.32(l), the word "Code" was added to complete the title of the Health and Safety Code.

Change: Concerning §139.50, the department has reorganized the section for the purpose of clarity. In addition, the department removed the requirement specifying that the initial consultation must be done onsite, which will allow for alternate methods of accomplishing the disclosure requirements. If the initial consultation is not conducted onsite, the facility will still be required to provide the written notifications and disclosures required in §139.50. These may be provided by email, facsimile transmission, or they may be sent by conventional mail. If the written notifications and Woman's Right to Know materials are sent by conventional mail, the abortion procedure cannot be scheduled until a minimum of 72 hours later. The facility will be required to document in the clinical record the method by which the required information was provided to the woman, the date and time it was provided, and the name and credentials of the facility representative providing it. This documentation will be used in the compliance monitoring of the facility during inspection. Also, in §139.50(a)(3) and (4), concerning "A Woman's Right to Know" booklet, the statement "if the woman chooses to view it." was added by the Board of Health.

Change: Concerning §139.58, the department changed the word "women's" to "woman's" as a correction.

Change: Concerning §139.59(e)(3), the department added the word "in" as a correction.

Change: Concerning Figure: 25 TAC, §139.52(a)(1), the Certification Form was reorganized to more clearly delineate the disclosure responsibilities of both the physician and the facility, and to include a line next to each item for the woman to confirm that the required information was provided.

The commenters included Senator Juan "Chuy" Hinojosa; Senator Eliot Shapleigh; Senator Jeff Wentworth; Representative Lon Burnam; Representative Frank J. Corte, Jr.; Representative Dawnna Dukes; Representative Jessica Farrar; Representative Elliott Naishtat; Representative Eddie Rodriguez; Representative Senfronia Thompson; Representative Michael M. Villarreal; National Council of Jewish Women, Texas State Public Affairs; Family Life Office Diocese of Fort Worth; Tyler Diocesan Council of Catholic Women of NCCU; Saint Anthony Catholic Church, Wylie, Texas; Texas Right to Life, Houston, Texas; Women's Health and Family Planning Association of Texas, Austin, Texas; Board of Nurse Examiners for the State of Texas; National Instructors Resource Center, ASHI Programs; ACLU Reproductive Freedom Project, New York; Center for Reproductive Rights, New York; Jane's Due Process, Austin; The Justice Foundation, San Antonio; Nova Health System, San Antonio; League of Women Voters of Texas, Austin; Texas Medical Association; Texas Association of Obstetricians and Gynecologists; Texas Association of Planned Parenthood Affiliates; Coalition for Nurses in Advanced Practice; and Project Rachel of San Antonio, Inc. In addition, numerous individuals commented. Commenters were neither for nor against the rules in their entirety; they expressed concerns, asked questions and suggested changes as discussed in the summary of comments.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§139.1 - 139.8

The amendments are adopted under the Health and Safety Code, Chapter 245, Health and Safety Code, Chapter 171, and the Health and Safety Code, §12.001, which provide the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The review of these rules implements Government Code, §2001.039.

§139.2. Definitions.

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

(1) Abortion--Any act or procedure performed after pregnancy has been medically verified with the intent to cause the termination of a pregnancy other than for the purpose of either the birth of a live fetus or removing a dead fetus. This term does not include birth control devices or oral contraceptives.

(2) Abortion facility--A place where abortions are performed.

(3) Act--Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245.

(4) Administrator--A person who:

(A) is delegated the responsibility for the implementation and proper application of policies, programs, and services established for the licensed abortion facility; and

(B) meets the qualifications established in §139.46(2) of this title (relating to Licensed Abortion Facility Staffing Requirements and Qualifications).

(5) Affidavit - A written statement, sworn to or affirmed, and witnessed by a witness whose signature and printed name appears on the affidavit. "Notarized affidavit" in these rules means an affidavit in which the statement is witnessed by a notary acting pursuant to Government Code, Chapter 406.

(6) Affiliate--With respect to an applicant or owner which is:

(A) a corporation--includes each officer, consultant, stockholder with a direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company--includes each officer, member, and parent company;

(C) an individual--includes:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, consultant, or stockholder with a direct ownership of at least 5.0%;

(D) a partnership--includes each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--includes each officer, consultant, or the equivalent under the specific business arrangement and each parent company.

(7) Ambulatory surgical center--An ambulatory surgical center licensed under Health and Safety Code, Chapter 243.

(8) Anniversary Date--The same month and day of each year as the expiration date of the license.

(9) Applicant--The owner of an abortion facility which is applying for a license under the Act. For the purpose of this chapter, the word "owner" includes non-profit organization.

(10) Board--The Texas Board of Health.

(11) Certified nurse-midwife (CNM)--A person who is:

(A) a registered nurse who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapters 301, and 304;

(B) recognized as an advanced practice nurse by the Board of Nurse Examiners for the State of Texas; and

(C) certified by the American College of Nurse-Midwives (ACNM) or ACNM Accreditation Council.

(12) Certified registered nurse anesthetist (CRNA)--A person who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapters 301 and 304, as a registered nurse, has current certification from the Council of Certification-Recertification of the American Association of Nurse Anesthetists, and is currently authorized by the Board of Nurse Examiners as a certified registered nurse anesthetist.

(13) Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership; or a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons.

(14) Clinical nurse specialist--A person who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapters 301 and 304, and recognized as a clinical nurse specialist by the Board of Nurse Examiners.

(15) Condition on discharge--A statement on the condition of the patient at the time of discharge.

(16) Critical item--All surgical instruments and objects that are introduced directly into the bloodstream or into other normally sterile areas of the body.

(17) Decontamination--The physical and chemical process that renders an inanimate object safe for further handling.

(18) Department--The Texas Department of Health.

(19) Director--The director of the Health Facility Licensing and Compliance Division of the Texas Department of Health or his or her designee.

(20) Disinfection--The destruction or removal of vegetative bacteria, fungi, and most viruses but not necessarily spores; the process does not remove all organisms but reduces them to a level that is not harmful to a person's health. There are three levels of disinfection:

(A) high level disinfection--kills all organisms, except high levels of bacterial spores, and is effected with a chemical germicide cleared for marketing as a sterilant by the Food and Drug Administration;

(B) intermediate-level disinfection--kills mycobacteria, most viruses, and bacteria with a chemical germicide registered as a "tuberculocide" by the Environmental Protection Agency (EPA); and

(C) low-level disinfection--kills some viruses and bacteria with a chemical germicide registered as a hospital disinfectant by the EPA.

(21) Education/information staff--A professional or nonprofessional person who is trained to provide information on abortion procedures, alternatives, informed consent, and family planning services.

(22) Facility--A licensed abortion facility as defined in this section.

(23) Health care facility--Any type of facility or home and community support services agency licensed to provide health care in any state or is certified for Medicare (Title XVIII) or Medicaid (Title XIX) participation in any state.

(24) Health care worker--Any person who furnishes health care services in a direct patient care situation under a license, certificate, or registration issued by the State of Texas or a person providing direct patient care in the course of a training or educational program.

(25) Hospital--A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241, or if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §1395 et. seq.).

(26) Immediate jeopardy to health and safety--A situation in which there is a high probability that serious harm or injury to patients could occur at any time or already has occurred and may well occur again if patients are not protected effectively from the harm or if the threat is not removed.

(27) Inspection--An on-site inspection by the department in which a standard-by-standard evaluation is conducted.

(28) Licensed abortion facility--A place licensed by the department under Health and Safety Code, Chapter 245, where abortions are performed.

(29) Licensed mental health practitioner--A person licensed in the State of Texas to provide counseling or psychotherapeutic services.

(30) Licensed vocational nurse (LVN)--A person who is currently licensed under Texas Occupations Code, Chapter 302, as a licensed vocational nurse.

(31) Licensee--A person or entity who is currently licensed as an abortion facility.

(32) Medical consultant--A physician who is designated to supervise the medical services of the facility.

(33) Midlevel provider--A midlevel provider is:

(A) an advance practice nurse who is registered currently licensed under the Nurse Practice Act, Texas Occupations Code, Chapters 301 and 304, and is recognized as an advanced practice nurse by the Board of Nurse Examiners (BNE) for the State of Texas. Advanced practice nurses may include, but not be limited to, the following:

(i) certified registered nurse anesthetist;

(ii) certified nurse midwife;

(iii) nurse practitioner;

(iv) clinical nurse specialist; and

(v) other titles as approved by the BNE; or

(B) a physician assistant currently licensed under the Physician Assistant Licensing Act, Texas Occupations Code, Chapter 204.

(34) Nonprofessional personnel--Personnel of the facility who are not licensed or certified under the laws of this state to provide a service and must function under the delegated authority of a physician, registered nurse, or other licensed health professional who assumes responsibility for their performance in the licensed abortion facility.

(35) Noncritical items--Items that come in contact with intact skin.

(36) Notarized copy--A copy attached to a notarized affidavit which states that the attached copy(ies) are true and correct copies of the original documents.

(37) Nurse practitioner--A person who is currently licensed under the Nursing Practice Act, Texas Occupations Act, Chapters 301 and 304, and recognized as a nurse practitioner by the Board of Nurse Examiners.

(38) Patient--A pregnant female on whom an abortion is performed, but shall in no event be construed to include a fetus.

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

(40) Physician--An individual who is currently licensed to practice medicine under the Medical Practice Act, Texas Occupations Code, Chapters 151-165.

(41) Plan of correction--A written strategy for correcting a licensing violation. The plan of correction shall be developed by the facility and shall address the system(s) operation(s) of the facility as the system(s) operation(s) apply to the deficiency.

(42) Postprocedure infection--An infection acquired at or during an admission to a facility; there must be no evidence that the infection was present or incubating at the time of admission to the facility. Postprocedure infections and their complications that may occur after an abortion include, but are not limited to, endometritis and other infections of the female reproductive tract, laboratory-confirmed or clinical sepsis, septic pelvic thrombophlebitis, and disseminated intravascular coagulopathy.

(43) Pregnant unemancipated minor certification form--The document prepared by the Texas Department of Health and used by physicians to certify the medical indications supporting the judgment for the immediate abortion of a pregnant minor.

(44) Pre-inspection conference--A conference held with department staff and the applicant or his or her representative to review licensure standards, inspection documents, and provide consultation prior to the on-site licensure inspection.

(45) Professional personnel--Patient care personnel of the facility currently licensed or certified under the laws of this state to use a title and provide the type of service for which they are licensed or certified.

(46) Quality assurance--An ongoing, objective, and systematic process of monitoring, evaluating, and improving the appropriateness, and effectiveness of care.

(47) Quality improvement--An organized, structured process that selectively identifies improvement projects to achieve improvements in products or services.

(48) Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapters 301 and 304 as a registered nurse.

(49) Sedation/analgesia levels--Levels of sedation /analgesia include:

(A) minimal sedation (anxiolysis);

(B) moderate sedation/analgesia ("conscious sedation");

(C) deep sedation/analgesia; and

(D) general anesthesia.

(50) Semicritical items--Items that come in contact with nonintact skin or mucous membranes. Semicritical items may include respiratory therapy equipment, anesthesia equipment, bronchoscopes, and thermometers.

(51) Standards--Minimum requirements under the Act and this chapter.

(52) Sterile field--The operative area of the body and anything that directly contacts this area.

(53) Sterilization--The use of a physical or chemical procedure to destroy all microbial life, including bacterial endospores.

(54) Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity that includes initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(55) Third trimester certification form--The document prepared by the Texas Department of Health and used by physicians to certify the medical indications supporting the judgment for the abortion of a viable fetus during the third trimester of pregnancy.

(56) Third trimester--A gestational period of not less than 26 weeks (following last -menstrual period (LMP)).

(57) Unemancipated minor--A minor who is unmarried and has not had the disabilities of minority removed under the Texas Family Code, Chapter 31.

§139.6. Public Information; Toll-Free Telephone Number.

(a) An abortion facility shall provide to a woman, at the time the woman initially consults the facility, a written statement indicating the number of the toll-free telephone number maintained under subsection (d) of this section. The written statement must be available in English and Spanish.

(1) The following form is an example of the statement in English.
Figure: 25 TAC §139.6(a)(1)

(2) The following form is an example of the statement in Spanish.
Figure: 25 TAC §139.6(a)(2)

(b) The department on request shall make the following information available to the public:

(1) the status of the license of any abortion facility;

(2) the date of the last inspection of the facility, any violation discovered during that inspection that would pose a health risk to a patient at the facility, any challenge raised by the facility to the allegation that there was a violation, and any corrective action that is acceptable to the department and that is being undertaken by the facility with respect to the violation; and

(3) an administrative or civil penalty imposed against the facility or a physician who provides services at the facility, professional discipline imposed against a physician who provides services at the facility, and any criminal conviction of the facility or a physician who provides services at the facility that is relevant to services provided at the facility.

(c) Subsection (b) of this section does not require the department to provide information that is not in the possession of the department. In accordance with §245.023(b) of the Act, the Texas State Board of Medical Examiners (board) is required to provide to the department information in the possession of the board that the department is required to provide under subsection (b) of this section.

(d) In accordance with Health and Safety Code, §245.023(c), the department shall maintain a toll-free telephone number that a person may call to obtain the information described by subsection (b) of this section.

(e) This section does not authorize the department to the release of the name, address, or phone number of any employee or patient of an abortion facility or of a physician who provides services at an abortion facility.

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 January 16, 2004.

TRD-200400345
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER B. LICENSING PROCEDURES

25 TAC §§139.21 - 139.25

The amendments are adopted under the Health and Safety Code, Chapter 245, Health and Safety Code, Chapter 171, and the Health and Safety Code, §12.001, which provide the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The review of these rules implements Government Code, §2001.039.

§139.22. Fees.

(a) The schedule of fees for an abortion facility license for all new, change of ownership, and renewal applications received prior to January 1, 2005, is as follows:

(1) initial license fee--$2,500;

(2) renewal license fee--$2,500; and

(3) change of ownership license fee--$2,500.

(b) Fees for renewal licenses issued January 1, 2005, through December 31, 2005, will be either $2,500 for one year or $5,000 for two years. The licensure period will be determined by the department prior to the licensure renewal date.

(c) Fees for two-year renewals for an abortion facility license for all initial, change of ownership, and renewal applications received on or after January 1, 2006, are as follows:

(1) initial license fee--$5000;

(2) renewal license fee--$5000; and

(3) change of ownership license fee--$5000.

(d) The department will not consider an application as officially submitted until the applicant pays the applicable licensing fee. The fee must accompany the application form.

(e) A license fee paid to the department is not refundable.

(f) Any remittance submitted to the department in payment of a required license fee must be in the form of a certified check, money order, or personal check made payable to the Texas Department of Health.

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

(h) The department may make periodic reviews of its license fee schedule to ensure that the fees imposed are in amounts reasonable and necessary to defray the cost to the department of administering the Act.

(i) The department will assess an annual assessment fee as follows.

(1) In addition to application fees for initial, renewal, and change of ownership license fees, an annual assessment fee per year will be imposed by the department in amounts reasonable and necessary to defray costs.

(2) The amount of the one time per year annual assessment fee will be determined by the department on an annual basis.

(3) Fees will be divided into three categories based on a three year history:

(A) the average per year of the previous three years reported abortions equals less than 1000;

(B) the average per year of the previous three years reported abortions equals 1000 - 2999;

(C) the average per year of the previous three years reported abortions equals 3000 or more.

(4) Facilities identified in each category will be assessed a proportionate share of the costs.

(5) Licensees receiving an initial license will be assessed the least of the three fees in effect at the time of application for an initial

or change of ownership license. The additional annual assessment fee is due at the same time as the application fee.

(6) The department shall notify each licensee of the amount assessed for the annual assessment fee by April 1, 2004, and by the first day of April for each subsequent year.

(7) The annual assessment fee must be received by the department no later than June 1, 2004, and the first day of June for each subsequent year.

(8) A licensee who fails to pay the assessed annual assessment fee will be subject to denial, revocation, probation, or suspension of a license as prescribed in §139.32 of this title (relating to License Denial, Suspension, Probation or Revocation).

§139.23. Application Procedures and Issuance of Licenses.

(a) Purpose. This section establishes the application procedures that an abortion facility must follow to obtain a license to operate as a licensed abortion facility in Texas.

(b) Definitions. The following terms when used in this section shall have the following meaning.

(1) Initial license--A license which is issued by the department to all first-time applicants for an abortion facility license (including those from unlicensed operating facilities and licensed facilities for which a change of ownership is anticipated, that meet the requirements of the Act and this chapter and have successfully completed the application procedures for an initial license as set out in subsection (c) of this section. This license expires 12 months after issuance up to January 1, 2005, and 24 months after January 1, 2005.

(2) Renewal license--A license issued by the department to a licensed abortion facility that meets all requirements of the Act and this chapter and has completed the application procedures for obtaining a renewal license as set out in subsection (d) of this section. Renewal licenses issued January 1, 2005, through December 31, 2005, will expire in either one or two years, to be determined by the department prior to the time of license renewal. Renewal licenses issued January 1, 2006, or after, will expire in two years.

(c) Application procedures for an initial license. This subsection establishes the application procedures for obtaining an initial license.

(1) Request for an application. Upon request for an abortion facility license, the Texas Department of Health (department) will furnish a person with an application packet. Applications may also be obtained and submitted through the department's web site.

(2) Application requirements. The applicant shall submit the information listed in subparagraph (C) of this paragraph to the department.

(A) An applicant shall not misstate a material fact on any documents required to be submitted under this subsection.

(B) The application form must be accurate and complete and must contain original signatures. The initial license fee must accompany the application.

(C) The following documents must be submitted with the original application form prescribed by the department and shall be originals or notarized copies:

(i) information on the applicant including name, street address, mailing address, social security number or Franchise Tax ID number, date of birth, and driver's license number;

(ii) the name, mailing address, and street address of the abortion facility. The address provided on the application must be the address from which the abortion facility will be operating and providing services;

(iii) the telephone number of the facility, the telephone number where the administrator can usually be reached when the facility is closed, and if the facility has a fax machine, the fax number;

(iv) a list of names and business addresses of all persons who own any percentage interest in the applicant including:

(I) each limited partner and general partner if the applicant is a partnership; and

(II) each shareholder, member, director, and officer if the applicant is a corporation, limited liability company or other business entity;

(v) a list of any businesses with which the applicant subcontracts and in which the persons listed under clause (iv) of this subparagraph hold any percentage of the ownership;

(vi) if the applicant has held or holds an abortion facility license or has been or is an affiliate of another licensed facility, the relationship, including the name and current or last address of the other facility and the date such relationship commenced and, if applicable, the date it was terminated;

(vii) if the facility is operated by or proposed to be operated under a management contract, the names and addresses of any person and organization having an ownership interest of any percentage in the management company;

(viii) a notarized affidavit attesting that the applicant is capable of meeting the requirements of this chapter;

(ix) an organizational structure of the staffing for the abortion facility. The organizational structure shall include full disclosure in writing of the names and addresses of all owners and persons controlling any ownership interest in the abortion facility. In the case of corporations, holding companies, partnerships, and similar organizations, the names and addresses of officers, directors, and stockholders, both beneficial and of record, when holding any percent, shall be disclosed. In the case of a non-profit corporation, the names and addresses of the officers and directors shall be disclosed;

(x) the name(s), address(es), and Texas physician license number(s) of the physician(s) (including the facility's designated medical consultant), and all midlevel providers who will provide services at the abortion facility;

(xi) the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(I) denial, suspension, probation, or revocation of an abortion facility license in any state, a license for any health care facility or a license for a home and community support services agency (agency) in any state; or any other enforcement action, such as (but not limited to) court civil or criminal action in any state;

(II) denial, suspension, probation, or revocation of or other enforcement action against an abortion facility license in any state, a license for any health care facility in any state, or a license for an agency in state which is or was proposed by the licensing agency and the status of the proposal;

(III) surrendering a license before expiration of the license or allowing a license to expire in lieu of the department proceeding with enforcement action;

(IV) federal or state (any state) criminal felony arrests or convictions;

(V) federal or state Medicaid or Medicare sanctions or penalties relating to the operation of a health care facility or agency;

(VI) operation of a health care facility or agency that has been decertified or terminated from participation in any state under Medicare or Medicaid; or

(VII) debarment, exclusion, or contract cancellation in any state from Medicare or Medicaid; and

(xii) for the two-year period preceding the application date, the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(I) federal or state (any state) criminal misdemeanor arrests or convictions;

(II) federal or state (any state) tax liens;

(III) unsatisfied final judgments;

(IV) eviction involving any property or space used as an abortion facility or health care facility in any state;

(V) injunctive orders from any court; or

(VI) unresolved final federal or state (any state) Medicare or Medicaid audit exceptions.

(3) Applicant copy. The applicant shall retain a copy of all documentation that is submitted to the department.

(4) Application processing. Upon the department's receipt of the application form, the required information described in paragraph (2)(C) of this subsection, and the initial license fee from an applicant, the department shall review the material to determine whether it is complete and correct.

(A) The time periods for reviewing the material shall be in accordance with §139.25 of this title (relating to Time Periods for Processing and Issuing a License).

(B) If an abortion facility receives a notice from the department that some or all of the information required under paragraph (2)(C) of this subsection is deficient, the facility shall submit the required information no later than six months from the date of the notice.

(i) A facility which fails to submit the required information within six months from the notice date is considered to have withdrawn its application for an initial license. The license fee will not be refunded.

(ii) A facility which has withdrawn its application must reapply for a license in accordance with this section, if it wishes to continue the application process. A new license fee is required.

(5) Withdrawal from the application process. If an applicant decides at any time not to continue the application process for an initial license, the application will be withdrawn upon written request from the applicant.

(6) Issuance of an initial license.

(A) The time periods for processing an initial application shall be in accordance with §139.25 of this title.

(B) Effective period of an initial license. The initial license is valid for 12 months up to January 1, 2005, and 24 months after January 1, 2005. The initial license expires on the last day of the month ending the licensure period.

(C) Pre-inspection. Once the department has determined that the application form, the information required to accompany the application form, and the initial license fee are complete and correct, the department shall schedule a pre-inspection conference with the applicant in order to inform the applicant or his or her designee of the standards for the operation of the abortion facility. The department, at its discretion, may waive the pre-inspection conference. Upon recommendation by the pre-inspection conference, the department will issue an initial license to the facility.

(D) Pre-inspection recommendation. After the pre-inspection conference has been held, the department will:

(i) issue an initial license to the owner of a facility, if the facility is found to be in compliance with the department's requirements for initial licensure; or

(ii) deny the application if the facility has not complied with the department's requirements for issuing an initial license. The procedure for denial of a license shall be in accordance with §139.32 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(7) A department representative shall inspect the abortion facility in accordance with §139.31 of this title (relating to On-Site Inspections and Complaint Investigations of a Licensed Abortion Facility) within 60 days after the issuance of an initial license. If the department determines that a facility is not in compliance with the provisions of the Act or this chapter after the initial onsite inspection, the department shall notify the facility. Notification shall be in accordance with §139.32 of this title.

(8) If for any reason, an applicant decides not to continue the application process, the applicant must submit to the department a written request to withdraw its application. If an initial license has been issued, the applicant shall cease providing abortion services and return the initial license to the department with its written request to withdraw. The department shall acknowledge receipt of the request to withdraw. The license fee will not be refunded.

(9) Continuing compliance by the abortion facility with the provisions of the Act and this chapter is required during the initial license period.

(d) Application procedures for renewal of a license.

(1) The department will send notice of expiration of a license to the licensee at least 60 days before the expiration date of the license. If the licensee has not received notice of expiration from the department 45 days prior to the expiration date, it is the duty of the licensee to notify the department and request an application for a renewal license.

(2) The licensee shall submit the following items to the department by certified mail, marked confidential, and postmarked no later than 30 days prior to the expiration date of the license:

(A) a complete and accurate renewal application form;

(B) current updated documents containing all the information required in subsection (c)(2)(C) of this section; and

(C) the renewal license fee.

(3) A facility shall not misstate a material fact on any documents required to be submitted to the department or required to be maintained by the facility in accordance with the provisions of the Act and this chapter.

(4) A department surveyor shall inspect a licensed abortion facility in accordance with §139.31(b) of this title.

(5) If a licensee makes timely and sufficient application for renewal, the license will not expire until the department issues the renewal license or until the department denies renewal of the license.

(A) The department shall issue a renewal license to a licensee who meets the minimum standards for a license in accordance with the provisions of the Act and this chapter.

(B) The department may propose to deny the issuance of a renewal license if:

(i) based on the inspection report, the department determines that the abortion facility does not meet or is in violation of any of the provisions of the Act or this chapter;

(ii) renewal is prohibited by the Texas Education Code, §57.491, relating to defaults on guaranteed student loans;

(iii) a facility discloses any of the actions or offenses listed in subsection (c)(2)(C)(xi) and (xii) of this section; and

(iv) a facility fails to file abortion reports in accordance with §139.4 of this title (relating to Annual Reporting Requirements for All Abortions Performed) or fails to ensure that the physicians report in accordance with §139.5 of this title (relating to Additional Reporting Requirements for Physicians).

(6) If a licensee makes a timely application for renewal of a license, and action to revoke, suspend, place on probation, or deny renewal of the license is pending, the license does not expire but does extend until the application for renewal is granted or denied after the opportunity for a formal hearing. A renewal license will not be issued unless the department has determined the reason for the proposed action no longer exists.

(7) If a suspension of a license overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this subsection; however, the department may not renew the license until the department determines that the reason for suspension no longer exists.

(8) If the department revokes or does not renew a license, a person may apply for an initial license by complying with the requirements of the Act and this chapter at the time of reapplication. The department may refuse to issue a license if the reason for revocation or nonrenewal continues to exist.

(9) Upon revocation or nonrenewal, a license holder shall return the original license to the department.

(10) The procedures for revocation, suspension, probation, or denial of a license shall be in accordance with §139.32 of this title.

(e) Failure to timely renew a license.

(1) If a licensee fails to timely renew a license in accordance with subsection (d) of this section, the department shall notify the licensee that the facility must cease operation on the expiration date of the license.

(2) To continue providing services at the abortion facility after the expiration of the license, the owner must apply for an initial license in accordance with subsection (c) of this section.

(f) Frequency of inspections. Inspections of the abortion facility shall be performed at a frequency prescribed by and in accordance with §139.31 of this title (relating to On-Site Inspections and Complaint Investigations of a Licensed Abortion Facility).

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 January 16, 2004.

TRD-200400346
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER C. ENFORCEMENT

25 TAC §§139.31 - 139.33

The amendments are adopted under the Health and Safety Code, Chapter 245, Health and Safety Code, Chapter 171, and the Health and Safety Code, §12.001, which provide the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The review of these rules implements Government Code, §2001.039.

§139.31. On-site Inspections and Complaint Investigations of a Licensed Abortion Facility.

(a) General. An on-site inspection shall determine if the requirements of the Act and this chapter are being met.

(1) An authorized representative of the department (surveyor) may enter the premises of a licensed abortion facility at reasonable times during business hours and at other times as it considers necessary to ensure compliance with:

(A) the Act and this chapter;

(B) an order of the commissioner of health (commissioner);

(C) a court order granting injunctive relief; or

(D) other enforcement actions.

(2) The surveyor is entitled to access all books, records, or other documents maintained by or on behalf of the facility to the extent necessary to ensure compliance with the Act, this chapter, an order of the commissioner, a court order granting injunctive relief, or other enforcement action. The department shall maintain the confidentiality of facility records as applicable under federal or state law. Ensuring compliance includes permitting photocopying by a department surveyor or providing photocopies to a department surveyor of any records or other information by or on behalf of the department as necessary to determine or verify compliance with the Act or this chapter.

(3) By applying for or holding a license, the facility consents to entry and inspection of the facility by the department or representative of the department in accordance with the Act and this chapter.

(b) Inspection procedures.

(1) All onsite inspections will be unannounced and conducted, at least, annually.

(2) The department's surveyor shall hold a conference with the person who is in charge of a licensed abortion facility prior to commencing the inspection for the purpose of explaining the nature and scope of the inspection. The surveyor shall hold an exit conference with the person who is in charge of the facility when the inspection is

completed, and the surveyor shall identify any records that were duplicated. Any original facility records that are removed from a facility shall be removed only with the consent of the facility.

(3) The department's authorized representative shall hold an exit conference and fully inform the person who is in charge of the facility of the preliminary finding(s) of the inspection and shall give the person a reasonable opportunity to submit additional facts or other information to the surveyor in response to those findings. The response shall be made a part of the inspection for all purposes and must be received by the department within 14 calendar days of receipt of the preliminary findings of the inspection by the facility.

(4) After the inspection is completed, the department shall provide the administrator of the facility specific and timely written notice of the findings of the inspection in accordance with paragraph (7) of this subsection.

(5) If the department determines that the facility is in compliance with minimum standards at the time of the on-site inspection, the department will send a license to the facility, if applicable.

(6) If the surveyor finds there are deficiencies, the department shall provide the facility with a statement of the deficiencies; the surveyor's recommendation for further action; or if there are no deficiencies found, a statement indicating this fact.

(7) If the department representative finds there are deficiencies, the facility and the department shall comply with the following procedure.

(A) The department shall provide the facility with a statement of deficiencies onsite at the time of the exit conference or within 14 calendar days of the exit conference.

(B) The facility administrator or person in charge shall sign the written statement of deficiencies and return it to the department with its plan of correction(s) for each deficiency within 14 calendar days of its receipt of the statement of deficiencies. The signature does not indicate the person's agreement with deficiencies stated on the form.

(C) The facility shall have the option to challenge any deficiency cited after receipt of the statement of deficiencies. A challenge to a deficiency(ies) shall be in accordance with this subparagraph.

(i) An initial challenge to a deficiency(ies) shall be submitted in writing no later than 14 calendar days from the facility's receipt of the statement of deficiencies to the program director for abortion facility licensing, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199. The initial written challenge shall include any and all documents supporting the facility's position.

(ii) If the initial challenge is favorable to the department, the facility may request a review of the initial challenge by submitting a written request to the Director, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199. The facility shall submit its written request for review of the initial challenge no later than 14 calendar days of its receipt of the department's response to the initial challenge. The department will not accept or review any documents that were not submitted with the initial challenge. A determination by the Director, Health Facility Licensing and Compliance Division, relating to a challenge to a deficiency(ies) will be considered the final determination by the department.

(iii) The department shall respond to any written challenge submitted under clauses (i) or (ii) of this subparagraph no later than 14 calendar days from its receipt.

(D) The department shall determine if the written plan of correction is acceptable. If the plan of correction(s) is not acceptable to the department, the department shall notify the facility and request that the plan of correction be modified by telephone or resubmitted no later than 14 calendar days from receipt of such request by the facility.

(E) If the facility does not come into compliance by the required date of correction, the department may propose to deny, suspend, place on probation, or revoke the license in accordance with §139.32 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(F) Acceptance of a plan of correction by the department does not preclude the department from taking enforcement action as appropriate under §139.32 of this title.

(8) The department shall refer issues and complaints relating to the conduct or action(s) by licensed health care professionals to their appropriate licensing boards.

(c) Complaints.

(1) In accordance with §139.50 of this title (relating to Disclosure Requirements), all licensed abortion facilities are required to provide the patient and her guardian, if present, if the patient is a minor at time of the initial visit or if guardianship is required, with a written statement that complaints relating to the abortion facility may be registered with the Director, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199.

(2) The department will evaluate all complaints against licensed abortion facilities. All complaints submitted to the department must be in writing and signed by the complainant. Only those allegations determined to be relevant to the Act or this chapter will be authorized for investigation. All information pertaining to a complaint is strictly confidential.

(3) The department or its authorized representative may enter the premises of an abortion facility during normal business hours as necessary to assure compliance with the Act and this chapter. The investigation may be conducted on-site, by phone or by mail.

(4) Conduct of the on-site investigation of a licensed abortion facility will include, but not be limited to:

(A) a conference prior to commencing the on-site investigation for the purpose of explaining the nature and scope of the investigation between the department's authorized representative and the administrator of the abortion facility, or his or her designee;

(B) an inspection of the facility;

(C) an inspection of medical records, personnel records, administrative files, reports, other records, and/or working papers;

(D) an interview with any physician or other health care practitioner, including abortion facility personnel who care for the recipient of abortion services;

(E) a conference at the conclusion of the inspection between the department's representative and the administrator or his or her designee of the facility; and

(F) identification by the department's representative of any facility documents that have been reproduced.

(5) If the department finds that there are deficiencies following the on-site inspection, the provisions of subsection (b)(6) and (7) of this section will apply.

(6) The department will review the report of the investigation and determine the validity of the complaint.

§139.32. License Denial, Suspension, Probation, or Revocation.

(a) The department may refuse to issue or renew a license for a facility if the facility fails to comply with any provisions of the Act, or Health and Safety Code, Chapters 245 and 171.

(b) The department may suspend, place on probation, or revoke the license of a facility for one or more of the following reasons:

(1) the facility commits fraud, misrepresentation, or concealment of a material fact on any documents required to be submitted to the department or required to be maintained by the facility pursuant to the Act;

(2) the facility or any of its employees materially alters any license issued by the department;

(3) the facility or its employees commits an act which causes immediate jeopardy to the health and safety of a patient;

(4) the facility is cited for deficiencies and fails to submit an acceptable plan of correction in accordance with this chapter;

(5) the facility has been cited for deficiencies and fails to timely comply with minimum standards for licensure within the dates designated in the plan of correction;

(6) the facility or any of its employees has aided, abetted, or permitted the commission of an illegal act;

(7) the facility or any of its employees fails to comply with any provisions of the Act or this chapter;

(8) the facility is not in compliance with minimum standards for licensure;

(9) the facility fails to provide the required application or renewal information;

(10) the facility fails to comply with an order of the commissioner of health or another enforcement procedure under the Act;

(11) the facility discloses an action described in §139.23(c)(2)(C)(xii) and (xiii) of this title (relating to Application Procedures and Issuance of Licenses);

(12) the facility knowingly employs as the facility administrator or chief financial officer an individual who was convicted of a felony or misdemeanor listed in subsection (c) of this subsection;

(13) has a history of failure to comply with the rules adopted under this chapter; or

(14) has aided, abetted or permitted the commission of an illegal act;

(c) The department may deny a person a license or suspend or revoke an existing license on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the ownership or operation of a facility.

(1) In determining whether a criminal conviction directly relates to the duties and responsibilities of the ownership or operation of a licensed abortion facility, and in determining the fitness of a person who has been convicted of a crime to perform such duties and responsibilities, the department shall consider the provisions of Texas Occupations Code, Chapter 53.

(2) The department is entitled to obtain criminal history information maintained by the Texas Department of Public Safety (Government Code, §411.122), the Federal Bureau of Investigation Identification Division (Government Code, §411.087), or any other law enforcement agency to investigate the eligibility of an applicant for an initial or renewal license and to investigate the continued eligibility of a licensee.

(3) The following felonies and misdemeanors directly relate to the duties and responsibilities of the ownership or operation of a licensed abortion facility because these criminal offenses demonstrate impaired ability to own or operate a facility:

(A) a misdemeanor violation of Health and Safety Code (HSC), Chapter 244;

(B) a misdemeanor or felony involving moral turpitude;

(C) a misdemeanor or felony relating to deceptive business practices;

(D) a misdemeanor or felony of practicing any health-related profession without a required license;

(E) a misdemeanor or felony under any federal or state law relating to drugs, dangerous drugs, or controlled substances;

(F) a misdemeanor or felony under the Texas Penal Code (TPC), Title 5, involving a patient or client of any health care facility, a home and community support services agency or a health care professional;

(G) a misdemeanor or felony under the TPC:

(i) Title 4 - offenses of attempting or conspiring to commit any of the offenses in this clause;

(ii) Title 5 - offenses against the person;

(iii) Title 7 - offenses against property;

(iv) Title 8 - offenses against public administration;

(v) Title 9 - offenses against public order and decency;

(vi) Title 10 - offenses against public health, safety or morals;

(vii) Title 11 - offenses involving organized crime.

(4) Offenses listed in paragraph (3) of this subsection are not exclusive in that the department may consider similar criminal convictions from other state, federal, foreign or military jurisdictions which indicate an impaired ability or tendency for the person to be unable to own or operate a facility.

(5) A license holder's license shall be revoked on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocations of parole, or revocation of mandatory supervision.

(d) All proceedings for the denial, suspension, probation, or revocation of a license under this section will be conducted at the State Office of Administrative Hearings, and in accordance with Chapter 245 of the Texas Health and Safety Code, Chapter 2001 of the Texas Government Code, and the Formal Hearing Procedures of the Texas Department of Health (Texas Administrative Code, Title 25, Part 1).

(e) A person who has had a facility license revoked under this section may not apply for a license under this chapter for one year following the date of revocation.

(f) After an inspection in which deficiencies were cited by the surveyor, a facility may submit its license for voluntary cancellation in lieu of the department proceeding with enforcement action. The department may accept such submission or reject it and proceed with an enforcement action. The facility, its owner(s), and its affiliates may not reapply for a license for six months from the date of the surrender or expiration.

(g) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for suspension no longer exists. A department surveyor shall conduct an inspection of the facility prior to making a determination.

(1) During the time of suspension, the suspended license holder shall return the original license certificate to the department.

(2) If a suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this chapter; however, the department may not renew the license until the department determines that the reason for suspension no longer exists.

(3) If suspension is for more than one year, the suspended license holder may apply to the department for cancellation of the suspension only after one year following the initial date of the suspension.

(h) If the department revokes or does not renew a license, a person may reapply for a license (subject to subsection (d) of this section), by complying with the requirements and procedures in this chapter at the time of reapplication. The department may refuse to issue a license if the reason for revocation or non-renewal continues to exist and may consider the enforcement history of the applicant, administrator or clinical director in making such a determination.

(i) Upon revocation or non-renewal, a license holder shall return the original license certificate to the department.

(j) Upon a licensee's felony conviction, felony probation revocation, revocation of parole, or revocation of mandatory supervision, the license shall be revoked.

(k) If the department finds that a licensed abortion facility is in repeated noncompliance with Health and Safety, Chapter 245, or rules adopted under this chapter, but the noncompliance does not in any way involve the health and safety of the public or an individual, the department may schedule the facility for probation rather than suspending or revoking the facility's license.

(l) The department may suspend or revoke the license of a licensed abortion facility that does not correct items that were in noncompliance or that does not comply with Health and Safety Code, Chapter 245, or rules adopted under this chapter within the applicable probation period.

(m) The department may suspend or revoke a license to be effective immediately when a situation(s) is identified that poses immediate jeopardy to the health and safety of person(s) at the facility.

(1) The department shall immediately give the licensee adequate notice of the action taken, the legal grounds for the action, and the procedure governing appeal of the action.

(2) The department shall set a hearing date not later than the 14th day after the effective date of the suspension or revocation.

(3) The department shall also notify the facility in writing of the emergency action, the legal grounds for the action, the effective date of the emergency action, the procedure governing appeal of the action, and the date set for the hearing. This notice shall be sent by certified mail, return receipt requested, or by personal delivery. The hearing shall be conducted at the State Office of Administrative Hearings, and pursuant to the Texas Health and Safety Code, Chapter 245, Texas Government Code, Chapter 2001 and the department's formal hearing procedures set out in Chapter 1 of this title.

(n) If a person violates the licensing requirements of the Act or rules adopted under the Act, the department may petition the district court for a temporary restraining order to restrain the person from continuing the violation or operating without a license.

(o) If a person operates a facility without a license as required by this chapter and the Act, the person is liable for a civil penalty of not less than $1,000 nor more than $2,500 for each day of violation.

(p) If a facility has had enforcement action taken by the department against it, the facility, its owner(s), or its affiliate(s) may not apply for a facility license for one year following the effective date of the enforcement action. For purposes of this subsection only, the term "enforcement action" means license revocation, suspension, emergency suspension, or denial or injunctive action but does not include administrative penalties or civil penalties. If the department prevails in one enforcement action (e.g., injunctive action) against the facility but also proceeds with another enforcement action (e.g., revocation) based on some or all of the same violations, but the department does not prevail in the second enforcement action (e.g., the facility prevails), the prohibition in this paragraph does not apply.

(q) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for suspension no longer exists. An authorized representative of the department shall conduct an on-site inspection of the facility prior to making a determination.

(1) During the time of suspension, the suspended license holder shall return the original license to the department.

(2) If a suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this chapter; however, the department may not renew the license until the department determines that the reason for suspension no longer exists.

(3) If suspension is for more than one year, the suspended license holder may apply to the department for cancellation of the suspension only after one year following the initial date of the suspension.

(r) If the department revokes or does not renew a license and the one-year period described in subsection (p) of this section has passed, a person may reapply for a license by complying with the requirements and procedures in this chapter at the time of reapplication. The department may refuse to issue a license if the reason for revocation or nonrenewal continues to exist.

(s) Upon revocation or nonrenewal, a license holder shall return the license to the department.

(t) After an on-site inspection in which deficiencies were cited by the surveyor, a facility may surrender its license before expiration or allow its license to expire in lieu of the department proceeding with enforcement action. A facility may surrender before the expiration date by returning its original license to the department. If a facility surrenders or allows expiration of the license, the facility, its owner(s), and its affiliates may not reapply for a license for six months from the date of the surrender or expiration.

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 January 16, 2004.

TRD-200400347

Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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25 TAC §139.34

The repeal is adopted under the Health and Safety Code, Chapter 245, Health and Safety Code, Chapter 171, and the Health and Safety Code, §12.001, which provide the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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General Counsel
Texas Department of Health
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SUBCHAPTER D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §§139.41 - 139.60

The amendments are adopted under the Health and Safety Code, Chapter 245, Health and Safety Code, Chapter 171, and the Health and Safety Code, §12.001, which provide the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The review of these rules implements Government Code, §2001.039.

§139.41. Policy Development and Review.

(a) The licensee shall be responsible for the conduct of the licensed abortion facility and shall assume full legal responsibility for developing, implementing, enforcing, and monitoring written policies governing the facility's total operation and for ensuring that these policies comply with the Act and the applicable provisions of this chapter and are administered so as to provide health care in a safe and professionally acceptable environment. These written polices shall include at a minimum the following:

(1) administrative policies governing the administration of the facility, covering at a minimum:

(A) personnel;

(B) employee orientation, training, and evaluation;

(C) employee and patient record system;

(D) auditing system for monitoring state or federal funds;

(E) advertisements for the facility;

(F) accuracy of public education information materials and activities in relation to abortion, birth control, and sexually-transmitted diseases;

(G) patient education/information services and referral services;

(H) reporting requirements; and

(I) procedures for the resolution of complaints regarding care or services rendered by licensed health professionals and other members of the facility staff, including contract services or staff. The facility shall document the receipt and the disposition of the complaint. The investigation and documentation must be completed within 30 calendar days after the facility receives the complaint, unless the facility has and documents reasonable cause for a delay.

(2) clinical policies governing medical and clinical practices and procedures of the facility, covering at a minimum:

(A) the provision of medical and clinical services;

(B) the provision of laboratory services;

(C) examination of fetal tissue;

(D) disposition of medical waste;

(E) emergency services;

(F) condition on discharge procedures;

(G) clinical records;

(H) reporting and filing requirements; and

(I) monitoring postprocedure infection(s).

(3) a policy to ensure that the facility is in compliance with fire safety provisions as required by the local codes;

(4) policies on decontamination, disinfection, and sterilization, and storage of sterile supplies;

(5) policies for parental notice for unemancipated pregnant minors as stipulated in Family Code, Chapter 33;

(6) policies for informed consent as stipulated in Health and Safety Code, Chapter 171, the Woman's Right to Know Act;

(7) policies for reporting suspected abuse or neglect as stipulated in Family Code, Chapter 261; and

(8) policies to ensure all women who present to obtain an abortion provide identification that includes the woman's date of birth.

(A) If the woman does not have identification stating her date of birth, she will be required to execute an affidavit on a form published by the department indicating that she does not have appropriate identification and indicating her date of birth on the affidavit. Figure: 25 TAC §139.41(a)(8)(A)

(B) The facility will keep a copy of the identification presented or the affidavit in its files.

(b) The licensee, in fulfilling its responsibility under subsection (a) of this section, shall review the facility's written policies and procedures periodically, but no less than once every two years; date to indicate time of last review; revise as necessary; and enforce.

§139.43. Personnel Policies.

The licensee shall develop, implement and enforce policies which shall govern all personnel staffed by the facility using the following minimum criteria:

(1) job descriptions, including qualifications for all personnel providing direct or indirect patient care;

(2) a requirement for orientation of all employees, volunteers, students and contractors to the policies and objectives of the facility and participation by all personnel in employee training specific to their job;

(3) job-related training for each position;

(4) a requirement for an annual evaluation of employee performance;

(5) in service and continuing education requirements;

(6) a requirement that all personnel providing direct patient care be currently certified in basic life support by the American Heart Association, the American Red Cross, or the American Safety and Health Institute, or in accordance with their individual professional licensure requirements, and if required in their job description or job responsibilities;

(7) a requirement that all personnel having direct contact with patients (employed or contracting with the facility) sign a statement that they have read, understand, and will respect the rights of all patients as established in §139.51 of this title (relating to Patient Rights at the Facility); and

(8) a requirement that all personnel complete a training program developed jointly by the department and the Department of Protective and Regulatory Services (DPRS) concerning their individual duties to report child abuse, how to identify and recognize abuse, and the jurisdiction of DPRS and local law enforcement over child abuse.

§139.50. Disclosure Requirements.

(a) At the time of a woman's initial consultation with a licensed abortion facility, the facility shall comply with the following.

(1) Provide the woman with a written statement indicating the number of the toll-free telephone line which is maintained by the department to provide specific information relating to licensed abortion facilities in Texas. The statement shall be in accordance with §139.6 of this title (relating to Public Information; Toll-free Telephone Number).

(2) Provide the woman with a written statement identifying the department as the responsible agency for facility complaint investigations. The statement shall inform persons to register complaints with the Director, Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Complaints must be registered with the department in writing. A complainant must provide his/her name. All complaints shall be confidential.

(3) Provide the woman with a copy of the department's "A Woman's Right to Know" booklet created for women seeking an abortion, if the woman chooses to view it.

(4) Provide the woman with a copy of the department's "A Woman's Right to Know" resource directory (required by Health and Safety Code, §171.015), if the woman chooses to view it.

(5) Inform the woman of her option to view the department's "A Woman's Right to Know" booklet and resource directory on the world wide web and provide her with the internet address for obtaining the information.

(6) Provide the woman with a written statement that she may call the department at (888) 973-0022 if the facility does not provide her with the information required in paragraphs (3) and (4) of this subsection.

(b) The facility shall ensure that the woman has been provided with all information required for voluntary and informed consent, as mandated by HSC, §171.012(a)(1)-(2) at least 24 hours prior to the abortion procedure.

(c) The facility shall initiate a clinical record for the woman at the time of the initial consultation. The following information pertaining to disclosure, as described in this section, must be documented in the clinical record:

(1) the date and time of the initial consultation;

(2) the method by the which the information required under subsections (a) and (b) of this section was provided; and

(3) the name and title of individual(s) who provided or verified the information required under subsections (a) and (b) of this section.

§139.51. Patient Rights at the Facility.

A licensed abortion facility shall ensure that all patients:

(1) be allowed to make her own choice and self-determination;

(2) are ensured the right to personal privacy and confidentiality of her choices and decisions;

(3) are ensured the right to voluntary and informed consent as defined in Health and Safety Code (HSC), §171.012, without paying a fee for the informational materials;

(4) are ensured individual counseling concerning private medical information and to be given a private opportunity to ask questions;

(5) be allowed to view their medical record, including the sonogram, if one has been performed, at any time as provided by law;

(6) have access to care and treatment consistent with available resources and generally accepted standards regardless of race, creed, and national origin;

(7) are allowed to ask additional questions after giving consent and to withdraw consent while still medically safe to do so;

(8) are provided freedom from abuse, neglect, or exploitation as those terms are defined in §1.204 of this title (relating to Abuse, Neglect, or Exploitation Defined); and

(9) be allowed to review the department's informational materials as described in HSC, §§171.014 and 171.015.

§139.52. Patient Education/Information Services.

(a) A licensed abortion facility shall ensure patient education/information services are provided to each patient to:

(1) ensure compliance with Health and Safety Code, §§171.011 and 171.012, concerning informed consent by utilizing the department's certification form, signed by the woman prior to an abortion procedure, and maintained in the patient's clinical record;
Figure: 25 TAC §139.52(a)(1)

(2) prepare the patient for surgery in a manner that facilitates her safety and comfort;

(3) assist the patient in reaching a decision about the method of post-procedure birth control she will use, if any, and respect her choices; and

(4) ensure, when medically appropriate, the patient is advised of the physician's obligation to take all reasonable steps to maintain the life and health of a child who is born alive.

(b) A licensed abortion facility shall, if needed, refer a patient to a licensed mental health practitioner who provides therapeutic intervention.

§139.58. Reporting Requirements.

A licensed abortion facility shall report a woman's death if it results from a complication(s) of an abortion. The report shall be made by phone or fax within one business day after the facility is notified of the death to the director of Health Facility Licensing and Compliance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, Telephone (512) 834-6646, or Fax (512) 834-4514 or (512) 834-6709.

§139.59. Anesthesia Services.

(a) Organization of anesthesia services. The organization of anesthesia services shall be appropriate to the scope of the services offered.

(b) General. A licensed abortion facility may provide various levels of sedation/analgesia and/or general anesthesia as defined in subsection (c) of this section. The patient may progress spontaneously from one level to another. The determination of patient monitoring and staffing requirements shall be based on the provisions set out in this section and the patient's acuity and the potential response of the patient to the procedure.

(c) Definitions.

(1) Minimal sedation (anxiolysis)--A drug-induced state during which patients respond normally to verbal commands. Although cognitive function and coordination may be impaired, ventilatory and cardiovascular functions are unaffected.

(2) Moderate sedation/analgesia ("conscious sedation")--A drug-induced depression of consciousness during which patients respond purposefully (reflex withdrawal from a painful stimulus is NOT considered a purposeful response) to verbal commands, either alone or accompanied by light tactile stimulation. No interventions are required to maintain a patent airway, and spontaneous ventilation is adequate. Cardiovascular function is usually maintained.

(3) Deep sedation/analgesia--A drug-induced depression of consciousness during which patients cannot be easily aroused but respond purposefully following repeated or painful stimulation. The ability to independently maintain ventilatory function may be impaired. Patients may require assistance in maintaining a patent airway, and spontaneous ventilation may be inadequate. Cardiovascular function is usually maintained.

(4) General anesthesia--A drug-induced loss of consciousness during which patients are not arousable, even by painful stimulation. The ability to independently maintain ventilatory function is often impaired. Patients often require assistance in maintaining a patent airway, and positive pressure ventilation may be required because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function. Cardiovascular function may be impaired.

(d) Minimum staffing for the management of the various levels of sedation/analgesia.

(1) Minimal sedation (anxiolysis). The minimum staffing required for administering minimal sedation (anxiolysis) and local anesthetic shall include the physician and sufficient support staff to perform the procedure.

(2) Moderate sedation/analgesia ("conscious sedation").

(A) The minimum staffing required for administering moderate sedation/analgesia ("conscious sedation") shall always include a minimum of:

(i) a physician, trained and experienced in the use of moderate sedation/analgesia ("conscious sedation"), airway management and resuscitation to manage the care of the patient; and

(ii) one trained, competent clinic staff person to monitor the patient at all times in the procedure and recovery room.

(B) The medical or nursing staff managing the anesthesia care of the patient under moderate sedation/analgesia ("conscious sedation") shall have no other responsibilities that would leave the patient unattended or compromise continuous monitoring.

(3) Deep sedation/analgesia.

(A) The minimum staffing during deep sedation/analgesia shall be in accordance with subsection (h) of this section.

(B) The person qualified and performing the administration of deep sedation/analgesia may not be the physician performing the procedure.

(4) General anesthesia.

(A) The minimum staffing during general anesthesia shall be in accordance with subsection (i) of this section.

(B) The person qualified and performing the administration of general anesthesia may not be the physician performing the procedure.

(e) Minimum training and knowledge.

(1) Minimal sedation (anxiolysis). All staff members managing the care of a patient under minimal sedation (anxiolysis) shall be certified in basic life support (BLS) with bi-annual recertification.

(2) Moderate sedation/analgesia ("conscious sedation").

(A) The medical or nursing staff managing the care of a patient receiving moderate sedation/analgesia ("conscious sedation") shall at a minimum have the following:

(i) training in BLS with bi-annual recertification;

(ii) annual training in the recognition of the cardiovascular and respiratory side effects of sedatives, as well as the variability of patient response; and

(iii) current knowledge of emergency supplies and equipment inventory and their use.

(B) The physician, physician extender, or nurse administering the medications shall know the pharmacology of the medications administered.

(3) Deep sedation/analgesia. The minimum training and knowledge required for providing deep sedation shall be in accordance with subsection (h) of this section.

(4) General anesthesia. The minimum training and knowledge required for providing general anesthesia shall be in accordance with subsection (i) of this section.

(f) Clinical and equipment standards for minimal sedation (anxiolysis) and local anesthetic. For licensed facilities administering minimal sedation (anxiolysis) or local anesthetic, the facility must have at a minimum, the following emergency equipment for local anesthetic and/or light sedation management:

(1) oxygen;

(2) mechanical ventilatory assistance equipment that includes airways and manual breathing bag;

(3) the ability to monitor blood pressure;

(4) emergency drugs as specified by the physician(s) on staff; and

(5) functioning oral suction machine apparatus.

(g) Procedure room requirements for moderate sedation/analgesia ("conscious sedation") and deep sedation/analgesia.

(1) Moderate sedation/analgesia ("conscious sedation"). The minimum standards for the procedure room(s) where moderate sedation/analgesia ("conscious sedation") is administered are as follows.

(A) The facility shall have the capability of monitoring blood pressure and oxygen saturation as well as a functioning oral suction machine apparatus.

(B) All patients receiving moderate sedation/analgesia ("conscious sedation") shall have a functional intravenous access in place. A functional intravenous access shall be placed in a patient's vein prior to the procedure and maintained until the patient has recovered from the effects of sedation as determined by the person administering the sedation or the physician performing the procedure.

(C) Emergency supplies and equipment shall be readily accessible and shall include the necessary drugs and equipment to resuscitate a non-breathing and unconscious patient. There shall be documentation that all emergency equipment and drugs are checked and maintained on a scheduled basis.

(D) Pharmacological antagonist medications and staff trained to administer these medications shall be readily available.

(2) Deep sedation/analgesia. The minimum standards for the procedure room where deep sedation/analgesia is administered shall be in accordance with subsection (h) of this section.

(3) General anesthesia. The minimum standards for the procedure room where general anesthesia is administered shall be in accordance with subsection (i) of this section.

(h) Standards for administering deep sedation/analgesia.

(1) A licensed abortion facility which provides deep sedation/analgesia shall provide professional staff; equipment for the administration (of deep sedation/analgesia); a post anesthesia care area; monitoring equipment for procedure room and post anesthesia recovery area sufficient for the provision of deep sedation/analgesia in accordance with the following American Society for Anesthesiologists standards and guidelines:

(A) Practice Guidelines for Sedation and Analgesia by Non-Anesthesiologists, dated April 2002;

(B) Standards, Guidelines, and Statements, dated October 2002, specifically:

(i) Basic Anesthetic Monitoring, dated October 21, 1986, as amended October 21, 1998; and

(ii) Standards for Post-Anesthesia Care, dated October 12, 1988, as amended October 19, 1994.

(2) If the provisions contained in the guidelines listed in paragraph (1) of this subsection conflict with this section, the provisions of this section supersede.

(3) Copies of the standards and guidelines are available for review at the Texas Department of Health, Health Facility Licensing and Compliance Division, Exchange Building, 8407 Wall Street, Austin, Texas 78754. Copies may also be obtained by writing the American Society of the Anesthesiologists, 520 North West Highway, Park Ridge, Illinois 60068-2573; Internet www.ASAhq.org; or by telephone at (847) 825-5586.

(i) Standards for administering general anesthesia.

(1) A licensed abortion facility which provides general anesthesia shall provide professional staff; equipment for the administration of general anesthesia; a post anesthesia care area; and monitoring equipment for procedure room and post anesthesia recovery area sufficient for the provision of general anesthesia. General anesthesia shall be provided in accordance with the following American Society for Anesthesiologists standards and guidelines: American Society of Anesthesiologists Standards, Guidelines, and Statements, dated October 2002, specifically:

(A) Guidelines for Office-Based Anesthesia, dated October 13, 1999;

(B) Basic Standards for Pre-anesthesia Care, dated October 14, 1987;

(C) Basic Anesthetic Monitoring, dated October 21, 1986, as amended October 21, 1998;

(D) Standards for Post-Anesthesia Care, dated October 12, 1988, as amended October 19, 1994; and

(E) Guidelines for Ambulatory Anesthesia and Surgery, dated October 11, 1997, as amended October 21, 1998.

(2) If the provisions contained in the guidelines listed in paragraph (1) of this subsection conflict with this section, the provisions of this section supersede.

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 146. TRAINING AND REGULATION OF PROMOTORES(AS) OR COMMUNITY HEALTH WORKERS

25 TAC §146.2

The Texas Department of Health (department) adopts an amendment to §146.2, concerning the Promotor(a) or Community Health Worker Training and Certification Advisory Committee. This section is adopted without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10076), and the section will not be republished.

The committee has provided advice to the Texas Board of Health (board) and the department related to the review of applications and the recommendation of qualifying applicants as sponsoring institutions, training instructors, or as promotores(as) or community health workers. The committee also recommends new or amended rules for the approval of the board. The committee was established under the Health and Safety Code, §11.016, which allowed the board to establish advisory committees. The committee is governed by the Government Code, Chapter 2110, concerning state agency advisory committees.

This section amends provisions relating to the operation of the committee. Specifically, the language is revised to improve the ability of the certification program and to expedite the process of reviewing applications for certification of promotores(as) or community health workers.

No public comments were received during the comment period for the rule.

The amendment is adopted under Health and Safety Code, §11.016, which allows the board to establish advisory committees; §48.003, which requires the board to adopt rules which "establish and operate a certification program for persons who act as promotoras or community health workers."; §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner; and Government Code, §2110.005, which requires the department to adopt rules stating the purpose and tasks of its advisory committees.

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 159. TERTIARY MEDICAL CARE

25 TAC §159.1

The Texas Department of Health (department) adopts an amendment to §159.1, concerning the reimbursement to tertiary care facilities and Level IV trauma facilities. Section 159.1 is adopted without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10077), and therefore the section will not be republished.

The rule implements the Health and Safety Code, Chapter 46, §§46.001-46.007, which identify the tertiary care account as a dedicated account in the general revenue fund and delineate the department's responsibilities to allocate these funds to compensate tertiary care facilities and Level IV trauma facilities for the costs of unreimbursed tertiary medical and stabilization services. Chapter 46 was unchanged by the 78th Legislature; however, no funds were appropriated for reimbursement to facilities under Chapter 46. Therefore, for state fiscal years 2004 and 2005, no applications for reimbursement will be accepted by the department. In addition, the 78th Legislature amended one of the statutory sources of the funds. House Bill 2292 (Chapter 198, 78th Legislature, 2003), §2.34, deleted the mandate that some unclaimed lottery prize money be placed in the tertiary care account.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed the section and has determined that reasons for adopting the section continue to exist; however, a revision was needed in order to reflect changes to program administration and the condition precedent of the appropriation of funds. Although no funds are appropriated this biennium, since the reimbursement law was not changed, the department wants to keep this section in case funds are appropriated in later years.

The amendment expands upon the definition of tertiary medical services. The amendment also clarifies that annual notification by the department to facilities applies only if funds are appropriated for reimbursement and deletes obsolete language in subsection (e) regarding fiscal year 2000.

The department published a Notice of Intention to Review for §159.1 in the *Texas Register* on October 10, 2003 (28 Tex Reg 8900). No comments were received.

No public comments were received during the comment period for the rules.

The amendment is adopted under the Health and Safety Code, Chapter 46, §46.004, which requires the department to adopt rules to govern the collection of information from facilities on unreimbursed tertiary medical and stabilization services; and the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 265. GENERAL SANITATION
SUBCHAPTER B. TEXAS YOUTH CAMPS SAFETY AND HEALTH

25 TAC §265.26

The Texas Department of Health (department) adopts new §265.26, concerning the prohibition of nudity at youth camps except in limited situations. Section 265.26 is adopted with changes to the proposed text as published in the August 22, 2003, issue of the *Texas Register* (28 TexReg 6693), as a result of comments received during the 30 day comment period. Specifically, new §265.26 provides that a youth camp may not allow campers or staffers to be nude except when bathing, showering, changing clothing, or receiving medical attention. The new rule is necessary for the department to carry out its responsibilities under the Texas Youth Camp Safety and Health Act, Health and Safety Code, Chapter 141. The new rule is not due to recent legislation, but is in response to published comments from nudist associations that plan to operate nudist youth camps in Texas during the 2004 camping season.

The following comments were received concerning the proposed new rule. Following each comment is the department's response and any resulting change(s).

Comment: One commenter recommended extending the rule to camp staffers and suggested more direct language for addressing nudity at youth camps.

Response: The department agreed and included the necessary language involving camp staffers.

Comment: One commenter recommended extending the rule to cover nudity when receiving medical attention.

Response: The department agreed and included the necessary language involving medical attention.

The commenters were individuals representing the Camping Association for Mutual Progress and Camp John Marc, a youth camp for children with special medical needs. Both commenters were in favor of the new rule.

The new rule is adopted under the Health and Safety Code, §141.009, which provides the Texas Board of Health (board) with the authority to adopt rules to establish health and safety standards for youth camps; and the Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§265.26. Nudity Prohibited.

A youth camp may not allow campers or staff to be nude, except when bathing, showering, changing clothing or receiving medical care.

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 295. OCCUPATIONAL HEALTH

SUBCHAPTER D. OCCUPATIONAL HEALTH RULES AND GUIDELINES

The Texas Department of Health (department) adopts the repeal of §§295.101-295.109, concerning occupational health rules and guidelines, and new §295.101, concerning recommended allowable concentrations of toxic gases that are being made available to the public. The repeal of §§295.101-295.109 and new §295.101 are adopted without changes to the proposed text as published in the August 22, 2003, issue of the *Texas Register* (28 TexReg 6699), and the sections will not be republished.

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 295.101 has been reviewed and the department has determined that reasons for adopting the section continue to exist in that a rule on this subject is needed; however, §295.101 needed revisions as described in this preamble and is adopted as a new section under an amended subchapter heading. Sections 295.102-295.109 have been reviewed and the department has determined that the reasons for adopting the sections as rules no longer continue to exist.

A notice of intention to review for §§295.101-295.109 was published in the January 5, 2001, issue of the *Texas Register* (26 TexReg 245) for the state agency review of rules in accordance with Government Code, §2001.039. No comments were received by the department on these sections.

The repeal of existing §295.101 and new §295.101 are adopted in order to clarify the change in purpose of the section, remove obsolete exposure limits for hazardous substances, and provide recommended allowable concentrations of toxic gases. Sections 295.102-295.109 are repealed because the sections were intended by the Legislature to serve only as guidance standards, and publication of such information in rules limits the department's ability to provide the most current recommended occupational health standards using the most cost effective means. Guidance standards and other occupational safety and health information will now be available to the public via the program's website or by contacting the program at the address and telephone number provided in new §295.101(d).

The new title for Subchapter D, "Occupational Health Guidelines," clarifies that sections under this subchapter serve as occupational health guidelines, rather than enforceable occupational standards for places of employment. New §295.101(a) specifies that the information in the section is being provided in order to meet the requirement specified in the Health and Safety Code (HSC), §341.016(c)(1), for the department to provide the public with information on allowable concentrations of toxic gases. This subsection also clarifies that the department's authority to issue occupational standards is limited by the language in the Health and Safety Code, §341.016(c)(2), and the fact that since passage of HSC, §341.016 in 1945, the U.S. Occupational Safety and Health Administration (OSHA) has been given preemptive federal jurisdiction over occupational safety and health matters in Texas industrial establishments, i.e., in the private sector. Therefore, the information provided in the section is being provided as public information, rather than enforceable standards. New §295.101(b) provides information on how the department derived the List of Toxic Gases and Recommended Allowable Concentrations. Section 295.101(b) clarifies that the List of Toxic Gases includes only those gases

that meet the OSHA Hazard Communication Standard's (29 Code of Federal Regulations, §1910.1200, Appendix A) definitions of "toxic" or "highly toxic" by inhalation. New §295.101(b) also clarifies that the toxic gases are identified by both chemical name and Chemical Abstract Service (CAS) Number and the Recommended Allowable Concentrations (RAC) for each gas was derived from the OSHA Permissible Exposure Limit for that substance, provided in both parts per million (ppm) and milligrams per cubic meter (mg/M^3) of air, as appropriate. New §295.101(c) provides the List of Toxic Gases and RACs. New §295.101(d) provides a program mailing address and telephone number in order to ensure public access to the program's information.

No comments were received on the proposal during the comment period.

25 TAC §§295.101 - 295.109

The repeals are adopted under the Health and Safety Code, §341.002, which provides the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapter 341; §341.016(c)(1), which requires the department to make available to the state's citizens information concerning allowable concentrations of toxic gases; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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25 TAC §295.101

The new section is adopted under the Health and Safety Code, §341.002, which provides the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapter 341; §341.016(c)(1), which requires the department to make available to the state's citizens information concerning allowable concentrations of toxic gases; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of the existing rules being repealed and this new rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. INDUSTRIAL HOMEWORK STANDARDS

25 TAC §§295.121 - 295.126

The Texas Department of Health (department) adopts the repeal of existing §§295.121-295.126, concerning industrial homework standards. Sections 295.121-295.126 are adopted without changes to the proposed text as published in the August 22, 2003, issue of the *Texas Register* (28 TexReg 6701), and will not be republished.

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 295.121-295.126 have been reviewed, and the department has determined that reasons for adopting the sections no longer continue to exist.

A notice of intention to review for §§295.121-295.126 was published in the January 5, 2001, issue of the *Texas Register* (26 TexReg 245) for the state agency review of rules in accordance with Government Code, §2001.039. No comments were received due to publication of this notice.

The repeal of §§295.121-295.126 removes unnecessary language and deletes an obsolete reference to a program created in 1937, when industrial homeworkers were commonly used to manufacture articles for employers. The existing rules contained language that is redundant with language in the Health and Safety Code (HSC), Chapter 143, the Industrial Homework Act, and the repeal removes unnecessary rules.

No comments were received on the proposal during the comment period.

The repeals are adopted under the Health and Safety Code (HSC), §143.010, which provides the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapter 143; and HSC, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

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CHAPTER 295. OCCUPATIONAL HEALTH

The Texas Department of Health (department) adopts the repeal of existing §§295.141-295.148, concerning standards for face and eye protection in public schools, and new §§295.141-295.143, concerning guidelines for selection and use of face and eye protection in public schools. The repeal of §§295.141-295.148 and new §§295.141-295.143 are adopted without changes to the proposed text as published in the August 22, 2003, issue of the *Texas Register* (28 TexReg 6702), and the sections will not be republished.

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 295.141-295.148 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that guidelines on this subject are needed. However, existing §§295.141-295.148 needed extensive revisions, as described in this preamble, and were repealed and replaced by new §§295.141-295.143, which are adopted under an amended subchapter heading.

A notice of intention to review for §§295.141-295.148 was published in the January 5, 2001, issue of the *Texas Register* (26 TexReg 245) for the state agency review of rules in accordance with Government Code, §2001.039. No comments were received due to publication of this notice.

Existing §§295.141-295.148 were repealed in order to clarify the change in applicability of the sections, remove obsolete standards and guidelines for face and eye protection, remove manufacturing and design standards that are not applicable to the purchasers of face and eye protection equipment, and facilitate adoption by reference of current and amended federal standards as guidelines for selection and use of face and eye protection.

The amended title for Subchapter F, "Guidelines for Selection and Use of Face and Eye Protection in Public Schools," clarifies that the sections under this subchapter are intended to serve as recommended guidelines for performing hazard assessments and making choices regarding the appropriate types of face and eye protection needed for certain activities in public schools, rather than serving as enforceable standards for the design and manufacture of face and eye protective equipment. New §295.141 clarifies that the rules are issued as health protection guidelines for selection and use of face and eye protection in public schools under the Health and Safety Code, §341.002(2), and are applicable to employees, students, and visitors who participate in certain educational activities and programs that pose a high risk for face or eye injuries. New §295.142 adopts by reference, as guidelines only, the standards for selection and use of eye and face personal protective equipment established by the U.S. Occupational Safety and Health Administration (OSHA), and adopts as a guideline, as amended, an OSHA reference document that assists employers in selecting eye and face protection based on workplace hazard assessments. New §295.143 provides a program mailing address and telephone number in order to ensure public access to the referenced documents and other program information.

No comments were received on the proposal during the comment period.

SUBCHAPTER F. STANDARDS FOR FACE AND EYE PROTECTION IN PUBLIC SCHOOLS

25 TAC §§295.141 - 295.148

The repeals are adopted under the Health and Safety Code, §341.002(2), which provides the Texas Board of Health (board) with the authority to establish standards and procedures for health protection measures; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 16, 2004.

TRD-200400355
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: February 5, 2004
Proposal publication date: August 22, 2003
For further information, please call: (512) 458-7236

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SUBCHAPTER F. GUIDELINES FOR SELECTION AND USE OF FACE AND EYE PROTECTION IN PUBLIC SCHOOLS

25 TAC §§295.141 - 295.143

The new rules are adopted under the Health and Safety Code, §341.002(2), which provides the Texas Board of Health (board) with the authority to establish standards and procedures for health protection measures; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The review of these rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 415. PROVIDER CLINICAL RESPONSIBILITIES

SUBCHAPTER G. DETERMINATION OF MANIFEST DANGEROUSNESS

25 TAC §415.305

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts amendments to §415.305 of Chapter 415, Subchapter G, concerning determination of manifest dangerousness without changes to the proposed text as published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10079).

Revisions to the rules in 2002 resulted in an inadvertent change to a requirement for the TDMHMR Review Board (i.e., a unanimous vote in order to determine a person manifestly dangerous). In the previous version of the rules, a unanimous vote by facility review board members was required in order for a person to be determined manifestly dangerous and a unanimous vote by the TDMHMR Review Board members was required in order for a person to be determined *not* manifestly dangerous. In an effort to combine the procedures for facility review boards and the TDMHMR Review Board, the type of unanimous vote for facility review boards was also required of the TDMHMR Review Board. The amendment changes the type of unanimous vote for the TDMHMR Review Board to that which was required in the previous version of the rules.

No comment on the proposal was received.

This section is adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and the Texas Code of Criminal Procedure, Articles 46.02 and 46.03, which require the TDMHMR commissioner to appoint a review board to determine whether a person committed to the maximum security unit is manifestly dangerous.

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 January 15, 2004.

TRD-200400254
Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: February 4, 2004
Proposal publication date: November 14, 2003
For further information, please call: (512) 206-4516

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CHAPTER 417. AGENCY AND FACILITY RESPONSIBILITIES

SUBCHAPTER K. ABUSE, NEGLECT, AND EXPLOITATION IN TDMHMR FACILITIES

25 TAC §417.504

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts amendments to §417.504 of Chapter 417, Subchapter K, concerning abuse, neglect, and exploitation in TDMHMR facilities, with changes to the proposed text as published in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8804).

The amendments redefine the types of allegations accepted for investigation by the Texas Department of Protective and Regulatory Services (TDPRS). TDPRS has adopted similar amendments in the December 19, 2003, issue of the *Texas Register* to initiate a workload reduction in response to a 25% reduction in funding for investigations in TDMHMR facilities by the 78th Legislature.

The definition of "verbal/emotional abuse" in §417.504(b)(1)(C) has been modified to clarify that the definition is met is the act or communication is of such a serious nature that a reasonable person would consider it harmful or causing distress.

Written comments on the proposal were received from the Parent Association for the Retarded of Texas (PART), Austin; Advocacy Incorporated, Austin; Texas Federation of Families for Children's Mental Health, Austin; and a parent of a state school resident, Garland.

Regarding the definition of "verbal/emotional abuse" in §417.504(b)(1)(C), two commenters were incredulous that if a person served were not capable of showing observable distress at being verbally or emotionally abused, then employees and others could curse, vilify, or degrade him or threaten him with physical or emotional harm. The commenters stated that "this is unbelievable that anyone with any compassion or common sense would think these actions are okay" if persons with mental retardation cannot show their pain. The commenters noted that the majority of persons served in state mental retardation facilities function in the severe range (one-year to three-year-old level) or profound range (under one-year-old level) and asked why anyone would want to give these individuals less protection. TDMHMR responds that it has revised the language in the definition to reflect a change made by TDPRS, who has statutory authority to define abuse. TDPRS has revised its definition in response to a similar comment and, accordingly, TDMHMR has revised related provisions within this rule. TDMHMR assures the commenters that verbal and emotional mistreatment of a person served is strictly prohibited and appropriate disciplinary action will be taken if TDMHMR determines that an employee has verbally or emotionally mistreated a person served. TDMHMR remains committed to providing care that respects the dignity and well being of persons served in its facilities.

Two commenters asked why the example language in §417.504(c) was being deleted. TDMHMR responds that the language was proposed as deleted so TDMHMR rules would not be inconsistent with TDPRS rules. TDPRS proposed two additional examples of general complaints that would not be investigated under its rules and TDMHMR chose not to reiterate all TDPRS's examples in its rules.

One commenter stated that the proposed rule amendment "provides excellent clarification of verbal/emotional abuse, and our organization supports its change." TDMHMR responds that it appreciates the commenter's support.

Another commenter stated that the proposed changes fundamentally alter the definition of verbal/emotional abuse to eliminate language that is pro-active and preventative and could serve as a deterrent to other potential perpetrators. The commenter expressed concern that "observable distress or harm" will be very difficult to operationalize and is a subjective determination. The commenter stated that "if these changes are adopted, we may experience an increase in allegations since the message that will be perceived is that certain types of allegations will not be investigated by PRS and therefore are not as serious." The commenter respectfully encouraged TDMHMR to enter into a dialogue with TDPRS to ensure a process is developed to transfer those allegations to TDMHMR with a certain amount of assurance that TDMHMR will address them, incorporate them into the data collection system and provide feedback to TDPRS on how the issue was addressed. The commenter indicated that her comments were supported by "Federation of Families, Mental Health Association in Texas and Texas Mental Health Consumers." TDMHMR responds that it has revised the language in the definition to reflect a change made by TDPRS, who has statutory authority to define abuse. TDPRS has revised its definition in response to a similar comment and, accordingly, TDMHMR has revised related provisions within this rule. TDMHMR remains committed to providing care that respects the dignity and well being of persons served in its facilities. This will include providing effective leadership to our employees and, when needed, taking appropriate disciplinary action. Regarding the development of a process to transfer to TDMHMR those allegations that won't be investigated by TDPRS, TDMHMR responds that TDPRS will refer those allegations (i.e., complaints) to the head of the facility who, as required by §417.504(c)(4), ensures the complaint is investigated administratively. Regarding assurances that TDMHMR will address the allegations, incorporate them into the data collection system, and provide feedback to TDPRS on how the issue was addressed, TDMHMR responds that the allegations will be investigated administratively as a general complaint as provided in §417.504(c)(4). TDMHMR notes that general complaint investigations are incorporated into facilities' data collection systems, but feedback is not provided to TDPRS.

The rule amendments are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Human Resources Code, Chapter 48, which requires the reporting and investigations of abuse, neglect, and exploitation of elderly and disabled persons; §48.255, which requires TDMHMR and TDPRS to develop joint rules to facilitate investigations in state mental health and mental retardation facilities; the Texas Family Code, Chapter 261, which requires the reporting and investigations of abuse or neglect of a child receiving services in a facility operated by TDMHMR; and §261.404, which requires TDMHMR and the Texas Department of Protective and Regulatory Services (TDPRS) to develop joint rules to facilitate investigations of a child receiving services in a facility operated by TDMHMR.

§417.504. Prohibition and Definitions of Abuse, Neglect, and Exploitation.

(a) Abuse, neglect, and exploitation of any person served is prohibited.

(b) Consistent with Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs), the terms "abuse," "neglect," and "exploitation" are defined as follows when the alleged perpetrator is an employee, agent, contractor, or is unknown.

(1) Abuse is:

(A) physical abuse, which is:

(i) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, which caused or may have caused physical injury or death to a person served;

(ii) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to a person served; or

(iii) the use of chemical or bodily restraints on a person served not in compliance with federal and state laws and regulations, including:

(I) Chapter 405, Subchapter F of this title (concerning Voluntary and Involuntary Behavioral Interventions in Mental Health Programs); and

(II) Chapter 405, Subchapter H of this title (concerning Behavior Management - Facilities Serving Persons with Mental Retardation);

(B) sexual abuse, which is any sexual activity involving an employee, agent, or contractor and a person served, including but not limited to:

(i) kissing a person served with sexual intent;

(ii) hugging a person served with sexual intent;

(iii) stroking a person served with sexual intent;

(iv) fondling a person served with sexual intent;

(v) engaging in with a person served:

(I) sexual conduct as defined in the Texas Penal Code, §43.01; or

(II) any activity that is obscene as defined in the Texas Penal Code, §43.21;

(vi) requesting, soliciting, or compelling a person served to engage in:

(I) sexual conduct as defined in the Texas Penal Code, §43.01; or

(II) any activity that is obscene as defined in the Texas Penal Code, §43.21;

(vii) in the presence of a person served:

(I) engaging in or displaying any activity that is obscene, as defined in the Texas Penal Code §43.21; or

(II) requesting, soliciting, or compelling another person to engage in any activity that is obscene, as defined in the Texas Penal Code §43.21;

(viii) committing sexual exploitation, as defined in the Texas Civil Practice and Remedies Code, §81.001, against a person served. A copy of the Texas Civil Practice and Remedies Code, §81.001, is referenced as Exhibit A in §417.516 of this title (relating to Exhibits);

(ix) committing sexual assault as defined in the Texas Penal Code §22.011, against a person served;

(x) committing aggravated sexual assault as defined in the Texas Penal Code, §22.021, against a person served; and

(xi) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, videotaping, or depicting of

a person served if the employee, agent, or contractor knew or should have known that the resulting photograph, film, videotape, or depiction of the person served is obscene as defined in the Texas Penal Code, §43.21, or is pornographic; and

(C) verbal/emotional abuse, which is any act or use of verbal or other communication, including gestures, to curse, vilify, or degrade a person served or threaten a person served with physical or emotional harm, that results in observable distress or harm to the person served or be of such a serious nature that a reasonable person would consider it harmful or causing distress.

(2) Neglect is a negligent act or omission by any individual responsible for providing services to a person served, which caused or may have caused physical or emotional injury or death to a person served or which placed a person served at risk of physical or emotional injury or death. Neglect includes, but is not limited to, the failure to:

(A) establish or carry out an appropriate individual program plan or treatment plan for a person served if such failure results in a specific incident or allegation involving a person served;

(B) provide adequate nutrition, clothing, or health care to a specific person served; or

(C) provide a safe environment for a specific person served, including the failure to maintain adequate numbers of appropriately trained staff if such failure results in a specific incident or allegation involving a person served.

(3) Exploitation is the illegal or improper act or process of using a person served or the resources of a person served for monetary or personal benefit, profit, or gain.

(c) Abuse, neglect, or exploitation does not include:

(1) the proper use of restraints and seclusion, including PMAB, and the approved application of behavior modification techniques as described in:

(A) Chapter 405, Subchapter F of this title, relating to Voluntary and Involuntary Behavioral Interventions in Mental Health Programs;

(B) Chapter 404, Subchapter E of this title, relating to Rights of Persons Receiving Mental Health Services; and

(C) Chapter 405, Subchapter H of this title, relating to Behavior Management -- Facilities Serving Persons With Mental Retardation;

(2) other actions taken in accordance with TDMHMR rules;

(3) such actions as an employee/agent/ contractor may reasonably believe to be immediately necessary to avoid imminent harm to self, persons served, or other individuals if such actions are limited only to those actions reasonably believed to be necessary under the existing circumstances. Such actions do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, including PMAB; or

(4) general complaints (e.g., regarding rights violations; theft of property; the daily administrative operations of a facility). (Within 24 hours of receipt of such a complaint, the APS investigator refers the complaint to the head of the facility using the Adult Protective Services Referral Form, who ensures the complaint is investigated administratively by the head of the facility, the facility rights officer, or other appropriate parties.)

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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Rodolfo Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER T. SUBMISSION OF CLEAN CLAIMS

28 TAC §21.2802, §21.2803

The Commissioner of Insurance adopts amendments to §21.2802 and §21.2803, concerning required data elements for non-electronic clean claims submitted to health maintenance organizations (HMOs) by dental providers. The amendments are adopted with changes to the proposed text as published in the October 31, 2003, issue of the *Texas Register* (28 TexReg 9396).

The adopted amendments are the result of Senate Bill (SB) 418, 78th Regular Session, which contained numerous provisions regarding the prompt payment of claims by HMOs, as well as preferred provider carriers. Among other things, SB 418 added new Insurance Code §843.336(d) concerning the adoption of required data fields on HMO claim forms that must be completed by a physician or provider in order for a claim to be considered clean. The purpose of this adoption is to implement those provisions, as described more fully herein. Pursuant to Insurance Code §843.336(d), on July 4, 2003, the department proposed rules implementing major portions of SB 418, including amendments to §21.2803 that listed required elements for non-electronic clean claims. Comments the department received on the proposed rules, as well as discussions with the Technical Advisory Committee on Claims Processing, indicated, among other things, that those rules did not reflect dental-specific requirements for clean claims submitted to HMOs. As a result, the department committed to work with interested parties to develop required data elements necessary to accommodate dental claims that are subject to SB 418, and this adoption is meant to achieve that purpose. The adoption includes changes to the amendments as proposed. In response to a comment, the department removed the phrase "if shown on the patient's identification card" from the clean claim element at §21.2803(c)(6). As a result, clean claims will require sufficient identifying information relating to a subscriber that is not the patient, but will not require information not readily available to the patient unless otherwise included on the patient's identification card by the HMO. The adoption also includes other minor changes to §21.2802 and §21.2803 to reletter and change references throughout the section to reflect the addition of the new subsection (c) and the inclusion of dental-specific elements.

Adopted §21.2802(5) and (9), and §21.2803(g) reflect changes in references to subsections of §21.2803, which are being relettered. The adopted amendment adds new subsection (c) to §21.2803 which lists the elements of a clean claim that must be included on a claim form submitted by a dental provider to an HMO. As previously explained in this adoption order, the proposal does not prescribe a claim form or list the fields on which the information must be provided. The department has referenced commonly-used American Dental Association claim forms, specifically the ADA-J515 and the ADA-J512. Subsection (a) of §21.2803 adds language reflecting the addition of adopted new subsection (c), and reletters existing §21.2803(c)-(g). In addition, references to §21.2803(c) in existing §21.2803(b) have been changed to §21.2803(d) to reflect addition of new subsection (c) and subsequent relettering of the subsections.

Comment: A commenter requests clarification that the reference in these rules to the ASC X12N 837 format (§21.2802(5)(B) and §21.2803(f)) includes the dental-specific ASC X12N 837D format.

Agency Response: The department clarifies that the references within the rules to the ASC X12N 837 format include the professional, institutional and dental claim formats.

Comment: A commenter requests removal of the phrase "if shown on the patient's ID card" from §21.2803(c)(10). The commenter suggests that this information is critical in claims processing and the absence of this information from a claim would substantially delay or halt claims processing. The commenter further indicates that an HMO's attempts to tie a patient to a subscriber could create a violation of privacy laws if the attempt proves to be incorrect. The commenter also notes that not requiring this information is inconsistent with medical claims in subsection (b) of §21.2803 and HIPAA Administrative Simplification requirements.

Agency Response: The department declines to make the requested change, but has removed the phrase "if shown on the patient's identification card" from the element at §21.2803(c)(6). As a result, carriers will be given sufficient information to tie a patient to a subscriber. A carrier will always be furnished with information that is commonly known to a patient: the name, gender and address of the subscriber. This should allow a carrier to access information to tie the patient to the subscriber. If a carrier wishes to have further information that is not commonly known to a patient, such as the subscriber's identification number or group/plan number, the carrier may include this information on the patient's identification card and guarantee that this information will be available on clean claims.

Comment: A commenter expresses support for the elements at §21.2803(c)(35) and (36) and specifically opposes any changes to these requirements.

Agency Response: The department is adopting these elements as proposed.

For With Changes: National Association of Dental Plans.

The amendments are adopted under the Insurance Code §36.001 and §843.336(d). Section 843.336(d) permits the commissioner to adopt rules that specify the information that must be entered into the appropriate fields on the applicable claim form for a claim to be a clean claim. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.2802. Definitions.

The following words and terms when used in this subchapter shall have the following meanings:

(1) Audit--A procedure authorized and described in §21.2809 of this title (relating to Audit Procedures) under which an HMO or preferred provider carrier may investigate a claim beyond the statutory claims payment period without incurring penalties under §21.2815 of this title (relating to Failure to Meet the Statutory Claims Payment Period).

(2) Billed charges--The charges for medical care or health care services included on a claim submitted by a physician or provider. For purposes of this subchapter, billed charges must comply with all other applicable requirements of law, including Texas Health and Safety Code §311.0025, Texas Occupations Code §105.002, and Texas Insurance Code Art. 21.79F.

(3) CMS--The Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services.

(4) Catastrophic Event--An event, including acts of God, civil or military authority, acts of public enemy, war, accidents, fires, explosions, earthquake, windstorm, flood or organized labor stoppages, that cannot reasonably be controlled or avoided and that causes an interruption in the claims submission or processing activities of an entity for more than two consecutive business days.

(5) Clean claim--

(A) For non-electronic claims, a claim submitted by a physician or provider for medical care or health care services rendered to an enrollee under a health care plan or to an insured under a health insurance policy that includes:

(i) the required data elements set forth in §21.2803(b) or (c) of this title (relating to Elements of a Clean Claim); and

(ii) if applicable, the amount paid by the primary plan or other valid coverage pursuant to §21.2803(d) of this title (relating to Elements of a Clean Claim);

(B) For electronic claims, a claim submitted by a physician or provider for medical care or health care services rendered to an enrollee under a health care plan or to an insured under a health insurance policy using the ASC X12N 837 format and in compliance with all applicable federal laws related to electronic health care claims, including applicable implementation guides, companion guides and trading partner agreements.

(6) Condition code--The code utilized by CMS to identify conditions that may affect processing of the claim.

(7) Contracted rate--Fee or reimbursement amount for a preferred provider's services, treatments, or supplies as established by agreement between the preferred provider and the HMO or preferred provider carrier.

(8) Corrected Claim--A claim containing clarifying or additional information necessary to correct a previously submitted claim.

(9) Deficient claim--A submitted claim that does not comply with the requirements of §21.2803(b), (c) or (e) of this title.

(10) Diagnosis code--Numeric or alphanumeric codes from the International Classification of Diseases (ICD-9-CM), Diagnostic and Statistical Manual (DSM-IV), or their successors, valid at the time of service.

(11) Duplicate Claim--Any claim submitted by a physician or provider for the same health care service provided to a particular individual on a particular date of service that was included in a previously submitted claim. The term does not include corrected claims, or claims submitted by a physician or provider at the request of the HMO or preferred provider carrier.

(12) HMO--A health maintenance organization as defined by Insurance Code §843.002(14).

(13) HMO delivery network--As defined by Insurance Code §843.002(15).

(14) Institutional provider--An institution providing health care services, including but not limited to hospitals, other licensed inpatient centers, ambulatory surgical centers, skilled nursing centers and residential treatment centers.

(15) Occurrence span code--The code utilized by CMS to define a specific event relating to the billing period.

(16) Patient control number--A unique alphanumeric identifier assigned by the institutional provider to facilitate retrieval of individual financial records and posting of payment.

(17) Patient-status-at-discharge code--The code utilized by CMS to indicate the patient's status at time of discharge or billing.

(18) Physician--Anyone licensed to practice medicine in this state.

(19) Place of service code--The codes utilized by CMS that identify the place at which the service was rendered.

(20) Preferred provider--

(A) with regard to a preferred provider carrier, a preferred provider as defined by Insurance Code Article 3.70-3C, §1(10) (Preferred Provider Benefit Plans) or Article 3.70-3C, §1(1) (Use of Advanced Practice Nurses and Physician Assistants by Preferred Provider Plans).

(B) with regard to an HMO,

(i) a physician, as defined by Insurance Code §843.002(22), who is a member of that HMO's delivery network; or

(ii) a provider, as defined by Insurance Code §843.002(24), who is a member of that HMO's delivery network.

(21) Preferred provider carrier--An insurer that issues a preferred provider benefit plan as provided by Insurance Code Article 3.70-3C, Section 2 (Preferred Provider Benefit Plans).

(22) Primary plan--As defined in §3.3506 of this title (relating to Use of the Terms "Plan," "Primary Plan," "Secondary Plan," and "This Plan" in Policies, Certificates and Contracts).

(23) Procedure code--Any alphanumeric code representing a service or treatment that is part of a medical code set that is adopted by CMS as required by federal statute and valid at the time of service. In the absence of an existing federal code, and for non-electronic claims only, this definition may also include local codes developed specifically by Medicaid, Medicare, an HMO, or a preferred provider carrier to describe a specific service or procedure.

(24) Provider--any practitioner, institutional provider, or other person or organization that furnishes health care services and that is licensed or otherwise authorized to practice in this state, other than a physician.

(25) Revenue code--The code assigned by CMS to each cost center for which a separate charge is billed.

(26) Secondary plan--As defined in §3.3506 of this title.

(27) Source of admission code--The code utilized by CMS to indicate the source of an inpatient admission.

(28) Statutory claims payment period--

(A) the 45-calendar-day period in which an HMO or preferred provider carrier shall make claim payment or denial, in whole or in part, after receipt of a non-electronic clean claim pursuant to Insurance Code Article 3.70-3C, §3A (Preferred Provider Benefit Plans) and Chapter 843;

(B) the 30-calendar-day period in which an HMO or preferred provider carrier shall make claim payment or denial, in whole or in part, after receipt of an electronically submitted clean claim pursuant to Insurance Code Article 3.70-3C, §3A (Preferred Provider Benefit Plans) and Chapter 843; or

(C) the 21-calendar-day period in which an HMO or preferred provider carrier shall make claim payment after affirmative adjudication of an electronically submitted clean claim for a prescription benefit pursuant to Insurance Code Article 3.70-3C, §3A(f) (Preferred Provider Benefit Plans) and §843.339, and §21.2814 of this title (relating to Electronic Adjudication of Prescription Benefits).

(29) Subscriber--If individual coverage, the individual who is the contract holder and is responsible for payment of premiums to the HMO or preferred provider carrier; or if group coverage, the individual who is the certificate holder and whose employment or other membership status, except for family dependency, is the basis for eligibility for enrollment in a group health benefit plan issued by the HMO or the preferred provider carrier.

(30) Type of bill code--The three-digit alphanumeric code utilized by CMS to identify the type of facility, the type of care, and the sequence of the bill in a particular episode of care.

§21.2803. Elements of a Clean Claim.

(a) Filing a Clean Claim. A physician or provider submits a clean claim by providing to an HMO, preferred provider carrier, or any other entity designated for receipt of claims pursuant to §21.2811 of this title (related to Disclosure of Processing Procedures):

(1) for non-electronic claims, the required data elements specified in subsection (b) of this section, or for non-electronic dental claims filed with an HMO, the required data elements specified in subsection (c) of this section;

(2) for electronic claims and for electronic dental claims filed with an HMO, the required data elements specified in subsections (e) and (f) of this subsection; and

(3) if applicable, any coordination of benefits or non-duplication of benefits information pursuant to subsection (d) of this section.

(b) Required data elements. CMS has developed claim forms which provide much of the information needed to process claims. Two of these forms, HCFA 1500 and UB-82/HCFA, and their successor forms, have been identified by Insurance Code Article 21.52C as required for the submission of certain claims. The terms in paragraphs (1) and (2) of this subsection are based upon the terms used by CMS on successor forms CMS-1500 and UB-92 CMS-1450 claim forms. The parenthetical information following each term refers to the applicable CMS claim form, and the field number to which that term corresponds on the CMS claim form.

(1) Required data elements for physicians or noninstitutional providers. The data elements described in this paragraph are required as indicated and must be completed in accordance with the

special instructions applicable to the data element for clean claims filed by physicians and noninstitutional providers.

(A) subscriber's/patient's plan ID number (CMS 1500, field 1a) is required;

(B) patient's name (CMS 1500, field 2) is required;

(C) patient's date of birth and gender (CMS 1500, field 3) is required;

(D) subscriber's name (CMS 1500, field 4) is required, if shown on the patient's ID card;

(E) patient's address (street or P.O. Box, city, state, zip) (CMS 1500, field 5) is required;

(F) patient's relationship to subscriber (CMS 1500, field 6) is required;

(G) subscriber's address (street or P.O. Box, city, state, zip) (CMS 1500, field 7) is required, but physician or provider may enter "same" if the subscriber's address is the same as the patient's address required by subparagraph (E) of this paragraph;

(H) other insured's or enrollee's name (CMS 1500, field 9), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (d) of this section. If the required data element specified in paragraph (1)(Q) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(I) other insured's or enrollee's policy/group number (CMS 1500, field 9a), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (d) of this section. If the required data element specified in paragraph (1)(Q) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(J) other insured's or enrollee's date of birth (CMS 1500, field 9b), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (d) of this section. If the required data element specified in paragraph (1)(Q) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(K) other insured's or enrollee's plan name (employer, school, etc.) (CMS 1500, field 9c), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (d) of this section. If the required data element specified in paragraph (1)(Q) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element. If the field is required and the physician or provider is a facility based radiologist, pathologist or anesthesiologist with no direct patient contact, the physician or provider must either enter the information or enter NA (not available) if the information is unknown;

(L) other insured's or enrollee's HMO or insurer name (CMS 1500, field 9d), is required if patient is covered by more than one health benefit plan, generally in situations described in subsection (d) of this section. If the required data element specified in paragraph (1)(Q) of this subsection, "disclosure of any other health benefit plans," is answered "yes," this element is required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete this data element;

(M) whether patient's condition is related to employment, auto accident, or other accident (CMS 1500, field 10) is required, but facility based radiologists, pathologists, or anesthesiologists shall enter "N" if the answer is "No" or if the information is not available;

(N) if the claim is a duplicate claim, a "D" is required, if the claim is a corrected claim, a "C" is required (CMS 1500, field 10d);

(O) subscriber's policy number (CMS 1500, field 11) is required;

(P) HMO or insurance company name (CMS 1500, field 11c) is required;

(Q) disclosure of any other health benefit plans (CMS 1500, field 11d) is required;

(i) if respond "yes", then

(I) data elements specified in paragraph (1)(H)-(L) of this subsection are required unless the physician or provider submits with the claim documented proof to the HMO or preferred provider carrier that the physician or provider has made a good faith but unsuccessful attempt to obtain from the enrollee or insured any of the information needed to complete the data elements in paragraph (1)(H)-(L) of this subsection;

(II) the data element specified in paragraph (1)(II) of this subsection is required when submitting claims to secondary payor HMOs or preferred provider carriers;

(ii) if respond "no," the data elements specified in paragraph (1)(H)-(L) of this subsection are not required if the physician or provider has on file a document signed within the past 12 months by the patient or authorized person stating that there is no other health care coverage; although the submission of the signed document is not a required data element, a copy of the signed document shall be provided to the HMO or preferred provider carrier upon request.

(R) patient's or authorized person's signature or notation that the signature is on file with the physician or provider (CMS 1500, field 12) is required;

(S) subscriber's or authorized person's signature or notation that the signature is on file with the physician or provider (CMS 1500, field 13) is required;

(T) date of injury (HCFA 1500, field 14) is required, if due to an accident;

(U) name of referring physician or other source (CMS 1500, field 17) is required for primary care physicians, specialty physicians and hospitals; however, if there is no referral, the physician or provider shall enter "Self-referral" or "None";

(V) I.D. Number of referring physician (CMS 1500, field 17a) is required for primary care physicians, specialty physicians and hospitals; however, if there is no referral, the physician or provider shall enter "Self-referral" or "None";

(W) narrative description of procedure (CMS 1500, field 19) is required when a physician or provider uses an unlisted or not classified procedure code or an NDC code for drugs;

(X) for diagnosis codes or nature of illness or injury (CMS 1500, field 21), up to four diagnosis codes may be entered, but at least one is required (primary diagnosis must be entered first);

(Y) verification number (CMS 1500, field 23), is required if services have been verified pursuant to §19.1724 of this title (relating to Verification). If no verification has been provided, a prior authorization number (CMS 1500, field 23), is required when prior authorization is required and granted;

(Z) date(s) of service (CMS 1500, field 24A) is required;

(AA) place of service codes (CMS 1500, field 24B) is required;

(BB) procedure/modifier code (CMS 1500, field 24D) is required;

(CC) diagnosis code by specific service (CMS 1500, field 24E) is required with the first code linked to the applicable diagnosis code for that service in field 21;

(DD) charge for each listed service (CMS 1500, field 24F) is required;

(EE) number of days or units (CMS 1500, field 24G) is required;

(FF) physician's or provider's federal tax ID number (CMS 1500, field 25) is required;

(GG) whether assignment was accepted (CMS 1500, field 27), is required if assignment under Medicare has been accepted;

(HH) total charge (CMS 1500, field 28) is required;

(II) amount paid (CMS 1500, field 29), is required if an amount has been paid to the physician or provider submitting the claim by the patient or subscriber, or on behalf of the patient or subscriber or by a primary plan in accordance with paragraph (1)(P) of this subsection and as required by subsection (d) of this section;

(JJ) signature of physician or provider or notation that the signature is on file with the HMO or preferred provider carrier (CMS 1500, field 31) is required;

(KK) name and address of facility where services rendered (if other than home or office) (CMS 1500, field 32) is required; and

(LL) physician's or provider's billing name, address and telephone number is required, and the provider number (CMS 1500, field 33) is required if the HMO or preferred provider carrier required provider numbers and gave notice of that requirement to physicians and providers prior to June 17, 2003.

(2) Required data elements for institutional providers. The data elements described in this paragraph are required as indicated and must be completed in accordance with the special instructions applicable to the data elements for clean claims filed by institutional providers.

(A) provider's name, address and telephone number (UB-92, field 1) is required;

(B) patient control number (UB-92, field 3) is required;

(C) type of bill code (UB-92, field 4) is required and shall include a "7" in the third position if the claim is a corrected claim;

(D) provider's federal tax ID number (UB-92, field 5) is required;

(E) statement period (beginning and ending date of claim period) (UB-92, field 6) is required;

(F) covered days (UB-92, field 7), is required if Medicare is a primary or secondary payor;

(G) noncovered days (UB-92, field 8), is required if Medicare is a primary or secondary payor;

(H) coinsurance days (UB-92, field 9), is required if Medicare is a primary or secondary payor;

(I) lifetime reserve days (UB-92, field 10), is required if Medicare is a primary or secondary payor, and the patient was an inpatient;

(J) patient's name (UB-92, field 12) is required;

(K) patient's address (UB-92, field 13) is required;

(L) patient's date of birth (UB-92, field 14) is required;

(M) patient's gender (UB-92, field 15) is required;

(N) patient's marital status (UB-92, field 16) is required;

(O) date of admission (UB-92, field 17) is required for admissions, observation stays, and emergency room care;

(P) admission hour (UB-92, field 18) is required for admissions, observation stays, and emergency room care;

(Q) type of admission (e.g., emergency, urgent, elective, newborn) (UB-92, field 19) is required for admissions;

(R) source of admission code (UB-92, field 20) is required;

(S) discharge hour (UB-92, field 21), is required for admissions, outpatient surgeries or observation stays;

(T) patient-status-at-discharge code (UB-92, field 22) is required for admissions, observation stays, and emergency room care;

(U) condition codes (UB-92, fields 24-30), are required if the CMS UB-92 manual contains a condition code appropriate to the patient's condition;

(V) occurrence codes and dates (UB-92, fields 32-35), are required if the CMS UB-92 manual contains an occurrence code appropriate to the patient's condition;

(W) occurrence span code, from and through dates (UB-92, field 36), are required if the CMS UB-92 manual contains an occurrence span code appropriate to the patient's condition;

(X) value code and amounts (UB-92, fields 39-41) are required for inpatient admissions. If no value codes are applicable to the inpatient admission, the provider may enter value code 01;

(Y) revenue code (UB-92, field 42) is required;

(Z) revenue description (UB-92, field 43) is required;

(AA) HCPCS/Rates (UB-92, field 44), are required if Medicare is a primary or secondary payor;

(BB) Service date (UB-92, field 45) is required if the claim is for outpatient services;

(CC) units of service (UB-92, field 46) are required;

(DD) total charge (UB-92, field 47) is required;

(EE) HMO or preferred provider carrier name (UB-92, field 50) is required;

(FF) provider number (UB-92, field 51), is required if the HMO or preferred provider carrier, prior to June 17, 2003, required provider numbers and gave notice of that requirement to physicians and providers.

(GG) prior payments-payor and patient (UB-92, field 54), are required if payments have been made to the physician or provider by the patient or another payor or subscriber, on behalf of the patient or subscriber, or by a primary plan as required by subsection (d) of this section;

(HH) subscriber's name (UB-92, field 58), is required if shown on the patient's ID card;

(II) patient's relationship to subscriber (UB-92, field 59) is required;

(JJ) patient's/subscriber's certificate number, health claim number, ID number (UB-92, field 60), is required if shown on the patient's ID card;

(KK) insurance group number (UB-92, field 62), is required if a group number is shown on the patient's ID card;

(LL) verification number (UB-92, field 63), is required if services have been verified pursuant to §19.1724 of this title (relating to Verification). If no verification has been provided, treatment authorization codes (UB-92, field 63) are required when authorization is required and granted;

(MM) principal diagnosis code (UB-92, field 67) is required;

(NN) diagnoses codes other than principal diagnosis code (UB-92, fields 68-75), are required if there are diagnoses other than the principal diagnosis;

(OO) admitting diagnosis code (UB-92, field 76) is required;

(PP) procedure coding methods used (UB-92, field 79), is required if the CMS UB-92 manual indicates a procedural coding method appropriate to the patient's condition;

(QQ) principal procedure code (UB-92, field 80), is required if the patient has undergone an inpatient or outpatient surgical procedure;

(RR) other procedure codes (UB-92, field 81), are required as an extension of subparagraph (QQ) of this paragraph if additional surgical procedures were performed;

(SS) attending physician ID (UB-92, field 82) is required;

(TT) signature of provider representative, electronic signature or notation that the signature is on file with the HMO or preferred provider carrier (UB-92, field 85) is required; and

(UU) date bill submitted (UB-92, field 86) is required.

(c) Required data elements-dental claims. The data elements described in this subsection are required as indicated and must be completed or provided in accordance with the special instructions applicable to the data elements for non-electronic clean claims filed by dental providers with HMOs.

(1) Patient's name is required;

(2) Patient's address is required;

(3) Patient's date of birth is required;

(4) Patient's gender is required;

(5) Patient's relationship to subscriber is required;

(6) Subscriber's name is required, if shown on the patient's ID card;

(7) Subscriber's address is required, but provider may enter "same" if the subscriber's address is the same as the patient's address required by paragraph (2) of this subsection;

(8) Subscriber's date of birth is required, if shown on the patient's ID card;

(9) Subscriber's gender is required;

(10) Subscriber's identification number is required, if shown on the patient's ID card;

(11) Subscriber's plan/group number is required, if shown on the patient's ID card;

(12) HMO's name is required;

(13) HMO's address is required;

(14) Disclosure of any other plan providing dental benefits is required and shall include a "no" if the patient is not covered by another plan providing dental benefits. If the patient does have other coverage, the provider shall indicate "yes" and the elements in paragraphs (15)- (20) of this subsection are required unless the provider submits with the claim documented proof to the HMO that the provider has made a good faith but unsuccessful attempt to obtain from the enrollee any of the information needed to complete the data elements;

(15) Other insured's or enrollee's name is required in accordance with the response to and requirements of paragraph (14) of this subsection;

(16) Other insured's or enrollee's date of birth is required in accordance with the response to and requirements of the element in paragraph (15) of this subsection;

(17) Other insured's or enrollee's gender is required in accordance with the response to and requirements of the element in paragraph (15) of this subsection;

(18) Other insured's or enrollee's identification number is required in accordance with the response to and requirements of the element in paragraph (15) of this subsection;

(19) Patient's relationship to other insured or enrollee is required in accordance with the response to and requirements of the element in paragraph (15) of this subsection;

(20) Name of other HMO or insurer is required in accordance with the response to and requirements of the element in paragraph (15) of this subsection;

(21) Verification or preauthorization number is required, if a verification or preauthorization number was issued by an HMO to the provider;

(22) Date(s) of service(s) or procedure(s) is required;

(23) Area of oral cavity is required, if applicable;

(24) Tooth system is required, if applicable;

(25) Tooth number(s) or letter(s) are required, if applicable;

(26) Tooth surface is required, if applicable;

(27) Procedure code for each service is required;

(28) Description of procedure for each service is required, if applicable;

(29) Charge for each listed service is required;

(30) Total charge for the claim is required;

(31) Missing teeth information is required, if a prosthesis constitutes part of the claim. A provider that provides information for this element shall include the tooth number(s) or letter(s) of the missing teeth;

(32) Notification of whether the services were for orthodontic treatment is required. If the services were for orthodontic treatment, the elements in paragraphs (34) and (35) of this subsection are required;

(33) Date of orthodontic appliance placement is required, if applicable;

(34) Months of orthodontic treatment remaining is required, if applicable;

(35) Notification of placement of prosthesis is required, if applicable. If the services included placement of a prosthesis, the element in paragraph (36) of this subsection is required;

(36) Date of prior prosthesis placement is required, if applicable;

(37) Name of billing provider is required;

(38) Address of billing provider is required;

(39) Billing provider's provider identification number is required, if applicable;

(40) Billing provider's license number is required;

(41) Billing provider's social security number or federal tax identification number is required;

(42) Billing provider's telephone number is required; and

(43) Treating provider's name and license number are required if the treating provider is not the billing provider.

(d) Coordination of benefits or non-duplication of benefits. If a claim is submitted for covered services or benefits in which coordination of benefits pursuant to §§3.3501-3.3511 of this title (relating to Group Coordination of Benefits) and §11.511(1) of this title (relating to Optional Provisions) is necessary, the amount paid as a covered claim by the primary plan is a required element of a clean claim for purposes of the secondary plan's processing of the claim and CMS 1500, field 29 or UB-92, field 54 must be completed pursuant to subsection (b)(1)(II) and (b)(2)(GG) of this section. If a claim is submitted for covered services or benefits in which non-duplication of benefits pursuant to §3.3053 of this title (relating to Non-duplication of Benefits Provision) is an issue, the amounts paid as a covered claim by all other valid coverage is a required element of a clean claim and CMS 1500, field 29 or UB-92, field 54 must be completed pursuant to subsection (b)(1)(II) and (b)(2)(GG) of this section. If a claim is submitted for covered services or benefits and the policy contains a variable deductible provision as set forth in §3.3074(a)(4) of this title (relating to Minimum Standards for Major Medical Expense Coverage) the amount paid as a covered claim by all other health insurance coverages, except for amounts paid by individually underwritten and issued hospital confinement indemnity, specified disease, or limited benefit plans of coverage, is a required element of a clean claim and CMS 1500, field 29 or UB-92, field 54 must be completed pursuant to subsection (b)(1)(II) and (b)(2)(GG) of this section. Notwithstanding these requirements, an HMO or preferred provider carrier may not require a physician or provider to investigate coordination of other health benefit plan coverage.

(e) A physician or provider submits an electronic clean claim by submitting a claim using the applicable format that complies with all applicable federal laws related to electronic health care claims, including applicable implementation guides, companion guides and trading partner agreements.

(f) If a physician or provider submits an electronic clean claim that requires coordination of benefits pursuant to §§3.3501-3.3511 of this title (relating to Group Coordination of Benefits) or §11.511(1) of this title (relating to Optional Provisions), the HMO or preferred provider carrier processing the claim as a secondary payor shall rely on the primary payor information submitted on the claim by the physician or provider. The primary payor may submit primary payor information electronically to the secondary payor using the ASC X12N 837 format and in compliance with federal laws related to electronic health care claims, including applicable implementation guides, companion guides and trading partner agreements.

(g) Format of elements. The elements of a clean claim set forth in subsections (b), (c), (d), (e) and (f), if applicable, of this section must be complete, legible and accurate.

(h) Additional data elements or information. The submission of data elements or information on or with a claim form by a physician or provider in addition to those required for a clean claim under this section shall not render such claim deficient.

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 January 12, 2004.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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Proposal publication date: October 31, 2003
For further information, please call: (512) 463-6327

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28 TAC §21.2820

The Commissioner of Insurance adopts new §21.2820 concerning identification (ID) cards issued by insurers who issue preferred provider benefit plans and health maintenance organizations (HMOs) (hereinafter "carriers"). The section is adopted with changes to the proposed text as published in the October 31, 2003, issue of the *Texas Register* (28 TexReg 9398).

The new section is necessary to implement certain provisions of Senate Bill (SB) 418, 78th Regular Legislative Session, concerning the content of ID cards issued by carriers. Among other things, SB 418 added new Texas Insurance Code Art. 3.70-3C,

Sec. 11, and §843.209. These sections contain provisions concerning ID cards issued by carriers regulated under the Insurance Code and subject to the provisions of SB 418, that basically require carriers that issue ID cards to display certain information on the cards. In developing this rule, the department discussed the provisions with the Technical Advisory Committee on Claims Processing (TACCP) appointed by the commissioner of insurance pursuant to SB 418, and drafted the proposal after receiving comments from members of the TACCP.

Pursuant to the emergency adoption provisions of Senate Bill (SB) 418, 78th Regular Session, the department adopted §21.2820 on an emergency basis effective August 16, 2003, which was the date that certain provisions of SB 418 went into effect. The emergency section will be withdrawn at the time this adoption becomes effective.

In response to a comment, §21.2820(b)(2) was changed to eliminate the requirement that the ID card contain both a toll-free number and a statement or other indication that a preferred provider may use the number to obtain the enrollee's first date of eligibility. The adopted section's language conforms more closely to the language of the statute. In addition, a change was made to §21.2820(b)(3) for purposes of consistency, and the effective date was modified to accommodate the transition from the application of the emergency rule to the final adopted rule.

The adopted section requires carriers that are subject to the applicable subchapter and that issue ID cards to display the first date of coverage or, in the alternative, to give a toll-free number by which a physician or provider may obtain this information. Because these provisions only apply to carriers and health plans subject to SB 418, they also contemplate that such cards identify applicability of the statute. Therefore, the adopted section also requires that the letters "TDI" or "DOI" be prominently displayed on the front of the card or document. As noted in the proposal, because a slightly different emergency rule has been in effect since August 16, 2003 (requiring that ID cards contain a symbol consisting of a star containing the letters "TDI"), any plans that have already printed cards containing the symbol as required by the emergency rule will be deemed to be in compliance with this adopted rule.

Finally, the adoption states that the requirements of the section apply to any HMO evidence of coverage or preferred provider benefit plan issued or renewed on or after February 1, 2004. The department believes that the adoption implements the ID card provisions of SB 418 consistent with the law's intent that the cards be as uniform and useful as possible for enrollees, insureds, carriers, and physicians and providers. The emergency rule relating to identification cards in effect prior to this adoption functioned similarly to this adopted rule and applied to any HMO evidence of coverage or preferred provider benefit plan issued or renewed on or after February 1, 2004. As noted earlier, the emergency rule will be withdrawn at the time this adoption becomes effective. The adoption of this permanent rule does not relieve a carrier's obligation to comply with the emergency rule nor does the adoption provide a delay or break in a carrier's requirement to comply with the identification card requirements.

Comment: Two commenters requested that the proposed effective date of January 1, 2004, be delayed by either one or two months to give plans more time to comply. One commenter urged that the department retain the January 1 date, as many health plans begin or renew their plan year on that date, and a later compliance date would defer the issuance of compliant ID cards for up to 11 months for such plans.

Agency Response: Because January 1, 2004 was the date contained in emergency rules that went into effect on August 16, 2003, carriers have had several months' notice and opportunity to prepare for the changes. The effective date has been changed in this adopted rule from the date included in the proposal, but only to accommodate the transition from the application of the emergency rule to the final adopted rule. Due to the substantially similar requirements in the emergency and adopted rules, the department expects that identification cards relating to plans issued or renewed on or after January 1, 2004 pursuant to the provisions of the emergency rule will effectively be in compliance with the requirements of this rule. Identification cards for plans issued or renewed on and after February 1, 2004 must be in compliance with this rule.

Comment: A commenter disagrees with the rule's requirement that the front of ID cards contain the words "TDI" or "DOI." The carrier contends that this will be costly and will have no measurable impact on two of the most critical health care issues: improving the quality of health care and making coverage more affordable.

Agency Response: The department disagrees, as inclusion of information identifying regulated plans was a provision of SB 418. Nevertheless, the department has been sensitive to costs of implementation. As a result of discussions with the TACCP, the proposed rule eliminated the emergency rule's requirement of a symbol in order to make compliance as simple as possible. The proposed rule also stated that carriers that had already printed cards containing the symbol would be deemed to be in compliance with the adopted final rule.

Comment: A commenter complains that the proposed rules on elements of a dental claim (§21.2803) make the subscriber ID number (Social Security Number or unique number) a required element if included on the ID card, yet this rule does not require inclusion of that number.

Agency Response: The department disagrees that this rule should mandate inclusion of a subscriber ID number, as SB 418 does not contain such a requirement. However, carriers are free to include that number on the ID cards.

Comment: One commenter urged removing the requirement that the card contain both a toll-free number and a statement or other indication that a preferred provider may use the number to obtain the enrollee's first date of eligibility for benefits. The commenter claimed a statement would further clutter up the card, and said the rule should track the statutory language requiring that the card contain the first date on which the enrollee or insured became eligible for benefits under the plan or a toll-free number a physician or provider may use to obtain that date. Another commenter supported the rule as proposed, stating that general statements like "For customer service" or "For member information" would not be sufficiently explicit to meet the statutory requirement.

Agency Response: The department believes that the first commenter's suggested change more closely complies with the statute, and has changed this part of the rule accordingly. The department is mindful of the limited space on ID cards, and believes that a more abbreviated notation, such as "Member information" is sufficiently explanatory.

For: Texas Medical Association. For, with changes: PacifiCare of Texas and PacifiCare Life Assurance Company; UNICARE Life & Health Insurance Company; Humana, Inc.; National Association of Dental Plans.

The new section is adopted under the Texas Insurance Code Article 3.70-3C, Sec. 11, and §36.001 and §843.209. Article 3.70-3C, Sec. 11, and §843.209 contain provisions concerning ID cards issued by carriers regulated under the Insurance Code and subject to the provisions of SB 418. Section 36.001 of the Insurance Code provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.2820. Identification Cards.

(a) An identification card, or other similar document that includes information necessary to allow enrollees and insureds to access services or coverage under an HMO evidence of coverage or a preferred provider benefit plan, that is issued by an HMO or preferred provider carrier subject to this subchapter pursuant to §21.2801 of this title (relating to Scope) shall comply with the requirements of this section.

(b) An identification card or other similar document issued to enrollees or insureds shall include the following information:

(1) the name of the enrollee or insured;

(2) the first date on which the enrollee or insured became eligible for benefits under the plan or a toll-free number that a preferred provider may use to obtain such information; and

(3) the letters "TDI" or "DOI" prominently displayed on the front of the card or document.

(c) The requirements of this section apply to an HMO evidence of coverage or a preferred provider benefit plan issued or renewed on or after February 1, 2004.

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 January 12, 2004.

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28 TAC §21.2826

The Commissioner of Insurance adopts new §21.2826, concerning waiver of certain statutory provisions regarding prompt payment of claims as to Medicaid and Children's Health Insurance Program (CHIP) plans. The section is adopted without changes to the proposed text as published in the October 31, 2003, issue of the *Texas Register* (28 TexReg 9400) and will not be republished.

The new section is necessary to implement, in part, SB 418, which contained numerous provisions regarding the prompt payment of claims by health maintenance organizations (HMOs) and preferred provider carriers (hereinafter collectively "carriers"). Among other things, SB 418 added new Texas Insurance Code Article 21.30 concerning waiver of requirements for certain programs administered by the Health and Human Services Commission (HHSC). The purpose of this section is to implement this provision as requested by HHSC.

Pursuant to the emergency adoption provisions of Senate Bill (SB) 418, 78th Regular Session, the department adopted §21.2826 on an emergency basis effective August 16, 2003, which was the date that certain provisions of SB 418 went into effect. The emergency section will be withdrawn at the time this adoption becomes effective.

Article 21.30 provides that if the commissioner of insurance, in consultation with the HHSC commissioner, determines that any of the stated provisions of Texas Insurance Code Article 3.70-3C, Chapter 843, or Article 21.52Z will cause a negative fiscal impact to the state with respect to providing benefits or services under the Medicaid or CHIP programs, the insurance commissioner shall by rule waive application of those provisions. The HHSC commissioner has advised the commissioner of insurance that application of the provisions of SB 418 to Medicaid and CHIP plans would have a negative fiscal impact on the state and has requested a waiver of the statute and rules for those plans. Based on this, the commissioner has determined that there would be a negative fiscal impact on the state and has adopted §21.2826, which provides that the provisions of the statute and rules stated therein do not apply to Medicaid and CHIP plans provided by a carrier to persons enrolled in those programs.

Comment: A commenter is concerned with the application of a waiver to a for-profit HMO administering Texas Medicaid benefits. The commenter states that it has experienced claim payment delays and poor responses to inquiries from for-profit HMOs and the only incentive for these HMOs to pay claims promptly is the potential penalty of SB 418. The commenter states its belief that existing contracts between HHSC and for-profit HMOs supersede HB 610 and SB 418 and therefore no prompt payment language exists. Exempting for-profit HMOs from the provisions of SB 418, the commenter asserts, would greatly jeopardize the commenter's ability to continue to treat a segment of society in need of health care.

Agency Response: SB 418 provides that the commissioner "shall" waive application of the provisions of SB 418 if, after consultation with the HHSC commissioner, he determines the provisions of SB 418 would have a negative fiscal impact on the state with respect to the provision of benefits or services under Medicaid or CHIP. The HHSC commissioner indicated the bill's requirements would have a negative fiscal impact on the state with respect to the provision of those benefits and services. SB 418 does not exclude for-profit HMOs from application of the waiver. Therefore, as directed by statute, the commissioner is adopting the waiver provision in this rule that applies to all HMOs providing benefits and services under Medicaid and CHIP programs, including for-profit HMOs.

Against: Texas Health Care, P.L.L.C.

The new section is adopted under Texas Insurance Code Article 21.30 and §36.001. Article 21.30 requires the commissioner of insurance, in consultation with the HHSC commissioner, to determine whether certain provisions of SB 418 will have a negative fiscal impact on the state with respect to the provision of benefits or services under Medicaid or CHIP programs and, if so, to waive application of those provisions as to the Medicaid or CHIP plans. Section 36.001 of the Insurance Code provides that the commissioner of insurance may adopt any rules necessary and

appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

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 January 12, 2004.

TRD-200400185
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: February 1, 2004
Proposal publication date: October 31, 2003
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.112

The Texas Commission on Environmental Quality (commission) adopts the amendment to §116.112. Section 116.112 is adopted *with change* to the proposed text as published in the October 10, 2003 issue of the *Texas Register* (28 TexReg 8810).

The amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The amendment implements House Bill 555, 78th Legislature, 2003. House Bill 555 amended Texas Health and Safety Code, §382.056, to specify that, for any air permit application subject to §382.056, the measurement of distances to determine compliance with any location or distance limitation in Texas Health and Safety Code, Chapter 382 (the Texas Clean Air Act), shall be taken toward structures that are in use at the time the application is filed with the commission. The amendment also separates by subsection distances required by the Texas Clean Air Act and those required elsewhere.

The amendment also implements House Bill 1287, 78th Legislature, 2003. House Bill 1287 amended Texas Health and Safety Code, §382.065, to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of a building that is in use as a residence, school, or place of worship at the time the application for a permit to operate the facility is filed with the commission. House Bill 1287 also establishes a method of making the measurement for the distance limitation and exempts certain facilities from the distance limitation.

SECTION DISCUSSION

Adopted §116.112(a), relating to Distance Limitations, specifies that, for all facilities subject to the public notice requirements in Chapter 116, Subchapter B, Division 3, concerning Public Notification and Comment Procedures; 30 TAC Chapter 39, Subchapters A, D, H, or K, concerning Applicability and General Provisions, Public Notice of Air Quality Applications, Applicability and General Provisions, and Public Notice of Air Quality Applications; respectively; or 30 TAC Chapter 122, Subchapter D, concerning Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition; the measurement for any location or distance limitation requirement in Texas Health and Safety Code, Chapter 382, will be taken towards structures that are in use at the time the application is filed with the commission. The commission revised the section after proposal to ensure that the intent of the rule is clear: to apply the requirements for the measurement of distances only to those distance limitations required by the text of the statute and not to all distance limitations in air authorizations or regulations. In §116.112(a), the phrase "required by" was changed to "requirement in." The distance limitation requirements currently in this chapter include: a limitation for construction or modification of a facility within 3,000 feet of a school under Texas Health and Safety Code, §382.052; a 3,000-foot limitation for lead smelting plants under Texas Health and Safety Code, §382.053; a 440- yard limitation on qualifying for affected person status to request hearing for concrete plants authorized by permit-by-rule or standard permit under Texas Health and Safety Code, §382.058; and a 440-yard limitation for concrete crushing facilities under Texas Health and Safety Code, §382.065.

Existing §116.112(2), regarding distance limitations for hazardous waste management facilities, moves to a new subsection (c) to separate it from the distance requirements under the Texas Clean Air Act.

Adopted §116.112(c) deletes the language previously in §116.112(2)(A) - (F) and replaces it with a cross-reference to 30 TAC §335.204, concerning Unsuitable Site Characteristics, and 30 TAC §335.205, concerning Prohibition of Permit Issuance, where the applicable distance limitations are found, because the deleted language was duplicative of the provisions in §335.204 and §335.205.

Existing §116.112(3) moves to adopted §116.112(b)(2) and is reworded to prohibit the operation, but not the location, of a concrete crusher in close proximity to sensitive receptors. This change will allow the storage of concrete crushing equipment closer to populated areas. Paragraph (2) also specifies that the minimum distance limitation applies only to the residence, school, or place of worship that is in use at the time the permit application is filed with the commission. The exemption from the distance limitation for facilities authorized to operate at the site as of September 1, 2001 has been revised and moved to new subparagraph (B).

Adopted §116.112(b)(2)(A) specifies that the measurement for determination of compliance with the distance requirement shall be taken from the point on the concrete crushing facility that is nearest to the receptor to the point on the building in use as a

residence, school, or place of worship that is nearest the concrete crushing facility. Subparagraph (B) exempts those concrete crushing facilities authorized to operate at the site as of September 1, 2001 from the distance limitation. Subparagraph (C) exempts those facilities crushing concrete that is produced by the demolition of a structure, as long as those facilities: are located on the site of the demolition; operate on-site during one period of no more than 180 calendar days; crush material that is used primarily on-site; comply with applicable conditions stated in commission rules, including operating conditions; and are not located in a county with a population of 2.4 million or more, or in a county adjacent to a county with a population of 2.4 million or more. House Bill 1287 also restricts the exemption from the distance limitation and measurement requirements to facilities for which the commission determines that operation at the location will cause no adverse environmental or health effects. Compliance with this condition is determined during protectiveness review as part of permit development. Subparagraph (D) exempts buildings occupied or used solely by the owner of the facility or the owner of the property upon which the facility is located from the distance limitation and measurement requirements of this section.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule does not meet the definition of a "major environmental rule." 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 adopted rule modifies the existing rule to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of any residence, school, or place of worship in use at the time the application for a permit to operate the facility is filed with the commission, and exempts certain facilities from the distance limitation. The adopted rule also establishes methods of making the measurement for distance limitations relevant to concrete crushing facilities and to permit applications under Texas Health and Safety Code, Chapter 382, that are subject to notice and opportunity for hearing. The adopted rule does not impose any other restriction or control on any facility.

In addition, Texas Government Code, §2001.0225, only applies 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 is not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rule does not meet any of the four applicability requirements. Specifically, the adopted rule implements the requirements of Texas Health and Safety Code, §382.056(s) and §382.065.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule 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 the adopted rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The adopted rule implements changes to Texas Health and Safety Code, §382.056, specifically, the addition of subsection (s); and §382.065, which is substantially rewritten, and to which subsections (c) and (d) were added.

The commission further performed an assessment of the adopted rule and whether it constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of this adopted rule is to provide greater certainty for the regulated community in making siting and compliance decisions. The adopted rule substantially advances this purpose by providing for a method of making measurements to satisfy existing distance limitations requirements in Texas Health and Safety Code, Chapter 382, and specifying that such distance requirements are pertinent only to structures in use at the time the permit application is filed with the commission. The adopted rule also specifies a method for making measurements for the existing distance requirement for concrete crushing facilities, specifies some of the conditions under which operation of such facilities may occur, and details limited exemptions from this distance requirement. The adopted rule does not impose any other restriction or control on any facility.

Promulgation and enforcement of the adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rule is no more restrictive than existing rules, and it does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted rule does not operate to affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the adopted rule does not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rule is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and therefore, required that applicable goals and policies of the Texas Coastal Management Program were considered during the rulemaking process.

The commission's consistency determination for the adopted rule in accordance with 31 TAC §505.22 found that the adopted rulemaking is consistent with the applicable Texas Coastal Management Program goal to protect and preserve the quality and values of coastal natural resource areas (31 TAC §501.12(1)), and the policy which requires that the commission protect air quality in coastal areas (31 TAC §501.14(q)). The adopted rulemaking establishes that for all facilities subject to the public notice requirements in Chapter 116, Subchapter B, Division 3; TAC Chapter 39, Subchapters A, D, H, or K; or Chapter 122, Subchapter D, the measurement for any distance requirement will be taken towards structures that are in use at the time the application is filed with the commission. The adopted rulemaking also prohibits the operation, but not the location of a concrete crusher in close proximity to sensitive receptors.

The adopted rulemaking also specifies that the measurement for determination of compliance with the distance requirement shall be taken from the point on the concrete crushing facility that is nearest to the receptor to the point on the building in use as a residence, school, or place of worship that is nearest the concrete crushing facility. The adopted rulemaking also specifies that the minimum distance limitation applies only to the residence, school, or place of worship that is in use at the time the permit application is filed with the commission. The adopted rulemaking exempts from the distance limitation and measurement requirements those facilities crushing concrete produced by the demolition of a structure as long as those facilities: are located on the site of the demolition; operate on-site for one period of no more than 180 calendar days; crush material that is used primarily on-site; comply with applicable conditions stated in commission rules, including operating conditions; and are not located in a county with a population of 2.4 million or more, or in a county adjacent to a county with a population of 2.4 million or more. The adopted rulemaking also exempts buildings occupied or used solely by the owner of the property upon which the facility is located from the distance limitation and measurement requirements. The adopted rulemaking does not authorize any new air emissions. Therefore, the rulemaking is consistent with the Texas Coastal Management Program.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Because Chapter 116 contains applicable requirements under Chapter 122, Federal Operating Permits, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 116 requirements for each emission unit at their sites that is affected by the revisions to Chapter 116.

PUBLIC COMMENT

A public hearing on this proposal was held on October 29, 2003, but no members of the public appeared in order to participate. During the comment period, which closed on October 29, 2003, the commission received written comments from the EPA, the Houston Sierra Club (HSC), and Baker Botts, L.L.P. on behalf of Southern Crushed Concrete, Inc. (SCC). All of the commenters opposed specific parts of the proposal.

RESPONSE TO COMMENTS

The HSC commented that because Texas has no state zoning or land use regulations that the distance requirements in air authorizations are one of the few effective means of preventing nuisance conditions. HSC believes that the rule amendment that requires distances as specified by Texas Health and Safety Code, Chapter 382 to be measured to structures in use at the time of permit application will result in additional nuisance conditions.

The commission is not revising the rule in response to this comment. The commission disagrees that this rule amendment will result in additional nuisance conditions. This amendment does not exempt any facility from compliance with 30 TAC §101.4, Nuisance. The amendment will ensure that the affected facilities, upon meeting buffer distance requirements at the time the application is filed with the commission, will not be responsible for subsequent location choices made by surrounding landowners over which they have no control. Further, the language implements a specific statutory requirement in House Bill 555.

The HSC stated its opposition to the amendment that exempts temporary concrete crushers that recycle concrete from building demolition for use on site from the distance limitation for concrete crushers. It also suggested that a requirement that a concrete crushing facility not create an air pollution nuisance should be a condition of operation.

The commission is not revising the rule in response to this comment. House Bill 1287, 78th Legislature, 2003, modified the Texas Clean Air Act to exempt these temporary facilities from the distance limitation in Texas Health and Safety Code, 382.065.

The exemption from the minimum distance limitation for temporary concrete crushers will not apply in Harris County and counties adjacent to Harris County. In addition, this amendment does not exempt any facility from compliance with §101.4, which prohibits any facility from creating an air pollution nuisance.

SCC suggested that the phrase, "at the time of application," in §116.112(a) be replaced with, "at the time the application is filed with the commission," in order to be more consistent with the statutory language.

The commission is revising the rule in response to this comment to make the language consistent with the language of the statute.

SCC also requested: that the phrase, "was made," in §116.112(b)(2) be replaced with, "was filed," to be more consistent with the statutory language; the removal of the phrase, "to operate," from §116.112(b)(2) to eliminate any potential confusion between applications for preconstruction permits and federal operating permits; and the addition of a phrase specifying that subsequent applications for permit amendment or renewal will not change the date of application.

The commission is revising the rule to replace "was made" with "is filed" in response to this comment to match the statutory language in Texas Health and Safety Code, §382.065(b)(2). The commission is removing the phrase "permit to operate" and replacing it with the statutory language, "initial authorization for the operation of" which should address the last two issues raised by the commenter.

SCC requested that the phrase, "structure housing a residence . . ." in §116.112(b)(2)(A) be replaced with the phrase, "building used as a residence . . ." to eliminate any potential confusion that might result over the meaning of the term "structure."

The commission is revising the rule in response to this comment to match the statutory language in Texas Health and Safety Code, §382.065(a), which specifies, "a building in use as a residence . . .."

SCC requested that §116.112(b)(2)(B) and (C) be reworded to indicate that §116.112(b) imposes only an operational restriction.

The commission is not revising the rule based on this comment. The commission believes that §116.112(b)(2) specifies that the distance limitation only applies to the operation of facilities.

SCC commented that the commission should eliminate the reference to "consecutive calendar" days of operation in §116.112(b)(2)(C) because House Bill 1287 did not specify that the exemption for temporary crushers was based on consecutive calendar days.

The commission is revising the rule to specify the agency's interpretation that the operation of a concrete crusher under this

exemption is limited to one period of 180 calendar days, regardless of the number of days within that time period that the facility is in operation. The word "consecutive" has been removed not because the time period is not limited to 180 consecutive days once operation begins, but to specify that operation during that period of time need not take place on consecutive days. The limited period of operation at the site begins with the first day of operation and runs until the last day of operation. That period must be 180 days or less to qualify for the exemption in subparagraph (C). Not interpreting the statute to mean one 180-day period of operation could allow operation at a particular site for an indefinite period of time. In order to avoid confusion, the commission is specifying its interpretation in the rule.

The EPA commented that the removal of the existing SIP-approved distance requirements for hazardous waste facilities in §116.112(2) and replacement with a cross-reference to §335.205 in proposed §116.112(c) should also include a cross-reference to §335.204 since §335.204(b)(6) and (e)(6) are equivalent to existing §116.112(2). EPA also stated that such a cross-reference would include limitations not currently in §116.112 in the SIP. The EPA also commented that facilities permitted under the requirements of existing §116.112(2) would continue to be subject to the requirements of §116.112(2). Finally, it is the EPA's position that it would deem the cross-reference to §335.204 and §335.205 to refer to the version of §335.204 adopted on August 6, 2003 and the version of §335.205 adopted on October 24, 2001.

The commission has revised the rule to reflect EPA's comments.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and Texas Health and Safety Code, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; and §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state; §382.065, concerning Certain Locations for Concrete Crushing Facility Prohibited, which requires the commission to prohibit by rule the operation of a new concrete crushing facility within 440 yards of any residence, school, or place of worship in use at the time the application for a permit to operate the facility is filed with the commission; and §382.056(s), concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which establishes a method of making the measurement for distance limitations relevant to permit applications under Texas Health and Safety Code, Chapter 382, that are subject to notice and opportunity for hearing.

§116.112. Distance Limitations.

(a) For any facility subject to the notice and hearing requirements of Subchapter B, Division 3 of this chapter (relating to Public Notification and Comment Procedures); Chapter 39, Subchapters A, D, H, or K of this title (relating to Applicability and General Provisions, Public Notice of Air Quality Applications, Applicability and General Provisions, and Public Notice of Air Quality Applications); or Chapter 122, Subchapter D of this title (relating to Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition), the measurement of distances to determine compliance with any location or distance limitation requirement in Texas Health and Safety Code, Chapter 382, shall be taken toward structures that are in use at the time the permit application is filed with the commission, and that are not occupied or used solely by the owner of the facility or the owner of the property upon which the facility is located.

(b) The following facilities must satisfy the following distance criteria.

(1) Lead smelters. New lead smelting plants shall be located at least 3,000 feet from any individual's residence where lead smelting operations have not been conducted before August 31, 1987. This subsection does not apply to:

(A) a modification of a lead smelting plant in operation on or before August 31, 1987;

(B) a new lead smelting plant or modification of a plant with the capacity to produce 200 pounds or less of lead per hour; or

(C) a lead smelting plant that was located more than 3,000 feet from the nearest residence when the plant began operations.

(2) Concrete crushing facilities. A concrete crushing facility must not be operated within 440 yards of any building in use as a single or multi-family residence, school, or place of worship at the time the application for the initial authorization for the operation of that facility at that location is filed with the commission.

(A) The measurement of distances shall be taken from the point on the concrete crushing facility nearest to the residence, school, or place of worship to the point on the building in use as a residence, school, or place of worship that is nearest the concrete crushing facility.

(B) The minimum distance limitation and measurement requirements of this paragraph do not apply to concrete crushing facilities that were authorized to operate at the site as of September 1, 2001.

(C) Unless the facility is located in, or located in a county adjacent to, a county with a population of 2.4 million or more, the minimum distance limitation and measurement requirements of this paragraph do not apply to facilities operated on a site during one period of no more than 180 calendar days that crush concrete resulting from the demolition of a structure on that site for use primarily at that site, and which comply with all applicable conditions stated in commission rules, including operating conditions.

(D) The minimum distance limitation and measurement requirements of this paragraph do not apply to structures occupied or used solely by the owner of the facility or the owner of the property upon which the facility is located.

(c) For applicable distance limitations at hazardous waste management facilities, see §335.204 of this title (relating to Unsuitable Site Characteristics), as amended and adopted in the August 22, 2003 issue of the *Texas Register* (28 TexReg 6915), and §335.205 of this title (relating to Prohibition of Permit Issuance), as amended and adopted in the November 9, 2001 issue of the *Texas Register* (26 TexReg 9135).

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 January 15, 2004.

TRD-200400243

Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: October 10, 2003
For further information, please call: (512) 239-5017

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 6. INVESTMENT MANAGEMENT SUBCHAPTER A. STANDARDS OF CONDUCT FOR FINANCIAL ADVISORS

34 TAC §§6.1 - 6.5

The Comptroller of Public Accounts adopts new §§6.1, 6.2, 6.3, 6.4, and 6.5 concerning the standards of conduct and disclosure requirements applicable to financial advisors or service providers who provide financial services to the comptroller or advise the comptroller in connection with the management or investment of state funds, without changes to the proposed text as published in the December 12, 2003, issue of the *Texas Register* (28 TexReg 11086).

These new sections are adopted under Texas Administrative Code, Title 34, Part 1, new Chapter 6, Investment Management, new Subchapter A, Standards of Conduct for Financial Advisors. These new sections are proposed pursuant to Senate Bill 1059, 78th Legislature, Regular Session, 2003.

Senate Bill 1059, 78th Legislature, Regular Session, adopts Government Code, new Chapter 2263, regarding ethics and disclosure requirements for outside financial advisors and service providers. New Government Code, §2263.004, requires the governing body of a state governmental entity by rule to adopt standards of conduct applicable to financial advisors or service providers who provide financial services to the state governmental body or advise the state governmental body in connection with the management or investment of state funds. These provisions of Senate Bill 1059 were effective September 1, 2003.

New §6.1 outlines the definitions of comptroller and financial advisor applicable to this subchapter. New §6.2 addresses the applicability of the subchapter to financial advisors or service providers who render important investment or funds management advice to the comptroller with respect to state funds. New §6.3 outlines disclosure requirements for financial advisors or service providers, including a requirement to file an annual statement with the comptroller and the state auditor. New §6.4 outlines standards of conduct for financial advisors or service providers, which are in addition to any standards required by any contracts or service agreements. New §6.5 provides that a contract is voidable by the comptroller if a financial advisor or service provider violates a standard of conduct outlined in this subchapter.

No comments were received regarding adoption of the new sections.

These new sections are adopted under Government Code, new §2263.004 (as enacted by Senate Bill 1059, 78th Legislature, Regular Session, 2003), which requires the governing body of a state governmental entity by rule to adopt standards of conduct applicable to financial advisors or service providers who provide financial services to the state governmental body or advise the state governmental body in connection with the management or investment of state funds.

The new sections implement Government Code, Chapter 2263.

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 January 14, 2004.

TRD-200400226
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: February 3, 2004
Proposal publication date: December 12, 2003
For further information, please call: (512) 475-0387

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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS SUBCHAPTER B. LONG-TERM CARE, DISABILITY AND LIFE INSURANCE

34 TAC §41.17

The Teacher Retirement System of Texas (TRS) adopts amendments to §41.17 relating to definitions for the Long-Term Care Insurance Program set out in chapters 1576 and 1577, Texas Insurance Code. The amendments clarify that the effective date of employment is the date on which an employee is a TRS member to reflect the changes made in House Bill 3459, 78th Legislature, Regular Session, 2003, which establishes a new 90-day waiting period for TRS membership for employees hired on or after September 1, 2003. The amendments are adopted without changes to the text as published in the October 24, 2003, issue of the *Texas Register* (28 TexReg 9202) and therefore, will not be republished.

The amendments change the definition of the effective date of employment so that an individual's effective date of employment is the day on which an individual: (1) is on active duty in his or her first TRS-covered position; and (2) is a participating TRS member. In addition, the amendments provide clarification and update references to reflect the recodified Insurance Code provisions that establish the program.

No comments on the proposed amendments were received.

The amendments are adopted under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for, among other things, the transaction of business of the board.

The amendments are also adopted under §1576.006 and §1577.002, Insurance Code which authorize TRS to adopt rules to implement the chapters.

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 January 15, 2004.

TRD-200400299
Ronnie Jung
Interim Executive Director
Teacher Retirement System of Texas
Effective date: February 4, 2004
Proposal publication date: October 24, 2003
For further information, please call: (512) 542-6115

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SUBCHAPTER E. ACTIVE EMPLOYEES HEALTH REIMBURSEMENT ARRANGEMENTS

34 TAC §41.101, §41.102

The Teacher Retirement System of Texas (TRS) adopts new §41.101 and §41.102 concerning organizations eligible to respond to and the proposal procedure for the new active employee Health Reimbursement Arrangement Program ("HRA Program") established by House Bill 3257, 78th Legislature, Regular Session, 2003, which amends article 3.50-8, Insurance Code. The new rules set out the criteria for organizations to be eligible to submit a proposal to be the HRA Program administrator and the proposal procedure for that procurement. The new sections are adopted without changes to the text as published in the October 24, 2003, issue of the *Texas Register* (28 TexReg 9202) and therefore, will not be republished.

New §41.101 addresses the criteria that an organization must meet to be eligible to submit a proposal to be the HRA administrator. Additionally, new §41.102 sets forth the procedures for submitting proposals in response to a request for proposals for the HRA program administrator.

No comments on the proposed rules were received.

The new rules are adopted under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for, among other things, the transaction of business of the board. The new rules are also adopted under Insurance Code, article 3.50-8, §4, which authorizes TRS, as trustee, to adopt rules to implement the HRA Program and §4A, which authorizes TRS to contract with an entity to be the independent administrator of the HRA Program.

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 January 15, 2004.

TRD-200400300
Ronnie Jung
Interim Executive Director
Teacher Retirement System of Texas
Effective date: February 4, 2004
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For further information, please call: (512) 542-6115

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 8. PRIVATE SECTOR PRISON INDUSTRIES OVERSIGHT AUTHORITY

CHAPTER 245. GENERAL PROVISIONS

37 TAC §245.21

The Private Sector Prison Industries Oversight Authority Board adopts the amendment to §245.21 without changes to the proposed text as published in the October 17, 2003 issue of the *Texas Register* (22 TexReg 9427).

The purpose of the amendment is to make appropriate administrative changes to enhance public safety.

No comments were received.

The amendment is adopted under Texas Government Code, §§497.051 - 497.062, which provides the Oversight Authority with the authority to promulgate rules; 18 United States Code 1761; 42 United States Code, §§4321-4347; and 40 Code of Federal Regulations Part 1500.

Cross Reference to Statute: 18 United States Code 1761; 42 United States Code, §§4321-4347; and 40 Code of Federal Regulations Part 1500.

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-200400219
Carl Reynolds
General Counsel
Private Sector Prison Industries Oversight Authority
Effective date: February 3, 2004
Proposal publication date: October 17, 2003
For further information, please call: (512) 463-0422

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37 TAC §245.30

The Private Sector Prison Industries Oversight Authority Board adopts the amendment to §245.30, concerning Distribution of Wages of Work Program Participants without changes to the proposed text as published in the October 17, 2003, issue of the *Texas Register* (28 TexReg 9063).

The purpose of the amendment is to make appropriate administrative changes to enhance public safety.

No comments were received regarding the proposed amendment.

The amendment is adopted under Texas Government Code, §§497.051 - 497.062, which provides the Oversight Authority with the authority to promulgate rules; 18 United States Code 1761; 42 United States Code, §§4321 - 4347; and 40 Code of Federal Regulations Part 1500.

Cross Reference to Statute: 18 United States Code 1761; 42 United States Code, §§4321 - 4347; and 40 Code of Federal Regulations Part 1500.

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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Carl Reynolds
General Counsel
Private Sector Prison Industries Oversight Authority
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For further information, please call: (512) 463-0422

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 5. EMERGENCY MEDICAID FOR ALIENS INELIGIBLE FOR REGULAR MEDICAID

The Texas Department of Human Services (DHS) adopts the repeal of Chapter 5, Medicaid Programs for Aliens, consisting of §5.2002 and §5.2004; and adopts new Chapter 5, Emergency Medicaid for Aliens Ineligible for Regular Medicaid, consisting of §5.1 and §5.2, without changes to the proposed text published in the November 7, 2003, issue of the *Texas Register* (28 TexReg 9788).

Justification for the repeals and new sections is to establish a rule base for procedure and requirements by which aliens can receive emergency medical services if they are not eligible for regular Medicaid because of their immigration status, and to rewrite the rules in plain-English format that is easier for the public to understand.

DHS received no comments regarding adoption of the repeals and new sections.

40 TAC §5.1, §5.2

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3734

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CHAPTER 5. MEDICAID PROGRAMS FOR ALIENS

SUBCHAPTER B. MEDICAID BENEFITS FOR ALIENS NOT LEGALLY RESIDING IN THE UNITED STATES

40 TAC §5.2002, §5.2004

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001-22.040 and §§32.001- 32.067.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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Proposal publication date: November 7, 2003
For further information, please call: (512) 438-3734

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CHAPTER 49. CONTRACTING FOR COMMUNITY CARE SERVICES

The Texas Department of Human Services (DHS) adopts the repeal of §§49.1, 49.3, 49.5, 49.7, 49.9-49.11, 49.13-49.15, 49.17, 49.19, 49.21, 49.23, 49.25, and 49.27; and adopts new §§49.1, 49.11-49.20, 49.31-49.33, 49.41-49.43, 49.51-49.54, and 49.61-49.63 in its Contracting for Community Care Services chapter.

New §§49.1, 49.14, 49.17, 49.18, 49.31, and 49.41 are adopted with changes to the proposed text published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6515). The repeals of §§49.1, 49.3, 49.5, 49.7, 49.9-49.11,

49.13-49.15, 49.17, 49.19, 49.21, 49.23, 49.25, and 49.27; and new §49.11-49.13, 49.15, 49.16, 49.19, 49.20, 49.32, 49.33, 49.42, 49.43, 49.51-49.54, and 49.61-49.63 are adopted without changes to the proposed text.

Justification for the repeals and new sections is to reorganize and rewrite the rules in plain English as part of the agency's initiative to make its rules easier to navigate and understand. DHS wrote the proposed rules to complement licensure rules for DHS-licensed entities and to place rules specific to Community Care contractors as much as possible within the same chapter. Therefore, rules outlining contract requirements for contractors in the Consolidated Waiver Program, Community Based Alternatives, and Primary Home Care were placed in new Chapter 49 and will be deleted from Chapters 47, 48, and 50 of this title (relating to Primary Home Care, Community Care for Aged and Disabled, and §1915(c) Consolidated Waiver Program) in subsequent issues of the *Texas Register*. Rules regarding access to a contractor's records that appear in Chapter 69 of this title (relating to Contracted Services) were restated in new §49.33 for the convenience of the public and provider agencies.

DHS received written comments from Advocacy, Incorporated. A summary of the comments and DHS's responses follow.

Comment: In regard to §49.1, Definitions, a comment was received that the definition of "client" in this section is the person eligible for services. In later sections, the client is expected to sign off on certain documents. If the client is a minor child or an individual with a legally authorized guardian, then the parent or guardian would need to sign the documents. It was suggested that language be added to ensure appropriate action and documentation regarding client and/or guardian/parent. Rules should require that when a complaint is resolved, the client or the client's guardian's or parent's initials must be obtained or, if the client's guardian or parent refuses to sign, a witness's signature must be obtained. This requirement should also be added to §49.18, Client Rights and Responsibilities.

Response: DHS agrees with this comment and added a new definition for "representative" at §49.1(32) and renumbered the remaining definitions in the section. DHS also revised §§49.17(a) and (f)(1) and (2); 49.18; 49.31(b)(5), (6), and (10); and 49.41(a) to replace "client" with "client/client's representative."

Comment: In regard to §49.14, Provisional Contracts, DHS was asked if it had reviewed this section to make sure there were no unintended barriers to getting the support family services providers added to Community Living Assistance and Support Services (CLASS) under the umbrella of DHS contracting rules. As an example, would the requirement that home and community support services agencies, before applying for a provisional contract, have their license for at least one year or have provided attendant or home health services place a barrier on getting support family services providers added to CLASS?

Response: Section 49.14 only applies to provisional contracts, which relate to home and community support services agencies that contract to provide services for the Primary Home Care (PHC) Program, Community Based Alternatives (CBA) Program, and the Consolidated Waiver Program (CWP). This section is not applicable to CLASS, because CLASS does not require a provisional contract. However, DHS revised the section to make it clear that the requirement applies to home and community support services agencies contracting to provide services for PHC, CBA, and CWP.

Comment: In §49.14, does CBA/HCSS refer to all waiver programs or just CBA and CWP?

Response: CBA/HCSS does not refer to all waiver programs.

Comment: Does DHS need to add that a provider must have provided services as a licensed Child Placement Agency (CPA) to §49.14(c)(4)?

Response: No. Section 49.14(c)(4) only applies to provisional contracts, which relate to home and community support services agencies that contract to provide services in the PHC, CBA, and CWP programs and do not require additional licenses other than what is required in this subsection. DHS did not make the requested change.

Comment: In regard to §49.18, Client Rights and Responsibilities, a request was made to add a requirement that the provider agency provide each client with information on the Consumer Directed Services (CDS) option no later than the time services begin.

Response: Not all providers have a CDS contract with DHS, nor is CDS available in all programs. It is the responsibility of DHS staff/contracted case managers to educate and inform the client/client's representative of any services available through DHS. DHS made no changes as a result of this comment.

Comment: In regard to §49.31, Record Requirements, in subsection (b)(9) there is a requirement that provider agencies keep "records of client conduct." It is very unclear what type program requirement this refers to or whether there is to be some sort of new requirement to monitor and record "client conduct." This requirement, left to interpretation, could result in subjective use of inappropriate collection of client's private/personal conduct, which may be way beyond any specific program requirement. In this case, Advocacy, Inc., would have major objections to such record keeping. With respect to an individual's right to self determination, privacy and dignity of risk, this requirement needs to be clarified.

Response: DHS agrees with this comment and has revised §49.31(b)(9) to state: "records of client conduct that may affect service delivery as outlined in program-specific rules."

Comment: In regard to §49.41(c)(12), Billings and Claims Payment, it was suggested that DHS add language to expand the exception that allows a provider agency to receive payment for services provided to a client in a facility when the payment is for an assessment. The exception should also include transition/relocation activities as allowed by DHS program rules. This change anticipates the ability of certain §1915(c) Medicaid waiver community care programs to pay for transition and relocation activities with waiver dollars, pending waiver amendment submissions by DHS and subsequent Centers for Medicare and Medicaid Services (CMS) approval.

Response: DHS agrees with this statement and has revised §49.41(c)(12) to include the expanded exception.

Comment: A general comment was made suggesting that DHS contracting staff meet with DHS program staff regarding the addition of support family services to the CLASS program service array. This will require some new contracting mechanisms, and the rules need to support this activity and not become a barrier or cause delays. The comments assume that any final rules will include the necessary provisions to allow for support family services in the CLASS program and that those barriers will be addressed before rules are adopted.

Response: DHS has considered this. The new rule, as proposed in §49.14, would not be a barrier or cause a delay in setting up support family services. DHS made no changes as a result of this comment.

40 TAC §§49.1, 49.3, 49.5, 49.7, 49.9 - 49.11, 49.13 - 49.15, 49.17, 49.19, 49.21, 49.23, 49.25, 49.27

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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SUBCHAPTER A. DEFINITIONS

40 TAC §49.1

The new section is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new section affects the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

§49.1. Definitions.

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

(1) Advanced directives--An instruction made under the Health and Safety Code, §§166.032, 166.034, or 166.035, to administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition.

(2) Adverse action--An adverse action includes any action taken by the Texas Department of Human Services (DHS) that:

(A) terminates or suspends a DHS contract before its stated expiration date;

(B) denies, terminates, or suspends payments, in whole or part, to a contractor;

(C) demands repayment for an overpayment;

(D) directs one of its contractors to terminate or suspend a subcontract or payments to any subcontractor or provider of medical services;

(E) reduces a contractor's block grant funds by 25% or more of the amount DHS reimburses if DHS plans to allocate the withheld funds to another contractor for similar services in the same geographic area, if the contractor alleges that the reduction was in violation of DHS rules, was discriminatory, or was without reasonable basis in law or fact; this does not apply to funding or contracts subject to DHS's competitive procurement rules;

(F) prevents a legal entity from contracting with DHS for a prescribed period; or

(G) imposes any adverse sanction or other action to which a provider agency has a statutory right to a formal hearing.

(3) Alternative language--Any reference to an alternative language of a document means putting the document in a language that can be clearly understood by the person reading it (for example, Spanish or Braille).

(4) Assignee--A legal entity that assumes a Community Care contract through a legal assignment of the contract from the contracting entity.

(5) Assignor--A legal entity that assigns its Community Care contract to another legal entity.

(6) Cause--A determination that the contractor failed to comply with the terms of the contract or applicable program rules.

(7) Client--A person who is eligible to receive services according to program specific eligibility requirements.

(8) Client hold--The suspension of client referrals by DHS to the provider agency.

(9) Compliance monitoring--The systematic review of client case records and interviews with clients, provider agency staff, and others, as appropriate, to determine compliance with service delivery requirements.

(10) Contract--The formal, written agreement between DHS and a provider agency to provide services to eligible DHS clients in exchange for reimbursement.

(11) Contract assignment--The transfer of a contract by one legal entity to another legal entity.

(12) Contract manager--A DHS employee who is responsible for the overall management of the contract with the provider agency.

(13) Contractor--A provider agency.

(14) Controlling party--An owner who is a sole-proprietor, a partner owning 5% or more of the partnership, or a corporate stockholder owning 5% or more of the outstanding stock of the contracted provider, or a member of the board of directors.

(15) Corrective action plan (CAP)--The plan of action the provider agency proposes and submits to DHS to correct contract deficiencies DHS has cited.

(16) Cost reimbursement method of payment--Payment directly related to the allowable reimbursable costs incurred by the provider agency.

(17) Days--Any reference to days means calendar days unless otherwise specified in the text. Calendar days include weekends and holidays.

(18) Debarment--When DHS chooses to prohibit a legal entity from conducting business with DHS, in any capacity, for a certain period.

(19) DHS--The Texas Department of Human Services.

(20) Expedited payments system (EPS)--An automated payment system, offered to qualifying Community Based Alternatives/Home and Community Support Services (CBA/HCSS) and Primary Home Care/Family Care (PHC/FC) providers for Personal Assistance Services (PAS) only, which allows the provider agency to receive a substantial portion of its payment at the beginning of the month based on services provided in the previous month.

(21) Extrapolation--To predict outcomes by projecting past experience or known data.

(22) Fiscal monitoring--DHS's review of the documentation that supports the provider agency's billing.

(23) Involuntary contract termination--When DHS terminates a provider agency's contract without the consent of the provider agency.

(24) Level II administrative penalty--A penalty DHS assesses for violations of Home and Community Support Services Agencies (HCSSA) licensing rules, as described in Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies).

(25) HCSSA monitoring agreement--An agreement between the provider agency and DHS Long Term Care Regulatory (LTCR) in which the provider agency agrees to hire a professional consultant to assist in correcting license problems uncovered during the HCSSA survey.

(26) Practitioner--A currently licensed Texas physician or physician assistant, or a registered nurse approved by the Texas State Board of Nurse Examiners to practice as an advanced practice nurse.

(27) Program specific documents/rules/requirements--Those documents/rules/requirements specifically identified and/or stated in the program rules.

(28) Provider agency--An agency that has a contract with DHS to provide Community Care services to DHS clients.

(29) Provisional contract--A time-limited contract that is limited to one year and meets the requirements in §49.12 of this chapter (relating to General Requirements for Participation).

(30) Recoupment--When DHS recovers an overissuance to a provider agency by reducing payments to that provider agency until the overissuance is recovered.

(31) Re-enrollment--DHS's requirement to complete and submit new contract application forms and enter into a new contract.

(32) Representative--The client's spouse, other responsible party, or legal representative.

(33) Restitution--When a provider agency reimburses DHS for an overissuance that the provider agency has received.

(34) Sanction--An adverse action that DHS may take against a provider agency.

(35) Solicitation--When a provider agency entices or lures an individual to receive services from the provider agency when that provider agency knows that the individual is the client of another provider agency.

(36) Suspension--A contract sanction wherein DHS temporarily suspends or halts a provider agency's right to conduct business with DHS.

(37) Unit rate method of payment--Payment according to each unit of service provided.

(38) Vendor hold--A contract sanction wherein DHS withholds the provider agency's contract payments.

(39) Working days--Days DHS is open for business.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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SUBCHAPTER B. CONTRACTOR REQUIREMENTS

40 TAC §§49.11 - 49.20

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

§49.14. Provisional Contracts.

(a) All new home and community support services agencies contracting to provide services in Primary Home Care/Family Care, Community Based Alternatives, and Consolidated Waiver Program are provisional contracts.

(b) Provisional contracts are limited to one year and are subject to the requirements specified in this section.

(c) Before applying for a provisional contract, the provider agency must:

(1) have held the appropriate Home and Community Support Services Agencies (HCSSA) license, used to qualify for the contract, for at least one year;

(2) have completed an on-site HCSSA health survey;

(3) be eligible to have the HCSSA license renewed; and

(4) have provided attendant or home health services:

(A) to at least 10 clients, with at least two of the clients having received ongoing services during a 60-day period; and

(B) for a total of at least 500 hours during the 12 months immediately preceding the provider agency's contract application in the region in which the provider agency is applying for a contract.

(d) The Texas Department of Human Services (DHS) does not enter into a provisional contract if the provider agency:

(1) has not completed a pre-contract orientation from DHS;

(2) is under a HCSSA monitoring agreement with DHS Long Term Care Regulatory (LTCR);

(3) has a Level II administrative penalty pending with DHS LTCR;

(4) has a license revocation action pending with DHS LTCR; or

(5) had any Community Care program contract involuntarily terminated in the 24 months preceding the provider agency's contract application.

(e) DHS may choose not to enter into a provisional contract if the provider agency was assessed any Level II administrative penalties in the 12 months preceding the provider agency's contract application and there is no pending administrative hearing on the administrative penalties.

(f) If the provider agency's provisional contract is allowed to expire due to noncompliance with program-specific rules, the provider agency cannot enter into another provisional contract for the same Community Care services until at least 24 months after the effective date of the expiration.

(g) If the provider agency chooses to voluntarily withdraw from a provisional contract, the provider agency cannot enter into another provisional contract for the same Community Care services for at least 12 months after the effective date of the withdrawal.

(h) DHS may terminate the provider agency's provisional contract at any time if DHS finds the provider agency does not meet the requirements for provisional contracting as outlined in subsection (c) of this section or if DHS finds that the provider agency does not meet other contracting requirements.

(i) DHS conducts at least one formal monitoring review of each provisional contract during the provisional period.

(j) The provider agency may request an administrative review of the formal monitoring by following the procedures described in §49.54 of this chapter (relating to Administrative Review).

§49.17. Complaint Procedures.

(a) The provider agency must document, investigate, and resolve all complaints that the client/client's representative and/or the Texas Department of Human Services (DHS) reports.

(b) Provider agencies with contracts that require a DHS license must investigate and resolve complaints in accordance with applicable licensure rules. If there are no such rules, the provider agency must adhere to the requirements outlined in subsections (c)-(e) of this section.

(c) Provider agencies with contracts that require licensure by an entity other than DHS must investigate and resolve complaints within five workdays from the receipt of the complaint report unless a different time frame is found in the service-specific program requirements.

(d) The provider agency must maintain a log of client complaints and must ensure that:

(1) all written complaints are stamped with the date of receipt;

(2) all verbal complaints are documented with the date of receipt and a narrative of the allegation(s); and

(3) the complaint log is accessible to DHS staff.

(e) All documentation of complaint investigations must contain the following information:

(1) who conducted the investigation;

(2) who was contacted during the investigation;

(3) the findings of the investigation; and

(4) any actions taken as a result of the investigation.

(f) When a client-initiated complaint is resolved, the provider agency must obtain:

(1) the client's/client's representative's initials; or

(2) a witness's signature if the client/client's representative refuses to sign.

§49.18. Client Rights and Responsibilities.

(a) The provider agency must provide each client/client's representative with the following information no later than the time services begin:

(1) a general orientation on tasks to be provided;

(2) consumer rights and responsibilities, as described in the Human Resources Code, Chapter 102;

(3) client conduct requirements;

(4) procedures for filing complaints;

(5) the name and/or title and telephone number of the person to call to make a verbal complaint; and

(6) the provider agency's responsibilities in providing the services.

(b) The provider agency must make an interpreter available to the client/client's representative upon request.

(c) The provider agency must make written material available to the client/client's representative in alternative languages upon request and maintain a copy of the material in the alternative languages provided.

(d) The provider agency must give the information in subsection (a) of this section to the client/client's representative both verbally and in writing, with no more than 12 months between each notification.

(e) The Texas Department of Human Services (DHS) must receive a copy of any changes before the provider agency amends its policies affecting the items specified in this section. In addition, each client/client's representative must receive written notification of the change before it becomes effective.

(f) The provider agency cannot enact any DHS-approved policy changes before providing written notification to each client/client's representative.

(g) The provider agency must not require clients to perform services for the provider agency or other clients.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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SUBCHAPTER C. RECORDS

40 TAC §§49.31 - 49.33

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

§49.31. Record Requirements.

(a) The provider agency must maintain all financial and contract-related records:

(1) according to recognized fiscal and accounting practices; and

(2) in accordance with Texas Department of Human Services (DHS) contract requirements.

(b) The provider agency must maintain DHS client documentation, including:

(1) the service plan;

(2) service delivery records;

(3) significant incidents regarding progress, illnesses, and accidents that may be used to maintain or revise the service plans;

(4) suspension and termination records, discharge plans, client referrals, and placements;

(5) client rights and responsibilities provided to the client/client's representative;

(6) complaint procedures provided to the client/client's representative;

(7) orientations completed;

(8) abuse, neglect, or exploitation incidents referred to the appropriate investigative authority;

(9) records of client conduct that may affect service delivery as outlined in program-specific rules;

(10) provider agency responsibilities provided to the client/client's representative; and

(11) additional program-specific requirements.

(c) The provider agency must maintain personnel records on every employee and volunteer, and must also maintain records on subcontractors.

(d) The provider agency must complete all service delivery records in ink when using paper service delivery records.

(e) The provider agency must use the official DHS form to document services delivered or to document all of the required elements of the services delivered, as provided in program-specific rules.

(f) The provider agency must not preprint or pre-enter any record of time on any form used to document services delivered.

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. BILLINGS AND PAYMENT

40 TAC §§49.41 - 49.43

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

§49.41. Billings and Claims Payment.

(a) A provider agency must not charge and cannot take any action against or require any supplemental payment from a client/client's representative, family member, or persons acting on the client's behalf for any claim(s) the Texas Department of Human Services (DHS) denies or reduces because of the provider agency's failure to comply with any DHS or federal rule or procedure.

(b) A provider agency is responsible for the accuracy of the claims submitted for payment.

(c) A provider agency is entitled to payment if:

(1) the services are:

(A) authorized by DHS in writing;

(B) submitted on a verbally approved form or as a facility-initiated referral to DHS within the required time frames, if applicable; or

(C) submitted by way of a prior verbally approved form or facility-initiated referral form that is supportive of the verbal approval, if applicable;

(2) the reimbursement corresponds to the provider agency's service authorization and service delivery record;

(3) services, when allowed to be ordered by a practitioner, are allowed under Title XVIII and Title XIX of the Social Security Act;

(4) services were ordered by a practitioner whose license has not been suspended or who has not been excluded from participation in either Title XVIII or XIX of the Social Security Act;

(5) practitioner orders are available, when required;

(6) appropriate billing forms are used and approved billing procedures are followed;

(7) services are provided to a client on or before the date services are terminated;

(8) services are provided by an individual whose license or certification, if applicable to the services provided, has not been suspended or who has not been excluded from participation in either Title XVIII or XIX of the Social Security Act;

(9) the provider agency submits correct and appropriate billings after services have been provided and all other contract requirements are met;

(10) the DHS claims processor receives a complete and accurate claim for services for which the provider agency is entitled to payment within 12 months after the date of services.

(A) In the event that Medicaid eligibility for benefits is established after the provision of services, the 12-month period for the submission of claims will start on the date of eligibility.

(B) DHS's claims processor must receive adjustments to claims during the applicable 12-month period. Claims and adjustments rejected or denied during the 12-month period through no fault of the provider agency may be paid upon approval by DHS.

(C) The requirement to submit claims within 12 months of the date of service does not prohibit a provider agency from re-billing in the case of state-generated retroactive adjustments;

(11) the client is eligible for Medicaid benefits (if services are provided through Medicaid); and

(12) the client is not an inpatient of a hospital (unless otherwise specified in contract terms or program rules), intermediate care facility, skilled nursing facility, state hospital, state school, or intermediate care facility for persons with mental retardation or related conditions (except when a provider agency is authorized to receive payment for an assessment used to determine eligibility and/or transition/relocation activities as allowed by DHS program rules).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Effective date: February 5, 2004
Proposal publication date: August 15, 2003
For further information, please call: (512) 438-3734

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SUBCHAPTER E. AUDITS, MONITORING, AND REVIEWS

40 TAC §§49.51 - 49.54

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections affect the Human Resources Code, §§22.0001-22.040 and §§32.001-32.067.

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 January 16, 2004.

TRD-200400342
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: February 5, 2004
Proposal publication date: August 15, 2003
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER F. SANCTIONS AND TERMINATION

40 TAC §§49.61 - 49.63

The new sections are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides the Texas Health and Human Services Commission with the authority to administer federal medical assistance funds.

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Filed with the Office of the Secretary of State on January 16, 2004.

TRD-200400343
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: February 5, 2004
Proposal publication date: August 15, 2003
For further information, please call: (512) 438-3734

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

Notice is given that the Commissioner of Insurance will consider a proposal made in a staff petition which seeks amendments of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2003 and 2004 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0104-01-I), was filed on January 20, 2004.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2003 and 2004 model vehicles.

A copy of the petition, including a 90-page exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A-0104-01-I).

Comments on the proposed changes must be submitted in writing no later than 5:00 p.m. on February 29, 2004 to the Office of the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, Texas Department of Insurance, P.O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

A public hearing on this matter will not be held unless a separate request for a hearing is submitted to the Office of the Chief Clerk during the comment period defined above.

This notification is made pursuant to Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

TRD-200400406
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: January 21, 2004

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Final Action on Rules

Effective date: February 14, 2004

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF AMENDMENTS TO THE TEXAS BASIC MANUAL OF RULES, CLASSIFICATIONS AND EXPERIENCE RATING PLAN FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE

The Commissioner of Insurance adopted the amendments proposed by the Texas Department of Insurance (TDI) staff in a petition filed on November 25, 2003. Notice of the proposal (Reference No. W-1103-23-I) was published in the December 5, 2003, issue of the *Texas Register* (28 TexReg 10975). No hearing was requested on this matter. TDI received no comments concerning the proposed amendments.

The Commissioner adopts the amendments proposed by staff. The purpose of these amendments to Rule XVIII- Group Purchase of Workers' Compensation in the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (the Manual) is to implement Section 2 of HB 1865, which passed during the 78th Legislature. This bill amended Article 5.57A of the Texas Insurance Code by expanding the definition of "group" to include two or more members of a trade association of business entities that join together with the approval of the Commissioner to purchase individual workers' compensation insurance policies covering each participating trade association member.

The adopted amendments to the Manual are on file in the Chief Clerk's Office of the Texas Department of Insurance under Reference No. W-1103-23-I and are incorporation by reference into Commissioner's Order No. 04-0043.

The staff requests that the proposed amendments to the Manual as proposed herein be adopted effective 15 days after notice of adoption is published in the *Texas Register*.

The Commissioner has jurisdiction of this matter pursuant to Articles 5.57A and 5.96 of the Texas Insurance Code.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments proposed by staff to the Manual be and hereby are adopted.

IT IS FURTHER ORDERED that the proposed amendments to the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance will go into effect 15 days after notice of adoption is published in the *Texas Register*.

TRD-200400295
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: January 15, 2004

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Review

State Board of Examiners for Speech-Language Pathology and Audiology

Title 22, Part 32

The State Board of Examiners for Speech-Language Pathology and Audiology will review and consider for readoption, revision, or repeal Texas Administrative Code, Title 22, Examining Boards, Part 32, State Board of Examiners for Speech-Language Pathology and Audiology, Subchapter A, Definitions, §741.1; Subchapter B, The Board, §§741.11 - 741.15; Subchapter C, Screening Procedures, §§741.31 - 741.33; Subchapter D, The Standards of Professional and Ethical Conduct, §741.41; Subchapter E, Requirements for Licensure and Registration of Speech-Language Pathologists, §§741.61 - 741.66; Subchapter F, Requirements for Licensure and Registration of Audiologists, §§741.81 - 741.86; Subchapter G, Requirements for Dual Licensure as a Speech-Language Pathologist and an Audiologist, §741.91; Subchapter H, Fitting and Dispensing of Hearing Instruments, §§741.101 - 741.103; Subchapter I, Application Procedures, §741.111 and §741.112; Subchapter J, Licensure Examinations, §741.121; Subchapter K, Issuance and Display of License and Registration, §741.141 and §741.142; Subchapter L, License and Registration Renewal, §§741.161 - 741.165; Subchapter M, Fees and Processing Procedures, §741.181 and §741.182; and Subchapter N, Denial, Probation, Suspension, or Revocation of Licensure or Registration, §§741.191 - 741.195.

This review is in accordance with the requirements of the Texas Government Code, §2001.039 regarding agency review of existing rules.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continues to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the committee.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Linda Wiegman, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the committee.

TRD-200400391
Cheryl Sancibrian
Presiding Officer
State Board of Examiners for Speech-Language Pathology and Audiology
Filed: January 20, 2004

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Adopted Rule Review

Texas Youth Commission

Title 37, Part 3

In accordance with the General Appropriation Act, Article IX, Section 167, 75th Legislature, the Texas Youth Commission is adopting the review of Title 37, Part 3, Chapter 97, concerning Security and Control, and Chapter 99, concerning General Provisions. The proposed review was published in the December 19, 2003, issue of the *Texas Register* (28 TexReg 11363).

The Commission has determined that the reasons for adopting the rules contained in these chapters continue to exist.

No public comments were received regarding this review.

TRD-200400392
Neil Nichols
Interim Executive Director
Texas Youth Commission
Filed: January 20, 2004

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 4 TAC §20.22(a)

Pest Mgmt Zone	Planting Dates	Destruction Deadline
1	after February 1	September 1
2 - Area 1	No dates set	September 1
2 - Area 2	No dates set	September 1
2 - Area 3	No dates set	September 1
2 - Area 4	No dates set	October 1
3 - Area 1	after February 1	October 1
3 - Area 2	after February 1	October 15
4	No dates set	October 10
5	No dates set	October 20
6	No dates set	October 31
7	after February 1	October 31
8 - Area 1	after February 1	October 31
8 - Area 2	after February 1	November 30
9	No dates set	**February 1** [~~No date set~~]
10	No dates set	February 1

Figure: 22 TAC §523.101(b)

OLD RULE	NEW RULE
SUBCHAPTER A. CONTINUING PROFESSIONAL EDUCATION PURPOSE AND DEFINITION	
§523.1. CPE Purpose and Definitions.	§523.102. CPE Purpose and Definitions.
§523.2. Standards for CPE Program Development.	§523.103. Standards for CPE Program Development.
§523.3. Savings Provisions and Dispositions Table.	§523.101. Savings Provisions and Dispositions Table.
SUBCHAPTER B. CONTINUING PROFESSIONAL EDUCATION RULES FOR INDIVIDUALS	
§523.21. Establishment of Mandatory CPE Program.	§523.110. Establishment of Mandatory CPE Program.
§523.22. Mandatory CPE Reporting.	§523.111. Mandatory CPE Reporting.
§523.23. Mandatory CPE Attendance.	§523.112. Mandatory CPE Attendance.
§523.24. Denial of a License.	§523.113. Denial of a License.
§523.25. Disciplinary Actions Relating to CPE.	§523.114. Disciplinary Actions Relating to CPE.
§523.26. Credits for Instructors and Discussion Leaders.	§523.115. Credits for Instructors and Discussion Leaders.
§523.27. Credits for Published Articles and Books.	§523.116. Credits for Published Articles and Books.
§523.28. Minimum Hours Required Per CPE Reporting Period as a Participant.	§523.117. Minimum Hours Required Per CPE Reporting Period as a Participant.
§523.29. Limitation for Non-Technical Courses.	§523.118. Limitation for Non-Technical Courses.
§523.30. Alternative Sources of CPE.	§523.119. Alternative Sources of CPE.
§523.31. Standards for CPE Reporting.	§523.120. Standards for CPE Reporting.
§523.32. CPE for Non-CPA Owners.	§523.121. CPE for Non-CPA Owners.
SUBCHAPTER C. ETHICS RULES: INDIVIDUALS AND SPONSORS	
§523.34. Course Content and Board Approval after September 1, 2003.	§523.132. Contracted Ethics Instructors after January 1, 2005.
§523.41. Board Rules and Ethics Course.	§523.130. Board Rules and Ethics Course.
§523.43. Course Content and Board Approval.	§523.133. Course Content and Board Approval.
SUBCHAPTER D. STANDARDS FOR CONTINUING PROFESSIONAL EDUCATION PROGRAMS AND RULES FOR SPONSORS	
§523.51. Program Standards.	§523.140. Program Standards.
§523.52. Evaluation.	§523.141. Evaluation.
§523.53. Program Time Credit Measurement.	§523.142. Program Time Credit Measurement.
§523.54. Sponsor's Record.	§523.143. Sponsor's Record.
§523.55. Board Contracted CPE Sponsors.	§523.144. Board Contracted CPE Sponsors.
§523.56. Obligations of the Sponsor.	§523.145. Obligations of the Sponsor.
§523.57. Registry of CPE Sponsors.	§523.146. Registry of National Association of State Boards of Accountancy (NASBA) CPE Sponsors.
§523.58. Sponsor Review Oversight Program.	§523.147. Sponsor Review Oversight Program.

Figure: 22 TAC Chapter 523--Preamble

Birth Month of Licensee	Accrual Period for Taking the 4-hour Ethics Course	Deadline for Reporting the 4-Hour Ethics Course
January	January 1, 2005 to January 31, 2007	January 31, 2007
February	January 1, 2005 to February 28, 2007	February 28, 2007
March	January 1, 2005 to March 31, 2007	March 31, 2007
April	January 1, 2005 to April 30, 2007	April 30, 2007
May	January 1, 2005 to May 31, 2007	May 31, 2007
June	January 1, 2005 to June 30, 2007	June 30, 2007
July	January 1, 2005 to July 31, 2007	July 31, 2007
August	January 1, 2005 to August 31, 2007	August 31, 2007
September	January 1, 2005 to September 30, 2007	September 30, 2007
October	January 1, 2005 to October 31, 2007	October 31, 2007
November	January 1, 2005 to November 30, 2007	November 30, 2007
December	January 1, 2005 to December 31, 2007	December 31, 2007

Figure: 25 TAC §139.6(a)(1)

TOLL-FREE TELEPHONE NUMBER

1-888-973-0022

You have the right to access certain information concerning this abortion facility by using the toll-free telephone number listed above. If you make a call to the number, your identity will remain anonymous.

The toll-free telephone line can provide you with the following information:

- whether this abortion facility is licensed by the Texas Department of Health;
- the date of the last inspection of this facility by the Texas Department of Health and any violations of law or rules discovered during that inspection that may pose a health risk to you;
- any relevant fine, penalty, or judgment rendered against this facility or a doctor who provides services at this facility.

Figure: 25 TAC §139.6(a)(2)

Línea de información gratuita

1-888-973-0022

Usted tiene el derecho de obtener cierta información concerniente a este centro de aborto usando la línea de información gratuita que aparece arriba. Si usted llama a este número, su identidad permanecerá anónima.

La línea de información gratuita puede ofrecerle la siguiente información:

- Si este centro de aborto tiene licencia del Departamento de Salud de Texas.

- La fecha de la última inspección de este centro por el Departmento de Salud de Texas, y cualquier infracción de la ley o de las reglas descubierta durante esa inspección, que pudiera poner en peligro su salud.

- Cualquier multa, pena o sentencia impuesta en contra de este centro o de algún doctor que preste servicios en ese lugar."

Figure: 25 TAC §139.41(a)(8)(A)

Affidavit

I, _____, swear or affirm that my date of birth is

_____, _____ , and that I do not have appropriate identification that

states my date of birth.

Signature: _____

Printed name:_____

Witness:_____

Printed name of witness:_____

Figure: 25 TAC §139.52(a)(1)

CERTIFICATION

Each item on this certification form must be reviewed. The woman should place her initials beside each statement and sign the bottom of the form.

I certify that the following information was presented to me, at least 24 hours prior to the abortion, by the physician who is to perform the abortion or by the referring physician:

_____ the name of the physician who will perform the abortion;

_____ the particular medical risks associated with the particular abortion procedure to be employed; including when medically accurate:

- _____ the risk of infection and hemorrhage;
- _____ the potential danger to subsequent pregnancy and of infertility; and
- _____ the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer.

_____ the probable gestational age of the unborn child at the time the abortion is to be performed; and

_____ the medical risks associated with carrying the child to term.

The physician who is to perform the abortion or the physician's agent has informed me that:

_____ medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

_____ the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion;

_____ public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices; and

I have also been informed that:

_____ I have the right to review the printed materials prepared by the Texas Department of Health entitled the "A Woman's Right to Know" booklet and the resource directory, which describe the unborn child and list agencies that offer alternatives to abortion, and that those materials must be given to me if I choose to view them;

_____ "A Woman's Right to Know" booklet and resource directory are also accessible on an Internet website sponsored by the department.

I made the following choice (choose one of the following):

_____ I requested and was provided a printed copy of "A Woman's Right to Know" booklet and the resource directory.
_____ I chose to review the "Woman's Right to Know" materials on this website.
_____ I declined the informational materials.

_____
Signature

_____
Date

_____
Printed Name

Figure: 25 TAC §157.123(c)

The Texas EMS/Trauma System is a network of regional EMS/trauma systems.

Each regional EMS/trauma system has a regional advisory council (RAC) that is held accountable by the Texas Department of Health for developing, implementing, and monitoring a regional EMS/trauma system plan. These plans facilitate trauma and emergency health care system networking within the RAC's own trauma service areas (TSA) or among a group of TSAs.

A RAC is an organized group of health care entities and concerned citizens who share an interest in improving and organizing EMS/trauma care within a specific TSA. RAC membership shall include hospitals, EMS providers, first responder organizations, physicians, nurses, EMS personnel, rehabilitation facilities, as well as concerned citizens and community groups.

All counties within the state have been grouped into twenty-two TSAs, lettered "A" through "V". Each TSA is multi-county and contains a minimum of three counties.

E= Essential criteria
D= Desired criteria

I.	System Management and Planning	
A.	Bylaws: The following criteria must be addressed in the RAC bylaws or other official RAC documents.	
1.	Written mission statement.	E
2.	EMS/Trauma System development goals outlined for the RAC/TSA.	E
3.	Defined chain of command, organizational decision-making process and flow of information.	E
4.	Committees and committee structures are clearly defined.	E
5.	Roles and responsibilities of RAC officers and their election process are clearly defined.	E
6.	A clear voting process to ensure only authorized votes are cast.	E
7.	Member participation requirements are clearly defined.	E
8.	Fees and/or dues are assessed in a fair and equitable manner, and shall be approved by a vote of the general membership.	E
9.	All entities caring for trauma patients are encouraged to attend RAC meetings and actively participate.	E
10.	RAC general membership holds final authority to approve/ratify the bylaws.	E
11.	Expenditure approval & budget authority identified in RAC organizational levels.	E
12.	Documented annual review of bylaws and system plan.	E
B.	A system needs assessment is completed annually.	E

C.	A written system plan is developed and submitted to the Texas Department of Health (TDH) for approval.	E
II.	RAC Operations	
A.	The System Plan is distributed to all member entities.	E
B.	Meetings are scheduled and conducted in accordance with the RAC's bylaws or other governance documents.	E
C.	Physical and Human Resources.	
1.	A permanent mailing address.	E
2.	A permanent office.	D
3.	A coordinator experienced in system development and implementation and/or clerical staff.	D
D.	RAC Communications.	
1.	TDH is notified as soon as possible of any major changes in the RAC.	E
2.	A formal process is established to communicate with the membership.	E
3.	An annual report is completed and submitted to TDH and RAC membership.	E
4.	Representatives are sent to neighboring RAC meetings when patient flow crosses TSA boundaries.	D
E.	RAC finances are conducted in accordance with state contract and other regulatory requirements.	E
F.	Education and training is conducted to meet the needs identified in the annual needs assessment and/or in performance improvement activities.	E
G.	A written plan identifies all resources available in the TSA for emergency and disaster preparedness.	E
H.	A regional performance improvement (PI) program is developed and implemented.	E
I.	A regional injury prevention program is developed and implemented.	E

Figure: 25 TAC §289.204(e)

Category of License		Fee
(1)	Accelerator (used for Production of Radioactive Material	$11,968.00
(2)	Agency-Accepted Training Course (Involving Possession of Radioactive Material)	$2,872.00
(3)	Bone Mineral Analyzer	$1,552.00
(4)	Broad License	$16,170.00
(5)	Calibration Service (Survey Instrument)	$1,320.00
(6)	Calibration/Reference Source	$990.00
(7)	Civil Defense	$1,552.00
(8)	Decontamination Service	
	(A) Fixed Site	$19,998.00
	(B) Mobile	$6,556.00
(9)	Demonstration/Sales	$2,992.00
(10)	Environmental Laboratory	$1,222.00
(11)	Eye Applicator	$1,222.00
(12)	Fine Leak Testing Device	$3,762.00
(13)	Fixed Multi-Beam Teletherapy	$6,732.00
(14)	X-Ray Fluorescence	$1,552.00
(15)	Hand-held Light Intensifying Imaging Device	$1,552.00
(16)	Gas Chromatograph	$1,442.00
(17)	Gauge	
	(A) Spinning Pipe-Thickness/Portable	$2,200.00
	(B) Fixed	$1,772.00
(18)	General License Acknowledgement-Gauge	$550.00

Category of License		Fee
(19)	Industrial Radiography (Fixed Facility)	$4,422.00
(20)	Industrial Radiography (Temporary Field Site)	$9,306.00
(21)	Installer, Repair, or Maintenance	$2,442.00
(22)	Irradiator (Self-Contained)	$2,442.00
(23)	Irradiator (Unshielded)	$15,048.00
(24)	In-Vitro Use of Radioactive Material	$738.00
(25)	In-Vitro Test Kit Manufacturer	$3,840.00
(26)	Leak Test Service	$1,442.00
(27)	Manufacturing and Commercial Distribution	
	(A) Processor of Radioactive Material	$38,082.00
	(B) Other Manufacturing and Commercial Distribution	$6,204.00
	(C) Commercial Distribution Only	$2,872.00
	(D) Limited Manufacturing (loose material)	$5,544.00
(28)	Medical Therapy (Sealed Source)	$2,112.00
(29)	Medical Therapy (Unsealed Source)	$1,772.00
(30)	Mineral Recovery (Byproduct Material)	$52,262.00
(31)	Mobile Scanning Service	$3,432.00
(32)	Naturally Occurring Radioactive Material (NORM)-Commercial Processing	$19,998.00
(33)	Nuclear Medicine (Diagnostic)	$1,882.00
(34)	Nuclear Pharmacy	$5,544.00
(35)	Neutron Generator Target	
	(A) Sealed	$1,584.00
	(B) Unsealed	$3,168.00

Category of License		Fee
(36)	Pacemaker	$892.00
(37)	Pipe Joint Collar Marker	$1,772.00
(38)	Radiopharmaceutical Manufacturing	$16,390.00
(39)	Remote Controlled Brachytherapy Device (Includes Low Dose-Rate and High Dose-Rate Remote Afterloaders and Intravenous Brachytherapy)	$2,772.00
(40)	Research and/or Development	$2,332.00
(41)	Source Material	$2,992.00
(42)	Special Nuclear Material	$1,772.00
(43)	Teletherapy	$2,772.00
(44)	Tracer Studies (Used in Other Than Oil and Gas Industry Wellbores)	$5,104.00
(45)	Tracer Studies (Used in Oil and Gas Industry Wellbores)	$3,080.00
(46)	Waste Processing-Class I Exempt	$2,992.00
(47)	Waste Processing-Class I	$31,218.00
(48)	Waste Processing-Class II	$73,954.00
(49)	Waste Processing-Class III	$213,906.00
(50)	Well Logging	$3,080.00
(51)	Other Specific License	$1,552.00
(52)	Additional Authorized Use Sites Where Radioactive Material Is Stored Or Used Under Same License Or Where Only Records Are Stored	25% of Applicable Fee Not To Exceed 50 Additional sites
(53)	Reciprocity	Fee of Applicable Category

Figure: 25 TAC §289.204(j)

	Category of Machine/Type of Use	Fee
(1)	Computerized Tomography (CT)	$1,440.00
(2)	Fluoroscopy	$710.00
(3)	Accelerator, Simulator, or Other Therapeutic Radiation Machine	$510.00
(4)	Radiographic Machines Only	$450.00
(5)	Podiatric Radiographic Only	$340.00
(6)	Dental Radiographic Only	$300.00
(7)	Veterinary, Including CT, Fluoroscopy, and Accelerators	$240.00
(8)	Industrial Radiography	
	(A) Fixed Facility	$1,480.00
	(B) Temporary Job Sites	$2,480.00
(9)	Other Industrial (A) Diffraction (B) Computerized Tomography (C) Fluoroscopy (D) Flash Radiography (E) Hand-held Light Intensifying Image Devices	$500.00
(10)	Morgues and Educational Facilities Utilizing Radiation Machines for Non-human Use, Including CT, Fluoroscopy, and Accelerators	$500.00

Category of Machine/Type of Use		Fee
(11)	Minimal Threat Radiation Machines as Specified in 25 TAC §289.231(ll)(3) of this Title (A) Cathodoluminescence (B) Electron Beam Welding (C) Fluorescence X-Ray (D) Gauge - X-Ray (E) Ion Implantation (F) Package X-Ray (G) Particle Size Analyzer - X-Ray (H) Cabinet X-Ray (Certified) (I) Other	$240.00
(12)	Exposure Rate or Dose Measurements performed by a Licensed Medical Physicist as Specified in 25 TAC §289.226(b)(9) of this Title	
(13)	Services as Specified in 25 TAC §289.226(b)(10) of this Title (A) Exposure Rate or Dose Measurements (B) Radiation Machine Output Measurements (C) Agency-Accepted Training Courses (D) Calibration (E) Demonstration/Sales (F) Assembly, Installation or Repair (G) Equipment Performance Evaluations on Dental Radiation Machines (H) Provider of Equipment	$220.00
(14)	Laser - Medical/Research/Academic	$200.00
(15)	Laser - Industrial/Services/Entertainment	$340.00
(16)	Reciprocity	Fee of Applicable Category
(17)	Additional Authorized Use Location Where Radiation Machines or Services are Authorized Under the Same Registration	30% of Applicable Fee

Figure: 25 TAC §289.204(m)

	License Category	New Application	Operational Status	Closure Only	Post-Closure
(a)	Conventional	$361,794		$95,202	$81,268
(b)	In Situ	$252,057	$95,202	$95,202	$40,634
(c)	Heap Leach	$254,617			
(d)	Disposal Only	$292,757	$95,202	$95,202	$81,268

Figure: 25 TAC §289.227(e)(15)

$$C = \frac{s}{\overline{X}} = \frac{1}{\overline{X}} \left[\sum_{i=1}^{n} \frac{(X_i - \overline{X})^2}{n-1} \right]^{1/2}$$

Where: s = estimated standard deviation of the popultion
$\overline{X}$ = mean value of observation in sample
X_i = ith observation in sample
n = number of observations in sample

Figure: 25 TAC §289.227(j)

RADIOGRAPHIC ENTRANCE EXPOSURE LIMITS

Technique	Patient Thickness (cm)	Exposure Limit (mR)
Chest (PA)		
(Non-Grid)	23	20
(Grid)	23	30
Abdomen (KUB)	23	450
Lumbo-Sacral Spine (AP)	23	550
Cervical Spine (AP)	13	120
Thoracic Spine (AP)	23	325
Full Spine	23	300
Skull (lateral)	15	150
Foot (DP)	8	50

Figure: 25 TAC §289.227(k)(4)(A)(*i*)

TABLE II. HALF-VALUE LAYER FOR SELECTED kVp

X-ray tube voltage (kilovolt peak)		Minimum HVL (mm of AL)
Designed operating range	Measured operating potential	
Below 51--------	30	0.3
	40	0.4
	50	0.5
51 to 70----------	51	1.2
	60	1.3
	70	1.5
Above 70--------	71	2.1
	80	2.3
	90	2.5
	100	2.7
	110	3.0
	120	3.2
	130	3.5
	140	3.8
	150	4.1

Figure: 25 TAC §289.227(l)(5)

$$\left|\overline{X}_1 - \overline{X}_2\right| \le 0.10\left(\overline{X}_1 + \overline{X}_2\right)$$

Figure: 25 TAC §289.227(o)(1)

Type of Machine	Frequency
CT	1 year
Fluoroscopy	1 year
Radiographic Podiatric use only	4 years
All other Radiographic	2 years

Figure: 25 TAC §289.227(s)(1)

	Name of Records/Documents	Rule Cross Reference	Time Interval for Keeping Records/Documents
(A)	Current 25 TAC §289.203, 204, 205, 226, 227, and 231	As listed on certificate of registration	Until termination of registration
(B)	Current certificate of registration	§289.203(b)(1)(B)	Until termination of registration
(C)	Notice of violation from last inspection, if applicable	§289.203(b)(1)(D)	Until next inspection
(D)	Documentation of correction of any violations	§289.203(b)(1)(D)	Until next inspection
(E)	Personnel monitoring records	§289.231(m)	Until termination of registration
(F)	Surveys (public dose evaluation)	§289.231(o)	Until termination of registration
(G)	FDA variances on equipment	§289.227(h)	Until termination of registration
(H)	Current operating and safety procedures	§289.227(i)(2)	Until termination of registration
(I)	Protective devices annual check	§289.227(i)(4)(B)	3 years
(J)	Credentials of individuals operating radiation machines	§289.227(i)(5)	Until individual leaves that facility
(K)	Entrance exposure rate/fluoroscopy	§289.227(m)(3)(D)	3 years
(L)	CT dose measurements	§289.227(n)(3)(C)	3 years
(M)	CT films resulting from quality control tests	§289.227(n)(4)(D)	3 years

	Name of Records/Documents	Rule Cross Reference	Time Interval for Keeping Records/Documents
(N)	Equipment performance evaluations and corrections	§289.227(o)(1),(2), and (3)	3 years
(O)	Film processing records and corrections	§289.227(p)(2),(3), and (6)	3 years
(P)	Alternate processing systems records	§289.227(q)	3 years
(Q)	Digital imaging acquisition systems records	§289.227(r)	3 years
(R)	Receipt, transfer, and disposal	§289.226(m)(1)(D)	Until termination of registration
(S)	Calibration and intercomparison of systems used to ensure compliance with this chapter	§289.227(o)(4) §289.231	3 years

Figure: 25 TAC §289.231(k)(2)

MEAN QUALITY FACTORS, Q, AND FLUENCE PER UNIT DOSE EQUIVALENT FOR MONOENERGETIC NEUTRONS

	Neutron Energy (MeV)	Quality Factor** (Q)	Fluence per Unit Dose Equivalent* (neutrons $cm^{-2}rem^{-1}$)	Fluence per Unit Dose Equivalent* (neutrons $cm^{-2}Sv^{-1}$)
(thermal)	2.5×10^{-8}	2	980×10^{6}	980×10^{8}
	1.0×10^{-7}	2	980×10^{6}	980×10^{8}
	1.0×10^{-6}	2	810×10^{6}	810×10^{8}
	1.0×10^{-5}	2	810×10^{6}	810×10^{8}
	1.0×10^{-4}	2	840×10^{6}	840×10^{8}
	1.0×10^{-3}	2	980×10^{6}	980×10^{8}
	1.0×10^{-2}	2.5	$1{,}010 \times 10^{6}$	$1{,}010 \times 10^{8}$
	1.0×10^{-1}	7.5	170×10^{6}	170×10^{8}
	5.0×10^{-1}	11	39×10^{6}	39×10^{8}
	1.0	11	27×10^{6}	27×10^{8}
	2.5	9	29×10^{6}	29×10^{8}
	5.0	8	23×10^{6}	23×10^{8}
	7.0	7	24×10^{6}	24×10^{8}
	10	6.5	24×10^{6}	24×10^{8}
	14	7.5	17×10^{6}	17×10^{8}
	20	8	16×10^{6}	16×10^{8}
	40	7	14×10^{6}	14×10^{8}
	60	5.5	16×10^{6}	16×10^{8}
	1.0×10^{2}	4	20×10^{6}	20×10^{8}
	2.0×10^{2}	3.5	19×10^{6}	19×10^{8}
	3.0×10^{2}	3.5	16×10^{6}	16×10^{8}
	4.0×10^{2}	3.5	14×10^{6}	14×10^{8}

*Monoenergetic neutrons incident normally on a 30-centimeter diameter cylinder tissue-equivalent phantom.

**Value of quality factor (Q) at the point where the DE is maximum in a 30-centimeter diameter cylinder tissue-equivalent phantom.

Figure: 25 TAC §289.231(ll)(2)

Machine Type/Type of Use	Years Between Inspections
CT	2 years
Fluoroscopy	2 years
Accelerators, Simulators, and Other Therapeutic Radiation Machines	2 years
Radiographic Only	3 years
Podiatric Radiographic Only	4 years
Minimal Threat	5 years
Industrial Radiography	1 year
Other Industrial	5 years
Laser (Human Use/Research/Academic)	As deemed necessary by the agency
Other Laser	As deemed necessary by the agency
Mammography	1 year

NOTE: The inspection intervals specified above were based upon the average number of health-related violations per inspection by category, as determined from compliance history data. These intervals will be reviewed at least every two years, and appropriate adjustments will be made.

Figure: 25 TAC §289.231(ll)(6)

Specific Subsection	Name of Record	Time Interval Required for Record Keeping
(r)(6)	Occupational dose assessments and administrative controls	Until termination of registration
(bb)(6)	Records at Additional Authorized Use/Storage Locations	While site is authorized on registration
(cc)(1)	Routine Surveys, Instrument Calibration	3 years
(cc)(2)	Surveys, Measurements, Calculations Used for Dose Determination	Until termination of registration
(dd)(1)-(3)	Individual Monitoring Results; BRC Form 231-3	Update annually; Maintain until termination of registration
(dd)(4)	Embryo/Fetus Dose	Until termination of registration
(dd)(5)	Records Used to Prepare BRC Form, 231-3	3 years
(ee)	Dose to Individual Members of the Public	Until termination of registration

Figure: 25 TAC §289.231(II)(7)

PAGE _____ OF _____

BRC Form 231-3
August 2003

Texas Department of Health/Bureau of Radiation Control

OCCUPATIONAL EXPOSURE RECORD FOR A MONITORING PERIOD

1. NAME (LAST, FIRST, MIDDLE INITIAL)	2. IDENTIFICATION NUMBER	3. ID TYPE	4. SEX ☐ MALE ☐ FEMALE	5. DATE OF BIRTH

6. MONITORING PERIOD	7. LICENSEE OR REGISTRANT NAME	8. LICENSE OR REGISTRATION NUMBER(S)	9A. ☐ RECORD ☐ ESTIMATE	9B. ☐ ROUTINE ☐ PSE

INTAKES

10A. RADIONUCLIDE	10B. CLASS	10C. MODE	10D. INTAKE IN µCi

DOSES (in rem)

DEEP DOSE EQUIVALENT (DDE)	11.
EYE DOSE EQUIVALENT TO THE LENS OF THE EYE (LDE)	12.
SHALLOW DOSE EQUIVALENT, WHOLE BODY (SDE,WB)	13.
SHALLOW DOSE EQUIVALENT, MAX EXTREMITY (SDE,ME)	14.
COMMITTED EFFECTIVE DOSE EQUIVALENT (CEDE)	15.
COMMITTED DOSE EQUIVALENT, MAXIMALLY EXPOSED ORGAN (CDE)	16.
TOTAL EFFECTIVE DOSE EQUIVALENT *(BLOCKS 11+15) (TEDE)*	17.
TOTAL ORGAN DOSE EQUIVALENT, MAX ORGAN *(BLOCKS 11+16) (TODE)*	18.

19. COMMENTS

20. SIGNATURE -- LICENSEE OR REGISTRANT	21. DATE PREPARED

INSTRUCTIONS AND ADDITIONAL INFORMATION PERTINENT TO THE COMPLETION OF BRC FORM 231-3
(All doses should be stated in rems)

1. Type or print the full name of the monitored individual in the order of last name (include "Jr," "Sr," "III," etc.), first name, middle initial (if applicable).

2. Enter the individual's identification number, including punctuation. This number should be the 9-digit social security number if at all possible. If the individual has no social security number, enter the number from another official identification such as a passport or work permit.

3. Enter the code for the type of identification used as shown below:

CODE	ID TYPE
SSN	U.S. Social Security Number
PPN	Passport Number
CSI	Canadian Social Insurance Number
WPN	Work Permit Number
IND	INDEX Identification Number
OTH	Other

4. Check the box that denotes the sex of the individual being monitored.

5. Enter the date of birth of the individual being monitored in the format MM/DD/YY.

6. Enter the monitoring period for which this report is filed. The format should be MM/DD/YY - MM/DD/YY.

7. Enter the name of the licensee or registrant.

8. Enter the Agency license or registration number or numbers.

9A. Place an "X" in Record or Estimate. Choose "Record" if the dose data listed represent a final determination of the dose received to the best of the licensee's or registrant's knowledge. Choose "Estimate" only if the listed dose data are preliminary and will be superseded by a final determination resulting in a subsequent report. An example of such an instance would be dose data based on self-reading dosimeter results and the licensee intends to assign the record dose on the basis of TLD results that are not yet available.

9B. Place an "X" in either Routine or PSE. Choose "Routine" if the data represent the results of monitoring for routine exposures. Choose "PSE" if the listed dose data represents the results of monitoring of planned special exposures received during the monitoring period. If more than one PSE was received in a single year, the licensee or registrant should sum them and report the total of all PSEs.

10A. Enter the symbol for each radionuclide that resulted in an internal exposure recorded for the individual, using the format "Xx-###x," for instance, Cs-137 or Tc-99m.

10B. Enter the lung clearance class as listed in §289.202(ggg)(2)(F) **[Appendix B to Part D (D, W, Y, V, or O for other)]** for all intakes by inhalation.

10C. Enter the mode of intake. For inhalation, enter "H." For absorption through the skin, enter "B." For oral ingestion, enter "G." For injection, enter "J."

10D. Enter the intake of each radionuclide in μCi.

11. Enter the deep dose equivalent (DDE) to the whole body.

12. Enter the eye dose equivalent (LDE) recorded for the lens of the eye.

13. Enter the shallow dose equivalent recorded for the skin of the whole body (SDE,WB).

14. Enter the shallow dose equivalent recorded for the skin of the extremity receiving the maximum dose (SDE,ME).

15. Enter the committed effective dose equivalent (CEDE) or "NR" for "Not Required" or "NC" for "Not Calculated".

16. Enter the committed dose equivalent (CDE) recorded for the maximally exposed organ or "NR" for "Not Required" or "NC" for "Not Calculated".

17. Enter the total effective dose equivalent (TEDE). The TEDE is the sum of items 11 and 15.

18. Enter the total organ dose equivalent (TODE) for the maximally exposed organ. The TODE is the sum of items 11 and 16.

19. COMMENTS.
In the space provided, enter additional information that might be needed to determine compliance with limits. An example might be to enter the note that the SDE,ME was the result of exposure from a discrete hot particle. Another possibility would be to indicate that an overexposed report has been sent to the Agency in reference to the exposure report.

20. Signature of the person designated to represent the licensee or registrant.

21. Enter the date this form was prepared.

Figure: 25 TAC §289.233(c)(19)

$$C = \frac{s}{\overline{X}} = \frac{1}{\overline{X}} \left[\sum_{i=1}^{n} \frac{(X_i - \overline{X})^2}{n-1} \right]^{1/2}$$

Where: s = estimated standard deviation of the population

$\overline{X}$ = mean value of observations in sample

X_i = ith observation in sample

n = number of observations in sample

Figure: 25 TAC §289.233(i)(3)(F)(vii)

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BRC Form 233-1 Texas Department of Health/Bureau of Radiation Control

OCCUPATIONAL EXPOSURE RECORD FOR A MONITORING PERIOD

1. NAME (LAST, FIRST, MIDDLE INITIAL)	2. IDENTIFICATION NUMBER	3. ID TYPE	4. SEX ☐ MALE ☐ FEMALE	5. DATE OF BIRTH

6. MONITORING PERIOD	7. LICENSEE OR REGISTRANT NAME	8. LICENSE OR REGISTRATION NUMBER(S)	9A. ☐ RECORD ☐ ESTIMATE	9B. ☐ ROUTINE ☐ PSE

INTAKES

10A. RADIONUCLIDE	10B. CLASS	10C. MODE	10D. INTAKE IN µCi

DOSES (in rem)	
DEEP DOSE EQUIVALENT (DDE)	11.
EYE DOSE EQUIVALENT TO THE LENS OF THE EYE (LDE)	12.
SHALLOW DOSE EQUIVALENT, WHOLE BODY (SDE,WB)	13.
SHALLOW DOSE EQUIVALENT, MAX EXTREMITY (SDE,ME)	14.
COMMITTED EFFECTIVE DOSE EQUIVALENT (CEDE)	15.
COMMITTED DOSE EQUIVALENT, MAXIMALLY EXPOSED ORGAN (CDE)	16.
TOTAL EFFECTIVE DOSE EQUIVALENT *(BLOCKS 11+15) (TEDE)*	17.
TOTAL ORGAN DOSE EQUIVALENT, MAX ORGAN *(BLOCKS 11+16) (TODE)*	18.
19. COMMENTS	

20. SIGNATURE -- LICENSEE OR REGISTRANT	21. DATE PREPARED

INSTRUCTIONS AND ADDITIONAL INFORMATION PERTINENT TO THE COMPLETION OF BRC FORM 233-1
(All doses should be stated in rems)

1. Type or print the full name of the monitored individual in the order of last name (include "Jr," "Sr," "III," etc.), first name, middle initial (if applicable).

2. Enter the individual's identification number, including punctuation. This number should be the 9-digit social security number if at all possible. If the individual has no social security number, enter the number from another official identification such as a passport or work permit.

3. Enter the code for the type of identification used as shown below:

CODE	ID TYPE
SSN	U.S. Social Security Number
PPN	Passport Number
CSI	Canadian Social Insurance Number
WPN	Work Permit Number
IND	INDEX Identification Number
OTH	Other

4. Check the box that denotes the sex of the individual being monitored.

5. Enter the date of birth of the individual being monitored in the format MM/DD/YY.

6. Enter the monitoring period for which this report is filed. The format should be MM/DD/YY - MM/DD/YY.

7. Enter the name of the licensee or registrant.

8. Enter the Agency license or registration number or numbers.

9A. Place an "X" in Record or Estimate. Choose "Record" if the dose data listed represent a final determination of the dose received to the best of the licensee's or registrant's knowledge. Choose "Estimate" only if the listed dose data are preliminary and will be superseded by a final determination resulting in a subsequent report. An example of such an instance would be dose data based on self-reading dosimeter results and the licensee intends to assign the record dose on the basis of TLD results that are not yet available.

9B. Place an "X" in either Routine or PSE. Choose "Routine" if the data represent the results of monitoring for routine exposures. Choose "PSE" if the listed dose data represents the results of monitoring of planned special exposures received during the monitoring period. If more than one PSE was received in a single year, the licensee or registrant should sum them and report the total of all PSEs.

10A. Enter the symbol for each radionuclide that resulted in an internal exposure recorded for the individual, using the format "Xx-###x," for instance, Cs-137 or Tc-99m.

10B. Enter the lung clearance class as listed in Appendix B to Part D (D, W, Y, V, or O for other) for all intakes by inhalation.

10C. Enter the mode of intake. For inhalation, enter "H." For absorption through the skin, enter "B." For oral ingestion, enter "G." For injection, enter "J."

10D. Enter the intake of each radionuclide in µCi.

11. Enter the deep dose equivalent (DDE) to the whole body.

12. Enter the eye dose equivalent (LDE) recorded for the lens of the eye.

13. Enter the shallow dose equivalent recorded for the skin of the whole body (SDE,WB).

14. Enter the shallow dose equivalent recorded for the skin of the extremity receiving the maximum dose (SDE,ME).

15. Enter the committed effective dose equivalent (CEDE) or "NR" for "Not Required" or "NC" for "Not Calculated".

16. Enter the committed dose equivalent (CDE) recorded for the maximally exposed organ or "NR" for "Not Required" or "NC" for "Not Calculated".

17. Enter the total effective dose equivalent (TEDE). The TEDE is the sum of items 11 and 15.

18. Enter the total organ dose equivalent (TODE) for the maximally exposed organ. The TODE is the sum of items 11 and 16.

19. COMMENTS.
In the space provided, enter additional information that might be needed to determine compliance with limits. An example might be to enter the note that the SDE,ME was the result of exposure from a discrete hot particle. Another possibility would be to indicate that an overexposed report has been sent to the Agency in reference to the exposure report.

20. Signature of the person designated to represent the licensee or registrant.

21. Enter the date this form was prepared.

Figure: 25 TAC §289.233(i)(4)(A)

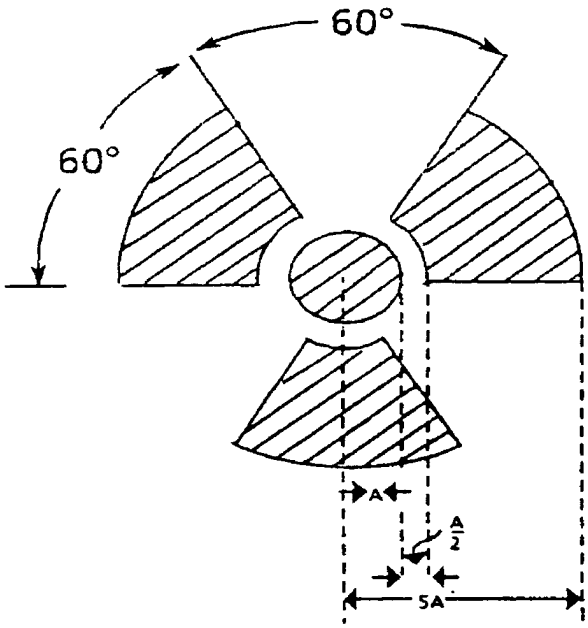

Figure: 25 TAC §289.233(i)(4)(B)(*iii*)
BRC FORM 233-2

Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3189

NOTICE TO EMPLOYEES

TEXAS REGULATIONS FOR CONTROL OF RADIATION

The Texas Department of Health has established standards for your protection against radiation hazards, in accordance with to the Texas Radiation Control Act, Health and Safety Code, Chapter 401.

YOUR EMPLOYER'S RESPONSIBILITY
Your employer is required to-
1. Apply these regulations to work involving sources of radiation and radiation machines.

2. Post or otherwise make available to you a copy of the Texas Department of Health regulations, certificates of registration, notices of violations, and operating procedures that apply to work you are engaged in, and explain their provisions to you.

YOUR RESPONSIBILITY AS A WORKER
You should familiarize yourself with those provisions of the regulations and the operating procedures that apply to the work you are engaged in. You should observe their provisions for your own protection and protection of your co-workers.

WHAT IS COVERED BY THESE REGULATIONS
1. Limits on exposure to radiation machines in restricted and unrestricted areas;
2. Measures to be taken after accidental exposure;
3. Individual monitoring devices, surveys and equipment;
4. Caution signs, labels, and safety interlock equipment;
5. Exposure records and reports;
6. Options for workers regarding agency inspections; and
7. Related matters.

REPORTS ON YOUR RADIATION EXPOSURE HISTORY
1. The regulations require that your employer give you a written report if you receive an exposure in excess of any applicable limit as set forth in the regulations or in the certificate of registration. The basic limits for exposure to employees are set forth in 25 Texas Administrative Code (TAC) §289.233(i)(3)(A) of this title (relating to Radiation Control Regulations for Radiation Machines Used in Veterinary Medicine). These subsections specify limits on exposure to radiation and exposure to concentrations of radioactive material in air and water.

2. If you work where individual monitoring devices are provided in accordance with 25 TAC §282.233(i)(3)(B) of this title;
(a) your employer must give you a written report, upon termination of your employment, of your radiation exposures if you request the information on your radiation exposure in writing; and
(b) your employer must furnish to you, upon your written request, an annual written report of your exposure to radiation.

INSPECTIONS
All registered activities are subject to inspection by representatives of the Texas Department of Health. In addition, any worker or representative of the workers who believes that there is a violation of the Texas Radiation Control Act, the regulations issued thereunder, or the terms of the employer's license or registration with regard to radiological working conditions in which the worker is engaged, may request an inspection by sending a notice of the alleged violation to the Texas Department of Health. The request must set forth the specific grounds for the notice, and must be signed by the worker or the representative of the workers. During inspections, agency inspectors may confer privately with workers, and any worker may bring to the attention of the inspectors any past or present condition that the individual believes contributed to or caused any violation as described above.

POSTING REQUIREMENT

Copies of this notice shall be posted in a sufficient number of places in every establishment where employees are employed in activities registered, in accordance with 25 TAC §289.233 (relating to Radiation Control Regulations for Radiation Machines Used in Veterinary Medicine), to permit employees to observe a copy on the way to or from their place of employment.

Figure: 25 TAC §289.233(i)(5)(E)(*i*)(*I*)

TABLE I. HALF-VALUE LAYER FOR SELECTED kVp

X-ray tube voltage (kilovolt peak)		Measured HVL (mm of AL)
Designed operating range	Measured operating potential	
Below 51----------	30	0.3
	40	0.4
	50	0.5
51 to 70----------	51	1.2
	60	1.3
	70	1.5
Above 70----------	71	2.1
	80	2.3
	90	2.5
	100	2.7
	110	3.0
	120	3.2
	130	3.5
	140	3.8
	150	4.1

Figure: 25 TAC §289.233(j)(1)(K)(*i*)(*II*)

"INFORMATION FALLING WITHIN EXCEPTION OF THE TEXAS PUBLIC INFORMATION ACT, GOVERNMENT CODE, CHAPTER 552----CONFIDENTIAL

This document contains information submitted to the Texas Department of Health, Bureau of Radiation Control by

_____
(Name of Company) (Name of Submitter)

which is claimed to fall within the following exception to the Texas Public Information Act, Government Code, Chapter 552, Subchapter C _____
(Appropriate Subsection)

WITHHOLD FROM PUBLIC DISCLOSURE

_____
(Signature and Title) (Office) (Date)"

Figure: 25 TAC §289.233(j)(2)

	Name of Records/Documents	Specific Rule Subsection	Time Interval for Keeping Records/Documents
(A)	Current 25 TAC §289.233	As listed on certificate of registration	Until termination of registration
(B)	Inventory of all radiation machines possessed	(h)(5)(A)	5 years
(C)	Current operating and safety procedures	(i)(2)	Until termination of registration
	Documentation that all staff who operate the radiation machine(s) have read this document		Until next on-site inspection
(D)	Surveys (public dose evaluation)	(i)(3)(C)	Until termination of registration
(E)	Occupational dose assessment and administrative control records	(i)(3)(F)(*vi*)	Until termination of registration
(F)	Current certificate of registration	(i)(4)(B)(*i*)(*II*)	Until termination of registration
(G)	Notice of violation from last inspection, if applicable	(i)(4)(B)(*i*)(*IV*)	Until next on-site inspection
(H)	Documentation of correction of any violations	(i)(4)(B)(*i*)(*IV*)	Until next on-site inspection
(I)	Protective devices annual check	(i)(5)(D)(*ii*)	5 years
(J)	Equipment performance evaluations	(i)(5)(S)(*ii*)	5 years
(K)	Film processing records and corrections	(i)(9)(F)	5 years

	Name of Records/Documents	Specific Rule Subsection	Time Interval for Keeping Records/Documents
(L)	Alternate processing systems records	(i)(10)	5 years
(M)	Digital imaging acquisition systems records	(i)(11)	5 years
(N)	Receipt, transfer, and disposal	(j)(1)(A)	Until termination of registration
(O)	Records at Additional Authorized Use/Storage Locations	(j)(1)(A)	White site is authorized on registration
(P)	Surveys, Measurements, Calibrations Used for Dose Determination	(j)(1)(N)(*ii*)	Until termination of registration
(Q)	Individual Monitoring Records	(j)(1)(O)	Until termination of registration
(R)	Occupational Dose Results, BRC Form 233-1	(j)(1)(O)(*i*)-(*iii*)	Update annually; Maintain until termination of registration
(S)	Embryo/Fetus Dose	(j)(1)(O)(*iv*)	Until termination of registration
(T)	Records Used to Prepare BRC Form 233-1	(j)(1)(O)(*v*)	5 years
(U)	Dose to Individual Members of the Public	(j)(1)(P)	Until termination of registration

Figure: 25 TAC §289.233(k)(2)(D)(*iii*)(*II*)

TABLE II
BASE ADMINISTRATIVE PENALTIES

Table IIA - Base Amounts

Type of User	Amount
All registrants	$5,000
Other persons not registered	$10,000

Table IIB - Percentage of Base Amounts Based on Severity Level of Violation

Severity Level	Percent of Amount Listed in Table 1A
I	100
II	80
III	50
IV	15
V	5

Figure: 25 TAC §289.251(f)(4)(D)(*iii*)(*II*)(-a-)

The receipt, possession, use, and transfer of this source, Model _____, Serial No._____, are subject to a general license and the regulations of the NRC or of a state with which the NRC has entered into an agreement for the exercise of regulatory authority. Do not remove this label.

CAUTION - RADIOACTIVE MATERIAL - THIS SOURCE CONTAINS (AMERICIUM-241) (PLUTONIUM-238) (PLUTONIUM-239)*. DO NOT TOUCH RADIOACTIVE PORTION OF THIS SOURCE.

_____; or
Name of Manufacturer or Initial Transferor

* Showing only the name of the appropriate material.

Figure: 25 TAC §289.251(f)(4)(D)(*iii*)(*II*)(-b-)

The receipt, possession, use, and transfer of this source, Model _____, Serial No._____, are subject to a general license and the regulations of any licensing state. Do not remove this label.

CAUTION - RADIOACTIVE MATERIAL - THIS SOURCE CONTAINS RADIUM-226. DO NOT TOUCH RADIOACTIVE PORTION OF THIS SOURCE.

_____; or
Name of Manufacturer or Initial Transferor

Figure: 25 TAC §289.251(f)(4)(G)(*iii*)(*II*)(-a-)

This radioactive material shall be received, acquired, possessed, and used only by physicians, veterinarians, clinical laboratories, or hospitals and only for *in vitro* clinical or laboratory tests not involving internal or external administration of the material, or the radiation therefrom, to human beings or animals. Its receipt, acquisition, possession, use, and transfer are subject to the regulations and a general license of the NRC or of a state with which the NRC has entered into an agreement for the exercise of regulatory authority.

_____; or
Name of Manufacturer

Figure: 25 TAC §289.251(f)(4)(G)(*iii*)(*II*)(-b-)

This radioactive material shall be received, acquired, possessed, and used only by physicians, veterinarians, clinical laboratories, or hospitals and only for *in vitro* clinical or laboratory tests not involving internal or external administration of the material, or the radiation therefrom, to human beings or animals. Its receipt, acquisition, possession, use, and transfer are subject to the rules and a general license of a licensing state.

_____; or
Name of Manufacturer

Figure: 25 TAC §289.251(m)(1)

Element (atomic number)	Isotope	Column I Gas Concentration Ci/ml*	Column II Liquid and Solid Concentration µCi/ml**
Antimony (51)	Sb-122		3×10^{-4}
	Sb-124		2×10^{-4}
	Sb-125		1×10^{-3}
Argon (18)	Ar-37	1×10^{-3}	
	Ar-41	1×10^{-7}	
Arsenic (33)	As-73		5×10^{-3}
	As-74		5×10^{-4}
	As-76		2×10^{-4}
	As-77		8×10^{-4}
Barium (56)	Ba-131		2×10^{-3}
	Ba-140		3×10^{-4}
Beryllium (4)	Be-7		2×10^{-2}
Bismuth (83)	Bi-206		4×10^{-4}
Bromine (35)	Br-82	4×10^{-7}	3×10^{-3}
Cadmium (48)	Cd-109		2×10^{-3}
	Cd-115m		3×10^{-4}
	Cd-115		3×10^{-4}
Calcium (20)	Ca-45		9×10^{-5}
	Ca-47		5×10^{-4}
Carbon (6)	C-14	1×10^{-6}	8×10^{-3}
Cerium (58)	Ce-141		9×10^{-4}
	Ce-143		4×10^{-4}
	Ce-144		1×10^{-4}
Cesium (55)	Cs-131		2×10^{-2}
	Cs-134m		6×10^{-2}
	Cs-134		9×10^{-5}
Chlorine (17)	Cl-138	9×10^{-7}	4×10^{-3}
Chromium (24)	Cr-51		2×10^{-2}
Cobalt (27)	Co-57		5×10^{-3}
	Co-58		1×10^{-3}
	Co-60		5×10^{-4}
Copper (29)	Cu-64		3×10^{-3}

* Values are given in Column I only for those materials normally used in gases.

** µCi/gm for solids

Element (atomic number)	Isotope	Column I Gas Concentration µCi/ml*	Column II Liquid and Solid Concentration µCi/ml**
Dysprosium (66)	Dy-165		4×10^{-3}
	Dy-166		4×10^{-4}
Erbium (68)	Er-169		9×10^{-4}
	Er-171		1×10^{-3}
Europium (63)	Eu-152 (T/2=9.2 h)		6×10^{-4}
	Eu-155		2×10^{-3}
Fluorine (9)	F-18	2×10^{-6}	8×10^{-3}
Gadolinium (64)	Gd-153		2×10^{-3}
	Gd-159		8×10^{-4}
Gallium (31)	Ga-72		4×10^{-4}
Germanium (32)	Ge-71		2×10^{-2}
Gold (79)	Au-196		2×10^{-3}
	Au-198		5×10^{-4}
	Au-199		2×10^{-3}
Hafnium (72)	Hf-181		7×10^{-4}
Hydrogen (1)	H-3	5×10^{-6}	3×10^{-2}
Indium (49)	In-113m		1×10^{-2}
	In-114m		2×10^{-4}
Iodine (53)	I-126	3×10^{-9}	2×10^{-5}
	I-131	3×10^{-9}	2×10^{-5}
	I-132	8×10^{-8}	6×10^{-4}
	I-133	1×10^{-8}	7×10^{-5}
	I-134	2×10^{-7}	1×10^{-3}
Iridium (77)	Ir-190		2×10^{-3}
	Ir-192		4×10^{-4}
	Ir-194		3×10^{-4}
Iron (26)	Fe-55		8×10^{-3}
	Fe-59		6×10^{-4}
Krypton (36)	Kr-85m	1×10^{-6}	
	Kr-85	3×10^{-6}	
Lanthanum (57)	La-140		2×10^{-4}
Lead (82)	Pb-203		4×10^{-3}

* Values are given in Column I only for those materials normally used in gases.

** µCi/gm for solids

Element (atomic number)	Isotope	Column I Gas Concentration µCi/ml*	Column II Liquid and Solid Concentration µCi/ml**
Lutetium (71)	Lu-177		1×10^{-3}
Manganese (25)	Mn-52		3×10^{-4}
	Mn-54		1×10^{-3}
	Mn-56		1×10^{-3}
Mercury (80)	Hg-197m		2×10^{-3}
	Hg-197		3×10^{-3}
	Hg-203		2×10^{-4}
Molybdenum (42)	Mo-99		2×10^{-3}
Neodymium (60)	Nd-147		6×10^{-4}
	Nd-149		3×10^{-3}
Nickel (28)	Ni-65		1×10^{-3}
Niobium (Columbium) (41)	Nb-95		1×10^{-3}
	Nb-97		9×10^{-3}
Osmium (76)	Os-185		7×10^{-4}
	Os-191m		3×10^{-2}
	Os-191		2×10^{-3}
	Os-193		6×10^{-4}
Palladium (46)	Pd-103		3×10^{-3}
	Pd-109		9×10^{-4}
Phosphorus (15)	P-32		2×10^{-4}
Platinum (78)	Pt-191		1×10^{-3}
	Pt-193m		1×10^{-2}
	Pt-197m		1×10^{-2}
	Pt-197		1×10^{-3}
Polonium (84)	Po-210		7×10^{-6}
Potassium (19)	K-42		3×10^{-3}
Praseodymium	Pr-142		3×10^{-4}
	Pr-143		5×10^{-4}
Promethium (61)	Pm-147		2×10^{-3}
	Pm-149		4×10^{-4}
Radium (88)	Ra-226		1×10^{-7}
	Ra-228		3×10^{-7}

* Values are given in Column I only for those materials normally used in gases.

** µCi/gm for solids

Element (atomic number)	Isotope	Column I Gas Concentration µCi/ml*	Column II Liquid and Solid Concentration µCi/ml**
Rhenium (75)	Re-183		6×10^{-3}
	Re-186		9×10^{-4}
	Re-188		6×10^{-4}
Rhodium (45)	Rh-103m		1×10^{-1}
	Rh-105		1×10^{-3}
Rubidium (37)	Rb-86		7×10^{-4}
Ruthenium (44)	Ru-97		4×10^{-3}
	Ru-103		8×10^{-4}
	Ru-105		1×10^{-3}
	Ru-106		1×10^{-4}
Samarium (62)	Sm-153		8×10^{-4}
Scandium (21)	Sc-46		4×10^{-4}
	Sc-47		9×10^{-4}
	Sc-48		3×10^{-4}
Selenium (34)	Se-75		3×10^{-3}
Silicon (14)	Si-131		9×10^{-3}
Silver (47)	Ag-105		1×10^{-3}
	Ag-110m		3×10^{-4}
	Ag-111		4×10^{-4}
Sodium (11)	Na-24		2×10^{-3}
Strontium (38)	Sr-85		1×10^{-3}
	Sr-89		1×10^{-4}
	Sr-91		7×10^{-4}
	Sr-92		7×10^{-4}
Sulfur (16)	S-35	9×10^{-8}	6×10^{-4}
Tantalum (73)	Ta-82		4×10^{-4}
Technetium (43)	Tc-96m		1×10^{-1}
	Tc-96		1×10^{-3}

* Values are given in Column I only for those materials normally used in gases.

** µCi/gm for solids

Element (atomic number)	Isotope	Column I Gas Concentration µCi/ml*	Column II Liquid and Solid Concentration µCi/ml**
Tellurium (52)	Te-125m		2×10^{-3}
	Te-127m		6×10^{-4}
	Te-127		3×10^{-3}
	Te-129m		3×10^{-4}
	Te-131m		6×10^{-4}
	Te-132		3×10^{-4}
Terbium (65)	Tb-160		4×10^{-4}
Thallium (81)	Tl-200		4×10^{-3}
	Tl-201		3×10^{-3}
	Tl-202		1×10^{-3}
	Tl-204		1×10^{-3}
Thulium (69)	Tm-170		5×10^{-4}
	Tm-171		5×10^{-3}
Tin (50)	Sn-113		9×10^{-4}
	Sn-125		2×10^{-4}
Tungsten (Wolfram) (74)	W-181		4×10^{-3}
	W-187		7×10^{-4}
Vanadium (23)	V-48		3×10^{-4}
Xenon (54)	Xe-131m	4×10^{-6}	
	Xe-133	3×10^{-6}	
	Xe-135	1×10^{-6}	
Ytterbium (70)	Y-175		1×10^{-3}
Ittrium (39)	Y-90		2×10^{-4}
	Y-91m		3×10^{-2}
	Y-91		3×10^{-4}
	Y-92		6×10^{-4}
	Y-93		3×10^{-4}
Zinc (30)	Zn-65		1×10^{-3}
	Zn-69m		7×10^{-4}
	Zn-69		2×10^{-2}

* Values are given in Column I only for those materials normally used in gases.

** µCi/gm for solids

Element (atomic number)	Isotope	Column I Gas Concentration μCi/ml*	Column II Liquid and Solid Concentration μCi/ml**
Zirconium (40)	Zr-95		6×10^{-4}
	Zr-97		2×10^{-4}
Beta and/or gamma emitting radioactive material not listed above with half-life less than 3 years		1×10^{-10}	1×10^{-6}

NOTE 1: Many radioisotopes disintegrate into isotopes that are also radioactive. In expressing the concentrations in this paragraph, the activity stated is that of the parent isotope and takes into account the daughters.

NOTE 2: For purposes of subsection (d) of this section where a combination of isotopes is involved, the limit for the combination should be derived as follows: Determine for each isotope in the product the ratio between the concentration present in the product and the exempt concentration established in this paragraph for the specific isotope when not in combination. The sum of such ratios may not exceed "1" (for example, unity).

EXAMPLE:

$$\frac{\text{Concentration of Isotope A in Product}}{\text{Exempt Concentration of Isotope A}} +$$

$$\frac{\text{Concentration of Isotope B in Product}}{\text{Exempt Concentration of Isotope B}} \quad \# \ 1$$

* Values are given in Column I only for those materials normally used in gases.

** μCi/gm for solids

Figure: 25 TAC §289.251(m)(2)

Radioactive Material	Microcuries
Antimony-122 (Sb-122)	100
Antimony-124 (Sb-124)	10
Antimony-125 (Sb-125)	10
Arsenic-73 (As-73)	100
Arsenic-74 (As-74)	10
Arsenic-76 (As-76)	10
Arsenic-77 (As-77)	100
Barium-131 (Ba-131)	10
Barium-133 (Ba-133)	10
Barium-140 (Ba-140)	10
Beryllium-7 (Be-7)	100
Bismuth-210 (Bi-210)	1
Bromine-82 (Br-82)	10
Cadmium-109 (Cd-109)	10
Cadmium-115m (Cd-115m)	10
Cadmium-115 (Cd-115)	100
Calcium-45 (Ca-45)	10
Calcium-47 (Ca-47)	10
Carbon-14 (C-14)	100
Cerium-141 (Ce-141)	100
Cerium-143 (Ce-143)	100
Cerium-144 (Ce-144)	1
Cesium-129 (Cs-129)	100
Cesium-131 (Cs-131)	1,000
Cesium-134m (Cs-134m)	100
Cesium-134 (Cs-134)	1
Cesium-135 (Cs-135)	10
Cesium-136 (Cs-136)	10
Cesium-137 (Cs-137)	10
Chlorine-36 (Cl-36)	10
Chlorine-38 (Cl-38)	10
Chromium-51 (Cr-51)	1,000
Cobalt-57 (Co-57)	100
Cobalt-58m (Co-58m)	10
Cobalt-58 (Co-58)	10
Cobalt-60 (Co-60)	1
Copper-64 (Cu-64)	100
Dysprosium-165 (Dy-165)	10
Dysprosium-166 (Dy-166)	100

Radioactive Material	Microcuries
Erbium-169 (Er-169)	100
Erbium-171 (Er-171)	100
Europium-152 (Eu-152) 9.2h	100
Europium-152 (Eu-152) 13 yr	1
Europium-154 (Eu-154)	1
Europium-155 (Eu-155)	10
Fluorine-18 (F-18)	1,000
Gadolinium-153 (Gd-153)	10
Gadolinium-159 (Gd-159)	100
Gallium-67 (Ga-67)	100
Gallium-72 (Ga-72)	10
Germanium-68 (Ge-68)	10
Germanium-71 (Ge-71)	100
Gold-195 (Au-195)	10
Gold-198 (Au-198)	100
Gold-199 (Au-199)	100
Hafnium-181 (Hf-181)	10
Holmium-166 (Ho-166)	100
Hydrogen-3 (H-3)	1,000
Indium-111 (In-111)	100
Indium-113m (In-113m)	100
Indium-114m (In-114m)	10
Indium-115m (In-115m)	100
Indium-115 (In-115)	10
Iodine-123 (I-123)	100
Iodine-125 (I-125)	1
Iodine-126 (I-126)	1
Iodine-129 (I-129)	0.1
Iodine-131 (I-131)	1
Iodine-132 (I-132)	10
Iodine-133 (I-133)	1
Iodine-134 (I-134)	10
Iodine-135 (I-135)	10
Iridium-192 (Ir-192)	10
Iridium-194 (Ir-194)	100
Iron-52 (Fe-52)	10
Iron-55 (Fe-55)	100
Iron-59 (Fe-59)	10
Krypton-85 (Kr-85)	100

Radioactive Material	Microcuries
Krypton-87 (Kr-87)	10
Lanthanum-140 (La-140)	10
Lutetium-177 (Lu-177)	100
Manganese-52 (Mn-52)	10
Manganese-54 (Mn-54)	10
Manganese-56 (Mn-56)	10
Mercury-197m (Hg-197m)	100
Mercury-197 (Hg-197)	100
Mercury-203 (Hg-203)	10
Molybdenum-99 (Mo-99)	100
Neodymium-147 (Nd-147)	100
Neodymium-149 (Nd-149)	100
Nickel-59 (Ni-59)	100
Nickel-63 (Ni-63)	10
Nickel-65 (Ni-65)	100
Niobium-93m (Nb-93m)	10
Niobium-95 (Nb-95)	10
Niobium-97 (Nb-97)	10
Osmium-185 (Os-185)	10
Osmium-191m (Os-191m)	100
Osmium-191 (Os-191)	100
Osmium-193 (Os-193)	100
Palladium-103 (Pd-103)	100
Palladium-109 (Pd-109)	100
Phosphorus-32 (P-32)	10
Platinum-191 (Pt-191)	100
Platinum-193m (Pt-193m)	100
Platinum-193 (Pt-193)	100
Platinum-197m (Pt-197m)	100
Platinum-197 (Pt-197)	100
Polonium-210 (Po-210)	0.1
Potassium-42 (K-42)	10
Potassium-43 (K-43)	10
Praseodymium-142 (Pr-142)	100
Praseodymium-143 (Pr-143)	100
Promethium-147 (Pm-147)	10
Promethium-149 (Pm-149)	10
Radon-222 (Rn-222)	100
Rhenium-186 (Re-186)	100
Rhenium-188 (Re-188)	100

Radioactive Material	Microcuries
Rhodium-103m (Rh-103m)	100
Rhodium-105 (Rh-105)	100
Rubidium-81 (Rb-81)	10
Rubidium-86 (Rb-86)	10
Rubidium-87 (Rb-87)	10
Ruthenium-97 (Ru-97)	100
Ruthenium-103 (Ru-103)	10
Ruthenium-105 (Ru-105)	10
Ruthenium-106 (Ru-106)	1
Samarium-151 (Sm-151)	10
Samarium-153 (Sm-153)	100
Scandium-46 (Sc-46)	10
Scandium-47 (Sc-47)	100
Scandium-48 (Sc-48)	10
Selenium-75 (Se-75)	10
Silicon-31 (Si-31)	100
Silver-105 (Ag-105)	10
Silver-110m (Ag-110m)	1
Silver-111 (Ag-111)	100
Sodium-22 (Na-22)	10
Sodium-24 (Na-24)	10
Strontium-85 (Sr-85)	10
Strontium-87m (Sr-87m)	10
Strontium-89 (Sr-89)	1
Strontium-90 (Sr-90)	0.1
Strontium-91 (Sr-91)	10
Strontium-92 (Sr-92)	10
Sulphur-35 (S-35)	100
Tantalum-182 (Ta-182)	10
Technetium-96 (Tc-96)	10
Technetium-97m (Tc-97m)	100
Technetium-97 (Tc-97)	100
Technetium-99m (Tc-99m)	100
Technetium-99 (Tc-99)	10
Tellurium-125m (Te-125m)	10
Tellurium-127m (Te-127m)	10
Tellurium-127 (Te-127)	100
Tellurium-129m (Te-129m)	10
Tellurium-129 (Te-129)	100
Tellurium-131m (Te-131m)	10

Radioactive Material	Microcuries
Tellurium-132 (Te-132)	10
Terbium-160 (Tb-160)	10
Thallium-200 (Tl-200)	100
Thallium-201 (Tl-201)	100
Thallium-202 (Tl-202)	100
Thallium-204 (Tl-204)	10
Thulium-170 (Tm-170)	10
Thulium-171 (Tm-171)	10
Tin-113 (Sn-113)	10
Tin-125 (Sn-125)	10
Tungsten-181 (W-181)	10
Tungsten-185 (W-185)	10
Tungsten-187 (W-187)	100
Vanadium-48 (V-48)	10
Xenon-131m (Xe-131m)	1,000
Xenon-133 (Xe-133)	100
Xenon-135 (Xe-135)	100
Ytterbium-175 (Yb-175)	100
Yttrium-87 (Y-87)	10
Yttrium-88 (Y-88)	10
Yttrium-90 (Y-90)	10
Yttrium-91 (Y-91)	10
Yttrium-92 (Y-92)	100
Yttrium-93 (Y-93)	100
Zinc-65 (Zn-65)	10
Zinc-69m (Zn-69m)	100
Zinc-69 (Zn-69)	1,000
Zirconium-93 (Zr-93)	10
Zirconium-95 (Zr-95)	10
Zirconium-97 (Zr-97)	10
Any radioactive material not listed above other than alpha emitting radioactive material	0.1

Figure: 25 TAC §289.252(ii)(2)

Radionuclides	Limit	Unsealed Sources			Sealed Sources
		10^3	10^4	10^5	10^{10}
Ce-142, Pr-141, Nd-144, Nd-145, Sm-146, Sm-147, Sm-148, Gd-148, Gd-150, Gd-151, Gd-152, Tb-159, Dy-154, Dy-156, Ho-165, Hf-174, W-180, Pt-190, Pb-210, Bi-209, Bi-209m, Po-208, Po-209, Po-210, Ra-226, Ac-227, Th-228, Th-229, Th-230, Pa-231, U-232, U-233, U-234, U-235, U-236, Np-235, Np-237, Pu-236, Pu-238, Pu-239, Pu-240, Pu-241, Pu-242, Pu-244, Am-241, Am-242m, Am-243, Cm-242, Cm-243, Cm-244, Cm-245, Cm-246, Cm-247, Cm-248, Bk-247, Bk-249, Cf-248, Cf-249, Cf-250, Cf-251, Cf-252, Es-254, Any Alpha-emitting radionuclide not listed above or mixtures of unknown alpha emitters of unknown composition	0.01 µCi	.01 mCi	0.1 mCi	1.0 mCi	100 Ci
Be-10, Al-26, Si-32, Ar-39, Ar-42, K-40, Ca-45, Ca-48, Ti-44, V-49, V-50, Fe-60, Zn-70, Ge-68, Ge-76, Kr-81, Sr-90, Zr-96, Mo-100, Tc-98, Rh-101, Rh-102, Pd-107, Ag-108m, Cd-113m, Cd-116, Sn-121m, Sn-123, Sn-124, Sn-126 Te-121m, Te-123, Te-130, I-129, La-137, La-138, Ce-139, Nd-150, Pm-143, Pm-144, Pm-145, Pm-146, Sm-145, Eu-150, Tb-157, Tb-158, Dy-159, Ho-166m, Lu-173, Lu-174, Lu-174m, Lu-175, Lu-176, Lu-177m, Hf-172, Hf-182, Ta-179, Re-184m, Re-187, Re-189, Os-194, Ir-199m2, Pt-192, Pt-198, Hg-194, Pb-202, Pb-205, Bi-208, Ra-228, Np-236, Bk-248, Any radionuclide other than alpha-emitting radionuclides not listed above or mixtures of beta emitters of unknown composition	0.1 µCi	0.1 mCi	1.0 mCi	10 mCi	1.0 kCi
Na-22, Co-60, Ru-106, Ag-110m, Cs-134, Ce-144, Eu-152, Eu-154, Bi-210	1.0 µCi	1.0 mCi	10 mCi	100 mCi	10 kCi
Cl-36, Ca-45, Mn-54, Ni-63, Zn-65, Se-75, Rb-87, Zr-93, Nb-93m, Cd-109, In-115, Sb-125, Ba-133, Ba-135, Cs-137, Gd-153, Eu-155, Tm-170, Tm-171, W-181, Tl-204	10 µCi	10 mCi	100 mCi	1.0 Ci	100 kCi
C-14, Fe-55, Co-57, Ni-59, Kr-85, Tc-97, Tc-99, Pt-193, Ir-194, Th (natural), Th-232, U(natural), U-238	100 µCi	100 mCi	1.0 Ci	10 Ci	1.0 MCi
H-3	1.0 mCi	1 Ci	10 Ci	100 Ci	10 MCi

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.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of January 2, 2004, through January 8, 2004. The public comment period for these projects will close at 5:00 p.m. on February 13, 2004.

FEDERAL AGENCY ACTIONS:

Applicant: Sterling Exploration & Production Company, LLC; Location: The projects are located in State Tracts (ST) 47, 48, 52, 53, 65, 71, 95, 180 and 181, Matagorda Bay, Calhoun County, Texas. The projects can be located on the U.S.G.S. quadrangle maps entitled: Keller Bay and Carancahua Pass, Texas. Approximate UTM Coordinates: Zone 14; 21641(03)/008, Easting: 745833; Northing: 3158503; /009, Easting: 745833; Northing: 3158503; /010, Easting: 748836, Northing: 3160569; /011, Easting: 748863, Northing: 3160569; /012, Easting: 751468, Northing: 3158315; /013, Easting: 751468, Northing: 3158315; /014, Easting: 745840, Northing: 3160721; /015, Easting: 762254, Northing: 3160183; /016, Easting: 762254, Northing: 3160183. Project Description: The applicant proposes to drill and install wells in ST's 52, 71, 95, and 180. If the wells become viable, the applicant proposes to install 2- to 4-inch flow lines from the wells to existing structures or onto the mainland for production. The flow lines would be installed by jetting using a jet sled and would be placed in ST's 47, 48, 52, 53, 65, 71, 95, 180 and 181. CCC Project No.: 03-0400-F1; Type of Application: U.S.A.C.E. permit application #21641(03)/008, /009, /010, /011, 012, /013, /014, /015, /016 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Bayside Developers, Inc.; Location: The project is located in Galveston Bay, at the terminus of Avenue A, in San Leon, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Bacliff, Texas. Approximate UTM Coordinates: Zone 15; Easting: 311975; Northing: 3264963. Project Description: The applicant proposes to retain one existing pier and boathouse and construct an additional pier and boathouse. Both piers are for private use. His project previously included the placement of fill material to extend and improve an existing rock groin that extends from an existing road right of way. The applicant has revised his plans and removed the improvements to the rock groin from his permit plans. CCC Project No.: 03-0401-F3; Type of Application: U.S.A.C.E. permit application #23002 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Port of Corpus Christi Authority; Location: The project is located in Portland, San Patricio County, Texas along the shoreline of Corpus Christi Bay, approximately 3,500 feet west of the existing La Quinta Channel. The project can be located on the U.S.G.S. quadrangle map entitled: Gregory, Texas. Approximate UTM Coordinates: Zone 14; Easting: 669130; Northing: 3085284. Project Description: The applicant proposes to construct a container terminal for berthing three post-Panamax ships on 1,114 acres along the proposed extension of the La Quinta Channel identified in the Federal Corpus Christi Ship Channel, Texas, Channel Improvement Project. The applicant plans to hydraulically dredge 1,250,000 cubic yards of material from 29.5 acres of bay bottom to a depth of -43 feet mean low tide for a marine berth. The area to be dredged includes 27.1 acres of unvegetated bay bottom and 2.4 acres of low-density seagrass. The proposed project also involves the discharge of fill into 4 acres of jurisdictional wetlands along the existing shoreline, construction of a marginal wharf, 3,800 feet by 140 feet, for berthing and unloading container ships, construction of a container yard, intermodal terminal, road and rail access corridor, buffer zone, dredge material placement area, and other ancillary facilities. The applicant proposes to create 27.1 acres of shallow water unvegetated bay bottom and plant 7.2 acres of seagrass and 6.6 acres of smooth cordgrass for mitigation within the proposed 200 acre beneficial use site GH that will be constructed as part of the Federal Corpus Christi Ship Channel, Texas, Channel Improvement Project. CCC Project No.: 03-0408-F1; Type of Application: U.S.A.C.E. permit application #23269 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A §1251-1387). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: Willacy County Navigation District; Location: The project is located at 600 through 700 East Port Drive, Port Mansfield, Willacy County, TX. The project can be located on the U.S.G.S. quadrangle map entitled: Port Mansfield, Texas. Approximate UTM Coordinates: Zone 14; Easting: 656350; Northing: 2937800. Project Description: The applicant proposes to develop a portion of the Industrial Basin in the Port Mansfield Small Boat Harbor as a residential waterfront subdivision. Approximately 1,200 linear feet of concrete sheet pile bulkheading would be installed by jetting and/or driving along the waterfront. The sheet pile wall would extend into the high bank for a minimum of 20 feet at each end to prevent erosion behind the wall. Most of the sheet pile would be installed landward of the existing high bank with the exception of an area of erosion that extends for approximately 280 feet and would cover 0.08 acre of area behind the proposed bulkhead. A total of 5,200 cubic yards of material would be mechanically excavated from in front of the proposed bulkhead to achieve a depth of -5.5 feet Mean Sea Level (MSL). Approximately 3,500 cubic yards of this material would be excavated below -1.2 feet MSL. Excavated material would deposited on-site within an earthen berm except for 300 cubic yards of fill that would be placed below -1.2 feet MSL in the area to be backfilled. Silt fences and hay bales would be placed around the fill area to prevent discharge from re-entering the basin. CCC Project No.: 03-0414-F3; Type of Application: U.S.A.C.E. permit application

#23258 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A §1251-1387).

Applicant: Apache Corporation; Location: The project is located in the Gulf of Mexico, in the Galveston Anchorage Area, in Galveston Area Block 151, in Federal waters, offshore Texas. Approximate X, Y Coordinates: X: 3,409,959; Y: 532,800. Project Description: The applicant proposes to amend Department of the Army Permit 20084(02) to include the drilling of additional wells from a typical marine jack-up rig and, if productive, service the wells from a new 4-pile platform that will be linked to the existing platform by a 75-foot-long bridge. CCC Project No.: 04-0006-F1; Type of Application: U.S.A.C.E. permit application #20084(03) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200400415
Larry L. Laine
Chief Clerk, Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: January 21, 2004

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Sections 403.011, 2155.001, and 2156.121, Texas Government Code, and Chapter 54, Subchapter F, Sections 54.602, 54.611 - 618, and 54.636, Texas Education Code, the Comptroller of Public Accounts (Comptroller), on behalf of the Texas Prepaid Higher Education Tuition Board (Board), announces the issuance of its Request for Proposals (RFP #167j) for tactical asset allocation strategy investment management services for the Texas Guaranteed Tuition Plan, the state's prepaid higher education tuition program and one of the Texas Tomorrow Funds (Program). The funds to be managed are funds from contracts and investments of the Program. The Comptroller and the Board request proposals from qualified firms for tactical asset allocation strategy investment management services for the Program's portfolio. The Comptroller, as Chair and Executive Director of the Board, is issuing this RFP in order that the Board may move forward with retaining the necessary investment manager(s). The Comptroller and the Board reserve the right to award more than one contract under the RFP. If approved by the Board, the successful respondent(s) will be expected to begin performance of the contract on or about April 5, 2004.

Contact: Parties interested in submitting a proposal should contact John C. Wright, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Room G-24, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, January 30, 2004, between 2:00 p.m. and 5:00 p.m. Central Zone Time (CZT), and during normal business hours thereafter.

The Comptroller will also make the entire RFP available electronically on the Texas Marketplace after Friday, January 30, 2004, 2:00 p.m. CZT. The website address is http://esbd.tbpc.state.tx.us.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, February 6, 2004. Prospective respondents are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 475-0973 to ensure timely receipt. The Letter of Intent must be addressed to John C. Wright, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Non-mandatory Letters of Intent and Questions received after this time and date will not be considered. On or before Tuesday, February 10, 2004, the Comptroller expects to post responses to questions as a revision to the Texas Marketplace notice on the issuance of this RFP.

Closing Date: Proposals must be delivered to the Office of the Deputy General Counsel for Contracts, at the location specified above (ROOM G24) no later than 2:00 p.m. (CZT), on Wednesday, February 18, 2004. Proposals received in ROOM G24 after this time and date will not be considered regardless of the reason for the late delivery and receipt. Respondents are encouraged to and solely responsible for verifying timely receipt of proposals in that office (ROOM G24).

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Board shall make the final decision on any contract award or awards resulting from this RFP.

The Comptroller and the Board each reserve the right, in their sole discretion, to accept or reject any or all proposals submitted. The Comptroller and the Board are not obligated to execute any contracts on the basis of this notice or the distribution of any RFP. The Comptroller and the Board shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - January 30, 2004, 2:00 p.m. CZT; Non-Mandatory Letter of Intent to propose and Questions Due - February 6, 2004, 2:00 p.m. CZT; Official Responses to Questions posted - February 10, 2004; Proposals Due - February 18, 2004, 2:00 p.m. CZT; Contract Execution - April 1, 2004, or as soon thereafter as practical; Commencement of Project Activities - April 5, 2004. Issued in Austin, Texas, on January 21, 2004.

TRD-200400414
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: January 21, 2004

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of January 26, 2004 - February 1, 2004 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 January 26, 2004 - February 1, 2004 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of February 1, 2004 - February 29, 2004 is 5% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by §304.003 for the period of February 1, 2004 - February 29, 2004 is 5% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200400405
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 21, 2004

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Credit Union Department

Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application for a name change was received from Dallas Treasury Credit Union, Dallas, Texas. The credit union is proposing to change its name to LibertyOne Credit Union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200400409
Harold E. Feeney
Commissioner
Credit Union Department
Filed: January 21, 2004

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Applications for a Merger or Consolidation

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from MCT Credit Union (Port Neches) seeking approval to merge with Smith Bluff Texas Federal Credit Union (Nederland). MCT Credit Union will be the surviving credit union.

An application was received from Associated Credit Union (Deer Park) seeking approval to merge with Galveston County Federal Credit Union (Texas City). Associated Credit Union will be the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200400411
Harold E. Feeney
Commissioner
Credit Union Department
Filed: January 21, 2004

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from S&S Credit Union, Houston, Texas to expand its field of membership. The proposal would permit employees of ABM Janitorial Services located within Texas and Louisiana, companies who are wholly owned by ABM bearing different names located within Texas and Louisiana, and family members of the ABM employees named, to be eligible for membership in the credit union.

An application was received from Texas Dow Employees Credit Union, Lake Jackson, Texas to expand its field of membership. The proposal would permit the employees of U. S. Contractors, Ltd. dba U.S. Contractors, United Electrical & Instrumentation, and Brazos M & E, Ltd dba Brazos M & E all located at 622 Commerce Road, Clute, TX 77531, to be eligible for membership in the credit union.

An application was received from Scott and White Employees Credit Union, Temple, Texas (#1) to expand its field of membership. The proposal would permit the employees of Texas ROI, Inc. who work as contractors in any Scott and White Hospital facility or who work in or are supervised from Bell County, Texas, to be eligible for membership in the credit union.

An application was received from Scott and White Employees Credit Union, Temple, Texas (#2) to expand its field of membership. The proposal would permit the employees of Metro Aviation, Inc. (CareFlight) who work as contractors in any Scott and White Hospital facility or who work in or are supervised from Bell County, Texas, to be eligible for membership in the credit union.

An application was received from Scott and White Employees Credit Union, Temple, Texas (#3) to expand its field of membership. The proposal would permit the employees of Aeromedical Collection Services (CareFlight) who work as contractors in any Scott and White Hospital facility or who work in or are supervised from Bell County, Texas, to be eligible for membership in the credit union.

An application was received from Scott and White Employees Credit Union, Temple, Texas (#4) to expand its field of membership. The proposal would permit the employees of Siemens One/Siemens Health Services who work as contractors in any Scott and White Hospital facility or who work in or are supervised from Bell County, Texas, to be eligible for membership in the credit union.

An application was received from Scott and White Employees Credit Union, Temple, Texas (#5) to expand its field of membership. The proposal would permit the employees of The Relizon Company who work as contractors in any Scott and White Hospital facility or who work in or are supervised from Bell County, Texas, to be eligible for membership in the credit union.

An application was received from Scott and White Employees Credit Union, Temple, Texas (#6) to expand its field of membership. The proposal would permit the employees of Zimmerman & Associates LLC who work as contractors in any Scott and White Hospital facility or who work in or are supervised from Bell County, Texas, to be eligible for membership in the credit union.

An application was received from Scott and White Employees Credit Union, Temple, Texas (#7) to expand its field of membership. The

proposal would permit the employees of Aramark Company who work as contractors in any Scott and White Hospital facility or who work in or are supervised from Bell County, Texas, to be eligible for membership in the credit union.

An application was received from Houston Energy Credit Union, Houston, Texas to expand its field of membership. The proposal would permit the employees of Sun Technical Services, Inc. who work in or are supervised from the South Texas Project Electric Generating Station, Wadsworth, TX 77483, to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its branch office located in Houston, Texas. The proposal would permit persons who worship within a ten-mile radius of 10001 Richmond Avenue, Houston, Texas 77042, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at *http://www.tcud.state.tx.us/applications.html*. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200400410
Harold E. Feeney
Commissioner
Credit Union Department
Filed: January 21, 2004

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

EDS Credit Union, Dallas, Texas (Amended) - Persons who live, work or are located in Collin County, Texas.

MemberSource Credit Union, Houston, Texas - See Texas Register issue dated October 31, 2003.

Texans Credit Union, Richardson, Texas (#1) - See Texas Register issue dated October 31, 2003.

Texans Credit Union, Richardson, Texas (#2) (Amended) - Persons who work or reside within Dallas County, Texas.

Fort Worth City Credit Union, Fort Worth, Texas - See Texas Register issue dated November 28, 2003.

Application(s) to Expand Field of Membership - Denied

Telco Plus Credit Union, Longview, Texas (#2) - See Texas Register issue dated November 28, 2003.

Application(s) to Amend Articles of Incorporation - Approved

ChevronTexaco Employees Credit Union, Houston, Texas - See Texas Register issue dated November 28, 2003.

Community Credit Union, Plano, Texas - See Texas Register issue dated November 28, 2003.

Application(s) for a Merger or Consolidation - Approved

GTX Credit Union (Houston) and JSC Federal Credit Union (Houston) - See Texas Register issue dated October 31, 2003.

THD District 4 Credit Union (Amarillo) and The Education Credit Union (Amarillo) - See Texas Register issue dated September 26, 2003.

TRD-200400412
Harold E. Feeney
Commissioner
Credit Union Department
Filed: January 21, 2004

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Texas Commission on Environmental Quality

Notice of Public Hearing by the Texas Commission on Environmental Quality on Proposed Revisions to 30 TAC Chapter 106 and the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning revisions to 30 TAC Chapter 106, Permits by Rule, and corresponding revisions to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs.

The proposed rulemaking would eliminate the concrete batch plant permit by rule (PBR) and corresponding public notice requirements, reduce registration fees, eliminate the single-chambered incinerator PBR, allow law enforcement agencies to use a PBR to incinerate confiscated illegal drug evidence, minimize registration requirements, establish a notification procedure, update technical requirements for trench burners and aboveground air curtain incinerators, provide for a rapid authorization mechanism for remediation projects at gasoline stations and dry cleaning facilities, and establish technical requirements for all facilities performing remediation activities.

A public hearing on this proposal will be held in Austin on February 26, 2004 at 2:00 p.m. in Building F, Room 2210 at the commission's central office 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 with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Joyce Spencer, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2003-030-106-AI, and must be received by 5:00 p.m., March 1, 2004. For further information, please contact Debra Barber, Policy and Regulations Division at (512) 239-0412.

TRD-200400244

Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: January 15, 2004

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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 **March 1, 2004**. 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 March 1, 2004**. 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: Abuiny Enterprises, Inc. dba Mainland Conoco; DOCKET NUMBER: 2003-1091-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 0005707; LOCATION: Duncanville, Dallas 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: $1,050; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Andrews Transport, Inc.; DOCKET NUMBER: 2003-1078-PST-E; IDENTIFIER: PST Facility Identification Number 0055242, Regulated Entity Reference Number RN100670975; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: fuel distribution; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to observe that the owner or operator of the facility did not have a valid, current TCEQ delivery certificate; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Jill Reed, (915) 570-1359; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Camilla Coves Lot Owners Association, Inc. dba Camilla Coves Water System; DOCKET NUMBER: 2003-1218-PWS-E; IDENTIFIER: Public Water Supply (PWS) Identification Number 2040040; LOCATION: Coldspring, San Jacinto County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.46(f)(3)(A)(iv), by failing to keep monthly flushing records; 30 TAC §290.45(b)(1)(C)(ii), by failing to provide a total storage capacity of two hundred gallons per connection; 30 TAC §290.45(b)(1)(C)(iii), by failing to provide two or more pumps having a capacity of 2.0 gallons per minute per connection; 30 TAC §290.43(d)(3), by failing to maintain air-water-volume at the design water level in the pressure tanks; 30 TAC §290.43(c)(3), by failing to install proper overflow on the ground storage tank; 30 TAC §290.43(c)(5), by failing to install inlet and outlet connections to prevent short circuiting or stagnation of water; 30 TAC §290.46(j)(1), by failing to have a certified individual perform customer service inspections; 30 TAC §290.46(v), by failing to install all electrical wiring within the water plant in conduit; and 30 TAC §290.109(c)(1)(A), by failing to collect bacteriological samples from active service connections throughout the distribution system; PENALTY: $3,260; ENFORCEMENT COORDINATOR: Harvey Lassen, (512) 239-0513; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: Chevron U.S.A. Inc. dba Chevron Products Company; DOCKET NUMBER: 2003-0455-AIR-E; IDENTIFIER: Air Account Number EE-0082-P; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(b)(2)(G) and (c), TCEQ Air Permit Number 18897, and THSC, §382.085(b), by failing to operate within the permitted limit of 16,400 pounds per year, or 8.2 tons per year, of volatile organic compounds (VOC) for the main cooling tower, failing to operate within the permitted limit of 44.19 pounds per hour of nitrogen oxides, and failing to record the results of fugitive VOC emissions monitoring conducted on the main cooling tower during the month of June 2001; 30 TAC §101.6(a)(1)(A) {now 30 TAC §101.201(a)(1)(A)}, by failing to determine if the VOC limit exceedance from September 10, 2001 through December 31, 2001 was a reportable event; and 30 TAC §101.10(b)(1), by failing to report excess emissions resulting from upset conditions in the annual emissions inventory for 2001; PENALTY: $21,924; ENFORCEMENT COORDINATOR: Kim Morales, (713) 767-3500; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(5) COMPANY: Clearstream Wastewater Systems, Inc.; DOCKET NUMBER: 2003-1276-AIR-E; IDENTIFIER: Air Account Number HF-0034-K; LOCATION: Silsbee, Hardin County, Texas; TYPE OF FACILITY: plastic products manufacturing; RULE VIOLATED: 30 TAC §122.143(4), §122.146(2), and THSC, §382.085(b), by failing to submit the required annual compliance certification; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Rick Ciampi, (512) 239-3119; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(6) COMPANY: CMH Parks, Inc. dba Northwest Pines Mobile Home Park; DOCKET NUMBER: 2003-1340-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System; (TPDES) Permit Number 12218-001, Regulated Entity Reference Number RN101614311; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 12218-001, and the Code, §26.121(a), by allegedly having discharged wastewater exceeding ammonia nitrogen limits, total suspended solids limits, and flow limits; PENALTY: $808; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: City of Daingerfield; DOCKET NUMBER: 2003-1344-MWD-E; IDENTIFIER: TPDES Permit Number 10499-001, Regulated Entity Identification Number RN102177953;

LOCATION: Daingerfield, Morris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1); TPDES Permit Number 10499-001 Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by alleging to have exceeded the permitted effluent limits; PENALTY: $1,872; ENFORCEMENT COORDINATOR: Rick Ciampi, (512) 239-3119; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(8) COMPANY: Humberto Sampagno dba Gulf Bank Mobile Home Park; DOCKET NUMBER: 2003-1252-PWS-E; IDENTIFIER: PWS Identification Number 1010658; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2) and THSC, §341.033(d), by failing to collect and submit water samples for bacteriological analysis for the months of April - October 2002; and 30 TAC §290.109(g)(4), by failing to notify the public of sampling deficiencies; PENALTY: $2,450; ENFORCEMENT COORDINATOR: Walter Lassen, (512) 239-0513; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: Huntsman Petrochemical Corporation; DOCKET NUMBER: 2003-0650-AIR-E; IDENTIFIER: Air Account Number JE-0052-V; LOCATION: Port Neches, Jefferson County; Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2), Permit Number 20485, and THSC, §382.085(b), by failing to maintain an emission rate below the maximum allowable emission rate table and prevent the emission of an air contaminant that would contribute to air pollution; PENALTY: $14,250; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(10) COMPANY: Ingersoll-Rand Company; DOCKET NUMBER: 2003-1376-AIR-E; IDENTIFIER: Air Account Number DB-0476-R, Regulated Entity Number RN100215581; LOCATION: Garland, Dallas County, Texas; TYPE OF FACILITY: surface coating; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the annual Title V compliance certification within 30 days after the end of the September 26, 2001 - September 25, 2002 certification period; 30 TAC §122.145(2)(B) and Permit Number O-01465, by failing to submit a deviation report within the 30 days after the end of the September 26, 2001 - September 25, 2002 deviation reporting period; PENALTY: $1,580; ENFORCEMENT COORDINATOR: Judy Fox, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Kinder Morgan Tejas Pipeline, L.P.; DOCKET NUMBER: 2003-1379-AIR-E; IDENTIFIER: Air Account Number HG-1391-L, Regulated Entity Identification Number RN100542612; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: natural gas storage; RULE VIOLATED: 30 TAC §101.359 and THSC, §382.085(b), by failing to submit a completed annual compliance report in a timely manner; PENALTY: $1,540; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: Knightco Oil Inc. dba Superior Lubricants; DOCKET NUMBER: 2003-0976-PST-E; IDENTIFIER: PST Registration Number 0033904, Regulated Entity Identification Number RN100530328; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; and 30 TAC §334.22(a), by failing to pay outstanding underground storage tank fees; PENALTY: $4,200; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Ovais, Incorporated; DOCKET NUMBER: 2003-0789-PST-E; IDENTIFIER: PST Facility Identification Number 47574, Regulated Entity Identification Number 102464617; LOCATION: Somerville, Burleson County, Texas; TYPE OF FACILITY: convenience store; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,850; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 239-4492; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(14) COMPANY: Pacific Natural Energy, LLC; DOCKET NUMBER: 2003-1339-AIR-E; IDENTIFIER: Air Account Number DB4707Q, Federal Operating Permit Number O-02063; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: landfill gas recovery; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification report within 30 days after the 12-month period ending July 25, 2002; and 30 TAC §122.145(2)(B), by failing to submit a semi-annual deviation report within 30 days after the six-month period ending July 25, 2002; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Sac N Pac Stores, Inc.; DOCKET NUMBER: 2003-1339-EAQ-E; IDENTIFIER: Edwards Aquifer Program Protection Program Identification Number 95112702A; LOCATION: Kyle, Hays County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval for modifications to an existing Edwards Aquifer Protection Plan prior to commencing construction; PENALTY: $4,800; ENFORCEMENT COORDINATOR: Rick Ciampi, (512) 239-3119; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(16) COMPANY: Saif D Corporation dba Sunny Food Mart; DOCKET NUMBER: 2003-1007-PST-E; IDENTIFIER: PST Facility Identification Number 00251, Regulated Entity Identification Number RN101330751; LOCATION: Cedar Creek, Bastrop 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: $3,800; ENFORCEMENT COORDINATOR: Cari Bing, (512) 239-1445; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(17) COMPANY: Barkat Momin dba Shop N Go; DOCKET NUMBER: 2003-0954-PST-E; IDENTIFIER: PST Facility Identification Number 35291; LOCATION: Houston, 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: $3,150; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Waste Management of Texas, Inc.; DOCKET NUMBER: 2001-1553-MSW-E; IDENTIFIER: Municipal Solid Waste (MSW) Permit Number 1503; LOCATION: Kingston, Hunt County, Texas; TYPE OF FACILITY: municipal landfill; RULE VIOLATED: 30 TAC §330.111, §330.201(3), and MSW Permit 1503, by failing to monitor and remove leachate; 30 TAC §330.130, by failing to conduct gas monitoring in accordance with the landfill gas management plan; and 30 TAC §§205.6, 330.602, 334.22, and 334.128, by failing to pay fees; PENALTY: $5,200; ENFORCEMENT COORDINATOR:

Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: The City of Wichita Falls; DOCKET NUMBER: 2002-0965-MSW-E; IDENTIFIER: MSW Permit Number 1428; LOCATION: Wichita Falls, Wichita County, Texas; TYPE OF FACILITY: Type 1 landfill; RULE VIOLATED: 30 TAC §330.111 and §330.114, by failing to inspect all incoming loads at the entrance of the landfill, prevent storm water from draining into leachate risers, and prevent 12 inches of head above liner of risers of cell 11, cell 12, cell 13, and cell 14, and failing to construct leachate risers for cell 13 and cell 14 to a three to one slope; 30 TAC §330.123, by failing to ensure tarping and securement of loads entering the landfill; PENALTY: $13,650; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

TRD-200400390
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 20, 2004

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Texas Department of Health

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Arlington	USMD Surgical Hospital of Arlington LP	L05727	Arlington	00	01/05/04
Brownsville	Christopher R Gill MD PA	L05725	Brownsville	00	12/31/03
New Braunfels	Cancer Care Network of South Texas PA	L05717	New Braunfels	00	01/12/04
Port Arthur	Smith and Thome Cardiovascular Consultants LLP	L05743	Port Arthur	00	01/09/04
Throughout Tx	Clovis Corporation	L05641	Amarillo	00	12/30/03

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Hendrick Medical Center	L02433	Abilene	83	01/07/04
Abilene	Hendrick Medical Center	L02433	Abilene	84	01/08/04
Amarillo	Baptist St Anthonys Health System	L01259	Amarillo	70	01/05/04
Amarillo	Baptist St Anthonys Health System	L01259	Amarillo	71	01/12/04
Austin	Austin Diagnostic Clinic	L05646	Austin	03	01/07/04
Beaumont	Advanced Cardiovascular Specialists LLP	L05512	Beaumont	04	01/09/04
Beaumont	Baptist Hospital of Southeast Texas	L00358	Beaumont	94	01/13/04
Bonham	Northeast Medical Center LP	L03331	Bonham	21	01/13/04
Cleveland	Cleveland Regional Medical Center LP	L02055	Cleveland	30	01/12/04
College Station	College Station Hospital LP	L02559	College Station	55	01/13/04
Dallas	Mallinckrodt Inc	L03580	Dallas	47	01/09/04
El Paso	El Paso Healthcare System LTD	L02551	El Paso	42	01/12/04
El Paso	Tenet Hospitals Limited	L04758	El Paso	16	12/31/03
Fort Worth	Healthsouth of Texas Inc	L05473	Fort Worth	09	12/30/03
Fort Worth	Heart Center of North Texas PA	L05338	Fort Worth	05	01/08/04
Fort Worth	Fort Worth Medical Plaza Inc	L02171	Fort Worth	44	01/13/04
Fort Worth	Baylor All Saints Medical Center	L02212	Fort Worth	64	01/15/04
Hallsville	Southwestern Electric Power Company	L03297	Hallsville	14	01/15/04
Houston	Cardinal Health	L01911	Houston	123	01/13/04
Houston	Cardiology Clinic PA	L05710	Houston	02	01/05/04
Houston	EXXONMOBIL Upstream	L00205	Houston	54	01/07/04
Houston	Stork Southwestern Laboratories Inc	L05269	Houston	06	01/13/04
Houston	Baylor College of Medicine Office of Environmental Safety	L00680	Houston	80	01/14/04
Kilgore	Roy H Laird Memorial Hospital	L03496	Kilgore	16	01/13/04
Lubbock	Cardiologist of Lubbock PA	L05038	Lubbock	12	01/09/04
Lubbock	Covenant Health System	L04881	Lubbock	30	01/07/04
Lubbock	Covenant Medical Center	L00483	Lubbock	123	01/08/04
Lubbock	Texas Tech University Health Sciences Center	L01869	Lubbock	70	01/09/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Lubbock	University Medical Center	L04719	Lubbock	67	01/05/04
McAllen	McAllen Hospitals LP	L01713	McAllen	66	01/09/04
Midlothian	TXI Operations LP	L01421	Midlothian	38	01/13/04
Nacogdoches	Memorial Hospital	L01071	Nacogdoches	35	01/12/04
Odessa	Ector County Hospital District	L01223	Odessa	77	01/05/04
Olden	Link Field Services Inc	L05383	Olden	12	12/30/03
Pearland	X-R-I Non-Destructive Testing	L05275	Pearland	30	01/15/04
Point Comfort	Formosa Plastics Corporation - Texas	L03893	Point Comfort	25	01/15/04
Port Arthur	S K Rao MD PA	L05415	Port Arthur	05	01/08/04
Richardson	Richardson Cardiology Associates	L05667	Richardson	03	01/05/04
San Angelo	Hirschfeld Steel Company	L04361	San Angelo	12	01/13/04
San Angelo	Shannon Clinic	L04216	San Angelo	30	01/05/04
San Antonio	Cardinal Health	L02033	San Antonio	96	01/06/04
San Antonio	Central Cardiovascular Institute of San Antonio	L04892	San Antonio	11	01/05/04
San Antonio	Health South Surgery Center at Pasteur Plaza	L05659	San Antonio	01	01/09/04
San Antonio	Medi-Physics Inc	L04764	San Antonio	22	01/05/04
San Antonio	Methodist Healthcare System of San Antonio	L00594	San Antonio	181	01/08/04
San Antonio	Heart Hospital of San Antonio LP	L05722	San Antonio	01	01/12/04
Sherman	Texas Oncology PA	L05019	Sherman	06	01/09/04
Sugar Land	Schlumberger Technology Corporation	L00764	Sugar Land	87	01/13/04
Sugar Land	Methodist Health Centers	L05472	Sugar Land	10	01/13/04
Texas City	Blazer Inspection Inc	L04619	Texas City	35	01/13/04
Throughout Tx	Texas Department of Transportation	L00197	Austin	97	01/15/04
Throughout Tx	Gulf Coast Weld Spec	L05426	Beaumont	28	01/07/04
Throughout Tx	APAC-Texas Inc	L04503	Dallas	09	01/13/04
Throughout Tx	Licon Engineering Company Inc	L05530	El Paso	03	01/14/04
Throughout Tx	Cooperheat-MQS Inc	L00087	Houston	113	01/13/04
Throughout Tx	ERM Enviroclean-Southwest LLC	L05080	Houston	03	01/09/04
Throughout Tx	Oceaneering International Inc	L04463	Houston	36	12/31/03
Throughout Tx	Roxar Inc	L05547	Houston	05	12/31/03
Throughout Tx	Testmasters Inc	L03651	Houston	19	01/07/04
Throughout Tx	Metco	L03018	Houston	140	01/13/04
Throughout Tx	Superior Energy LLC	L05540	Pearland	02	12/31/03
Throughout Tx	E M Hobbs Inc	L05738	Sonora	01	01/14/04
Throughout Tx	Ludlum Measurements Inc	L01963	Sweetwater	65	01/07/04
Tyler	Trinity Mother Frances Health System	L01670	Tyler	107	01/07/04
Tyler	H & H X-Ray Services Inc	L02516	Tyler	44	01/15/04
Waxahachie	Baylor Medical Center at Waxahachie	L04536	Waxahachie	22	01/13/04

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Bowie	Beavers Construction Company	L05003	Bowie	05	12/31/03
Lubbock	Cardinal Health	L02737	Lubbock	48	01/05/04
Throughout Tx	Baker Hughes Oilfield Operations Inc	L00446	Houston	146	01/13/04
Throughout Tx	Great Guns Inc	L01990	Sour Lake	24	12/31/03

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Paris	Numed Imaging Centers Inc	L05538	Paris	01	01/12/04

LICENSE EXEMPTION ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Longview	Rhodes Testing	L04702	Longview		01/07/04
Navasota	Glenn Fuqua Inc	L04736	Navasota		01/05/04
San Antonio	Zachry Construction Corporation	L01995	San Antonio		01/05/04
Sherman	Texas Oncology PA	L05019	Sherman		01/13/04

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC), Chapter 289, the Texas Department of Health (department), Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC, Chapter 289. In granting termination of licenses, the department has determined that the licensee has properly decommissioned its facilities according to the applicable requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200400400
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: January 21, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Drash Consulting Engineers, Inc.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to Drash Consulting Engineers, Inc. (licensee-L04724) of San Antonio. A total penalty of $4,000 is proposed to be assessed the licensee for alleged violations of 25 Texas Administrative Code, Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, 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-200400401
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: January 21, 2004

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Texas Department of Housing and Community Affairs

Notice of Funding Availability

PY 2004 Single Family Funding Cycle

The Texas Department of Housing and Community Affairs (Department) announces the availability of approximately $24,412,500 for the 2004 Single Family funding cycle for the HOME Investment Partnerships Program (HOME). The availability and use of these funds is subject to the State HOME Rules (10 TAC Chapter 53) and the Federal HOME regulations governing the HOME Program (24 CFR Part 92).

ALLOCATION OF PY 2004 FUNDS Section 2306.111, Texas Government Code, mandates the Department to allocate housing funds awarded in the HOME Program to each Uniform State Service Region using the Regional Allocation Formula, developed by the Department.

Section 2306.111, Texas Government Code, also mandates that the Department is to allocate no less than 95 percent of the HOME Program

Funds to applicants which serve households located in a non-participating jurisdiction (non-PJ). In addition, five percent-approximately $2,250,000-of the HOME Program Funds are to be allocated to applicants serving persons with disabilities through either Multifamily or Single Family Activities. HOME Program funds under this five percent set-aside may be used to serve households in participating jurisdictions but only to serve persons with disabilities. All housing related applications intended to serve persons with disabilities must adhere to the Department's Integrated Housing Rule.

The Department intends to allocate a minimum of 20% of the annual HOME allocation to applicants serving persons with special needs. Eligible applicants include nonprofits, units of general local government, and PHAs with documented histories of working with special needs populations. Eligible Activities include homebuyer assistance, owner occupied housing assistance, and tenant based rental assistance. Additional scoring criteria has been established under each of the eligible Activities to assist the Department in reaching its goal.

ELIGIBLE APPLICANTS

Units of General Local Government

Nonprofit and For-profit Organizations

Public Housing Agencies (PHAs)

DESCRIPTION OF ACTIVITIES

Homebuyer Assistance

Down payment and closing cost assistance is provided to homebuyers for the acquisition of affordable single-family housing.

Eligible homebuyers may receive loans up to $10,000 per household for down payment and closing costs, depending on the location of the property, in the form of a 2nd or 3rd lien, zero-interest, deferred-forgivable 10-year loan. Eligible homebuyers with disabilities may receive loans up to $15,000 for down payment and closing costs, regardless of the location of the property, in the form of a deferred-forgivable loan. The Homebuyer Assistance loans are to be repaid at the time of resale of the property, refinance of the first lien, or repayment of the first lien, if any of these occurs before the end of the 10-year term. The amount of recapture will be based on the pro-rata share of the remaining term since one-tenth of the amount of the loan will be forgiven each year.

At the completion of the assistance, all properties must meet all applicable codes and standards, as specified in the application guide. Compliance with the basic access standards in new construction, established by §2306.514, Texas Government Code, is also required for any applicants utilizing federal or State money administered by the Department in the construction of single family homes.

For PY 2004 funds, this activity will comprise 35% of the HOME allocation that will be available through the Regional Allocation Formula process--approximately $7,756,875.

Owner-Occupied Housing Assistance

Rehabilitation or reconstruction cost assistance, in the form of grants, is provided to homeowners for the repair or reconstruction of their existing homes. The homes must be the principal residence of the homeowner.

At the completion of the assistance, all properties must meet all applicable codes and standards, as specified in the application guide. In addition, all housing that is reconstructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with 24 CFR 92.251(a). If a home is reconstructed, the applicant must also ensure compliance with the universal design features in new construction, established by §2306.514, Texas Government Code, required for any applicants utilizing federal or state money administered by the Department in the construction of single family homes.

This activity will comprise 45% of the HOME allocation that will be available through the Regional Allocation Formula process--approximately $9,973,125.

Tenant Based Rental Assistance

Rental subsidy and security and utility deposit assistance is provided to tenants, in accordance with written tenant selection policies, for a period not to exceed two years. TBRA allows the assisted tenant to live in and move to any dwelling unit with a right to continued assistance with the condition that assisted families participate in a Self-Sufficiency Program.

This activity will comprise 20% of the HOME allocation that will be available through the Regional Allocation Formula process--approximately $4,432,500.

COMPETITIVE REVIEW OF APPLICATIONS

HOME project funds will be awarded through regional competitions as per State of Texas HOME Program Rules, 10 TAC §§53.50 - 53.63. General Selection Criteria is listed in the State of Texas HOME Program Rules, 10 TAC §§53.50 - 53.63 and forms the basis for the State's development of scoring criteria for each activity. Scoring criteria will include the implementation of various bills, riders, and agency goals, which will be defined in the application process. The Department will conduct the review and scoring of all applications, by region where applicable, and make recommendations for funding.

SELECTION PROCESS

All applications for funds received are reviewed for threshold requirements regarding application documentation and compliance with Department requirements on previously awarded contracts. Qualifying applications are then ranked using scoring criteria that reflects the Department's housing priorities and then applicants are funded only if the score exceeds the minimum score established in the State of Texas HOME Program rules. The highest scoring applicants per activity will be recommended up to the limit of funds available per activity and region, with priority given to applicants serving special needs populations. Should an activity not have enough qualified applicants, the funds will be redirected to the next activity in the region that had a higher number of qualified applicants.

APPLICATION PROCEDURES, FINAL FILING

The HOME Application Guide will be available on the Department's web site at www.tdhca.state.tx.us on February 13, 2004 under *What's New* or you may call (512) 475-3993 to request an application copy on or after February 13, 2004. Applications must be on forms provided by the Department, and cannot be altered or modified and must be in final form before submitting them to the Department.

Deadline date for submitting a COMPLETE application and application fee is Friday, April 16, 2004 at 5:00 pm CST. Regardless if an application is hand-delivered, mailed through the U.S. Postal Service, or sent through a private carrier such as Federal Express or Airborne, the application must be received by the Department no later than Friday, April 16, 2004 at 5:00 pm CST. Applications will not be accepted through facsimile.

Applications mailed via the U.S. Postal Service must be mailed to:

Texas Department of Housing and 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 and Community Affairs

Single Family Finance Production Division

507 Sabine, Suite 700

Austin, Texas 78701

Applicants are required to remit a non-refundable application fee payable to the Texas Department of Housing and Community Affairs in the amount of $30.00 per application. Please send check, cashier's check or money order; do not send cash. Section 2306.147(b) of the Texas Government Code requires the Department to waive grant application fees for nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services. These organizations must include proof of their exempt status in lieu of the application fee. The application fee is not an eligible or reimbursable cost under the HOME Program.

Applications that do not meet the filing deadline and application fee requirements will be returned to the applicant and will not be considered for funding.

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. If deficiencies are not clarified or corrected to the satisfaction of the Department within eight business days of the deficiency notice date, five points shall be deducted from the score for each day the deficiency remains unresolved. If deficiencies are not clarified or corrected within ten business days from the deficiency notice date, then the application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date.

An applicant may appeal decisions made by the Department in accordance with 10 TAC §1.7 and §1.8.

This Notice of Funding Availability does not include text of the various applicable regulatory provisions that may be important to the HOME 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, application preparation and submission, evaluation criteria and information about the major Federal and State requirements that may affect a HOME project. The HOME Application Workshop schedule and registration will be posted on the Department's website at www.tdhca.state.tx.us on Friday, February 6, 2004.

Resolution Requirements

The Department requires that all applications submitted must include a resolution from the applicant's direct governing body (Board of Directors) 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 a past audit or Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance 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-200400403
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: January 21, 2004

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Notice of Funding Availability

PY 2004 Olmstead Set Aside Funding Cycle

The Texas Department of Housing and Community Affairs (Department) announces the availability of approximately $3,557,319 for the 2004 Olmstead Set Aside funding cycle for the HOME Investment Partnerships Program (HOME). The availability and use of these funds is subject to the State HOME Rules (10 TAC Chapter 53) and the Federal HOME regulations governing the HOME Program (24 CFR Part 92).

Allocation of HOME Olmstead Funds

Pursuant to Executive Order RP-13: Community Based Alternatives for People with Disabilities, the Department has set aside HOME funds to serve the individuals addressed by the *Olmstead* decision. The Olmstead Set Aside is for entities wishing to provide Tenant Based Rental Assistance (TBRA) to individuals currently residing in Nursing Facilities, State Mental Retardation Facilities, Community Intermediate Care Facilities for Persons with Disabilities, State Mental Health Facilities, and other institutional settings who desire to move out of an institution and receive services within their respective community.

Eligible Activities

The Olmstead Set Aside funds will be awarded statewide on a first-come, first-serve basis to provide Tenant Based Rental Assistance to serve individuals of the Olmstead population, which shall include rental subsidies and security and utility deposits.

Eligible Applicants

The Department provides HOME funds for the Olmstead Set Aside to the following eligible recipients:

Units of General Local Government;

Nonprofits; and

Public Housing Authorities (PHA).

Under the HOME Olmstead Set Aside, the Department will provide grant funds to eligible recipients for the provision of housing to extremely low, very low, and low-income individuals and families.

The Department will score applications on a first-come, first-serve basis and make funding recommendations based on the availability of funds.

Funds will be awarded in accordance with the rules and procedures as set forth in the State of Texas HOME Program rules at 10 TAC §§53.50 - 53.63.

Application Procedures, Final Filing

The HOME Olmstead Application Guide will be available on the Department's web site at www.tdhca.state.tx.us on February 13, 2004 under *What's New* or you may call (512) 475-3993 to request an application copy on or after February 13, 2004. Applications must be on forms provided by the Department, and cannot be altered or modified and must be in final form before submitting them to the Department.

There is no deadline for submitting a COMPLETE application and application fee. A complete application should be submitted when the Applicant is ready to administer a program. The FY 2004 Olmstead Set Aside funding cycle will remain open until all funds have been awarded. Applications will not be accepted through facsimile.

Applications mailed via the U.S. Postal Service must be mailed to:

Texas Department of Housing and 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 and Community Affairs

Single Family Finance Production Division

507 Sabine, Suite 700

Austin, Texas 78701

Applicants are required to remit a non-refundable application fee payable to the Texas Department of Housing and Community Affairs in the amount of $30.00 per application. Please send check, cashier's check or money order; do not send cash. Section 2306.147(b) of the Texas Government Code requires the Department to waive grant application fees for nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services. These organizations must include proof of their exempt status in lieu of the application fee. The application fee is not an eligible or reimbursable cost under the HOME Program.

If applicable, applications that do not include an application fee will be returned to the applicant and will not be considered for funding.

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. If deficiencies are not clarified or corrected to the satisfaction of the Department within eight business days of the deficiency notice date, five points shall be deducted from the score for each day the deficiency remains unresolved. If deficiencies are not clarified or corrected within ten business days from the deficiency notice date, then the application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date.

An Applicant may appeal decisions made by the Department in accordance with 10 TAC §1.7 and §1.8.

This Notice of Funding Availability does not include text of the various applicable regulatory provisions that may be important to the HOME 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 address the Olmstead 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 Application Workshop schedule and registration will be posted on the Department's website at www.tdhca.state.tx.us on Friday, February 6, 2004.

Resolution Requirements The Department requires that all applications submitted must include a resolution from the applicant's direct governing body (Board of Directors) 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 a past audit or Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance 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-200400404
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: January 21, 2004

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Notice of Public Hearing

MULTIFAMILY HOUSING REVENUE BONDS (EVERGREEN AT PLANO INDEPENDENCE SENIOR COMMUNITY APARTMENTS) SERIES 2004

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Plano Senior High School, 2200 Independence Parkway, Plano, Texas 75075, at 6:00 p.m. on February 17, 2004 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to PWA-Plano Independence Senior Community, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing development (the "Development") described as follows: 250-unit multifamily residential rental development to be located on the East side of Independence and on the South side of Plano Parkway, at approximately the 2800 block of Plano Parkway, Plano, Collin County, Texas 75075. The Development initially will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Robbye Meyer at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-2213; and/or robbye.meyer@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robbye Meyer in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robbye Meyer prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Robbye Meyer at least three days prior to the hearing date.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200400417
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: January 21, 2004

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Texas Department of Insurance

Company Licensing

Application for incorporation to the State of Texas by LEGACY HEALTH SOLUTIONS, INC., a domestic Health Maintenance Organization (HMO). The home office is in San Angelo, Texas.

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-200400407
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: January 21, 2004

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Texas Parks and Wildlife Department

Notice of Availability and Request for Comments on a Proposed Settlement Agreement

AGENCIES: Texas Parks and Wildlife Department (TPWD), Texas Commission on Environmental Quality (TCEQ), Texas General Land Office (GLO) (hereafter, Natural Resource Trustees).

ACTION: Notice of availability of a proposed Settlement Agreement for Natural Resource Damages and of a 30-day period for public comment on the Agreement beginning the date of publication of this notice.

SUMMARY: Notice is hereby given that the Draft Settlement Agreement for Natural Resource Damages Related to the New Amity Fuel Oil Spill, September 22, 2001 (Settlement Agreement) is hereby made available for public review and comment for a period of 30 days. The proposed Settlement Agreement calls for the Responsible Parties [Amity Shipping, Inc. and Associated Maritime Company (Hong Kong)] to provide $40,000 for restoration planning and the construction of one (1) acre of intertidal wetlands and 0.1 acres of oyster reef. Alternatively, the Trustees may propose comparable restoration projects providing natural resource services equivalent to those injured or lost.

The opportunity for public review and comment on the proposed Settlement Agreement announced in this notice is required under the Oil Pollution Act (OPA), 33 U.S.C. §2706(c)(5), and corresponding provisions of the federal OPA regulations at 15 C.F.R. §990.14(d) and §990.55 as well as the Texas Natural Resource Damage Assessment regulations at 31 TAC §20.42 and §20.44.

Interested members of the public are invited to request a copy of the proposed Settlement Agreement from Don Pitts of the Texas Parks and Wildlife Department, Resource Protection Division, 4200 Smith School Road, Austin, Texas 78744, (512) 912-7156, Fax: (512) 912-7160, e-mail: don.pitts@tpwd.state.tx.us.

DATES: Comments must be submitted in writing within 30 days of the publication of this notice to Don Pitts of the Texas Parks and Wildlife Department at the address listed in the previous paragraph. The Natural Resource Trustees will consider all written comments received during the 30-day comment period prior to finalizing the Draft Settlement Agreement.

SUPPLEMENTARY INFORMATION: On September 22, 2001, the motor tanker New Amity was involved in a collision with a barge NHS 1486, pushed by the tugboat Carson on the Houston Ship Channel in Galveston Bay, Harris County, Texas. As a result of the collision, the New Amity's fuel tank was breached discharging approximately 36,585 gallons of fuel oil (IFO 380) into the Houston Ship Channel and vicinity. The spilled IFO 380 impacted areas of the Houston Ship Channel and upper Galveston Bay including Barbours Cut, the Barbours Cut turning basin, Hog and Atkinson Islands, Goose Creek, Morgans Point and areas southward towards Kemah, Texas.

The Natural Resource Trustees and the Responsible Parties conducted a cooperative natural resource damage assessment of the impacts of the Incident. Based on the natural resource damage assessment, the Trustees determined that the Incident resulted in injuries to wetland and shoreline habitats and surface waters of the Houston Ship Channel and upper Galveston Bay as well as to fish, birds, and other wildlife species of the area, including benthic communities in the shallow water near-shore zones and benthic communities in the areas where shoreline impacts occurred from the Incident.

The Natural Resource Trustees have the authority under OPA, 33 U.S.C. §2701 et seq., to assess the natural resource injuries resulting from this incident. The TPWD, TCEQ, and GLO are Trustees of the natural resources injured by the discharge pursuant to OPA, 33 U.S.C. §2706 (b) and the Oil Spill Prevention and Response Act ("OSPRA"), Texas Natural Resources Code, §40.107 et seq.

The Natural Resource Trustees have determined that resources subject to their trust authority under these Acts were exposed to fuel oil as a result of the discharge. The quantity and concentration of the material discharged was sufficient to result in the impairment of exposed habitats. Consequently the Trustees are seeking the restoration of estuarine emergent wetlands and rocky and shell shorelines described in the proposed Settlement Agreement.

The Draft Settlement Agreement announced today identifies restoration actions which the Trustees propose to undertake in order to effect restoration, rehabilitation, replacement, or acquisition of resources or resource services that were injured by the spill. Proposed restoration projects will be implemented in accordance with a yet to be developed Restoration Plan that will be subjected to a public notice and comment process prior to being finalized.

For further information, contact Don Pitts at (512) 912-7156, fax: (512) 912-7160, e-mail: don.pitts@tpwd.state.tx.us.

TRD-200400393
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Filed: January 20, 2004

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Texas Department of Protective and Regulatory Services

Request for Proposal - Curriculum Development

The Texas Department of Protective and Regulatory Services (PRS) (to be renamed Department of Family and Protective Services (DFPS) effective February 1, 2004, Division of Contract Management, is soliciting Curriculum Development and Training services. PRS anticipates funding one contract as a result of this solicitation. The request for proposal (RFP) will be released on or about February 1, 2004, and will be posted on the State Internet Site at http://www.marketplace.state.tx.us/ on or about the date of its release.

Brief Description of Services: The purpose of this RFP is to solicit providers for developing the curriculum and providing training on advanced special needs adoption.

Eligible Offerors: Eligible offerors include private nonprofit and for-profit entities, public agencies, government entities, institutions of higher learning, partnerships, and individuals. Historically Underutilized Businesses (HUBs), Minority Businesses and Women's Enterprises, and Small Businesses are encouraged to apply.

Deadline for Proposals, Term of Contract, and Amount of Award: Proposals will be due March 1, 2004, at 3:00 p.m. A maximum amount not to exceed $70,000 is available for the period March 1, 2004, through January 28, 2005. The effective date of the contract awarded under this RFP will be March 1, 2004, through February 28, 2005.

Limitations: The funding allocated for the contract resulting from this RFP is dependent on Legislative appropriation. Funding is not guaranteed at the maximum level, or at any level. PRS reserves the right to reject any and all offers received in response to this RFP and to cancel this RFP if it is deemed in the best interest of PRS. PRS also reserves the right to re-procure this service.

If no acceptable responses are received, or no contract is entered into as a result of this procurement, PRS reserves the right to procure by non-competitive means in accordance with the law but without further notice to potential vendors.

Contact Person: Potential offerors may obtain a copy of the RFP on or about February 1, 2004. It is preferred that requests for the RFP be submitted in writing (by mail, email or fax) to: Vicki Logan; Mail Code E-541; Texas Department of Protective and Regulatory Services; P.O. Box 149030; Austin, Texas 78714-9030; Fax: 512-438-2031; or email Vicki.Logan@tdprs.state.tx.us.

TRD-200400252
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: January 15, 2004

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Texas State Board of Public Accountancy

Notice of Public Hearing Concerning 22 TAC §§523.130 - 523.132

Notice is hereby given that the Texas State Board of Public Accountancy will conduct a public hearing to receive testimony regarding revisions to 22 TAC §§523.130, 523.131, 523.132 concerning Board Rules and Ethics Course; Board Approval of Ethics Course Content after January 1, 2005; and Contracted Ethics Instructors after January 1, 2005.

The proposed new rule 523.131 is intended to make changes to the Board's required ethics course to expand the content of the course to include instruction in ethical principles and ethical reasoning and to apply those concepts to case studies that present ethical dilemmas relative to the Code of Professional Conduct found in 22 TAC chapter 501. To accommodate the expanded curriculum, changes have been proposed to rule 523.130 to increase the length and frequency of the course and provide for transition to the new ethics course. The changes to rule 523.132 are intended to specify objective criteria for the approval of ethics instructors to ensure a high quality of ethics instruction for the required ethics component of continuing professional education for certified public accountants.

A public hearing on this proposal will be held in Austin, Texas, March 16, 2004 from 10:00 a.m. until 12:00 p.m. at the Hobby Building, 333 Guadalupe, Room 100 (First Floor) Austin, Texas, 78701. The hearing will be structured for the receipt of oral and/or written comments from interested persons. Individuals who wish to present oral comments must submit their comments in writing prior to the public hearing. Individuals who have timely submitted written comments may register to present oral comments and will be called upon to present their oral comments in order of registration. Each oral presentation will be limited to ten minutes. There will be no open discussion during the hearing; however, a Board staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Written comments may be submitted to Rande K. Herrell, General Counsel at the Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701, (512) 305-7848 or via facsimile to (512) 305-7854. Please indicate on the comments submitted if you wish to make an oral presentation during the hearing. Comments must be received by February 27, 2004.

For further information, please contact Rande K. Herrell, General Counsel at (512) 305-7848.

Copies of the proposed rules will be printed in the January 30, 2004 issue of the *Texas Register* and can be found at http://www.sos.state.tx.us.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Kym Rusch at (512) 305-7842. Requests for special accommodations should be made as far in advance as possible.

TRD-200400294
Rande Herrell
General Counsel
Texas State Board of Public Accountancy
Filed: January 15, 2004

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Public Utility Commission of Texas

Notice of Application for Certificate of Convenience and Necessity in Jack and Wise Counties, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on January 15, 2004, for a certificate of convenience and necessity in Jack and Wise Counties, Texas.

Docket Style and Number: Application of Brazos Electric Power Cooperative, Inc. (BEPC) for a Certificate of Convenience and Necessity for a Single Circuit 138-kV Transmission Line in Jack and Wise Counties, Texas. Docket Number 29158.

The Application: The project would connect BEPC's planned generation plant near the community of Joplin in Jack County to its existing facilities in the area through the construction of approximately 8.4 miles of 138-kV transmission line. The project is designated the Jack County Generation Plant to Willow Substation. The right-of-way width for this project will be approximately 70 feet. The estimated cost for the project is $2,268,575.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by February 29, 2004, 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 29158.

TRD-200400388
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 16, 2004

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Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On January 14, 2004, Everest Broadband Networks of Texas, Incorporated filed an application with the Public Utility Commission of Texas (PUC) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60440. Applicant intends to relinquish its certificate.

The Application: Application of Everest Broadband Networks of Texas, Incorporated for Relinquishment of its Service Provider Certificate of Operating Authority, Docket Number 29167.

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 February 4, 2004. 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 29167.

TRD-200400396
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 20, 2004

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 12, 2004, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of COMTECH21, LLC for a Service Provider Certificate of Operating Authority, Docket Number 29150 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, and wireless services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell, Verizon, United Telephone, and Central Telephone Company of Texas, d/b/a Sprint.

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 February 4, 2004. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29150.

TRD-200400303
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 15, 2004

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Notice of Application for Termination of Retail Electric Provider Certification

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 14, 2004, for approval to terminate Retail Electric Provider (REP) Certificate Number 10042, pursuant to Public Utility Regulatory Act (PURA) §§39.101 - 39.109. A summary of the application follows.

Docket Title and Number: Petition of Polr Power, LLP, doing business as Mutual Energy/Texas for Termination of Retail Electric Provider Certification, Docket Number 29166 before the Public Utility Commission of Texas.

Persons wishing 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 February 6, 2004. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29166.

TRD-200400395
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 20, 2004

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on January 12, 2004, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of Southwestern Bell Telephone, L.P., d/b/a SBC Texas' request for NXX codes.

Docket Title and Number: Application of Southwestern Bell Telephone, L.P., d/b/a SBC Texas for Waiver of Denial of NXX Code Request in the Alvin Rate Center. Docket Number 29156.

The Application: Southwestern Bell Telephone, L.P., d/b/a SBC Texas (SBC) submitted a Central Office Code (NXX) Assignment Request to the Pooling Administrator for the assignment of NXX resources which

it contends are necessary to accommodate the non-Extended Area Service (EAS) for residential and business customers. The PA denied SBC's request. SBC seeks an exception to the application of NXX assignment guidelines. SBC asked that the commission instruct the PA to release the numbering resources SBC contends are necessary.

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 February 13, 2004. 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 29156.

TRD-200400301
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 15, 2004

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on January 12, 2004, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of Southwestern Bell Telephone, L.P., d/b/a SBC Texas' request for NXX codes.

Docket Title and Number: Application of Southwestern Bell Telephone, L.P., d/b/a SBC Texas for Waiver of Denial of NXX Code Request in the Frisco Rate Center. Docket Number 29157.

The Application: Southwestern Bell Telephone, L.P., d/b/a SBC Texas (SBC) submitted a Central Office Code (NXX) Assignment Request to the Pooling Administrator (PA) for the assignment of NXX resources which it contends are necessary to accommodate the non-Extended Area Service (EAS) for residential and business customers. The PA denied SBC's request. SBC seeks an exception to the application of NXX assignment guidelines. SBC asked that the commission instruct the PA to release the numbering resources SBC contends are necessary.

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 February 13, 2004. 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 29157.

TRD-200400302
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 15, 2004

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on January 13, 2004, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of Mid-Tex Cellular, Ltd.'s request for two additional NXX codes.

Docket Title and Number: Application of Mid-Tex Cellular, Ltd. For Waiver of NANPA Denial and Request for Expedited Action. Docket Number 29162.

The Application: Mid-Tex Cellular, Ltd. requested the Commission to waive the NANPA or Neustar denial of its request for two additional NXX codes and further requested that such waiver be expedited in consideration of the Applicant's circumstances requiring the new codes.

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 February 13, 2004. 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 29162.

TRD-200400389
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 16, 2004

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Public Notice of Interconnection Agreement

On January 16, 2004, Colorado Valley Telephone Cooperative, Incorporated and Cingular Wireless of Texas RSA 16 Limited Partnership, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2004) (PURA). The joint application has been designated Docket Number 29176. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 29176. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by February 17, 2004, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, 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. All correspondence should refer to Docket Number 29176.

TRD-200400397
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 20, 2004

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Public Notice of Interconnection Agreement

On January 16, 2004, United Telephone Company of Texas, Incorporated, doing business as Sprint, Central Telephone Company of Texas, doing business as Sprint, and XO Texas, Incorporated, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2004) (PURA). The joint application has been designated Docket Number 29178. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 29178. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by February 17, 2004, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, 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. All correspondence should refer to Docket Number 29178.

TRD-200400398
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: January 20, 2004

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Texas Department of Transportation

Public Notice--Public Hearing for Proposed Acquisition of Abandoned Rail Facility

The Texas Department of Transportation (department) will conduct a public hearing to receive comments on the department's proposed acquisition of a 33.5 mile segment of rail line in the Bonham Subdivision between milepost 94.0, near Paris, and milepost 127.5, east of Bonham, in Lamar and Fannin Counties, Texas.

The Union Pacific Railroad Company (UP) and the Texas Northeastern Division, Mid-Michigan Railroad, Inc. (TNER) have filed a notice of exemption with the Surface Transportation Board (STB) for UP to abandon and TNER to discontinue service over this rail line. The STB filed notice of the notices of exemption in the May 19, 2003, issue of the Federal Register (68 FR 27142), and is considering the UP and TNER filings under STB Docket Nos. AB-33 (Sub-No. 163X) and AB-364 (Sub-No. 8X).

The department has been coordinating with the Fannin County Rural Rail Transportation District (FCRRTD) to determine whether the department should acquire the line and preserve it for future rail service or other transportation uses. Transportation Code, Chapter 91, authorizes the department to acquire passenger or freight rail facilities and requires the department to coordinate with the governing body of a municipality, county or rural rail transportation district in which all or a segment of rail line is located upon receipt of notice of intent to abandon or discontinue rail service over that rail line.

The department has determined that there is a need to preserve this rail facility for continued rail service or to preserve the rail corridor for other transportation uses. The department will hold a public hearing on the date, time, and location indicated to receive public comments and assess the level of public support concerning the proposed acquisition of the rail line:

February 9, 2004, 9:00 a.m.

Texas Department of Transportation

Paris District Offices--Training Center

1365 North Main Street

Paris, Texas

All interested persons are invited to attend the public hearing and to provide input. Comments are specifically requested on the need to preserve the rail line and the impact of the rail line on area transportation, economic development, and employment.

Those desiring to make official comments may register starting at 8:30 a.m. Verbal and written comments may be presented at the public hearing, or written comments may be submitted by mail. To be included in the official record of the public hearing, written comments must be received by 5:00 p.m. on February 12, 2004. Written comments should be mailed to: Mario G. Medina, P.E., Director, Multimodal Section, Transportation Planning and Programming Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483.

Persons with disabilities who plan to attend the public hearing 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 Rick Mackey at (903) 737-9375 at least two business days prior to the hearing, so that appropriate arrangements can be made.

Please call Mr. Medina at (512) 416-2349 for further information.

TRD-200400408
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: January 21, 2004

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Request for Qualifications

The Texas Department of Transportation (TxDOT), an agency of the State of Texas, is issuing a Request for Qualifications (RFQ) to solicit interest from prospective, qualified Design-Builders (D-B) for the design, demolition, construction, renovation, and financing of a new TxDOT Houston Headquarters Complex (hereinafter referred to as the "Project"). Financing will be provided through a lease with option to purchase contract (LWOP). The RFQ submittal must include the RFQ Letter of Interest form (included in the complete RFQ), a statement of qualifications, a financial plan, and a conceptual project plan.

TxDOT is issuing this RFQ in accordance with Transportation Code, §201.1055, added by House Bill 7, 78th Legislature, Third Called Session, 2003, which allows an agreement with a private entity that offers the best value to the State of Texas to develop, design, construct, renovate, and finance a Houston District Headquarters Complex and to lease/purchase buildings and capital improvements that comprise the new headquarters complex. The project will be completed on TxDOT-owned real property to be leased to the D-B contracted to construct the Project. A provision of law authorizes the private entity to construct and retain ownership of the building leased on TxDOT-owned property. TxDOT will enter into an agreement for a term not to exceed 20 years to lease with an option to purchase (LWOP) the buildings and all capital improvements constructed on property leased to the D-B. A pre-submittal conference is scheduled for February 10, 2004, at 1:00 p.m., CST at the TxDOT Houston District Headquarters, 7721 Washington Avenue, Houston, Texas. The RFQ submittal is due by 5:00 p.m., CST, on Tuesday, March 9, 2004. A complete RFQ with description of the project, request, qualification requirements, evaluation, forms and attachments can be found at the following web site:

http://www.dot.state.tx.us/business/professionalservices.htm

In the drop down Alphabetic Business Listing, choose Request for Proposals / Qualifications - Maintenance Division,) (project number CBC4704-00-377).

A printed copy of the RFQ can be mailed if a request is received by FAX at (512) 416-3080.

D47B-CBC470400377 RFQ-Houston

THE FOLLOWING INFORMATION SHOULD ASSIST YOU IN LOCATING AND PRINTING THE HOUSTON DISTRICT COMPLEX RFQ FROM THE WEB.

PLEASE LET US KNOW IF YOU ARE UNABLE TO PRINT THIS INFORMATION. ((512) 416-3048 OR FAX (512) 416-3080)

http://www.dot.state.tx.us (TxDOT Expressway)

e-business

consultant services

professional services

From the Alphabetical Business Links box (Select Business topic) click the drop down list then select:

Request for Proposals / Qualifications - Maintenance Division

Houston District Headquarters

This file is available both in PDF and Word.

TRD-200400402
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: January 21, 2004

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Texas Water Development Board

Request for Applications

The Texas Water Development Board (TWDB) requests, pursuant to 31 Texas Administrative Code (TAC) §355.92, proposals for supplemental funding for regional water planning leading to the possible award of contracts for completing regional water plans as described in 31 TAC Chapter 357. In order to receive a grant, the applicant must be a political subdivision and must have been designated an eligible applicant by a regional water planning group as defined in 31 TAC §355.91.

Description of Funding Consideration. Funding will be targeted to address changed conditions that have occurred during preparation of the current regional water plans. Changed conditions can be the result of: 1. Unanticipated changes to the amount of water supply available to meet needs (for example, a region that has recently or is currently experiencing a drought of record); 2. Unanticipated changes to the volume or magnitude of water supply need due to greater than anticipated population growth or water demands; or 3. Development of new technology or availability of new supplies to meet water supply needs that were not recognized when the original scope of work was developed.

In the event that acceptable applications are not submitted, the TWDB retains the right to not award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information. Ten double-sided copies of a complete regional water planning grant application must be filed with the Board prior to 5:00 p.m., April 1, 2004. Applications must be directed either in person to Phyllis

Thomas, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas, or by mail to Phyllis Thomas, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

Applications will be evaluated according to 31 TAC §355.94 and the criteria for changed conditions as defined in this notice. All potential applicants may contact the Board to obtain these guidelines or may be obtained from the Texas Water Development Board's web page at: www.twdb.state.tx.us. Requests for information, the Board's rules, and instruction sheet covering the research and planning fund, may be directed to Phyllis Thomas at the preceding address or by calling (512) 463-7926, or by e-mail at Phyllis.Thomas@twdb.state.tx.us.

TRD-200400418
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: January 21, 2004

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Texas Workers' Compensation Commission

Correction of Error

The Texas Workers' Compensation Commission proposed amendments to 28 TAC §114.12 concerning self-insurance rules. The notice appeared in January 9, 2004, *Texas Register* (29 TexReg 320).

Due to an error by the *Texas Register* text that was not proposed for deletion was printed with strikethrough marks. Under subsection (a)(2)(B), the subparagraph (B) designation is proposed for deletion, but the text "an analysis of accident trends which:" should be printed as existing text under paragraph (2). The line should read as follows.

"[~~(B)~~] an analysis of accident trends which:"

TRD-200400416

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Workforce Resource

Request for Proposal

WORKFORCE INVESTMENT ACT (WIA) YOUTH PROGRAM

Proposals are requested for the Workforce Investment Act (WIA) Youth Program to serve economically disadvantaged youth, ages 14 through 21. We are seeking innovative Youth Programs that provide comprehensive youth services that improve educational achievement, prepare youth for succeeding in employment, support youth, and offer services intended to develop the potential of youth as citizens and leaders.

The Workforce Resource area includes the following 11 counties: Archer, Baylor, Clay, Cottle, Foard, Hardeman, Jack, Montague, Wichita, Wilbarger, and Young.

To obtain Request for Proposal packets contact John Chandler, Administrative Technician, Workforce Resource, 901 Indiana Ave., Ste. 180, Wichita Falls, TX 76301. Call 940.767.1432 or TDD# 1-800/RELAYTX or 1.800.735.2989 for more information. Email: John.Chandler@twc.state.tx.us Fax: 940.322.2683. Deadline to submit a proposal is 4 p.m., Friday, March 12, 2004.

We will conduct a Bidders' Conference at 10 a.m. on Wednesday, February 11, 2004, in the Workforce Resource conference room, located at 901 Indiana Ave. Ste 180, Wichita Falls, TX 76301. We will not accept questions over the phone. We will accept written questions until noon on Wednesday, February 11, 2004.

Workforce Resource is an Equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities. Program operation dependent upon availability of funds from Texas Workforce Commission.

TRD-200400315
Mona Williams-Statser
Executive Director
Workforce Resource
Filed: January 16, 2004

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 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 a 30-day 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.

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 29 (2004) is cited as follows: 29 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 "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 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 subscription information, see the back cover or 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 (using Arabic numerals) and Parts (using Roman 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 16, April 9, July 9, and October 8, 2004). 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).

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