# TEXAS REGISTER

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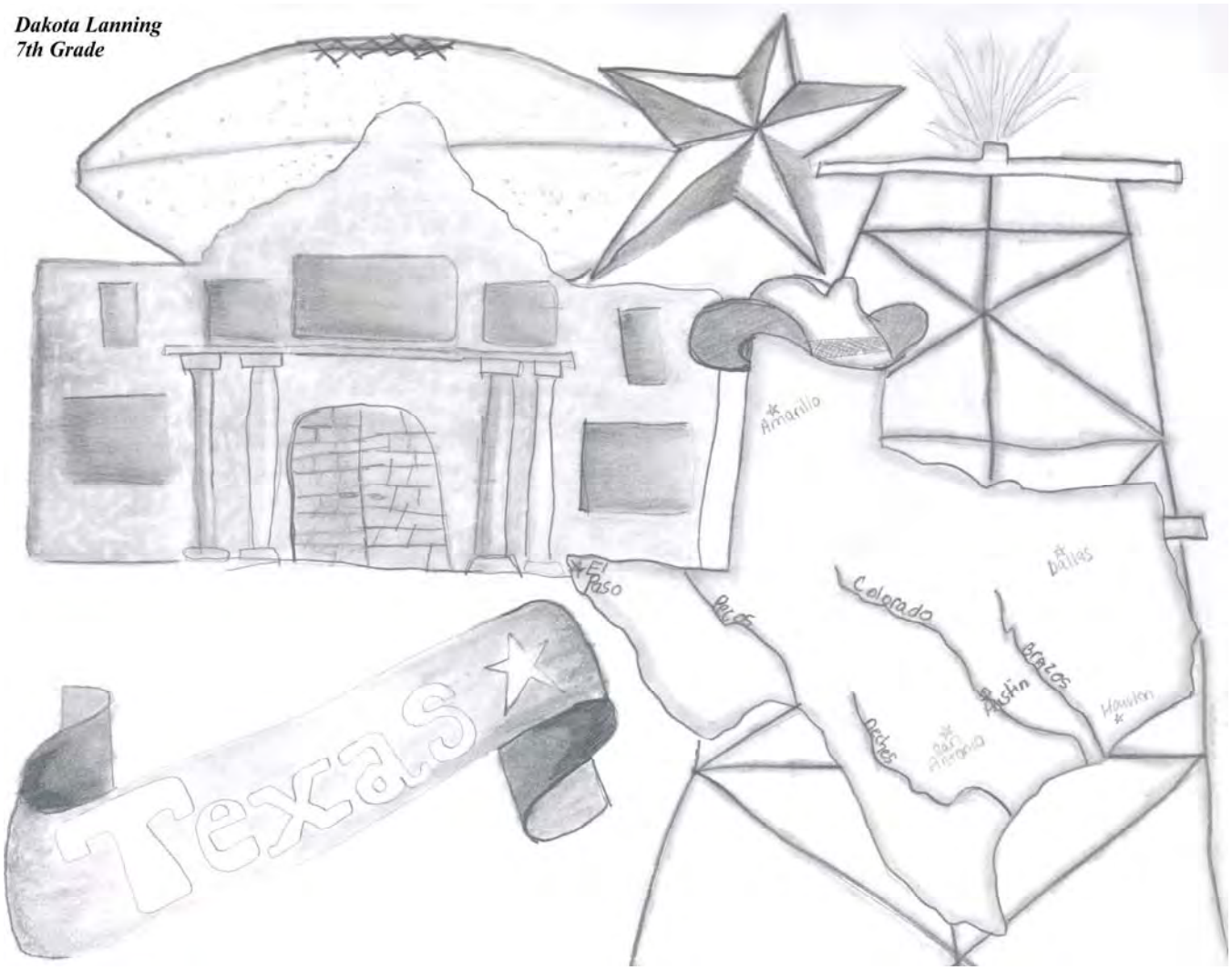

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# IN THIS ISSUE

## *WITHDRAWN RULES*



## *ADOPTED RULES*

# THE ATTORNEY GENERAL

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

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

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

## Requests for Opinions

**RQ-1011-GA**

**Requestor:**

The Honorable Mike Hamilton

Chairman, Committee on Licensing and Administrative Procedures

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a website may charge a fee to participants who answer questions for the opportunity to win prizes (RQ-1011-GA)

**Briefs requested by December 7, 2011**

**RQ-1012-GA**

**Requestor:**

The Honorable Jeri Yenne

Brazoria County Criminal District Attorney

Brazoria County Courthouse

111 East Locust, Suite 408 A

Angleton, Texas 77515

Re: Detention of an adult-certified juvenile under article 4.19 of the Code of Criminal Procedure (RQ-1012-GA)

**Briefs requested by December 7, 2011**

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

TRD-201104852

Jay Dyer

Deputy Attorney General

Office of the Attorney General

Filed: November 8, 2011

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# PROPOSED RULES

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

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

## TITLE 1. ADMINISTRATION

## PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

## CHAPTER 358. MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

## SUBCHAPTER C. FINANCIAL REQUIREMENTS

## DIVISION 6. BUDGETING FOR ELIGIBILITY AND CO-PAYMENT

**1 TAC §358.439**

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §358.439, concerning guardianship fees, in Chapter 358, Medicaid Eligibility for the Elderly and People with Disabilities.

Background and Justification

Section 670 of the Texas Probate Code authorizes a court to order guardianship-related costs and fees to compensate a guardian for costs related to the guardianship of certain Medicaid recipients. Section 32.02451 of the Texas Human Resources Code requires HHSC to take into consideration guardianship-related costs and fees ordered under Section 670 of the Texas Probate Code when determining the co-payment for a Medicaid recipient receiving services in a Medicaid-certified long-term care facility or in the community under a §1915(c) waiver program. Co-payment (also known as "applied income") is the amount of personal income a Medicaid recipient must pay toward the cost of his or her care. HHSC is allowed under state and federal law to deduct the amount of guardianship-related costs and fees from a Medicaid recipient's total countable income when calculating the co-payment of the recipient.

Senate Bill (S.B.) 220, 82nd Legislature, Regular Session, 2011, in part, amended §32.02451 of the Texas Human Resources Code and Section 670 of the Texas Probate Code to address matters related to guardianship-related costs and fees and their application in calculating a co-payment. S.B. 220 codified the provisions of HHSC's current policy concerning guardianship-related costs and fees, including the methodology for deducting guardianship-related costs and fees and the effective date of the deduction in determining the co-payment. Further, S.B. 220 required the Executive Commissioner of HHSC to adopt rules providing a procedure by which the recipient would submit to HHSC a copy of the court order to receive the deduction.

HHSC proposes to amend its rule governing guardianship fees to reflect its current policy in keeping with S.B. 220.

Section-by-Section Summary

The proposed amendment to §358.439 clarifies that HHSC may deduct a guardianship fee up to an amount set by the court from the Medicaid recipient's total countable income in determining the person's co-payment. The amendment also establishes that the deduction is limited to guardianship-related costs and fees, subject to the limitations of §32.02451 of the Texas Human Resources Code, Section 670 of the Texas Probate Code, and §358.439, as determined by HHSC.

In paragraph (3), the amendment states that the deduction is effective the later of: (1) the month the judge signs the court order awarding guardianship-related costs and fees, (2) the first month of eligibility for which the person has a co-payment, or (3) the first day of the month that the applicant or recipient provides HHSC with a copy of the court order awarding guardianship-related costs and fees.

Paragraphs (4) - (6) state that HHSC does not deduct any amount of guardianship-related costs and fees awarded before the date the court order was signed, does not deduct a guardianship establishment fee unless a new guardian is named in the most recent court order, and does not deduct any guardianship-related costs and fees ordered after the recipient has died.

Paragraph (7) addresses the procedure by which an applicant or a recipient would receive the deduction, in accordance with S.B. 220. The applicant or recipient must provide a copy of the court order to HHSC no later than the date specified by HHSC.

Paragraph (8) states that the deduction for guardianship-related costs and fees is applicable only for a guardianship of the person and not to any other type of guardianship.

The proposed amendment also revises the term "guardian fee" to "guardianship fee," when used in the rule title and within the body of the rule to reflect current terminology.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for each of the first five years the proposed amendment will be in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of the state or local governments.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because this rule applies to the co-payment of ap-

plicants and recipients of Medicaid services in certain living arrangements and does not affect businesses.

Public Benefit and Costs

Lawrence M. Parker, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the amendment will be in effect, the anticipated public benefit expected as a result of enforcing the amendment is that HHSC's policy regarding the guardianship fee deduction in the calculation of a co-payment will be clearer and, therefore, the assets of a ward will be better protected.

There are no anticipated economic costs to persons who are required to comply with the proposed amendment. There is no anticipated negative impact on local employment.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Barbara Fee, Health and Human Services Commission, Office of Family Services MC-2090, 909 West 45th Street, Austin, TX 78751, or by e-mail to barbara.fee@hhsc.state.tx.us, within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for December 8, 2011, at 9:00 a.m. in Room 164 of the HHSC-MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778.

Legal Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, §32.021 and Texas Government Code, §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas; and Texas Human Resources Code §32.02451, which requires the Executive Commissioner of HHSC to adopt rules providing a procedure for a Medicaid recipient to receive the guardianship fee deduction.

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

*§358.439. Guardianship [~~Guardian~~] Fee.*

[~~(a)~~] In determining the co-payment for a person receiving services in an institutional setting, the [~~The~~] Texas Health and Human Services Commission (HHSC) may deduct a guardianship [~~guardian~~] fee, if any, up to [~~in~~] an amount set by the court, from the [~~a~~] person's total countable income[~~, in determining the person's co-payment~~].

(1) The deduction is limited to guardianship-related costs and fees, subject to the limitations of §32.02451 of the Texas Human Resources Code, Section 670 of the Texas Probate Code, and this section, as determined by HHSC.

(2) [~~(b)~~] HHSC deducts the guardianship-related costs and fees [~~guardian fee~~] from total countable income after deducting the personal needs allowance, but before deducting any other allowances.

(3) The deduction is effective the later of:

(A) the month the judge signs the court order awarding guardianship-related costs and fees;

(B) the first month of eligibility for which the person has a co-payment; or

(C) the first day of the month that the applicant or recipient provides HHSC with a copy of the court order awarding the guardianship-related costs and fees.

(4) HHSC does not deduct any amount of guardianship-related costs and fees awarded before the date the court order was signed. The deduction is prospective only.

(5) HHSC does not deduct a guardianship establishment fee unless a new guardian is named in the most recent court order.

(6) HHSC does not deduct any guardianship-related costs and fees ordered after the recipient has died.

(7) To receive the deduction, an applicant or recipient must provide a copy of the court order to HHSC no later than the date specified by HHSC. No deduction will be given until the applicant or recipient provides HHSC with a copy of the court order awarding the guardianship-related costs and fees by submitting the court order as specified by HHSC.

(8) The deduction authorized by this section is limited to a guardianship of the person. No deductions are allowed for any other type of guardianship.

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

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104732
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 424-6900

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# TITLE 10. COMMUNITY DEVELOPMENT

## PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

## CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 Texas Administrative Code §80.3; and new 10 Texas Administrative Code §§80.40, 80.41, 80.70 - 80.73, 80.80, and 80.90 - 80.94, relating to the regulation of the manufactured housing program. The amendments and new rules are proposed to comply with Senate Bill 1 (82nd Legislature, 2011, 1st special session) that amends the Manufactured Housing Standards Act; to re-propose repealed rules in order to reorganize in new Subchapters D - G; to clarify the definition of a criminal record for license applicants; to remove the fee of $1.50 for a certified copy of the Statement of Ownership and Location; to clarify what criteria the Department will use to determine that any liens on real property have been released; and to require a copy of the deed to confirm that the applicant declaring a home abandoned is the owner of the real property.

The majority of the re-proposed rules remain the same as the current rules, but are proposed in new subchapters. The following is a description of changes made to the current rules.

Section 80.3(d): Revised the education fee to comply with the changes made in Senate Bill 1 (82nd Legislature, 2011, 1st special session) by breaking down the fees into three courses (Core Education Fee, Retailer Education Fee and Installer Education Fee).

Section 80.3(e): Removed text relating to approving a third-party to provide an initial licensing instruction course because the Department does not currently provide an option for third-party initial licensing instruction.

Section 80.3(k): Removed the charge of $1.50 for additional copies of the Statement of Ownership and Location because it cost more to process the payment than to provide a copy at no charge.

New Subchapter D is proposed to include new §80.40 and §80.41 previously located in Subchapter E.

New §80.40: The proposed new rule is the same as the repealed version.

New §80.41: The proposed new rule is proposed with changes in subsections (c) and (f).

Section 80.41(c)(1): Revised to comply with the changes made in Senate Bill 1 (82nd Legislature, 2011, 1st special session) by breaking down the hours required and types of courses (eight (8) hours for initial instruction course; four (4) hours for retailer course and four (4) hours for installer course).

Section 80.41(c)(2): Revised by requiring each course be required to test separately and a score of 70% correct is required to pass each test. Also, changed the word "prepared" to "approved" relating to the approval of questions by the director.

Section 80.41(c)(3): Changed the word "terminated" in the first sentence to "suspended." Added a sentence explaining while the license is in a suspended status the salesperson may not act as a manufactured housing salesperson.

Section 80.41(c)(4), (5) and (6): The paragraphs are deleted from the new rule because there is no requirement to list the curriculum in the rules.

Section 80.41(f)(3): Revised the criteria in determining whether to issue a license to an applicant based on the applicant's criminal record, instead of only considering denial of the license or suspension if the applicant has a criminal conviction.

Section 80.41(f)(4), (5) and (6): Changed wording from having a criminal conviction to having a criminal record.

New Subchapter E is proposed to include new §§80.70 - 80.73 previously located in Subchapter F.

New §80.70: The proposed new rule is the same as the repealed version.

New §80.71: The proposed new rule is the same as the repealed version.

New §80.72: The proposed new rule is the same as the repealed version.

New §80.73: The proposed new rule is the same as the repealed version.

New Subchapter F is proposed to include new §80.80 previously located in Subchapter G.

New §80.80: The proposed new rule is the same as the repealed version.

New Subchapter G is proposed to include new §§80.90 - 80.94 previously located in Subchapter H.

New §80.90: The proposed new rule is proposed with changes in subsections (d), (f) and (h).

Section 80.90(d): Removed reference relating to a fee for an additional certified copy of a statement of ownership and location because the fee is insignificant and is more costly to process for the Department when applications are rejected because the fee is missing. Providing a copy for free enables the user to reprint certified copies from their own computer which is more efficient for the consumer and the Department.

Section 80.90(f)(2)(D) and (3)(C): Added new subparagraphs to clarify what criteria the Department can use to determine that any liens on real property have been released. The criteria is the same as stated in §1201.2076(b) of the Occupations Code.

Section 80.90(h): Added requirement to provide a copy of the deed to confirm that the applicant declaring the home as abandoned is the owner of the real property. A high percentage of applications received are from persons who represent themselves as the owners of the real estate but who are not, resulting in a costly revocation process. Requiring a copy of the deed enables the Department to determine eligibility.

New §80.91: The proposed new rule is the same as the repealed version.

New §80.92: The proposed new rule is the same as the repealed version.

New §80.93: The proposed new rule is the same as the repealed version.

New Figure: 10 TAC §80.93(b): The Tax Lien Layout form is the same as the current form.

New §80.94: The proposed new rule is the same as the repealed version.

Joe A. Garcia, Executive Director of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs, has determined that for the first five-year period that the proposed rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering these sections. There will be no effect on small or micro-businesses because of the proposed rules. There are no anticipated

economic costs to persons who are required to comply with the proposed rules.

Mr. Garcia also has determined that for each year of the first five years that the proposed rules are in effect the public benefit as a result of enforcing the rules will be to provide clarification of procedures and to comply with the Manufactured Housing Standards Act.

Mr. Garcia has also determined that for each year of the first five years the proposed rules are in effect there should be no adverse effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

If requested, the Department will conduct a public hearing on this rulemaking, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029. The request for a public hearing must be received by the Department within 15 days after publication.

Comments may be submitted to Joe A. Garcia, Executive Director of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs, P.O. Box 12489, Austin, Texas 78711-2489 or by e-mail at mhproposedrulecomments@tdhca.state.tx.us. The deadline for comments is no later than 30 days from the date that these proposed rules are published in the *Texas Register.*

## SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

**10 TAC §80.3**

The amendments are proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.3. Fees.*

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

(d) Education Fee:

(1) Core Education Fee: Each attendee at the regularly offered course of initial instruction in the law and consumer protection regulations for license applicants shall be assessed a fee of $150 [~~$250~~]. Subject to availability of staff, the Department may provide additional initial instruction courses upon request for a fee of $150 [~~$250~~] per attendee plus reimbursement to the Department for the actual costs of the training session and any related costs, such as travel, meal, and lodging.

(2) Retailer Education Fee: $50 for each attendee.

(3) Installer Education Fee: $50 for each attendee.

(e) There is a fee of $300 to process an application for a contract to be approved to provide [~~an initial instruction for licensing course or~~] a continuing education program under §1201.113 of the Standards Act.

(f) - (j) (No change.)

(k) Fees Relating to Statements of Ownership and Location. Each fee shall accompany the required documents delivered or mailed to the Department at its principal office in Austin.

(1) A fee of $55 will be required for the issuance of a Statement of Ownership and Location.

[~~(2) A fee of $1.50 will be required for each additional requested certified copy other than copies provided at issuance as required by the Standards Act.~~]

(2) [~~(3)~~] If a correction of a document is required as a result of a mistake by the Department, there is no fee for the issuance of corrected document. However, if the error was not made by the Department, a request for correction of the error must be made on a completed Application for Statement of Ownership and Location and submitted to the Department along with the required fee of $55 and any necessary supporting documentation.

(3) [~~(4)~~] When multiple applications are submitted, the Form M set forth on the Department's website must be completed and attached to the front of the applications to identify each application and reconcile the fee for each application with the total amount of the payment. Failure to provide this form, properly completed, will delay the application's being deemed complete for processing.

(4) [~~(5)~~] A priority handling service may be offered by the Department for an additional fee of $55, for each review of an application, whether the application is complete or incomplete.

(l) - (n) (No change.)

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

Filed with the Office of the Secretary of State on November 7, 2011.

TRD-201104826
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 475-4733

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## SUBCHAPTER D. LICENSING

**10 TAC §80.40, §80.41**

The new rules are proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.40. Security Requirements.*

(a) For purposes of meeting the security requirements of §1201.105 of the Standards Act, "other security" means a deposit in a state or federally chartered bank or savings and loan association. If other security is posted, the other security must be maintained in or by a banking institution located in this state subject to a control

agreement in the promulgated form set forth on the Department's website. Such deposits are hereinafter referred to as security. If such security is reduced by a claim, the license holder shall, within twenty (20) calendar days, make up the deficit as required by §1201.109(c) of the Standards Act. No advance notice is required by the Department to the license holder, but the Department shall verify of the deposit.

(b) Any other security provided for compliance with §1201.105 of the Standards Act, shall remain in place and subject to a control agreement in favor of the Department for two (2) years after the person ceases doing business as a manufacturer, retailer, broker, rebuilder, or installer, or until such later time as the director may determine that no claims exist against the other security. The Director may consent to the substitution of a bond or a different qualifying deposit for other security provided that in the event a bond is filed to replace the assigned security, the initial effective date of the bond is the same or prior to the date of the assignment of security.

(c) If a required bond is canceled during the license period, the license shall be automatically suspended on the date bond coverage ceases.

(d) To be exempt from the additional security as required by §1201.106(b) of the Standards Act, a manufacturer who does not have a manufacturing plant in this state must have a bona fide service facility.

(1) The manufacturer shall provide the Department with the name, address and phone number of the service facility, conspicuous notice of which shall be provided to each Texas retailer who purchases homes from the manufacturer.

(2) The service facility shall be capable of compliance with the provisions of Sub-part I of the Manufactured Housing Improvement Act (latest edition) and capable of providing warranty service within the reasonable time requirements set by the Department in §80.73 of this chapter (relating to Procedures for Handling Consumer Complaints), and shall be subject to periodic review and inspection by Department personnel.

(3) If the Department determines that the requirements of paragraph (2) of this subsection have not been met, notice must be sent of that determination and of the requirement of an additional bond amount.

(4) Unless additional security is provided as required by the Standards Act, all out of state manufacturers must disclose their in-state service facility on each renewal of their license.

(e) In order for the Board to direct the Director to stop accepting bonds issued by a surety for reasons outlined in §1201.105(c) of the Standards Act, the Department experiences significant problems if:

(1) the surety fails on three (3) or more occasions to make the required reimbursement payment within thirty (30) calendar days from the date of notice from the director that a consumer claim has been paid; or

(2) is more than sixty (60) calendar days late in making a required reimbursement payment.

(f) If the director stops accepting bonds issued by a surety for reasons set forth in subsection (e) of this section, all licensees who are bonded by the affected surety will be notified immediately so they can supply the Department with a new valid bond when they renew their license. If a licensee fails to supply the Department with a new valid bond when they renew their license, their license is automatically suspended until the licensee provides a new valid bond.

*§80.41. License Requirements.*

(a) General License Requirements. In order to apply to obtain a license, the promulgated form of application for such license must be fully completed and executed and submitted to the Department, accompanied by the required fee, required security, and all other required supporting documentation. The Department may request any reasonably related additional information or documentation to clarify or support any application.

(1) Additional provisions applicable to salespersons.

(A) A salesperson is an agent of their sponsoring retailer or broker. The sponsoring retailer or broker is liable and responsible for the acts or omissions of a salesperson in connection with any activity subject to the Standards Act or this chapter. It is a violation of the Standards Act and this chapter for a retailer or broker of manufactured housing to employ a salesperson who is not licensed with the Department or permit them to conduct business subject to the Standards Act on their behalf.

(B) If a salesperson's sponsoring retailer or broker is no longer licensed, that salesperson's ability to act and a salesperson is automatically terminated until such time as he or she is acting under a duly licensed sponsoring retailer or broker and such sponsorship is on record with the Department. A salesperson shall surrender his or her license to the Department within ten (10) calendar days of termination from his or her sponsoring retailer.

(C) A sponsoring retailer or broker shall notify the Department in writing when a salesperson has been terminated or is no longer sponsored by said retailer or broker.

(D) A salesperson's sponsoring retailer or broker shall be issued a license card by the Department containing effective date and license number and name and license number of the sponsor. A salesperson shall be required to present a copy of a valid license card upon request.

(2) Additional provisions applicable to installers.

(A) A provisional installer's license shall become a full installer's license as outlined in §1201.104(f) of the Standards Act when the Department inspects a minimum of five (5) manufactured home installations and found not to have any identified installation violations.

(B) It is the responsibility of an installer who is still on a provisional status to notify the Department of each installation performed promptly. As used in this section, "promptly" means sufficiently early to enable the home to be inspected prior to any skirting being installed, in any event within three business days following the date of completion of the installation.

(C) It is the responsibility of the Department's field office to notify the Department's licensing section when a provisional installer's license is eligible for upgrade to a full installer's license.

(b) Applicable License Holder Ownership Changes.

(1) A license holder shall not change the location of a licensed business unless the license holder first files with the Department:

(A) a written notification of the address of the new location;

(B) an endorsement to the bond reflecting the change of location; and

(C) the original license.

(2) The change of location is not effective until all requirements are received by the Department.

(3) For a change in ownership of less than fifty percent (50%) of the licensed business entity, no new license is required provided that the existing bond or other security continues in effect. However, the current Articles of Incorporation or Assumed Name Certificate must accompany the request.

(4) For a change in ownership of fifty percent (50%) or more, the license holder must file with the Department, along with the appropriate fee and Articles of Incorporation or Assumed Name Certificate:

(A) a license addendum by the purchaser providing information as may be required by the Department; and

(B) certification by the surety that the bond for the licensed business entity continues in effect after the change in ownership; or

(C) an application for a new license along with a new bond or other security and proof that the education requirements of §1201.113 of the Standards Act, have been met.

(c) Education.

(1) The Standards Act requirement for an initial eight (8) hour course of instruction in the law, including instruction in consumer protection regulations; four (4) hour retailer education course; and/or four (4) hour installer education course shall be offered quarterly by the Department. Subject to limitations on Department resources, the Department will make special licensing classes available upon written request.

(2) Each test to be administered in connection with the course(s) will consist of a representative selection of questions from an approved set of questions approved by the Director. The test(s) will be open-book. A score of 70% correct is required to pass each test.

(3) For initial licensing of a salesperson, if the salesperson does not attend and successfully complete the initial licensing class provided by the Department within 90 days after the date of licensure, the license will automatically be suspended until the salesperson has attended and successfully completed that class. While the license is in a suspended status the salesperson may not act as a manufactured housing salesperson.

(d) Continuing Education.

(1) Continuing education courses must include any revisions to the Code within the preceding two years and the Department's current complaint resolution process and may also include any of the following:

(A) installation requirements;

(B) manufactured home financing;

(C) operation of manufactured home parks and communities; or

(D) other subjects determined by the Department to relate directly to the lawful operation of a business subject to the Code.

(2) Acceptable evidence that the requirements of §1201.113(b) of the Standards Act have been satisfied by the license holder or their related person on record with the Department, would be a certificate, letter, or similar statement provided by the approved education provider indicating that the course was timely completed. Such evidence may be submitted by fax, mail, e-mail, or in person.

(3) For license renewal, evidence of any required completion, with reference to license number, must be received by the Department before a license may be renewed.

(4) Approval of courses and providers. In order to be considered for approval by the Board to provide continuing education courses a party wishing to be considered for such approval must submit, for each course for which approval is sought, a letter application, accompanied by the nonrefundable processing fee, and the following:

(A) A narrative overview of the course, describing subject matter to be covered;

(B) Brief biographies, including credentials of each instructor demonstrating in depth knowledge of the subject matter to be taught;

(C) A copy of any course materials to be used. If the course materials are deemed to be proprietary they should be placed in a separate envelope, marked confidential, and accompanied by a written statement as to why they should not be treated as open records. There is no assurance that such materials will ultimately be accorded any exemption from disclosure under the Open Records provisions of the Texas Government Code;

(D) A schedule of any fees to be charged for the course;

(E) If completion of the course is limited to any particular group, a description of the limitation;

(F) As such information becomes available, an indication as to the locations, times, and dates for offerings; and

(G) Such other information as the Department may require.

(5) Once the Department determines that a request for approval is complete, that request will be placed on the next regularly scheduled meeting of the Board for consideration. The Department will provide the board with a written recommendation on each such request. The staff will advise the applicant of the board's action within ten (10) business days of the date of the board meeting, including a written statement as to any limitations, conditions, or other requirements imposed.

(A) Approvals shall be for a period not to exceed two years. The Department may, at no cost, attend or send a representative to attend any approved course to determine that the course is being taught in accordance with the terms of approval.

(B) The Department may revoke or suspend approval of a course if the Department determines that the course is not being taught in accordance with the terms of approval or that the course is not being administered in accordance with the law or these rules. Any action to revoke or suspend such an approval is a contested matter under Chapter 2001, Texas Government Code, and the party against whom revocation or suspension is sought may make a written request for a hearing before an Administrative Law Judge. If no such hearing is requested within thirty (30) calendar days after receipt of notice from the Department, the Department order of suspension or revocation shall become final.

(e) License Application and Renewal.

(1) Initial Application Processing.

(A) It is the policy of the Department to issue the license within seven (7) business days after receipt of all required information and the following conditions have been met:

*(i)* all required forms are properly executed; and

*(ii)* all requirements of applicable statutes and this chapter have been met.

(B) License applications and accompanying documents found to be incomplete or not properly executed shall be returned to the

applicant with an explanation of the specific reason and what information is required to complete license.

(C) Upon request, the Department will disclose the license number assigned and the effective date for a license that has been approved but not yet delivered to the license holder.

(2) License Renewal Requirements. It is the responsibility of a license holder to renew the license prior to its expiration date.

(A) In order to prevent the expiration and lapse of a license, a complete application for license renewal must be received by the Department prior to the date on which the current license expires.

(B) If an application for license renewal is received by the Department after the date on which the current license expires, the license will not be issued without the required late fees identified in §1201.116(d) and (e) of the Standards Act.

(3) Payment of license fees.

(A) All required fees must be paid in order to obtain a valid license, including a renewal license, from the Department.

(B) Any license issued by the Department is void and of no effect if based upon a check or other form of payment that is later returned for insufficient funds, closed account, or other reason, regardless of whether the Department notifies the applicant of the insufficiency of payment or the invalidity of the license.

(C) It is the applicant's responsibility to ensure that all licensing fees are paid in valid U.S. funds.

(f) License Application or Renewal Denial.

(1) In the evaluation of an applicant for a license other than a salesperson's license, the Director shall consider whether the applicant or any related person involved with the applicant has previously:

(A) been found in a final order to have participated in one or more violations of the Standards Act that served as grounds for the suspension or revocation of a license;

(B) been found to have engaged in activity subject to the Standards Act without possessing the required license;

(C) caused the trust fund to incur unreimbursed payments or claims;

(D) failed to abide by the terms of a final order or agreed final order, including the payment of any assessed administrative penalties; or

(E) had any state license revoked for violations of a law or rule.

(2) If any of the preceding factors is present with respect to the applicant or any related person involved with the applicant, the director will further determine:

(A) whether all appropriate corrective action has been taken;

(B) whether the applicant has adopted policies and procedures or taken other appropriate measures to prevent recurrences; and

(C) whether additional conditions or limitations on the license would be appropriate.

(3) In determining whether an applicant should be issued a license if that applicant states in his/her application for said license that he/she has a criminal record, which may include a conviction, deferred adjudication, plead guilty, or nolo contendere for any felony or misdemeanor offense, other than a Class C Misdemeanor for traffic violations, within five (5) years preceding the date of the application, the Director shall consider the factors set out in Texas Occupations Code, §53.022:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the intended manufactured housing business activity;

(C) the extent to which a license holder might engage in further criminal activity of the same or similar type as that in which the applicant previously had been involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the functions and responsibilities of the license holder's occupation or industry; and

(E) whether the offenses were defined as crimes of moral turpitude by statute or common law, from Class A misdemeanors to first, second, and third degree felonies carrying fines and/or imprisonment or both. Special emphasis shall be given to the crimes of robbery, burglary, theft, embezzlement, sexual assault, and conversion.

(4) In addition to the factors that may be considered in paragraph (3) of this subsection, the Department, in determining the present fitness of a person who has a criminal record, may consider the following:

(A) the extended nature of the person's past criminal activity;

(B) the age of the person at the time of the commission of the crime;

(C) the amount of time that has elapsed since the person's last criminal record;

(D) the conduct and work activity of the person prior to and following the criminal record; and

(E) evidence of the person's rehabilitation or attempted rehabilitation effort while incarcerated or following release.

(5) The applicant shall furnish proof in any form, as may be required by the Department, that he/she has maintained a record of steady employment and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases.

(6) If the Department suspends or revokes a valid license, or denies a person a license or the opportunity to be considered for a license in accordance with this subsection because of the person's prior criminal record and the relationship of the crime to the license, the Department shall:

(A) notify the person in writing stating reasons for the suspension, revocation, denial, or disqualification; and

(B) offer the person the opportunity for a hearing on the record. If the person does not request a hearing on the matter within thirty (30) calendar days from receipt of the Department's decision, the suspension, revocation, or denial becomes final.

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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Joe A. Garcia
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Texas Department of Housing and Community Affairs
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## SUBCHAPTER E. ENFORCEMENT

### 10 TAC §§80.70 - 80.73

The new rules are proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.70. Enforcement.*

(a) A licensee shall not obstruct or hinder any inspection, investigation, or enforcement efforts being carried out by the Department.

(b) Subpoenas or any other order issued by the Director may be served by any person acting on behalf of the Director.

*§80.71. Rules for Hearings.*

(a) Unless otherwise expressly set forth in the Standards Act or this chapter, all hearings shall be held and conducted pursuant to the applicable provisions of Texas Government Code, Chapter 2001.

(b) Any party to a hearing may request that a record of the hearing be made and transcribed by an independent court reporter, other than an employee of the Department. Such request must be made not later than seven (7) calendar days prior to the hearing. The additional cost and expense of the independent court reporter may be assessed against the party making the request.

(c) Notice of a hearing shall specify all state and federal laws, rules, and regulations, including but not limited to, if applicable, HUD regulations, that the Department believes are relevant to any issue to be involved in the hearing.

(d) If, after receiving notice of a hearing, a party fails to appear in person or by representative on the day and time set for hearing or fails to appear by telephone in accordance with Texas Government Code, Chapter 2001, also known as the Administrative Procedures Act, the hearing may proceed in that party's absence and a proposal for decision may be entered by default, accepting all facts and conclusions of law as deemed admitted.

(e) Pursuant to the Administrative Procedures Act, each party has the right to file exceptions to the Proposal for Decision and present a brief with respect to the exceptions. All exceptions must be filed with the Department within ten (10) business days of the Proposal for Decision, with replies to be filed ten (10) business days after the filing of exceptions.

(f) When an administrative hearing is held for any matter in which the Department seeks to take action against a licensee for violating the Standards Act or this chapter, whether such action is an action to assess administrative penalties, to require corrective action, to require cessation of improper activities, to suspend or revoke a license, or any combination thereof, the Department shall assess the costs of the proceeding against any party that fails to appear at a duly noticed administrative hearing. The costs assessed shall be the greater of $100 or the actual costs charged to the Department by the State Office of Administrative Hearings, the Office of the Attorney General, any court reporter, or any other third party providing services in connection with such hearing.

(g) The Department will seek the recovery of its costs from any party against whom it initiates an action if that action results in the entry of a final order taking any administrative action against that party, including the assessment of administrative penalties, requiring corrective action, requiring cessation of improper activities, suspension or revocation of a license, or any combination thereof.

*§80.72. Sanctions and Penalties.*

(a) In accordance with the provisions of §1201.605 of the Standards Act, the Director may assess and enforce penalties and sanctions against a person who violates any applicable law, rule, regulation, or administrative order of the Department.

(b) The determination of any penalties or other sanctions to be assessed shall be based on the consideration of statutory factors and whether the person against whom such penalties and/or sanctions are to be assessed has timely and in good faith taken the necessary steps to achieve, to the extent feasible, full compliance with all applicable state and federal laws, rules, and regulations and taken appropriate measures to prevent future violations.

(c) When a licensee first receives written notification of a claim for warranty service, the licensee must respond promptly to the request. A failure to do so shall constitute a violation of this chapter.

(d) Immediate corrective action is required if the matter involves an imminent safety hazard.

(e) If, after reasonable investigation, a licensee disputes whether warranty service is required and the licensee is unable to resolve the matter by agreement with the consumer, the licensee may request that the Department perform an inspection of the home. The running of the time to respond to the request for warranty service will be suspended from the time the request for inspection is received until the Department performs the inspection and issues its findings. When the Department concludes its review it will work with the affected licensee(s) and consumer(s) to agree upon a reasonable time to address its findings. In the event the parties cannot agree on a reasonable time, the Director shall issue a revised order assigning a time for compliance. An agreed or ordered time to respond to a request for warranty service may be extended by the Director in response to a request setting forth good cause for the extension. Any such request must be made to the Director prior to the expiration of the allotted time for response. Requests may be made by U.S. First Class mail, by FAX, or by e-mail, or, if followed with written confirmation sent U.S. First Class mail, or by telephone.

(f) Any and all penalties are IN ADDITION to full compliance with the Standards Act and rules (i.e., full, prompt corrective action, restitution, or whatever else the Standards Act and rules would have required in the first place). Failure to provide such compliance on a timely basis, as specified in the applicable order, will be deemed to be a violation of the order and serve as a basis for pursuing additional administrative action, including the assessing of additional penalties and the pursuit of suspension or revocation of licenses.

(g) The Department offers, at no charge, alternative dispute resolution as an inexpensive and informal way of attempting to resolve any claim or dispute. Depending on the parties, this may involve informal meetings or non-binding mediation. Alternative dispute resolution

is available upon request. In the event that a disputed matter cannot be resolved in this manner, the Department reserves the right to pursue all other lawful means of resolution including, but not limited to, pursuit of administrative remedies.

*§80.73. Procedures for Handling Consumer Complaints.*

(a) A complaint may be initiated by a consumer or by the Department. Unless the Department determines that it is appropriate to proceed in another manner a copy of the complaint will be provided to each person involved. The letter shall request a written response within ten (10) calendar days unless the Department determines that a longer or shorter period is warranted.

(1) If the consumer has not previously notified the manufacturer, retailer or installer, the Department will forward the written notification to the manufacturer, retailer, or installer. This will constitute written notice of a request for warranty service.

(2) If the consumer has previously provided written notification to the manufacturer, retailer or installer of the need for warranty service or repairs, but believes such has not been completed in a satisfactory manner, the Department shall perform a home inspection, if required. If a home inspection is performed and violations are found, the Department will assign responsibilities for repair, and notify the manufacturer, retailer, installer, and consumer of their responsibilities to complete such warranty or service repair in accordance with §1201.356(c) of the Standards Act.

(b) The Department shall make a consumer complaint home inspection upon request.

(1) Consumer Request. The consumer may, at any time, request that the Department perform a consumer complaint home inspection. A written complaint regarding failure to provide warranty work is deemed to be a request for a consumer complaint inspection. No written complaint form is required if a possible imminent safety hazard exists.

(2) Industry Request. Manufacturer or retailer requests for a consumer complaint home inspection must be signed, shall identify the home by HUD label and serial number(s), and shall provide the necessary information for the Department to contact the consumer and determine the physical location of the home. The manufacturer or retailer may request a consumer complaint home inspection if the manufacturer or retailer:

(A) believes that the consumer's complaints are not covered by the respective written warranty, or implied warranties;

(B) believes that the warranty service was previously properly provided; or

(C) has a dispute as to the respective responsibilities pursuant to the warranties.

(3) The Department will perform the inspection within thirty (30) calendar days from the date an inspection is requested.

(A) The consumer, manufacturer, retailer, and installer, as applicable, shall be notified of the scheduled inspection.

(B) The person conducting the inspection shall inspect all matters (relating to the home and/or the installation of the home) set forth in the complaint and any other items raised at the inspection.

(C) The person conducting the inspection will issue a report of inspection, completed to reflect the findings of the inspection.

(c) The retailer, installer, or manufacturer shall take immediate corrective action when notification is received from a consumer and the nature of the complaint indicates an imminent safety hazard or serious defect.

(d) Except as provided in subsection (c) of this section, manufacturers, retailers, and installers shall perform their obligations in accordance with any assigned order for corrective action pursuant to §1201.356(c) of the Standards Act within a reasonable period of time. A reasonable period of time is deemed to be thirty (30) calendar days following receipt of the order from the Department unless there is good cause requiring more time.

(e) When service or repairs are completed following any notice or orders from the Department pursuant to §1201.356(a) of the Standards Act, the manufacturer, retailer, and/or installer shall forward to the Department copies of service or work orders reflecting the date the work was completed, or other documentation to establish that the warranty service or repairs have been completed. A consumer is not required to sign the service or work order. These service or work orders must be received by the Department within five (5) calendar days after the expiration of the period of time specified in the warranty order issued by the Department. Corrective action taken is subject to re-inspection.

(f) If service or repairs cannot be made within the specified time frame, the license holder shall notify the Department in writing prior to the expiration of the specified time frame by certified mail. The notice shall list those items which have been, or will be, completed within the time frame and shall show good cause why the remainder of the service or repairs cannot be made within the specified time frame. The license holder shall request an extension for a specific time. If the Department fails to respond in writing to the request within five (5) business days of the date of receipt of the notice of request for extension, the extension has been granted.

(g) Once the Department receives the service or work orders confirming that all assigned items have been addressed and the Department has, to the extent deemed necessary or appropriate, inspected the work, a complaint will be closed.

(h) A complaint may be reopened for good cause upon the approval of the Director or his or her designee(s).

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

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## SUBCHAPTER F. MANUFACTURERS HOMEOWNERS' RECOVERY TRUST FUND

### 10 TAC §80.80

The new rule is proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as neces-

sary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.80. Administration of Claims under the Manufactured Homeowners' Recovery Trust Fund.*

(a) The Director, before authorizing any party performing warranty work or providing other goods or services that are to be reimbursed from the Manufactured Homeowners' Recovery Trust Fund (the "Fund") to proceed, will require that an estimate be submitted on the form set forth on the Department's website properly completed and executed.

(b) Re-assigned warranty work required by the Director to be performed shall, unless extended for good cause or provided otherwise in the order, be performed within thirty (30) days or such other time as the director may by order specify:

(1) evidence that re-assigned warranty work was performed shall, unless extended for good cause, be supplied to the Department within ten (10) days of completion; and

(2) all warranty work or other work to be reimbursed from the Fund, once completed, is subject to being re-inspected.

(c) An order re-assigning warranty work and designating the party responsible for the re-assigned warranty work as a "consumer" under §1201.358(d) of the Standards Act becomes final if not appealed within thirty (30) days.

(d) Failure to provide a required estimate in connection with an order to perform re-assigned warranty work, once that order has become final, may serve as grounds for an administrative action against the licensee.

(e) When a consumer has a covered claim against a licensee and the licensee has not satisfied the claim, the Department shall take appropriate steps to make sure that the claim is proper, meeting all requirements of laws and rules, and that all reasonable steps to satisfy the claim have been exhausted. If the damages arose as a result of a violation of the Texas Deceptive Trade Practice - Consumer Protection Act, the specific violation must be adequately documented. Acceptable documentation would include a court order finding that such a violation had occurred or the establishing of confirmed facts that would specifically constitute such a violation, along with proof that the court order could not be satisfied. The specific violation must relate directly to the manufactured home or the sale transaction regarding the manufactured home.

(f) Once a payment is made from the Fund, the Department shall file a claim under the bond of or deduct the amount paid from other security provided by the party primarily responsible for the unsatisfied claim.

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

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## SUBCHAPTER G. STATEMENTS OF OWNERSHIP AND LOCATION

### 10 TAC §§80.90 - 80.94

The new rules are proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.90. Issuance of Statements of Ownership and Location.*

(a) Application Requirements. In order to be deemed complete, an application for a Statement of Ownership and Location must include, as applicable:

(1) A completed and fully executed Application for Statement of Ownership and Location on the Department's prescribed current form;

(2) The required fee;

(3) If the statement of ownership and location is to reflect the recordation of a lien, other than a tax lien, for which the Department does not have the owner's consent, copies of documentation establishing the creation and existence of each such lien, and an affidavit of fact explaining the circumstances of the lien;

(4) When one or more existing liens are to be released, assigned, or foreclosed, appropriate supporting documentation;

(5) When an application for Statement of Ownership and Location indicates a change in ownership but no change in lien, supporting documentation that clearly establishes that the lien holder consented to that change; and

(6) When a manufactured home is to be designated for use as a dwelling after the home has been designated for business use, salvage, or as real property, evidence of a satisfactory habitability inspection by the Department.

(b) Right of Survivorship. If a right of survivorship election is made, then the Department will issue a new Statement of Ownership and Location to the surviving person(s) upon receipt of a copy of the death certificate of the deceased person(s), and a properly executed application for Statement of Ownership and Location, and the applicable fee.

(c) Corrections to Statements of Ownership and Location.

(1) If a correction is required as a result of a Department error, it will be corrected at no charge.

(2) If a correction is requested because of an error made by a party other than the Department, the correction will not be made until the Department receives the following:

(A) A complete corrected application for Statement of Ownership and Location; and

(B) Any necessary supporting documentation.

(d) Upon issuance of a Statement of Ownership and Location, the Department will mail one certified copy to the owner and one cer-

tified copy to the lienholder. If an additional certified copy is desired for a third party it should be noted on the application with appropriate mailing information.

(e) Exchanging a Document of Title for a Statement of Ownership and Location. The Department will issue a Statement of Ownership, with no change in status, to replace a title at no charge upon receipt of the original title and the physical location of the home. If a manufactured home title showed that it was personal property, that will be presumed to be its status until and unless a revised Statement of Ownership and Location is applied for and issued. Likewise, if a manufactured home has had a certificate of attachment issued and had title cancelled to real property, that shall be presumed to be its status until and unless a revised Statement of Ownership and Location is applied for and issued.

(f) Updating of Statements of Ownership and Location on Manufactured Homes Transferred as Real Property.

(1) When a manufactured home has become real property because the owner completed the conversion process required by the Standards Act, the home may be sold, transferred, or encumbered as real property by the customary means used for real property transactions. As long as the home remains real property at the same location, ownership of the home is confirmed in the same manner as any other real property, rather than by verifying Department records. A new Statement of Ownership and Location does not have to be applied for until and unless:

(A) the home is moved from the location specified on the statement of ownership and location;

(B) the current owner of the manufactured home wishes to convert it to personal property status;

(C) the use of the property is changed to business use or salvaged; or

(D) the manufactured home no longer meets the requirements to be classified as real property (such as the home being on property subject to a long term lease which is not assignable to the buyer or transferee).

(2) To convert a manufactured home from real property to personal property, the owner of the home must submit a completed Application for Statement of Ownership and Location to the Department with supporting documentation as follows:

(A) If the applicant is not the owner of record with the Department, satisfactory proof of ownership under a complete chain of title. Acceptable evidence would include, but not be limited to, authenticated copies of all intervening transfer documents, a court order confirming ownership, or title insurance policy in such owner's name issued by a title insurance company licensed to do business in Texas.

(B) Satisfactory evidence that any liens on the manufactured home have been discharged or that all lienholders have consented to the change.

(C) Evidence of either a satisfactory habitability inspection by the Department or an election to convert the status of the home to business use or salvage.

(D) For the purposes of subparagraph (B) of this subsection, the Department may rely on a commitment for title insurance, a title insurance policy, or a lawyer's title opinion to determine that any liens on real property have been released.

(3) To update the ownership on a manufactured home already elected and perfected as real property, and remaining in the same location as real property, the new owner of the home must submit a completed Application for Statement of Ownership and Location to the Department with supporting documentation as follows:

(A) If the applicant is not the owner of record with the Department, satisfactory proof of ownership under a complete chain of title. Acceptable evidence would include, but not be limited to, authenticated copies of all intervening transfer documents, a court order confirming ownership, or title insurance policy in such owner's name issued by a title insurance company licensed to do business in Texas.

(B) Satisfactory evidence that any liens on the manufactured home have been discharged or that all lienholders have consented to the change.

(C) For the purposes of subparagraph (B) of this subsection, the Department may rely on a commitment for title insurance, a title insurance policy, or a lawyer's title opinion to determine that any liens on real property have been released.

(4) When a home is being converted to real property, a copy stamped "filed" by the county must be submitted to the Department as evidence that the requirements of §1201.2055 of the Standards Act have been satisfied and the real property election has been perfected. This must be done within sixty (60) days from the issuance date reflected on the Statement of Ownership and Location.

(g) When a title company or attorney's office fails to complete the conversion of a manufactured home to real property, the holder or servicer of the loan may apply for a statement of ownership and location electing real property status after-the-fact, providing that evidence of notice to all parties is sent via certified mail and that proof of such efforts is provided along with an affidavit of fact describing such efforts, pursuant to §1201.2055(i)(3) of the Standards Act.

(h) Submitting an application for Statement of Ownership and Location pursuant to the abandonment provision in §1201.217 of the Standards Act, should include an affidavit of fact, on the prescribed form, attesting to that all statutory notifications have been made to the appropriate parties, including the tax assessor-collector of the county where the home is located, and evidence that all notification was sent via certified mail. A copy of the deed confirming that the applicant declaring the home as abandoned is the owner of the real property.

(i) A Priority Handling Service may be offered by the Department for an additional fee of $55, each time an application for statement of ownership and location is reviewed on a priority basis, whether the application is complete or incomplete. Initial or resubmitted applications submitted with priority handling requested and including the additional fee, will be processed within five working days from the date the application is recognized as received in the Department (applications received after 3:30 p.m. become part of the following day's mail).

(1) If the application is received complete, a Statement of Ownership and Location will be issued and mailed within the established time.

(2) If the application is received incomplete, a Request for Additional Information will be issued and mailed within the established time.

(3) Applications requiring habitability or salvage rebuilding inspections are not eligible for the Priority Handling Service.

*§80.91. Issuance of a Texas Seal.*

(a) Issuance of a Texas Seal requires the submittal of an application for statement of ownership and location, the applicable fee and the fee for each Texas Seal issued.

(b) A Texas Seal can only be issued to a home meeting the definition of a HUD Code manufactured home or a mobile home.

*§80.92. Inventory Finance Liens.*

(a) A lien and security interest on manufactured homes in the inventory of a retailer, as well as to any proceeds of the sale of those homes, is perfected by filing an inventory finance security form approved by this Department and in compliance with this chapter. The required form is set forth on the Department's website.

(b) A separate form must be filed for each licensed sales location and must include a summary of homes by label or serial number, that are secured with the form.

*§80.93. Recording Tax Liens on Manufactured Homes.*

(a) Manually filed tax liens shall be filed with the Department using the form set forth on the Department's website. No other form will be accepted for the manual filing of tax liens. The form must be properly completed.

(b) Electronically filed tax liens and tax lien releases shall be filed with the Department using the required format as provided in the following Tax Lien File Layout. No other format will be accepted for electronic filing of tax liens.
Figure: 10 TAC §80.93(b)

(c) When releasing a tax lien recorded with the Department via a tax certificate or tax paid receipt, the documentation must demonstrate the tax lien field has been satisfied for the correct home.

(d) For tax liens recorded after June 18, 2005, but prior to the rules that were effective on January 29, 2006, those tax liens relating to tax years prior to 2001 will be disregarded and will not be treated as having been recorded.

(e) A tax collector may file as a central tax collector under a single taxing entity ID number, in which case the liens recorded or released under that taxing entity ID number will extend to all liens created for tax obligations to the taxing entity for which the filer collects. In order, however, to file as a central collector, the filer must complete and provide to the Department the form set forth on the Department's website. A single filing for multiple taxing entities must reflect the aggregate amount of the tax liabilities to which the filing relates.

*§80.94. Report to County Tax Assessor-Collectors and County Appraisal Districts.*

In order to comply with §1201.220 of the Standards Act, which requires the Department to provide a monthly report to each tax assessor-collector and county appraisal district in Texas, the Department will provide the required information by hardcopy or electronically, when possible. Section 1201.009 of the Standards Act, allows the Department, if feasible, to perform any action under this chapter by electronic means.

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

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Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 475-4733

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# CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) proposes the repeal of 10 Texas Administrative Code §§80.40, 80.41, 80.70 - 80.73, 80.80, and 80.90 - 80.94, relating to the regulation of the manufactured housing program, in order to repeal Subchapters E - H and re-propose the rules as new Subchapters D - G.

Joe A. Garcia, Executive Director of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs, has determined that for the first five-year period that the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal. There will be no effect on small or micro-businesses because of the repeal. There are no anticipated economic costs to persons who are required to comply with the repeal.

Mr. Garcia also has determined that for each year of the first five years that the repeal is in effect the public benefit as a result of enforcing the repeal will be to provide the rules in a more organized manner.

Mr. Garcia has also determined that for each year of the first five years the repeal is in effect there should be no adverse effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

If requested, the Department will conduct a public hearing on the repeal of this rule, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029. The request for a public hearing must be received by the Department within 15 days after publication.

Comments may be submitted to Joe A. Garcia, Executive Director of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs, P.O. Box 12489, Austin, Texas 78711-2489 or by e-mail at mhproposedrulecomments@tdhca.state.tx.us. The deadline for comments is no later than 30 days from the date that the proposed repeal is published in the *Texas Register.*

## SUBCHAPTER E. LICENSING

### 10 TAC §80.40, §80.41

*(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeals are proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.40. Security Requirements.*

*§80.41. License Requirements.*

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

Filed with the Office of the Secretary of State on November 7, 2011.

TRD-201104822
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 475-4733

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## SUBCHAPTER F. ENFORCEMENT

### 10 TAC §§80.70 - 80.73

*(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeals are proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.70. Enforcement.*

*§80.71. Rules for Hearings.*

*§80.72. Sanctions and Penalties.*

*§80.73. Procedures for Handling Consumer Complaints.*

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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Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-4733

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## SUBCHAPTER G. MANUFACTURERS HOMEOWNERS' RECOVERY TRUST FUND

### 10 TAC §80.80

*(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeal is proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.80. Administration of Claims under the Manufactured Homeowners' Recovery Trust Fund.*

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

Filed with the Office of the Secretary of State on November 7, 2011.

TRD-201104824
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 475-4733

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## SUBCHAPTER H. STATEMENTS OF OWNERSHIP AND LOCATION

### 10 TAC §§80.90 - 80.94

*(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeals are proposed under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

*§80.90. Issuance of Statements of Ownership and Location.*

*§80.91. Issuance of a Texas Seal.*

*§80.92. Inventory Finance Liens.*

*§80.93. Recording Tax Liens on Manufactured Homes.*

*§80.94. Report to County Tax Assessor-Collectors and County Appraisal Districts.*

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

Filed with the Office of the Secretary of State on November 7, 2011.

TRD-201104825

Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 475-4733

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# TITLE 16. ECONOMIC REGULATION

## PART 1. RAILROAD COMMISSION OF TEXAS

### CHAPTER 12. COAL MINING REGULATIONS
### SUBCHAPTER G. SURFACE COAL MINING AND RECLAMATION OPERATIONS, PERMITS, AND COAL EXPLORATION PROCEDURES SYSTEMS
### DIVISION 2. GENERAL REQUIREMENTS FOR PERMITS AND PERMIT APPLICATIONS

**16 TAC §12.108**

The Railroad Commission of Texas (Commission) withdraws the proposed amendments published in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7109) and proposes these revised amendments to §12.108, relating to Permit Fees, to implement provisions of Senate Bill 1, 82nd Texas Legislature (Regular Session, 2011), and, specifically, Article VI, Railroad Commission Rider 9, which requires the amounts appropriated from general revenue for State fiscal years 2012 and 2013 to cover the cost of permitting and inspecting coal mining facilities. This requirement is contingent upon the Commission assessing fees sufficient to generate, during the 2012-2013 biennium, revenue to cover the general revenue appropriations.

The Commission proposes to amend subsection (b) to specify that the annual fees apply for calendar years 2011 and 2012. In paragraph (1), the Commission proposes to increase the annual fee for each acre of land within a permit area on which coal or lignite was actually removed during a calendar year from the current $130 to $154. In paragraph (2), the Commission proposes to increase the annual fee for each acre of land within a permit area covered by a reclamation bond on December 31st of each year, as shown on the map required at §12.142(2)(C) of this chapter (relating to Operation Plan: Maps and Plans), from the current $5.50 to $10.40. Finally, in paragraph (3), the Commission proposes to increase the annual fee for each permit in effect on December 31st of a year from the current $4,250 to $6,900. The Commission anticipates that annual fees at these new amounts will result in revenue of $2,652,652 in each year of the 2012-2013 biennium.

John Caudle, Director, Surface Mining and Reclamation Division, has determined that during each year of the first five years the proposed amendments would be in effect, the net effect on state government would be zero. There are no fiscal impacts on local governments.

The Commission's coal mining regulatory program is partially funded with a 50 percent cost reimbursement grant from the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement. The State share of the cost for implementing this regulatory program, $2,648,693 in Fiscal Year 2012 and $2,674,316 in Fiscal Year 2013, is funded from fees paid by the regulated coal mining industry. These fees come from two general categories: application fees and annual fees.

The application fees are specified in §12.108(a) and the Commission does not propose to revise these fees in this rulemaking. The total amount in annual fees required to fund this regulatory program was determined by subtracting the total amount of application fees estimated for collection annually in Fiscal Year 2012 and Fiscal Year 2013 from the estimated annual state share cost to fund the program in Fiscal Year 2012 and Fiscal Year 2013. Mr. Caudle estimates that the Commission will collect application fees annually in the amount of $90,000 in both Fiscal Year 2012 and Fiscal Year 2013. The remainder in State share expense is then allocated for collection from annual fees. The total amount of annual fees required is allocated for collection according to the following distribution: seven percent for annual permit fees, 18.5 percent (approximately 20 percent of the remainder) is derived from mined acreage fees, and 74.5 percent (approximately 80 percent of remainder) is derived from bonded acreage fees. The proposed annual fee rates were then determined based on the estimated area where coal or lignite is removed during 2011 and the estimated permit status and bonded acres on December 31, 2011.

The seven percent to be collected from annual permit fees ($179,400) was divided by 26, the estimated number of permits on December 31, 2011, to derive the $6,900 individual permit annual fee proposed in subsection (b)(3). The 18.5 percent to be collected from mined acreage fees ($477,400) was allocated across 3,100 acres, the estimated cumulative acres within the permit areas on which coal or lignite will be removed during the calendar year 2011, to derive the $154 acreage fee proposed in subsection (b)(1). Last, the remaining 74.5 percent to be collected through the bonded acreage fee ($1,905,852) was divided by 183,255 acres, the estimated cumulative acres under bond on December 31, 2011, to derive the $10.40 per bonded acre fee proposed in subsection (b)(2).

Mr. Caudle has determined that during each year of the first five years the proposed amendments would be in effect there will be an increase in the economic cost to the mining industry of approximately $1,041,250. This is based on a comparison of the revenue that would be generated under the current $130 annual mined acreage fee to the revenue that would be generated under the proposed amendment that would reduce this fee to $154 per mined acre; a comparison of the revenue that would be generated under the current annual fee of $5.50 per bonded acre to the revenue that would be generated under the proposed increase to $10.40 per bonded acre; and a comparison of the revenue generated under the current annual fee of $4,250 per permit to the revenue that would be generated under the proposed increased amount of $6,900 per permit, for each of the 26 permits issued.

Mr. Caudle has determined that the public benefit resulting from the new fee structure for coal mining activities is the alignment of fees paid by the coal mining industry with the costs incurred by the Railroad Commission, as required by Senate Bill 1.

In accordance with Texas Government Code, §2006.002, Mr. Caudle has determined that there will be no adverse economic effects on small businesses or micro-businesses resulting from the proposed amendments because there are no small businesses or micro-businesses, as those terms are defined in Texas Government Code, §2006.001, holding coal mining permits from the Commission. The proposed amendments also will not affect

a local economy; therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2002.022.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. Comments should refer to SMRD Docket No. 1-11. The Commission will accept comments until 12:00 p.m. (noon) on Monday, December 5, 2011, which is 17 days after publication in the *Texas Register.* The Commission has determined this is a reasonable opportunity for interested persons to submit data, views, or arguments, as required by Texas Government Code, §2001.029, for two reasons. First, the proposal and an online comment form will be available on the Commission's website no later than the day after the open meeting at which the Commission approves publication of the proposal, giving interested persons additional time to review and analyze the proposal and to draft and submit comments. Second, based on a formula and schedule agreed to by the coal mining industry and the Commission in 2005, every two years since 2005, the Commission has adjusted the surface mining fees based on that predetermined formula. This adjustment phases in fee increases based on bonded acreage for each permit as of December 31 of each year. At the same time, the portion of the fee derived from mined acreage correspondingly decreases and a revised annual permit fee is set based on this formula. These adjustments in fees are designed to take place over a ten-year period; this would be the fourth adjustment to the fee schedule. The Commission encourages all interested persons to submit comments on the proposal no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Mr. Caudle at (512) 463-6901. The status of pending Commission rulemakings is available at www.rrc.state.tx.us/rules/proposed.php.

The Commission proposes the amendments under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations and §134.055, which authorizes the Commission to obtain annual fees.

Statutory authority: Texas Natural Resources Code, §134.013 and §134.055.

Cross-reference to statute: Texas Natural Resources Code, §134.013 and §134.055.

Issued in Austin, Texas, on November 8, 2011.

*§12.108. Permit Fees.*

(a) (No change.)

(b) Annual Fees. In addition to application fees required by this section, each permittee shall pay to the Commission the following annual fees for calendar years 2011 and 2012 due and payable not later than March 15th of the year following the year for which these fees are applicable:

(1) a fee in the amount of $154 [~~$130~~] for each acre of land within the permit area on which coal or lignite was actually removed during the calendar year;

(2) a fee of $10.40 [~~$5.50~~] for each acre of land within a permit area covered by a reclamation bond on December 31st of the year, as shown on the map required by §12.142(2)(C) of this chapter (relating to Operation Plan: Maps and Plans); and

(3) a fee of $6,900 [~~$4,250~~] for each permit in effect on December 31st of the year.

(c) (No change.)

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

Filed with the Office of the Secretary of State on November 8, 2011.

TRD-201104845
Mary Ross McDonald
Director, Pipeline Safety Division
Railroad Commission of Texas
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 475-1295

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# TITLE 22. EXAMINING BOARDS

## PART 11. TEXAS BOARD OF NURSING

### CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

**22 TAC §217.19, §217.20**

Introduction. The Texas Board of Nursing (Board) proposes amendments to §217.19 (relating to Incident-Based Nursing Peer Review and Whistleblower Protections) and §217.20 (relating to Safe Harbor Peer Review for Nurses and Whistleblower Protections). The amendments are proposed under the authority of the Occupations Code §§301.352, 301.401, 301.4011, 301.402, 301.4025, 301.412, 301.413, 303.001, 303.005, and 301.151 and are necessary to implement the requirements of Senate Bill (SB) 192, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011.

SB 192 was enacted to improve the quality of patient care in this state by enhancing protections for nurses who report substandard and dangerous nursing practices to the Board or refuse to accept assignments that may endanger patients. (See Bill Analysis, Enrolled Version, 8/4/11). Although patient advocacy protections currently exist in the Nursing Practice Act (NPA), SB 192 enhances these protections by: (i) extending non-retaliation protections to individuals who advise nurses about their right to engage in protected patient advocacy activities, (ii) extending nurse liability immunity to include immunity from criminal prosecution and liability when making a protected report; and (iii) deterring retaliation against nurses for engaging in protected patient advocacy activities.

The existing patient advocacy protections for nurses are primarily located in Chapter 301, Subchapter I, and Chapter 303 of the Occupations Code. Under these provisions, nurses, along with several other types of entities, are required to report to the Board substandard nursing care, a nurse's suspected impairment or substance abuse, patient abuse, patient exploitation, and conduct that poses a risk of harm to patients. These provisions also provide nurses who report such conduct protection from civil liability and other discriminatory action. Further, §301.352 of the Occupations Code provides nurses the right to refuse to engage in conduct that might violate the minimum standards of nursing practice, a provision of the NPA, or a Board rule. Section

301.352 also provides nurses who refuse to engage in such conduct protection from discriminatory action. Finally, Chapter 303 affords nurses the opportunity to request a peer review determination if they refuse to engage in conduct that might result in a risk of harm to a patient (herein collectively referred to as "safe harbor").

In addition to the protections provided by the NPA, the Board has adopted extensive rules that define the process for invoking safe harbor; establish the minimum amount of due process a nurse is entitled to when requesting safe harbor peer review; provide guidance to facilities, agencies, and nursing employers in the development and application of peer review plans; and reiterate the protections provided by the NPA to nurses who invoke safe harbor or who file mandatory reports with the Board. Although these protections were designed to protect nurses who report substandard and dangerous nursing practices to the Board, nurses still face discrimination and employer retaliation for reporting such conduct. In order to encourage nurses to continue to advocate for the safety of their patients by reporting substandard and dangerous nursing practices to the Board and refusing to accept assignments that may result in harm to their patients, SB 192 expands the statutory protections afforded to nurses by the NPA and prohibits retaliation against nurses for reporting, in good faith, substandard and dangerous nursing practices and invoking safe harbor. The proposed amendments to §217.19 and §217.20 are necessary to implement the additional protections afforded by SB 192.

The Board's existing rules already extensively address the protections afforded by the NPA for nurses who file mandatory reports with the Board or invoke safe harbor. As such, few changes are necessary to implement the additional protections afforded by SB 192. While few in number, the proposed changes are significant, as they strengthen the patient advocacy protections afforded by the NPA and encourage nurses to continue to advocate for the safety of their patients. First, the proposal amends the definition of "peer review" in §217.19 and §217.20 to include information, advice, and assistance given to nurses and other persons regarding the rights and obligations of, and protections afforded to, nurses who file mandatory reports with the Board, request peer review, or raise concerns about patient safety. These proposed amendments are necessary for consistency with the additional protections afforded by SB 192. Second, the proposal amends the definition of "safe harbor" in §217.19 and §217.20 to include protection from employer suspension, termination, discipline, and discrimination for nurses who, in good faith, request safe harbor peer review. These proposed amendments are also necessary for consistency with the additional protections afforded by SB 192. Third, the proposal replaces the term "without malice" with the term "in good faith" throughout both sections for consistency with the provisions of SB 192. Finally, the proposal clarifies that nurses or other persons who provide advice about a nurse's rights, obligations, and protections associated with mandatory reporting and invoking safe harbor are protected from discipline, retaliation, suspension, termination, and discrimination. This proposed change is also necessary for consistency with the provisions of SB 192.

Section-by-Section Overview. Proposed amended §217.19(a)(14) defines "peer review" as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or nursing care, and a determination or recommendation regarding a complaint. The term also includes the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of and protections for nurses who raise care concerns, report under Chapter 301, request peer review, and the resolution of workplace and practice questions relating to nursing and patient care. Further, the peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with nursing peer review law and with applicable Board rules related to incident-based or safe harbor peer review.

Proposed amended §217.19(a)(15) defines "safe harbor" as a process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Further, safe harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

Proposed amended §217.19(c), regarding the applicability of incident-based peer review, requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of the Occupations Code §301.401(1) and §301.402(e) (NPA) (relating to alternate reporting by nurses to nursing peer review when a nurse engages in conduct subject to reporting), §301.403 (relating to nursing peer review committee reporting), §301.405(c) (relating to nursing peer review of external factors as part of employer reporting), and §301.407(b) (relating to alternate reporting by state agencies to peer review).

Proposed amended §217.19(j)(2) states that a nurse may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for filing a report in good faith under §217.19 and the Occupations Code §301.402(f) (retaliation for a report made in good faith prohibited) or advising a nurse of the nurse's rights and obligations under §217.19 and §301.402(f). A violation of §217.19(j) or the Occupations Code §301.402(f) is subject to the Occupations Code §301.413 that provides a nurse the right to file a civil suit to recover damages. Further, the nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. Finally, the proposed amended paragraph states that the Board does not have regulatory authority over practice settings or civil liability.

Proposed amended §217.19(m)(4) states that a person may not suspend or terminate the employment of, or otherwise discipline, retaliate, or discriminate against, a person who reports, in good faith, under §217.19(m) or who advises a nurse of the nurse's rights and obligations under §217.19(m). A violation of §217.19(m) is subject to the Occupations Code §301.413 (NPA) that provides a nurse the right to file a civil suit to recover damages. Further, the nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. Finally, the proposed amended paragraph states that the Board does not have regulatory authority over practice settings or civil liability.

Proposed amended §217.20(a)(14) defines "peer review" as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or nursing care, and a determination

or recommendation regarding a complaint. The term also includes the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of and protections for nurses who raise care concerns, report under Chapter 301, request peer review, and the resolution of workplace and practice questions relating to nursing and patient care. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Further, peer review conducted by any entity must comply with nursing peer review law and with applicable Board rules related to incident-based or safe harbor peer review.

Proposed amended §217.20(15) defines "safe harbor" as a process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Further, safe harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

Proposed amended §217.20(e)(2) state that the Occupations Code §303.005(c) and (h) (nursing peer review law) and §301.352 provide the following protections: (i) a nurse may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for requesting safe harbor in good faith; and (ii) a nurse or other person may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination.

Proposed amended §217.20(l)(4) states that a person may not suspend or terminate the employment of, or otherwise discipline, retaliate, or discriminate against, a person who reports, in good faith, under §217.20(l)(4) or advises a nurse of the nurse's rights and obligations under §217.20(l)(4). A violation of §217.20(l) is subject to the Occupations Code §301.413 that provides a nurse the right to file civil suit to recover damages. Further, the nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. Finally, the proposed amended paragraph states that the Board does not have regulatory authority over practice settings or civil liability.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit will be the adoption of requirements that improve the quality of patient care in this state by promoting patient advocacy by nurses and providing additional protection for nurses who report substandard or dangerous nursing practices to the Board or refuse to engage in conduct that may result in harm to patients.

There are no anticipated economic costs to persons who are required to comply with the proposal. The proposal incorporates and implements the additional protections afforded by SB 192 for nurses who: (i) report substandard or dangerous nursing practices to the Board, in compliance with existing provisions of the NPA and Board rules; or (ii) refuse to engage in conduct that could result in harm to a patient, in compliance with existing provisions of the NPA and Board rules. None of the proposed amendments substantively alter the existing requirements of §217.19 or §217.20 or impose new or additional requirements or restrictions upon individuals required to comply with the proposal, nor does the Board anticipate that an individual's method of compliance with these requirements will be altered due to the proposed amendments.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person who is required to comply with the proposal.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on December 19, 2011, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Melinda Hester, Lead Practice Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to melinda.hester@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §§301.352, 301.401, 301.4011, 301.402, 301.4025, 301.412, 301.413, 303.001, 303.005, 301.151.

Section 301.352(a) states that a person may not suspend, terminate, or otherwise discipline, discriminate against, or retaliate against a nurse who refuses to engage in an act or omission as provided by §301.352(a-1) or a person who advises a nurse of the nurse's rights under §301.352.

Section 301.352(a-1) provides that a nurse may refuse to engage in an act or omission relating to patient care that would constitute grounds for reporting the nurse to the Board under the Occupations Code, Subchapter I, that constitutes a minor incident, or that violates Chapter 301 or a Board rule if the nurse notifies the person at the time of the refusal that the reason for refusing is that the act or omission: (i) constitutes grounds for reporting the nurse to the Board; or (ii) is a violation of Chapter 301 or a rule of the Board.

Section 301.352(b) states that an act by a person under §301.352(a) does not constitute a violation of §301.352(b) if a nursing peer review committee under Chapter 303 determines that: (i) the act or omission the nurse refused to engage in was not conduct reportable to the Board under §301.403; a minor incident; or a violation of Chapter 301 or a Board rule; or (ii) the act or omission in which the nurse refused to engage was conduct reportable to the Board, a minor incident, or a violation

of Chapter 301 or a Board rule and the person rescinds any disciplinary or discriminatory action taken against the nurse; compensates the nurse for lost wages; and restores to the nurse any lost benefits.

Section 301.352(c) states that a nurse's rights under §301.352 may not be nullified by a contract.

Section 301.352(d) states that an appropriate licensing agency may take action against a person who violates §301.352.

Section 301.352(f) provides that a violation of §301.352 is subject to §301.413.

Section 301.401(1) defines "conduct subject to reporting" as conduct by a nurse that: (i) violates Chapter 301 or a Board rule and contributed to the death or serious injury of a patient; (ii) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse; (iii) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or (iv) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

Section 301.401(2) defines "minor incident" as conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person. Further, this term is synonymous with "minor error" or "minor violation of Chapter 301 or Board rule".

Section 301.401(3) defines "nursing educational program" as an educational program that is considered approved by the Board that may lead to an initial license as a registered nurse or vocational nurse.

Section 301.401(4) defines "nursing student" as an individual who is enrolled in a nursing educational program.

Section 301.4011 states that, in the Occupations Code Chapter 301, Subchapter I, a report is considered to be made in good faith if: (i) the person reporting believed that the report was required or authorized; and (ii) there was a reasonable factual or legal basis for that belief.

Section 301.402(b) states that a nurse shall report to the Board in the manner prescribed under §301.402(d) if the nurse has reasonable cause to suspect that: (i) another nurse has engaged in conduct subject to reporting; or (ii) the ability of a nursing student to perform the services of the nursing profession would be, or would reasonably be expected to be, impaired by chemical dependency.

Section 301.402(d) states that a report by a nurse under §301.402(b) must: (i) be written and signed; and (ii) include the identity of the nurse or student and any additional information required by the Board.

Section 301.402(e) states that, instead of reporting to the Board under §301.402(b), a nurse may make a report required under: (i) §301.402(b)(1) to a nursing peer review committee under Chapter 303; or (ii) §301.402(b)(2) to the nursing educational program in which the student is enrolled.

Section 301.402(f) provides that a person may not suspend or terminate the employment of, or otherwise discipline, discriminate against, or retaliate against, a person who reports in good faith under §301.402 or advises a nurse of the nurse's rights and obligations under §301.402.

Section 301.402(g) states that a violation of §301.402(f) is subject to §301.413.

Section 301.4025(a) states that, in a written, signed report to the appropriate licensing board or accrediting body, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to: (i) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or (ii) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

Section 301.4025(b) states that a nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. Further, for purposes of §301.4025(b), an employer or entity includes an employee or agent of the employer or entity.

Section 301.4025(c) states that a person may not suspend or terminate the employment of, or otherwise discipline, discriminate against, or retaliate against a person who reports in good faith under §301.4025 or advises a nurse of the nurse's right to report under §301.4025.

Section 301.4025(d) states that a violation of §301.4025(c) is subject to §301.413.

Section 301.412 states that a person who in good faith makes a report required or authorized under the Occupations Code, Subchapter I, or a person who advises a nurse of the nurse's right or obligation to report under Subchapter I: (i) is immune from civil and criminal liability, that in the absence of the immunity, might result from making the report or giving the advice; and (ii) may not be subjected to other retaliatory action as a result of making the report or giving the advice.

Section 301.413(a) states that a person may file a counterclaim in a pending action or prove a cause of action in a subsequent suit to recover defense costs, including reasonable attorney's fees and actual and punitive damages, if: (i) the person is named as a defendant in a civil action or subjected to other retaliatory action as a result of filing a report required or authorized, or reasonably believed to be required or authorized, under the Occupations Code, Subchapter I as a result of refusing to engage in conduct as authorized by §301.352; requesting in good faith a nursing peer review committee determination under §303.005; or providing advice to a person regarding filing a report required or authorized, or reasonably believed to be required or authorized, under Subchapter I as a result of refusing to engage in conduct as authorized by §301.352; or requesting in good faith a nursing peer review committee determination under §303.005; and (ii) the suit or retaliatory action is determined to be frivolous, unreasonable, or taken in bad faith.

Section 301.413(b) provides that a person may not suspend, terminate, or otherwise discipline, discriminate against, or retaliate against a person who: (i) reports in good faith under the Occupations Code, Subchapter I; (ii) requests, in good faith, a nursing peer review committee determination under §303.005; (iii) refuses to engage in conduct as authorized by §301.352; or (iv)

advises a nurse of the nurse's right to report under Subchapter I, request a nursing peer review committee determination under §303.005; or refuse to engage in conduct as authorized by §301.352.

Section 301.413(b-1) states that a person suspected of violating §301.413(b) may be reported to the appropriate licensing agency and, notwithstanding any other provision, that agency may impose an administrative penalty not to exceed $25,000 against the person if the agency finds a violation of §301.413(b). An administrative penalty imposed under §301.413(b-1) is in addition to other penalties the agency is authorized to impose and is subject to the procedural requirements applicable to the appropriate licensing agency.

Section 301.413(c) states that a person who reports under the Occupations Code, Subchapter I, refuses to engage in conduct as authorized by §301.352, or requests a nursing peer review committee determination under §303.005, or a person who advises a nurse of the nurse's right to report under Subchapter I, refuses to engage in conduct as authorized by §301.352, or requests a nursing peer review committee determination under §303.005, has a cause of action against a person who violates §301.413(b), and may recover: (i) the greater of actual damages, including damages for mental anguish even if no other injury is shown or $5,000; (ii) exemplary damages; (iii) court costs; and (iv) reasonable attorney's fees.

Section 301.413(d) provides that, in addition to the amount recovered under §301.413(c), a person whose employment is suspended or terminated in violation of §301.413 is entitled to: (i) reinstatement in the employee's former position or severance pay in an amount equal to three months of the employee's most recent salary; and (ii) compensation for wages lost during the period of suspension or termination.

Section 301.413(e) states that a person who brings an action under §301.413 has the burden of proof. Further, it is a rebuttable presumption that the person was suspended, terminated, or otherwise disciplined, discriminated against, or retaliated against for reporting under the Occupations Code, Subchapter I for refusing to engage in conduct as authorized by §301.352, for requesting a peer review committee determination under §303.005, or for providing advice to a person regarding reporting under Subchapter I, refusing to engage in conduct as authorized by §301.352, or requesting a peer review committee determination under §303.005 if: (i) the person was suspended, terminated, or otherwise disciplined, discriminated against, or retaliated against within 60 days after the date the report, refusal, or request was made or the advice was given; and (ii) the Board or a court determines that the report that is the subject of the cause of action was authorized or required under §§301.402, 301.4025, 301.403, 301.405, 301.406, 301.407, 301.408, 301.409, or 301.410 and made in good faith; the request for a peer review committee determination that is the subject of the cause of action was authorized under §303.005 and made in good faith; or the refusal to engage in conduct was authorized by §301.352; or the advice that is the subject of the cause of action was given in good faith.

Section 301.413(f) states that an action under §301.413 may be brought in a district court of the county in which: (i) the plaintiff resides; (ii) the plaintiff was employed by the defendant; or (iii) the defendant conducts business.

Section 303.001(1) defines "Board" as the Texas Board of Nursing.

Section 303.001(2) defines "nurse" as a registered nurse or a vocational nurse licensed under Chapter 301.

Section 303.001(3) defines "nursing" as the meaning assigned by §301.002.

Section 303.001(4) defines "nursing peer review committee" as a committee established under the authority of the governing body of a national, state, or local nursing association, a school of nursing, the nursing staff of a hospital, health science center, nursing home, home health agency, temporary nursing service, or other health care facility, or state agency or political subdivision for the purpose of conducting peer review. Further, the committee includes an employee or agent of the committee, including an assistant, an investigator, an intervenor, an attorney, and any other person who serves the committee in any capacity.

Section 303.001(4-a) defines "patient safety committee" as a committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety, including: (i) the entity's medical staff composed of individuals licensed under Subtitle B; or (ii) a medical committee under the Health and Safety Code, Subchapter D, Chapter 161.

Section 303.001(5) defines "peer review" as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or nursing care, and a determination or recommendation regarding a complaint. The term includes: (i) the evaluation of the accuracy of a nursing assessment and observation and the appropriateness and quality of the care rendered by a nurse; (ii) a report made to a nursing peer review committee concerning an activity under the committee's review authority; (iii) a report made by a nursing peer review committee to another committee or to the Board as permitted or required by law; (iv) implementation of a duty of a nursing peer review committee by a member, an agent, or an employee of the committee; and (v) the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of an protections for nurses who raise care concerns or report under Chapter 301 or other state or federal law; the rights and obligations of an protections for nurses who request nursing peer review under Chapter 301; nursing practice and patient care concerns; and the resolution of workplace and practice questions relating to nursing and patient care.

Section 303.005(a) defines "duty to a patient", for purposes of §303.005, as conduct required by standards of practice or professional conduct adopted by the Board for nurses. The term includes administrative decisions directly affecting a nurse's ability to comply with that duty.

Section 303.005(a-1) states that, for purposes of §303.005, a nurse or nurse administrator acts in good faith in connection with a request made or an action taken by the nurse or nurse administrator if there is a reasonable factual or legal basis for the request or action.

Section 303.005(b) provides, if a person who is required to establish a nursing peer review committee under §303.0015 requests a nurse to engage in conduct that the nurse believes violates a nurse's duty to a patient, the nurse may request, on a form developed or approved by the Board, a determination by a nursing peer review committee under Chapter 301 of whether the conduct violates a nurse's duty to a patient.

Section 303.005(c) provides that a nurse who in good faith requests a peer review determination under §303.005(b): (i) may not be disciplined or discriminated against for making the request; (ii) may engage in the requested conduct pending the peer review; (iii) is not subject to the reporting requirement under the Occupations Code Chapter 301 Subchapter I, and (iv) may not be disciplined by the Board for engaging in that conduct while the peer review is pending.

Section 303.005(d) states that if a nurse requests a peer review determination under §303.005(b) and refuses to engage in the requested conduct pending the peer review, the determination of the peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct, but the determination is not binding if a nurse administrator believes in good faith that the peer review committee has incorrectly determined a nurse's duty. Further, §303.005 does not affect the protections provided by §303.005(c)(1) or §301.352.

Section 303.005(e) states that if the conduct for which the peer review is requested under §303.005(b) involves the medical reasonableness of a physician's order, the medical staff or medical director shall be requested to make a determination as to the medical reasonableness of the physician's order, and that determination is determinative of that issue.

Section 303.005(f) provides that a nurse's rights under §303.005 may not be nullified by a contract.

Section 303.005(g) states that an appropriate licensing agency may take action against a person who violates §303.005.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference to Statute. The following statutes are affected by this proposal: §§301.352, 301.401, 301.4011, 301.402, 301.4025, 301.412, 301.413, 303.001, 303.005, 301.151, Occupations Code.

*§217.19. Incident-Based Nursing Peer Review and Whistleblower Protections.*

(a) Definitions.

(1) - (13) (No change.)

(14) Peer Review--Defined by TOC §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or nursing care, and a determination or recommendation regarding a complaint. The term also includes the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of and protections for nurses who raise care concerns, report under Chapter 301, request peer review, and the resolution of workplace and practice questions relating to nursing and patient care. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) - (17) (No change.)

(b) (No change.)

(c) Applicability of Incident-Based Peer Review. TOC §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of TOC §301.401(1) and §301.402(e) (NPA) (relating to alternate reporting by nurses to nursing peer review when a nurse engages in conduct subject to reporting), §301.403 (relating to nursing peer review committee reporting), §301.405(c) (relating to nursing peer review of external factors as part of employer reporting), and §301.407(b) (relating to alternate reporting by state agencies to peer review).

(d) - (i) (No change.)

(j) Nurse's Duty to Report.

(1) (No change.)

(2) A nurse may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for filing a report in good faith [~~made without malice~~] under this section and TOC §301.402(f) (retaliation for a report made in good faith [~~without malice~~] prohibited) or advising a nurse of the nurse's rights and obligations under this section and §301.402(f). A violation of this subsection or TOC §301.402(f) is subject to TOC §301.413 that provides a nurse the right to file a civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

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

(m) Reporting Conduct of other Practitioners or Entities: Whistleblower Protections.

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

(4) A person may not suspend or terminate the employment of, or otherwise discipline, retaliate, or discriminate against, a person who reports, in good faith [~~without malice~~], under this subsection or who advises a nurse of the nurse's rights and obligations under this subsection. A violation of this subsection is subject to TOC §301.413 (NPA) that provides a nurse the right to file a civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

*§217.20. Safe Harbor Peer Review for Nurses and Whistleblower Protections.*

(a) Definitions.

(1) - (13) (No change.)

(14) Peer Review--Defined by TOC §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or nursing care, and a determination or

recommendation regarding a complaint. The term also includes the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of and protections for nurses who raise care concerns, report under Chapter 301, request peer review, and the resolution of workplace and practice questions relating to nursing and patient care. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) - (17) (No change.)

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

(e) Safe Harbor Protections.

(1) (No change.)

(2) TOC §303.005(c) and (h) (NPR Law) and §301.352[~~,~~] provide the following protections:

(A) A nurse may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for requesting Safe Harbor in good faith.

(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination.

(C) (No change.)

(3) - (4) (No change.)

(f) - (k) (No change.)

(l) Reporting Conduct of other Practitioners or Entities; Whistleblower Protections.

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

(4) A person may not suspend or terminate the employment of, or otherwise discipline, retaliate, or discriminate against, a person who reports, in good faith [~~without malice~~], under this section or advises a nurse of the nurse's rights and obligations under this section. A violation of this subsection is subject to TOC §301.413 that provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

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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## 22 TAC §217.22

Introduction. The Texas Board of Nursing (Board) proposes new §217.22 (relating to Special Accommodations). This section is proposed under the authority of the Occupations Code §54.003 and §301.151 and is necessary to implement the requirements of Senate Bill (SB) 867, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011.

For each licensing examination administered by a state agency, SB 867 requires the agency to provide reasonable examination accommodations to examinees who have been diagnosed as having dyslexia. SB 867 further requires the agency to adopt rules establishing the eligibility criteria an examinee must meet in order to receive examination accommodations.

The Board's current procedures already allow an individual with a documented disability, including dyslexia, to request reasonable examination accommodations. However, these procedures have not been formalized in Board rule. In compliance with the mandates of SB 867, the proposed new section formalizes the Board's existing examination accommodation procedures in rule and specifies the criteria that an individual must meet in order to receive examination accommodations, including those individuals that have been diagnosed with dyslexia.

Under the proposal, an individual seeking examination accommodations must submit several pieces of documentation to the Board. First, the individual must submit a Special Accommodations Request Form to the Board. This form captures several necessary pieces of information about the individual, such as the individual's name and address; the individual's expected date of graduation; the approximate test date preferred by the individual; a description of the individual's disability; the specific testing accommodations sought by the individual; and a description of the testing accommodations that have been provided to the individual in the past. This information allows the Board to process the individual's request and to determine the type of testing accommodations that may be necessary for the individual. Second, the individual must submit a Professional Documentation of Disability Form (Disability Form) to the Board. In order to be eligible for examination accommodations, an individual's disability must be documented by one of the following healthcare providers: (i) for physical or mental disabilities other than learning disabilities, a licensed physician or psychologist with expertise in the area of the disability; (ii) for learning disabilities, a licensed psychologist or psychiatrist who has experience working with adults with learning disabilities; or (iii) for learning disabilities, a professional with a master's or doctorate degree in special education, education, psychology, educational psychology, or rehabilitation counseling who has training and experience in assessing intellectual ability level and interpreting tests of such ability; screening for cultural, emotional, and motivational factors; assessing achievement level; and administering tests to measure attention and concentration, memory, language reception and expression, cognition, reading, spelling, writing, and mathematics. The provider completing the Disability Form must also include a specific diagnosis of the individual's disability; a description of the nature, history, and extent of the individual's disability;

and the provider's specific recommendations for examination accommodations for the individual. Further, the information must be completed within the three years immediately preceding the individual's accommodation request. These requirements are necessary to: (i) ensure that the individual has been properly diagnosed with a verifiable disability, by a provider who is appropriately qualified through experience, education, and expertise to accurately diagnose disabilities and make recommendations about examination accommodations; (ii) determine the specific examination accommodations that may be necessary for the individual; and (iii) ensure that the information received by the Board is current and that the accommodations requested by the individual are necessary and appropriate. Third, the individual must submit a completed Consent to Release Information Form to the Board. This form permits the individual's provider to release information about the individual's disability to the Board, in conjunction with the Board's review of the individual's request for examination accommodations. Finally, the individual must submit a Nursing Program Verification Form (Verification Form) to the Board. The Verification Form must be completed by the dean or director of the nursing education program the individual attended. Further, the dean or director must provide a description of the examination accommodations that were provided by the nursing education program to the individual while the individual attended the nursing program. This information is necessary to verify the individual's stated disability and to identify examination accommodations that were provided to the individual in the past.

The proposal requires individuals to submit these forms to the Board at least 30 calendar days prior to registering for a licensing examination. This requirement is necessary to allow the Board adequate time to review the information submitted by the individual and to request additional and/or clarifying information, if necessary. If the Board needs additional and/or clarifying information and the individual has submitted his/her paperwork to the Board outside of this prescribed time period, the individual's licensing examination may have to be postponed or re-scheduled until all of the required information has been received and reviewed by the Board.

All of the forms required by the proposal, as well as the Board's instructions and requirements for providers completing the Disability Form, are available on the Board's website, as is stated in the text of the proposed new section. Further, all of the forms required by the proposal are published in the "In Addition" section in this issue of the *Texas Register* for public comment.

Section-by-Section Overview. Proposed new §217.22(a) states that the Board will provide reasonable accommodations for its licensing examinations according to the provisions of proposed new §217.22.

Proposed new §217.22(b) requires individuals requesting special examination accommodations to submit the following information to the Board: (i) a completed Special Accommodations Request Form; (ii) a Professional Documentation of Disability Form, completed within the three years immediately preceding the accommodation request by a diagnostician meeting the Board's requirements; (iii) a completed Consent to Release Information Form; and (iv) a Nursing Program Verification Form completed by the dean or director of the nursing program attended.

Proposed new §217.22(c) requires an individual requesting special examination accommodations to submit the information required by the proposed new section to the Board at least 30 calendar days prior to registering for the licensing examination. The proposed new subsection further clarifies that the Board will process an individual's accommodation request once all of the required information and documentation is received by the Board.

Proposed new §217.22(d) states that the Board's requirements for diagnosticians and the forms referenced in proposed new §217.22(b) may be found on the Board's website, which is located at http://www.bon.texas.gov/olv/pdfs/SPECACC.pdf.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed new section is in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed new section is in effect, the public benefit will be the adoption of regulations that provide disabled individuals an opportunity to request and receive reasonable examination accommodations. Further, the proposed new section promotes fairness and equality in occupational licensure and effectuates compliance with the requirements of SB 867.

There may also be associated costs of compliance with the proposed new section for some individuals. Not every individual will be required to comply with the proposed new section. Only those individuals with disabilities who wish to receive examination accommodations will be required to comply with the proposed new section. Although the Board anticipates the probable costs of compliance for these individuals to be minimal, the total probable cost of compliance may vary among individuals based upon several factors, including: (i) the costs associated with completing and submitting the required paperwork to the Board; (ii) the costs, if any, associated with a provider completing the Disability Form; and (iii) the costs, if any, associated with a dean or director completing the Verification Form.

An individual seeking an examination accommodation must complete the Special Accommodations Request Form and the Consent to Release Information Form. Neither of these forms require complex information or are lengthy in nature. As a result, the Board anticipates that an individual could complete these forms within a relatively short amount of time. Once the individual has completed these forms, the individual must submit them to the Board. The proposal does not prescribe the manner in which the information must be submitted to the Board. As such, each individual is free to choose the most economical method of submitting the required paperwork to the Board. An individual may deliver the information to the Board's offices in person, mail the information to the Board or utilize a commercial carrier such as FedEx or UPS, or transmit the information to the Board through facsimile transmission. Regardless of the particular method chosen, the Board anticipates the costs of transmitting the required information to the Board to be less than $25.

In order to be eligible to receive examination accommodations under the proposal, the individual must have a disability that has been diagnosed by a qualified provider. Further, the proposal requires the provider to complete the Disability Form and for the completed form to be submitted to the Board. Although the proposal specifies the types of providers that may complete the Disability Form, the Board anticipates that most individuals will have been previously diagnosed or treated by the provider completing the form. As a result, the Board does not anticipate there to be

costs associated with the provider's completion of the form. In the event, however, that a particular provider requires payment in order to complete the form, either in the form of co-insurance, a co-payment, or self pay, the probable cost of compliance will vary substantially among individuals based upon the following factors: (i) whether the individual is covered by health insurance; (ii) whether the individual's particular health insurance coverage requires a co-payment or other costs; and (iii) a particular provider's requirements for completing the Disability form. Each individual, however, has the information necessary to estimate these individual costs. Further, although the proposed new section requires the Disability Form to be submitted to the Board, the proposal does not prescribe the manner in which the information must be submitted to the Board. As such, each individual is free to choose the most economical method of submitting the required paperwork to the Board. An individual or a provider may deliver the information to the Board's offices in person, mail the information to the Board or utilize a commercial carrier such as FedEx or UPS, or transmit the information to the Board through facsimile transmission. Regardless of the particular method chosen, the Board anticipates the costs of transmitting the required information to the Board to be less than $25.

Lastly, the proposal requires the Verification Form to be completed by the dean or director of the nursing program attended by the individual requesting examination accommodations. The Board does not anticipate there to be costs associated with a dean or director's completion of the Verification form. In the event, however, that a particular dean or director requires payment in order to complete the form, the probable cost of compliance will vary substantially among individuals based upon the following factors: (i) the particular requirements of the dean or director for completion of the Verification Form; and (ii) the policies and procedures of the dean or director's nursing education program. Each individual, however, has the information necessary to estimate these individual costs. Further, although the proposed new section requires the Verification Form to be submitted to the Board, the proposal does not prescribe the manner in which the information must be submitted to the Board. As such, each individual is free to choose the most economical method of submitting the required paperwork to the Board. An individual or a dean or director may deliver the information to the Board's offices in person, mail the information to the Board or utilize a commercial carrier such as FedEx or UPS, or transmit the information to the Board through facsimile transmission. Regardless of the particular method chosen, the Board anticipates the costs of transmitting the required information to the Board to be less than $25.

Further, because the proposal relates to licensing examinations, it is anticipated that an individual should only incur the associated costs of compliance with the proposed new section one time, provided that the individual successfully passes the licensing examination. Any other costs of compliance with proposed new §217.22 result from the legislative enactment of the Occupations Code §54.003 and Chapter 301 and are not a result of the adoption, enforcement, or administration of this proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

The Government Code §2006.001(1) defines a micro business as a legal entity, including a corporation, partnership, or sole proprietorship that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has not more than 20 employees. The Government Code §2006.001(2) defines a small business as a legal entity, including a corporation, partnership, or sole proprietorship, that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has fewer than 100 employees or less than $6 million in annual gross receipts. Each of the elements in §2006.001(1) and (2) must be met in order for an entity to qualify as a micro business or small business.

As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed new section will not have an adverse economic effect on any individual, Board regulated entity, or other entity required to comply with the proposal because no individual, Board regulated entity, or other entity required to comply with the proposal meets the definition of a small or micro business under the Government Code §2006.001(1) or (2). The only entities subject to the proposal are individual examinees seeking examination accommodations. Because these individuals are not independently owned and operated legal entities that are formed for the purpose of making a profit, no individual subject to the proposal qualifies as a micro business or small business under the Government Code §2006.001(1) or (2). Therefore, in accordance with the Government Code §2006.002(c) and (f), the Board is not required to prepare a regulatory flexibility analysis.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on December 19, 2011, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Mark Majek, Director of Operations, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to mark.majek@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. New §217.22 is proposed under the Occupations Code §54.003 and §301.151.

Section 54.003(a) defines "dyslexia" as having the same meaning assigned by the Education Code §51.970.

Section 54.003(b) states that, for each licensing examination administered by a state agency, the agency shall provide reasonable examination accommodations to an examinee diagnosed as having dyslexia.

Section 54.003(c) states that each state agency shall adopt rules necessary to implement §54.003, including rules to establish the

eligibility criteria an examinee must meet for accommodation under §54.003.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference to Statute. The following statutes are affected by this proposal: §54.003 and §301.151, Occupations Code

*§217.22. Special Accommodations.*

(a) The Board will provide reasonable accommodations for its licensing examinations as set forth in this section.

(b) Individuals requesting special accommodations must submit the following information to the Board:

(1) A completed Special Accommodations Request Form;

(2) A Professional Documentation of Disability Form, completed within the three years immediately preceding the accommodation request by a diagnostician meeting the Board's requirements;

(3) A completed Consent to Release Information Form; and

(4) A Nursing Program Verification Form completed by the dean or director of the nursing program attended.

(c) An individual requesting special accommodations must submit the information required by this section to the Board at least 30 calendar days prior to registering for the licensing examination. The Board will process the accommodation request once all of the required information and documentation is received.

(d) The Board's requirements for diagnosticians and the forms referenced in subsection (b) of this section may be found on the Board's website, located at http://www.bon.texas.gov/olv/pdfs/SPECACC.pdf.

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

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104757
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 305-6822

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# TITLE 25. HEALTH SERVICES

## PART 1. DEPARTMENT OF STATE HEALTH SERVICES

### CHAPTER 415. PROVIDER CLINICAL RESPONSIBILITIES--MENTAL HEALTH SERVICES

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (DSHS), proposes amendments to §§415.101 - 415.111 and the repeal of §§415.112 - 415.114, concerning the Department of State Health Services/Department of Aging and Disability Services Drug Formulary.

BACKGROUND AND PURPOSE

The proposed amendments and repeals are necessary to conform the rules to statute and current DSHS operations. The proposed amendments are also needed to reflect the elimination of the Texas Department of Mental Health and Mental Retardation and the creation of DSHS and the Department of Aging and Disability Services (DADS) pursuant to House Bill 2292 (78th Legislature, Regular Session, 2003).

The proposed amendments include references to DADS in the title of the formulary and in the membership of the Executive Formulary Committee (committee) because the formulary is used and maintained by both DSHS and DADS, as individuals treated in DADS facilities, DSHS facilities, and by local authorities often have concomitant issues which transcend agency divisions. The proposed amendments ensure that the appropriate DSHS and DADS members are included on the committee and expressly require that at least two psychiatrists be on the committee. The proposed revisions also make the DADS state supported living center medical director a voting member of the committee; change the ex officio membership of the committee; and allow the DSHS Assistant Commissioner for Mental Health and Substance Abuse to appoint members to the committee.

The proposed repeals delete sections of the rules addressing an exhibit, references, and distribution of the rules.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). Sections 415.101 - 415.111 have been reviewed and the department has determined that the reasons for adopting the sections continue to exist because rules on this subject are needed. Sections 415.112 - 415.114 have been reviewed and the department has determined that reasons for adopting the sections no longer exist.

SECTION-BY-SECTION SUMMARY

Throughout the proposed amendments to §§415.101 - 415.111, references to "TDMHMR" are replaced with references to the "Department of State Health Services" or "DSHS," and references to the "TDMHMR Drug Formulary" are replaced with references to the "Department of State Health Services/Department of Aging and Disability Services Drug Formulary" or the "DSHS/DADS Drug Formulary." In addition, the following amendments are proposed.

Section 415.102(a) is amended to state that the formulary in its entirety is applicable to all DSHS facilities in all circumstances except when "DSHS transfers an individual to a general hospital to receive non-mental health acute care services." The proposed amendment is a nonsubstantive revision to state more clearly that the formulary does not apply when an individual is transferred from a DSHS facility to a general hospital for the purpose of receiving non-mental health acute care services. Section 415.102(b) is amended to provide that the entities governed by the subchapter are responsible for drafting contracts with their contractors that provide DSHS-funded medications and medication-related services to ensure that contractors comply with the

subchapter; as with the revision to subsection (a), the proposed revisions are made for the purpose of stating the requirement more clearly.

Section 415.103 is amended by adding language to the definition of "local authority" to include a local behavioral health authority designated in accordance with Texas Health and Safety Code, §533.0356; by adding certain health care professionals to the definition of "practitioner," by amending the definition of the formulary to reflect that it is revised annually; and by adding the definition of "DSHS facility" to include the Texas Center for Infectious Disease and the Rio Grande State Center. Section 415.103 is also amended by adding definitions of "DADS," "DSHS," "Interim Formulary Update," and "Mental health services;" and deleting definitions of "State mental retardation facility," "TDMHMR," "TDMHMR Drug Formulary," and "TDMHMR facility."

Section 415.104 is amended by revising subsection (e) to provide a more current citation to a rule located in Chapter 412, Subchapter G of this title (concerning Mental Health and Community Services Standards).

Section 415.105 is amended by designating the existing language as subsection (a) and revising that language to state more clearly that the use of proprietary names in the formulary is for information purposes only and is not meant to be an endorsement. The subsection is also amended by adding language stating that the formulary provides tables summarizing the recommended dosage ranges for the psychotropic drugs for clinician reference; that the tables are intended as guidelines and are not intended to replace other references or the clinician's clinical judgment; and that clinicians should consult the American Hospital Formulary Service Drug Information, the approved Food and Drug Administration product labeling, and other guidelines on the appropriate prescribing of psychoactive medications. Section 415.105 is also amended by the designation of a new subsection (b), which provides that interim formulary updates are incorporated into the annual formulary and that the interim formulary update conforms to the same format as the formulary.

Amendments to §415.106 update appropriate clinical members who serve on the Executive committee, to reflect organizational changes that have occurred since the section was adopted; it is also revised to provide that the Assistant Commission for Mental Health and Substance Abuse Services is responsible for appointing the committee members.

Section 415.107 is amended by revising subsection (b) to replace a reference to the TDMHMR medical director with a reference to the DSHS behavioral health medical director, reflecting an organizational change that has occurred since the section was adopted.

Section 415.108 is amended by deleting rule reference to §415.112 (concerning Exhibit) from subsection (a) and adding a new subsection (d), which now includes the New Drug Application form which is currently found in §415.112, which is proposed herein for repeal.

Section 415.109 is amended by adding a new subsection (b), which states the frequency of publication of the formulary, and provides that quarterly updates to the formulary, if any, will be published in an interim formulary update. In addition, the section is amended to replace references to the TDMHMR medical director with references to the DSHS behavioral health medical director, reflecting an organizational change that has occurred since the section was adopted.

Section 415.112 is proposed for repeal, as this section is not needed to exist as a separate section; instead, the New Drug Application form referenced in this section is proposed to be included as a new subsection (d) in §415.108 relating to Applying to Have a Drug Added to the Formulary. These changes will eliminate unnecessary cross-referencing between rules, and will make the sections more readable and user-friendly.

The proposed repeal of §415.113 removes a provision that restates the various rules, policies, and federal statutes referenced in this subchapter.

The proposed repeal of §415.114 removes the requirement for distribution of these rules.

FISCAL NOTE

Michael Maples, Assistant Commissioner, Mental Health and Substance Abuse Division, has determined that for each year of the first five years that the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed for amendment and repeal.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Maples has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the sections as proposed for amendment and repeal. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections as proposed.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed for amendment and repeal. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Maples has determined that for each year of the first five years the sections are in effect the public will benefit from adoption of the sections. The public benefit anticipated as a result of the repealed sections would be the elimination of unnecessary rules while ensuring proper and efficient treatment of persons with mental illness, as well as adequate provision of community-based mental health and mental retardation services through a local authority, through the use and maintenance of the formulary. The public benefit of the enforcing or administering the sections would be to provide the appropriate clinical members to serve on the committee and better tailor formulary drugs and use guidelines to the clinical population served.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Nnenna Ezekoye, Mental Health and Substance Abuse Division, Department of State Health Services, Mail Code 2053, P.O. Box 149347, Austin, Texas 78714-9347, (512) 206-5268, or by email to Nnenna.Ezekoye@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

## SUBCHAPTER C. USE AND MAINTENANCE OF DEPARTMENT OF STATE HEALTH SERVICES/DEPARTMENT OF AGING AND DISABILITY SERVICES DRUG FORMULARY

**25 TAC §§415.101 - 415.111**

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §571.006, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules as necessary for the proper and efficient treatment of persons with mental illness; Health and Safety Code, §534.052, which requires the adoption of rules necessary and appropriate to ensure the adequate provision of community-based mental health and mental retardation services through a local authority; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The amendments affect Health and Safety Code, Chapters 534, 571, and 1001; and Government Code, Chapter 531.

*§415.101. Purpose.*

The purpose of this subchapter is to provide policies and procedures governing the use and maintenance of the Department of State Health Services/Department of Aging and Disability Services (DSHS/DADS) Drug Formulary [~~*TDMHMR Drug Formulary*~~].

*§415.102. Application.*

(a) This subchapter applies to Department of State Health Services (DSHS) [~~TDMHMR~~] facilities, [~~Central Office,~~] local authorities, and their respective contractors for medications and medication-related services funded by DSHS [~~the Texas Department of Mental Health and Mental Retardation (TDMHMR)~~]. [~~(~~]The DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] in its entirety applies to all DSHS [~~TDMHMR~~] facilities in all circumstances except when DSHS transfers an individual to a general hospital to receive non-mental health acute care services. [~~an individual receives acute care services of limited duration in a general hospital.)~~]

(b) DSHS [~~TDMHMR~~] facilities[~~, Central Office,~~] and local authorities are responsible for drafting contracts with [~~amending the contracts of~~] their contractors that provide DSHS-funded [~~TDMHMR-funded~~] medications and medication-related services to ensure that contractors comply [~~their compliance~~] with this subchapter.

*§415.103. Definitions.*

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

(1) (No change.)

(2) Contractor--An entity that provides DSHS-funded [~~TDMHMR-funded~~] mental health [~~or mental retardation~~] services pursuant to a contract with a service system component or DSHS [~~TDMHMR~~].

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

(4) [~~(3)~~] Drug entity--A specific chemical compound and all of its pharmaceutically equivalent salt forms that [~~which~~] are used in the diagnosis, cure, mitigation, treatment or prevention [~~treatment or mitigation~~] of disease.

(5) DSHS--The Department of State Health Services.

(6) DSHS/DADS Drug Formulary--An annually updated listing by nonproprietary name of all drugs approved for use by service system components and their contractors.

(7) DSHS facility--A facility operated by DSHS, including a state mental health facility, the Texas Center for Infectious Disease, and the Rio Grande State Center.

(8) [~~(4)~~] Emergency--A situation in which it is immediately necessary to administer medication to an individual to prevent:

(A) imminent probable death or substantial bodily harm to the individual because the individual:

*(i)* overtly or continually is threatening or attempting to commit suicide or serious bodily harm; or

*(ii)* is behaving in a manner that indicates that the individual is unable to satisfy the individual's need for nourishment, essential medical care, or self-protection; or

(B) imminent physical or emotional harm to others because of threats [~~threat~~], attempts, or other acts the individual overtly or continually makes or commits.

(9) [~~(5)~~] Individual--Any person receiving services from a service system component or contractor.

(10) Interim Formulary Update--A quarterly update to the DSHS/DADS Drug Formulary, which is incorporated into the annual DSHS/DADS Drug Formulary.

(11) [~~(6)~~] Local authority--A local mental health authority [~~An entity~~] designated [~~by the TDMHMR commissioner~~] in accordance with [~~the~~] Texas Health and Safety Code, §533.035(a) or a local behavioral health authority designated in accordance with Texas Health and Safety Code, §533.0356.

(12) Mental health services--All services concerned with research, prevention, and detection of mental disorders and disabilities, and all services necessary to treat, care for, control, supervise, and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from substance abuse or chemical dependency.

(13) [~~(7)~~] Practitioner--A person who acts within the scope of a professional license to prescribe, distribute, administer, or dispense a prescription drug or device, (e.g., a physician, registered nurse, advanced practice registered nurse [~~nurse practitioner~~], physician assistant, licensed vocational nurse, pharmacist, dentist).

(14) [~~(8)~~] Pharmacy and therapeutics committee--A DSHS [~~TDMHMR~~] facility committee composed of physicians, pharmacists, registered nurses, and others as appointed by the facility CEO that assists in the formulation of broad professional policies regarding the evaluation, selection, distribution, handling, use, and administration, and all other matters relating to the use of drugs and devices in the facility [~~recommends drug-related policy to the facility's clinical/medical director and CEO~~].

(15) [~~(9)~~] Reserve drug--A formulary drug with specific guidelines for use as described in the DSHS/DADS Drug Formulary [~~formulary~~].

(16) [~~(10)~~] Service system component--DSHS, a DSHS [~~A TDMHMR~~] facility, or local authority.

(17) [~~(11)~~] State mental health facility--A state hospital or a state center with an inpatient component that is operated by DSHS [~~TDMHMR~~].

~~[(12) State mental retardation facility--A state school or a state center with a mental retardation residential component that is operated by TDMHMR.]~~

~~[(13) TDMHMR--The Texas Department of Mental Health and Mental Retardation.]~~

~~[(14) *TDMHMR Drug Formulary* or formulary--A continually revised printed listing by nonproprietary name of all drugs approved for use by service system components and their contractors.]~~

~~[(15) TDMHMR facility--A state mental health facility or a state mental retardation facility.]~~

*§415.104. General Requirements.*

(a) The Department of State Health Services [~~Texas Department of Mental Health and Mental Retardation~~] maintains a closed formulary (DSHS/DADS Drug Formulary) [~~(*TDMHMR Drug Formulary*)~~] that lists drugs approved by the Executive Formulary Committee for use by service system components and their contractors.

(b) A drug is not available for general use by service system components or their contractors unless it is approved by the Executive Formulary Committee. Drugs not listed in the DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] or the Interim Formulary Update [~~*Interim Formulary Update*~~] may not be used except under the limited circumstances described in §415.110 of this title (relating to Prescribing Non-formulary Drugs).

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

(e) Drug research conducted at a DSHS [~~TDMHMR~~] facility is governed by Chapter 414, Subchapter P of this title (concerning Research in DSHS [~~at TDMHMR~~] Facilities). Local authorities conducting drug research must comply with all applicable state and federal laws, rules, and regulations, including Title 45, Code of Federal Regulations, Part 46 (Protection of Human Subjects), as required by §412.313 [~~§412.309(f)~~] of this title (relating to Rights and Protection [~~Responsibilities~~]) of Chapter 412, Subchapter G of this title (concerning Mental Health Community Services Standards).

*§415.105. Organization of DSHS/DADS [~~TDMHMR~~] Drug Formulary.*

(a) Drugs are listed in the DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] by nonproprietary name. The list is based on a modified format of the American Hospital Formulary Service Drug Information [~~*American Hospital Formulary Service Drug Information*~~] and includes an alphabetical index. The use of proprietary names, which may follow in parentheses, is for information purposes only and is not meant to be an endorsement. [~~Proprietary names may follow in parentheses for information only; the listing of proprietary names is not an endorsement.~~] Cost comparisons and prescribing information are provided as determined necessary by the Executive Formulary Committee. The DSHS/DADS Drug Formulary provides tables summarizing the recommended dosage ranges for the psychotropic drugs for clinician reference. These tables are intended as guidelines and are not intended to replace other references or the clinician's clinical judgment. Clinicians should consult the American Hospital Formulary Service Drug Information, the approved Food and Drug Administration product labeling, and other guidelines on the appropriate prescribing of psychoactive medications. [~~The *American Hospital Formulary Service Drug Information* serves as a standard reference in addition to the approved Food and Drug Administration product labeling.~~] The DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] notes limitations recommended by the Executive Formulary Committee regarding the use of a drug, including specific limitations or guidelines for the use of a reserve drug.

(b) The Interim Formulary Updates are incorporated into the annual DSHS/DADS Drug Formulary. The Interim Formulary Update conforms to the same format as the DSHS/DADS Drug Formulary.

*§415.106. Executive Formulary Committee.*

(a) Composition.

(1) The chairperson of the Executive Formulary Committee is a physician appointed by the DSHS Assistant Commissioner for Mental Health and Substance Abuse Services [~~TDMHMR medical director~~].

(2) The DSHS State Hospitals Section [~~TDMHMR~~] pharmacy discipline head serves as the permanent secretary of the committee and is responsible for preparing the agenda and minutes of committee meetings.

(b) Membership. DSHS members [~~Members~~] of the Executive Formulary Committee are appointed by the DSHS Assistant Commissioner for Mental Health and Substance Abuse Services. The Executive Formulary Committee consists of: [~~TDMHMR medical director, which consists of:~~]

(1) two state mental health facility physicians, at least one of whom must be a psychiatrist;

(2) two state supported living center [~~mental retardation facility~~] physicians, at least one of whom must be a psychiatrist;

(3) (No change.)

(4) one DSHS facility pharmacy director;

(5) one DADS state supported living center facility pharmacist;

~~[(4) two TDMHMR facility pharmacy directors;]~~

(6) [~~(5)~~] one DSHS [~~TDMHMR~~] facility clinical pharmacologist;

~~[(6) one TDMHMR facility director of nursing;]~~

(7) two DSHS [~~one TDMHMR~~] facility registered nurses [~~nurse~~];

(8) the DSHS [~~TDMHMR~~] pharmacy services director [~~discipline head~~];

(9) the DADS medical director;

(10) the DSHS behavioral health medical director;

(11) the DADS statewide clinical pharmacy director;

(12) [~~(9)~~] the following ex officio, non-voting members:

(A) the DSHS State Hospital Section director;

(B) the DSHS State Hospital Section Medical Director;

(C) the DADS Assistant Commissioner for State Supported Living Centers;

(D) the DSHS director, Community Mental Health and Substance Abuse Program Services Section; and

(E) other persons as appointed by the DSHS Assistant Commissioner for Mental Health and Substance Abuse Services.

~~[(A) the TDMHMR medical director;]~~

~~[(B) the TDMHMR associate medical director for mental retardation/developmental disability;]~~

~~[(C) the TDMHMR associate medical director for mental health;]~~

~~[(D) the TDMHMR director, state mental health facilities;]~~

~~[(E) the TDMHMR director, state mental retardation facilities;]~~

~~[(F) the TDMHMR deputy commissioner, community programs; and]~~

~~[(G) the TDMHMR director, central contracting and procurement support; and]~~

~~[(10) other persons as appointed by the TDMHMR medical director.]~~

(c) Term of service. With the exception of the DSHS State Hospitals Section [~~TDMHMR~~] pharmacy discipline head, which is a standing membership position, members serve staggered three-year terms and may be reappointed to one additional term. Ex officio members may be reappointed at the discretion of the DSHS Assistant Commissioner for Mental Health and Substance Abuse [~~as specified by the TDMHMR medical director~~].

(d) (No change.)

(e) Administrative support. The DSHS State Hospitals Section [~~TDMHMR medical director's office~~] provides administrative support to the Executive Formulary Committee.

*§415.107. Responsibilities of the Executive Formulary Committee.*

(a) The Executive Formulary Committee maintains and updates the DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] by:

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

(b) The Executive Formulary Committee makes other recommendations concerning drug use and policy as requested by the DSHS behavioral health [~~TDMHMR~~] medical director.

(c) Approval of a drug entity for inclusion in the DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] does not imply approval of all formulations for that drug. The Executive Formulary Committee designates the formulations that are allowed for general use by service system components and their contractors.

(d) Approval of a drug formulation constitutes approval of all brands of the product that have been proven to be bioequivalent as listed in the then-current Approved Drug Products with Therapeutic Equivalence Evaluations, published by the United States Food and Drug Administration [~~*Approved Drug Products with Therapeutic Equivalence Evaluations*~~].

(e) (No change.)

*§415.108. Applying to Have a Drug Added to the Formulary.*

(a) Any member of the Executive Formulary Committee, any service system component practitioner, or any contract practitioner may apply to have a drug added to the DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] by completing the New Drug Application form in subsection (d) of this section [~~Form DF-1, referenced as Exhibit A in §415.112 of this title (relating to Exhibit)~~] and including:

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

(b) Submitting the application.

(1) If the person submitting the application is a DSHS [~~TDMHMR~~] facility practitioner or a DSHS [~~TDMHMR~~] facility contract practitioner, then that practitioner submits the application to the facility's pharmacy and therapeutics committee for approval. If the committee approves the application, then it forwards the application to the Executive Formulary Committee.

(2) (No change.)

(3) If the person completing the application is a member of the Executive Formulary Committee, then that person submits the application directly to the Executive Formulary Committee.

(c) (No change.)

(d) The New Drug Application form.

Figure: 25 TAC §415.108(d)

*§415.109. Changing the DSHS/DADS [~~TDMHMR~~] Drug Formulary.*

(a) Changes to the DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~] are based on need, effectiveness, risk, and cost as contained in current and unbiased biomedical literature.

(b) The DSHS/DADS Drug Formulary is updated and published once a year. Quarterly updates to the DSHS/DADS Drug Formulary, if any, will be listed in an Interim Formulary Update.

(c) [~~(b)~~] Recommendations by the Executive Formulary Committee for changes to the DSHS/DADS Drug Formulary [~~*TDMHMR Drug Formulary*~~], as reflected in the meeting's minutes, are submitted to the chairperson of the Executive Formulary Committee [~~TDMHMR medical director~~].

(d) [~~(c)~~] If the chairperson of the Executive Formulary Committee [~~TDMHMR medical director or designee~~] approves the recommendations, then the recommendations must be:

(1) identified as approved in writing before implementation; and

(2) listed in the Interim Formulary Update [~~*Interim Formulary Update*~~] and distributed to the CEOs, clinical/medical directors, and pharmacy directors of all service system components, and to members of the Executive Formulary Committee.

*§415.110. Prescribing Non-formulary Drugs.*

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

(c) DSHS [~~TDMHMR~~] shall develop and enforce written policies and procedures for monitoring and approving the prescribing of

non-formulary drugs by DSHS [~~TDMHMR~~] facility practitioners and facility contract practitioners. The written policies and procedures are contained in DSHS's [~~TDMHMR's~~] Pharmacy Management Operating Instruction.

*§415.111. Adverse Drug Reactions.*

(a) (No change.)

(b) DSHS [~~TDMHMR~~] shall develop written policies and procedures for DSHS [~~TDMHMR~~] facilities when reporting adverse drug reactions to the Food and Drug Administration. The written policies and procedures are contained in DSHS's [~~TDMHMR's~~] Pharmacy Management Operating Instruction.

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

Filed with the Office of the Secretary of State on November 4, 2011.

TRD-201104817
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 776-6990

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## SUBCHAPTER C. USE AND MAINTENANCE OF TDMHMR DRUG FORMULARY

### 25 TAC §§415.112 - 415.114

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

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §571.006, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules as necessary for the proper and efficient treatment of persons with mental illness; Health and Safety Code, §534.052, which requires the adoption of rules necessary and appropriate to ensure the adequate provision of community-based mental health and mental retardation services through a local authority; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The repeals affect Health and Safety Code, Chapters 534, 571, and 1001; and Government Code, Chapter 531.

*§415.112. Exhibit.*

*§415.113. References.*

*§415.114. 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 November 4, 2011.

TRD-201104818
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 776-6990

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# PART 11. CANCER PREVENTION AND RESEARCH INSTITUTE OF TEXAS

## CHAPTER 703. GRANTS FOR CANCER PREVENTION AND RESEARCH

### 25 TAC §703.20

The Cancer Prevention and Research Institute of Texas (Institute), proposes new §703.20, concerning Certification of Tobacco-Free Policy for Entities Receiving CPRIT Funds. The 2007 Legislature enacted House Bill 14, which amended Chapter 102 of the Health and Safety Code, abolished the Texas Cancer Council, created the Institute, and provided rulemaking authority to the Institute's Oversight Committee. In addition, these rules are adopted pursuant to and in satisfaction of the provisions of Texas Health and Safety Code, Chapter 102, and other relevant statutes.

Section 703.20 is proposed to set forth the requirement that grant recipients certify compliance with a tobacco-free policy as a condition of eligibility for receiving grant funds.

Kristen Pauling Doyle, General Counsel for the Cancer Prevention and Research Institute of Texas, has determined that for the first five-year period the new rule is in effect there will be no foreseeable implications relating to costs or revenues for state or local government as a result of enforcing or administering the new rule.

Ms. Doyle also has determined that for each year of the first five years the new rule is in effect the public benefit anticipated as a result of enforcing the new rule will be clarification of the policies and procedures the Institute will follow to implement its statutory duties to award grants from the Cancer Prevention and Research fund. There are no anticipated economic costs to persons who are required to comply with the new rule as proposed.

Ms. Doyle has determined that the new rule shall not have an effect on small businesses or micro businesses.

Written comments on the proposed new rule may be submitted to Kristen Pauling Doyle, General Counsel, Cancer Prevention and Research Institute of Texas, by facsimile transmission at (512) 475-2563, by electronic mail to cprit@cprit.state.tx.us, or by U.S. mail to P.O. Box 12097, Austin, Texas 78711. Comments are due within 30 days of the publication of the proposed rule in the *Texas Register.*

The new rule is proposed under the authority of the Texas Health and Safety Code Annotated, §102.108 and §102.251, which provide the Institute's Oversight Committee with rulemaking authority and direct the Institute to adopt rules relating to grant award procedures.

There is no other statute, article, or code that is affected by the proposed new rule.

*§703.20. Certification of Tobacco-Free Policy for Entities Receiving CPRIT Funds.*

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

(1) CPRIT-funded entity--An institution, organization or company that receives grant funding from CPRIT equal to or more than $25,000 during the applicable fiscal year. All references to the CPRIT funded-entity include the entity's faculty, staff, employees, and students.

(2) Tobacco--All forms of tobacco products, including but not limited to cigarettes, cigars, pipes, water pipes (hookah), bidis, kreteks, electronic cigarettes, smokeless tobacco, snuff and chewing tobacco.

(b) To be eligible to receive CPRIT funding, a CPRIT-funded entity shall certify that the entity has adopted and enforces Tobacco-free workplace policy.

(c) A Tobacco-free workplace policy will comply with the certification required by this section if the policy is adopted by the CPRIT-funded entity's board of directors, governing body, or similar, and at a minimum, includes provisions:

(1) Prohibiting the use and/or possession of all Tobacco products and/or paraphernalia by all employees and visitors to the property owned, operated, leased, occupied, or controlled by the CPRIT-funded entity. For purposes of the Tobacco-free workplace policy, the CPRIT-funded entity may designate the property to which the policy applies, so long as the workplace policy encompasses all buildings and structures where the CPRIT project is taking place as well as the sidewalks, parking lots, and walkways, and attached parking structures immediately adjacent.

(2) Providing for and/or referring to Tobacco use cessation services separately for employees.

(d) Exceptions--Upon request by a CPRIT-funded entity, the CPRIT executive director may grant a waiver of compliance with this section. If granted, the waiver is effective only for the fiscal year during which it was granted.

(e) Provisions in this section apply to all grant proposals submitted to the Institute in response to a request for proposals issued by the Institute on or after March 1, 2012. All other CPRIT-funded entities must certify compliance with this rule by August 31, 2012 or the first anniversary of the CPRIT-funded entity's grant award, whichever is later.

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

Filed with the Office of the Secretary of State on November 7, 2011.

TRD-201104821
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 305-8498

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# TITLE 30. ENVIRONMENTAL QUALITY

## PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

## CHAPTER 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS

## SUBCHAPTER G. ACTION BY THE EXECUTIVE DIRECTOR

### 30 TAC §50.139

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §50.139.

Background and Summary of the Factual Basis for the Proposed Rule

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

*HB 2694, §10.01 and §10.05(a): Limitations for State Agencies*

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) lists the general powers and duties of the commission that apply to the commission's air, water, and waste permitting programs. TWC, §5.115(a) specifies that it applies to contested cases arising under the commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights, and waste applications.

*HB 2694, §10.02 and §10.04: Executive Director Participation*

HB 2694, §10.02 amends TWC, §5.228(c) and (d) to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 deletes TWC, §5.228(e), which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

*HB 2694, §10.03: Discovery*

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

*HB 2694, §10.05(b)*

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011. Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

*Proposed Rule Amendments*

Implementation of HB 2694, Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; and §80.109, Designation of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings.

HB 2694, §10.03 and §10.05(b) would be implemented through the amendment concurrently proposed to §80.151, Discovery.

Section Discussion

The commission proposes to amend §50.139, Motion to Overturn Executive Director's Decision, by adding language to subsection (a) that states that notwithstanding any other law, a state agency, except a river authority, may not file a motion to overturn the executive director's action on an application that was received by the commission on or after September 1, 2011 unless the state agency is the applicant. This change is necessary to implement HB 2694, §10.01, which made changes to TWC, §5.115(b) by adding language that provides that state agencies, except river authorities, receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. This proposed rule would amend Chapter 50 in conjunction with required amendments to Chapters 55 and 80 to implement the provisions of HB 2694. The fiscal impact of the amendments to Chapters 55 and 80 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendment to Chapter 50 which would prohibit certain state agencies (as specified in the proposed amendment to Chapter 55) from contesting the issuance of a permit or license by filing a motion to overturn the executive director's action.

It is generally uncommon for other state agencies to participate as parties in contested case hearings. Historically, the Texas Parks and Wildlife Department (TPWD) has been the only state agency that has participated as a protesting party in hearings on water right applications, and that participation has been limited to a small number of hearings. Therefore, the proposed amendment to Chapter 50 is not expected to have a significant fiscal impact on TPWD or other state agencies.

The proposed rule will not have a fiscal impact on units of local government since it does not apply to local governments.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law, specifically HB 2694.

The proposed amendment to Chapter 50 would not have a significant fiscal impact on individuals or businesses that apply for a license or permit since the rule only applies to certain state agencies. The historical instances of those agencies participating as protesting parties in a contested case hearing and filing a motion to overturn the executive director's action have been rare. Therefore, any cost reduction that an individual or business might experience as a result of the proposed prohibition is not expected to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule which prohibits certain state agencies from filing a motion to overturn the executive director's action when issuing a license or permit. A small business is expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rule.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely af-

fect 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 amendment to Chapter 50 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendment is procedural in nature and no fiscal impact is expected if the amendment is adopted. Therefore, this rulemaking action does not 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.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendment to Chapter 50 is developed to implement HB 2694. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendment is procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendment does 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. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rule updates the commission's contested case hearing process and does not approve or authorize an action listed in 30 TAC §281.45, Actions Subject to Consistency With the Goals and Policies of the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 12, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103 , concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements for requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB)

2694, Article 10, 82nd Legislature, 2011. The amendment is also proposed under Texas Government Code, Chapter 311.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§50.139. Motion to Overturn Executive Director's Decision.*

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn [~~of~~] the executive director's action on an application or water quality management plan (WQMP) update certification. Notwithstanding any other law, a state agency, except a river authority, may not file a motion to overturn the executive director's action on an application that was received by the commission on or after September 1, 2011 unless the state agency is the applicant. Wherever other commission rules refer to a "motion for reconsideration[~~"~~]," that term should be considered interchangeable with the term "motion to overturn executive director's decision."

(b) A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director to the applicant and persons on any required mailing list for the action.

(c) A motion to overturn must be filed no later than 20 days after the date persons who timely commented on the WQMP update are notified of the response to comments and the certified WQMP update. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(d) An action by the executive director under this subchapter is not affected by a motion to overturn filed under this section unless expressly ordered by the commission.

(e) With the agreement of the parties or on their own motion, the commission of the general counsel may, by written order, extend the period of time for filing motions to overturn and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(f) Disposition of motion.

(1) Unless an extension of time is granted, if a motion to overturn is not acted on by the commission within 45 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director, the motion is denied.

(2) In the event of an extension, the motion to overturn is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(g) When a motion to overturn is denied under subsection (f) of this section, a motion for rehearing does not need to be filed as a prerequisite for appeal. Section 80.272 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion to overturn is denied. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

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

Filed with the Office of the Secretary of State on November 4, 2011.

TRD-201104799

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 239-0779

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# CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§55.103, 55.201, 55.203, and 55.256.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

*HB 2694, §10.01 and §10.05(a): Limitations for State Agencies*

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) lists the general powers and duties of the commission that apply to the commission's air, water, and waste permitting programs. TWC, §5.115(a) specifies that it applies to contested cases arising under the commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights, and waste applications.

*HB 2694, §10.02 and §10.04: Executive Director Participation*

HB 2694, §10.02 amends TWC, §5.228(c) and (d) to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 repeals TWC, §5.228(e) which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

*HB 2694, §10.03: Discovery*

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

*HB 2694, §10.05(b)*

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011. Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

*Proposed Rule Amendments*

Implementation of HB 2694, Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; and §80.109, Designation of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings.

HB 2694, §10.03 and §10.05(b) would be implemented through an amendment concurrently proposed to §80.151, Discovery.

Section by Section Discussion

The commission proposes amendments to §§55.103, 55.201, 55.203, and 55.256 to implement HB 2694, §10.01 and §10.05(a), which made changes to TWC, §5.115(b) by adding language that provides that state agencies, except river authorities, receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission.

The commission proposes to amend §55.103, Definitions, by adding text that limits the state agencies who may be affected persons. Specifically, the changes provide that notwithstanding any other law, state agencies, except river authorities, may not file requests for contested case hearing or reconsideration, nor be considered an affected person or named a party, or otherwise contest the issuance of a permit or license on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant.

The commission proposes to amend §55.201, Requests for Reconsideration or Contested Case Hearing, by adding language to subsections (e) and (h) that would prohibit state agencies, except river authorities, from filing a request for reconsideration or motion for rehearing.

The commission proposes to amend §55.203(b), Determination of Affected Person, by adding language that provides that except as provided by §55.103, governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

The commission proposes to amend §55.256(b), Determination of Affected Person, by adding language that provides that except as provided by §55.103, governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. These proposed rules would amend Chapter 55 in conjunction with required amendments to Chapter 50 and Chapter 80 to implement the provisions of HB 2694. The fiscal impact of amendments to Chapters 50 and 80 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendments to Chapter 55 which would add language to several sections to: provide that state agencies may not contest the issuance of a permit or license as set forth in §55.103, and exclude state agencies from filing a motion to overturn, a request for contested case hearing, a request for reconsideration or a motion for a rehearing unless the state agency is the applicant. The proposed rules do not apply to river authorities per HB 2694.

It is generally uncommon for other state agencies to participate as parties in contested case hearings. Historically, the Texas Parks and Wildlife Department (TPWD) has been the only state agency that has participated as a protesting party in hearings on water right applications, and that participation has been limited to a small number of hearings. Therefore, the proposed amendments to Chapter 55 are not expected to have a significant fiscal impact on TPWD or other state agencies.

The proposed rules will not have a fiscal impact on units of local government since it does not apply to local governments.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, specifically HB 2694.

The proposed amendments to Chapter 55 would not have a significant fiscal impact on individuals or businesses that apply for a license or permit since the rules only apply to state agencies. The historical instances of agencies participating as protesting parties in a contested case hearing and filing a motion to overturn the executive director's action have been rare. Therefore, any cost reduction that an individual or business might experience as a result of the proposed prohibition is not expected to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. A small business is expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, 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 amendments to Chapter 55 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature and no fiscal impact is expected if these amendments are adopted. Therefore, this rulemaking action does not 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.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 55 were developed to implement HB 2694. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendments do 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. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rules update the commission's contested case hearing process and do not approve or authorize an action listed in 30 TAC §281.45, Actions Subject to Consistency With the Goals and Policies of the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 12, 2011, at 10:00 a.m. in Building B, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

## SUBCHAPTER D. APPLICABILITY AND DEFINITIONS

### 30 TAC §55.103

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which

establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements for requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011. The amendment is also proposed under Texas Government Code, Chapter 311.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§55.103. Definitions.*

The following words and terms, when used in Subchapters D - G of this chapter (relating to Applicability and Definitions; Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) shall have the following meanings. Affected person--A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.203 of this title (relating to Determination of Affected Person), or, if applicable under §55.256 of this title (relating to Determination of Affected Person). Notwithstanding any other law, a state agency, except a river authority, may not file a request for a contested case hearing or request for reconsideration, nor may it be considered an affected person or named a party, or otherwise contest of a permit or license on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 239-0779

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## SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

### 30 TAC §55.201, §55.203

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements for requests for reconsideration and contested case hearings.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011. The amendment is also proposed under Texas Government Code, Chapter 311.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§55.201. Requests for Reconsideration or Contested Case Hearing.*

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this chapter (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, [~~and~~] the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this chapter, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program); or

(C) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

*(i)* increase significantly the quantity of waste authorized to be discharged; or

*(ii)* change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization that is submitted after September 1, 2007, unless the application for the production area authorization seeks:

(A) an amendment to a restoration table value in accordance with the requirements of §331.107(g) of this title (relating to [~~Amendment of~~] Restoration [~~Table Values~~]);

(B) the initial establishment of monitoring wells for any area covered by the authorization, including the location, number, depth, spacing, and design of the monitoring wells, unless the executive director uses the recommendations of an independent third-party expert as provided in §331.108 of this title (relating to Independent Third-Party Experts); or

(C) an amendment to the type or amount of financial assurance required for aquifer restoration, or by Texas Water Code, §27.073, to assure that there are sufficient funds available to the state to utilize a third-party contractor for aquifer restoration or plugging of abandoned wells in the area. Adjustments solely associated with the annual inflation rate adjustment required under §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), or for adjustments due to decrease in the cost estimate for plugging and abandonment of wells when plugging and abandonment has been approved by the executive director in accordance with §331.144 of this title (relating to Approval of Plugging and Abandonment) are not considered an amendment to the type or amount of financial assurance required for aquifer restoration or well plugging and abandonment.

*§55.203. Determination of Affected Person.*

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Except as provided by §55.103 of this title (relating to Definitions), governmental [~~Governmental~~] entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

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

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Robert Martinez
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Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0779

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## SUBCHAPTER G. REQUESTS FOR CONTESTED CASE HEARING AND PUBLIC COMMENT ON CERTAIN APPLICATIONS

**30 TAC §55.256**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commis-

sion may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements for requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011. The amendment is also proposed under Texas Government Code, Chapter 311.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§55.256. Determination of Affected Person.*

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Except as provided by §55.103 of this title (relating to Definitions), governmental [~~Governmental~~] entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.

(c) All relevant factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health, safety, and use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

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

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## CHAPTER 80. CONTESTED CASE HEARINGS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§80.17, 80.108, 80.109, 80.117, 80.131, 80.151, 80.257 and 80.261.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

*HB 2694, §10.01 and §10.05(a): Limitations for State Agencies*

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) is part of Subchapter D, which lists the general powers and duties of the commission that apply to the commission's air, water and waste permitting programs. TWC, §5.115(a) specifies that it applies to contested cases arising under the commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights and waste applications.

*HB 2694, §10.02 and §10.04: Executive Director Participation*

HB 2694, §10.02 amends TWC, §5.228(c) and (d), to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 removes TWC, §5.228(e) which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

*HB 2694, §10.03: Discovery*

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

*HB 2694, §10.05(b)*

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011. Therefore, the

changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

*Proposed Rule Amendments*

Implementation of HB 2694, Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; and §80.109, Designation of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings.

HB 2694, §10.03 and §10.05(b) would be implemented through amendments concurrently proposed to §80.151, Discovery.

Section by Section Discussion

*§80.17, Burden of Proof*

The commission proposes to amend §80.17 by deleting subsection (e), which requires the executive director to comply with §80.108, which is proposed for amendment as discussed elsewhere in this preamble. Specifically, this text is no longer necessary because the executive director will always be a party in contested case hearings. This change is necessary to implement HB 2694, §10.04.

*§80.108, Executive Director Party Status in Permit Hearings*

The commission proposes to amend §80.108 by deleting current subsections (a) - (c) and (e) - (m). Subsections (a) - (c) list the types of applications for which the executive director is either a mandatory party or is prohibited from being a party and the factors for the executive director to consider when deciding whether to be a party on applications for which he has discretion. Subsection (e) provides that the executive director may not assist an applicant in meeting its burden of proof, unless the applicant is eligible to receive assistance. Subsections (f) - (m) concern the executive director's decisions regarding party participation and documentation of those decisions.

Existing subsection (d) would remain as the sole text of this section. In addition, the language is proposed to be amended by deleting text that states that the executive director's participation is limited to the sole purpose of providing information. New language is proposed to be added that states that the executive director is a party in all contested case hearings regarding permitting matters, and his role is to support the position developed by the executive director in the underlying proceeding. These changes are necessary to implement HB 2694, §§10.02, 10.04 and 10.05(b).

*§80.109, Designation of Parties*

The commission proposes to amend §80.109 by removing language in subsection (a) that provides that the executive director can be named a party after parties are designated at the preliminary hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party. TWC, §5.228(c) is also implemented through a proposed change to subsection (b)(2).

The commission proposes to amend subsection (b)(5) by adding text that provides that notwithstanding any other law, a state agency, except a river authority, may not be a party to a hearing on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant. In addition, the commission proposes to delete current subsections (b)(6) and (7) which provide that the Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status, and that the Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status. These changes are needed to implement HB 2694, §10.01 and §10.05(a) which amended TWC, §5.115(b), which provides that a state agency that receives notice under TWC, §5.115(b) may submit comments to the commission in response to the notice but may not contest the issuance of a permit or license by the commission. Paragraphs (8) - (11) would be renumbered as (6) - (9).

*§80.117, Order of Presentation*

The commission proposes to amend §80.117(b) by deleting a reference to the executive director if named as a party. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

*§80.131, Interlocutory Appeals and Certified Questions*

The commission proposes to amend §80.131(c) by deleting text regarding service to and responses from the executive director when the executive director does not participate as a party in a contested case hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

*§80.151, Discovery Generally*

The commission proposes to amend §80.151 by designating existing text as subsection (a) and adding proposed subsections (b) and (c) which would establish requirements for discovery in contested case hearings using prefiled testimony. This change is necessary to implement HB 2694, §10.03 and §10.05(b).

Proposed subsection (b) would require that in hearings using prefiled testimony, except for hearings on water and sewer ratemaking, all discovery must be completed before the deadline to submit the prefiled testimony. Hearings in which prefiled testimony was used but in which discovery was completed before September 1, are also excluded from the new requirements of proposed subsection (b). When the deadline for prefiled testimony is the same date for all parties, the discovery deadline would be the same for all parties.

Proposed subsection (b) would not mandate that all prefiled deadlines must be on the same day for a particular party. If the date for submission of prefiled testimony varies by party the deadline for completing discovery must also vary by party, however, all parties are under the continuing duty to supplement their discovery responses as required by the Texas Rules of Civil Procedure, §193.5 and §195.6. The proposed rule does not mandate how the schedule for prefiled testimony must be structured, provided it comports with §80.117. For example,

upon agreement of the parties in a permitting matter, the schedule may allow for the applicant's prefiled testimony to be staggered by witness to accommodate the additional burden of concurrently responding to discovery and preparing prefiled testimony. The proposed rule is not intended to allow parties to circumvent full participation in the discovery process by submitting prefiled testimony prior to the date specified by the Administrative Law Judge, thereby limiting the time available for depositions. Additionally, this rule does not mandate prefiled testimony in hearings, nor does it mandate a change to the discovery requirements in hearings that do not use prefiled testimony.

Furthermore, the proposed amendment to §80.151 does not prohibit parties from entering into Texas Rules of Civil Procedures, Rule 11 agreements regarding modifications to §80.151 for good cause or prohibit a party from requesting that the Administrative Law Judge require that an expert's factual observations, tests, supporting data, calculations, photographs, or opinions be reduced to a tangible form as allowed by the Texas Rules of Civil Procedure §195.5.

Representatives Wayne Smith and Warren Chisum sent a letter to TCEQ Executive Director Mark Vickery dated August 5, 2011, to express clarification and purposes of the legislative intent of HB 2694, §10.03 (new TWC, §5.315). The letter provides that in cases where all parties share the same deadline for prefiled testimony, there should be a single discovery deadline applicable to all parties in the cases. Further, the letter specifically states that the "underlying intent of this legislation is to establish that once a party submits prefiled testimony in a contested case before SOAH, that party is no longer subject to discovery from other parties in the case." The commission considered this information in proposing the changes to §80.151.

Proposed subsection (b)(1) would provide that this subsection is applicable to hearings on applications that are subject to the jurisdiction of SOAH on or after September 1, 2011, with three exceptions. Those exceptions are contested case hearings using prefiled testimony where all discovery was completed before September 1, 2011, water ratemaking proceedings, and sewer ratemaking proceedings.

Proposed subsection (b)(2) would provide that all discovery must be completed before the deadline to submit the prefiled testimony.

Proposed subsection (b)(3) would require a single deadline for completion of discovery for all parties in cases where all parties share the same deadline for prefiled testimony.

Proposed subsection (b)(4) would provide that the deadline to complete discovery shall correspond to the final deadline for that party to submit all of its prefiled testimony in cases where parties have different deadlines for the submission of prefiled testimony. In cases where a party has staggered deadlines for prefiling its written testimony, then the deadline for that party is the last date for filing prefiled testimony. In addition, after the deadline for a party to submit all of its prefiled testimony in a contested case, that party would no longer be subject to discovery from other parties in the case.

Proposed subsection (b)(5) would state that the requirements of this subsection do not relieve a party's duty to supplement its discovery responses as required by Texas Rules of Civil Procedure, §193.5 and §195.6.

Proposed subsection (c) would provide that all other contested case hearings, including those for which discovery has been completed before September 1, 2011, are governed by §80.151 as it existed immediately before the effective date of this section and the rule is continued in effect for that purpose.

*§80.257, Pleadings Following Proposal for Decision*

The commission proposes to amend §80.257 by deleting the second sentence of subsection (a), which provides that the commission or general counsel may request that the executive director file briefs concerning legal or policy issues in contested cases in which the executive director has not participated as a party. This change is necessary to implement HB 2694, §10.02, which amended TWC, §5.228(c) and (d).

*§80.261, Scheduling Commission Meetings*

The commission proposes to amend §80.261(a) by deleting text regarding notification of commission meetings that applies when the executive director does not participate as a party in a contested case hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. These proposed rules would amend Chapter 80 in conjunction with required amendments to Chapters 50 and 55 to implement the provisions of HB 2694. The fiscal impact of amendments to Chapters 50 and 55 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendments to Chapter 80 which would revise the role of the executive director in contested case hearings; would state that the executive director will always be a party to a contested case hearing; would repeal the executive director participation rules; and would repeal the rule that stipulates when the executive director could assist certain applicants with burden of proof. The proposed rules would also add a new deadline for discovery in contested case hearings where prefiled testimony is used. The new deadline for discovery would not apply to hearings for which discovery was completed by September 1, 2011 nor would it apply to water and sewer ratemaking proceedings. The proposed rules will also specify that a state agency, except a river authority, may not be a party to a hearing on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant.

The proposed requirements for executive director participation and for conducting discovery in contested case hearings are not expected to have a significant fiscal impact for the agency since the executive director is a party in most permit application hearings and since discovery rules only change the timeline for completion of discovery and do not expand or limit discovery. The agency and other parties will continue to have the same duty as they currently do under the Texas Rules of Civil Procedure to supplement their discovery responses as needed to accurately reflect the facts and provide pertinent data.

Since the scope of the proposed rules concerns the role of the executive director in contested case hearings and do not expand

or limit rules concerning discovery, units of local government are not expected to experience any significant fiscal impact as a result of the proposed rules.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, specifically HB 2694.

The proposed amendments to Chapter 80 would not have a significant fiscal impact on individuals or businesses that apply for a license or permit since the scope of the rules concerns the role of the executive director in contested case hearings and since they do not expand or limit rules concerning discovery. Individuals and businesses would continue to have the same duty as they do currently under the Texas Rules of Civil Procedure to supplement their discovery responses in contested case hearings as needed. The proposed rules are not expected to change the practices of an individual or business when participating as a party in a contested case hearing.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. A small business is expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, 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 amendments to Chapter 80 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature and no fiscal impact is expected if these amendments are adopted. Therefore, this rulemaking action does not 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.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 80 were developed to implement HB 2694. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendments do 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. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rules update the commission's contested case hearing process and do not approve or authorize an action listed in 30 TAC §281.45, Actions Subject to Consistency With the Goals and Policies of the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 12, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

## SUBCHAPTER A. GENERAL RULES

**30 TAC §80.17**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§80.17. Burden of Proof.*

(a) The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b) - (d) of this section.

(b) Section 291.12 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding involving a proposed change of water and sewer rates not governed by Chapter 291, Subchapter I of this title (relating to Wholesale Water or Sewer Service).

(c) Section 291.136 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding related to a petition to review rates changed pursuant to a written contract for the sale of water for resale filed under Texas Water Code, Chapter 11 or 12, and in an appeal under Texas Water Code, §13.043(f).

(d) In an enforcement case, the executive director has the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

~~[(e) In permitting matters, the executive director shall comply with the requirements of §80.108 of this title (relating to Executive Director Party Status in Permit Hearings).]~~

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

Filed with the Office of the Secretary of State on November 4, 2011.

TRD-201104803
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 239-0779

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## SUBCHAPTER C. HEARING PROCEDURES

**30 TAC §§80.108, 80.109, 80.117, 80.131**

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsid-

eration or Contested Case Hearing, which establishes requirements for requests for reconsideration and contested case hearings.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011. The amendment is also proposed under Texas Government Code, Chapter 311.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§80.108. Executive Director Party Status in Permit Hearings.*

~~[(a) Except to the extent superseded by subsection (b) of this section, the executive director shall not participate as a party in the following contested case hearings concerning permitting matters:]~~

~~[(1) an application concerning municipal solid waste where land use is the sole issue at hearing, including hearings held for determination of land use compatibility under Texas Health and Safety Code (THSC), §361.069;]~~

~~[(2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195;]~~

~~[(3) an application for an air quality permit to authorize emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment (TARA) Section Emissions Screening List;]~~

~~[(4) an application for a permit for a municipal solid waste transfer facility under §330.7 of this title (relating to Permit Required);]~~

~~[(5) an application for a permit for the processing of grit and grease trap waste under under §330.7 of this title;]~~

~~[(6) an application for a permit for composting facilities under §332.3 of this title (relating to Applicability); and]~~

~~[(7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting).]~~

~~[(b) The executive director shall participate as a party in the following contested case hearings relating to permitting matters:]~~

~~[(1) an application concerning water rights;]~~

~~[(2) an application for which the executive director has recommended denial of the permit;]~~

~~[(3) an involuntary amendment; and]~~

~~[(4) an application for which the draft permit includes provisions opposed by the applicant.]~~

~~[(c) For permitting matters not included in subsections (a) or (b) of this section, the executive director shall, on a case-by-case basis, consider the following criteria in the manner specified in determining whether to participate as a party.]~~

~~[(1) The executive director shall, as a preliminary matter, determine whether there is any issue to be presented in the hearing that merits participation of the executive director, based on the existence of one or more of the following:]~~

~~[(A) one or more of the issues to be presented in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved;]~~

~~[(B) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies;]~~

~~[(C) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or]~~

~~[(D) any issue to be considered is likely to affect federal program approval or authorization.]~~

~~[(2) If the executive director finds that there are issues weighing in favor of participation under paragraph (1) of this subsection, the executive director may elect to participate as a party or he may also consider the following factors in the manner described:]~~

~~[(A) whether there is a significant disparity in the experience and resources of the parties. A significant disparity weighs in favor of executive director participation. In evaluating whether there is a significant disparity, the executive director shall consider:]~~

~~*[(i)* the legal capacity of the parties, based on whether any party is not represented by counsel and the prior contested case hearing experience of the parties at the agency;]~~

~~*[(ii)* the financial capacity of the parties, including documentation or evidence of financial disparity if offered by any party, and including whether any party is:]~~

~~*[(I)* a qualifying local governmental entity;]~~

~~*[(II)* a non-profit entity; or]~~

~~*[(III)* a small business; and]~~

~~*[(iii)* the technical capacity of the parties, including an evaluation of:]~~

~~*[(I)* the number and complexity of the administrative and technical notices of deficiency issued during the administrative and technical review of the application;]~~

~~*[(II)* the number and complexity of the technical issues raised by parties to the hearing during the comment period or at the preliminary hearing; and]~~

~~*[(III)* whether any of the parties does not have access to a technical expert; and]~~

~~[(B) whether there are limitations on the availability of agency staff, including specialized staff expertise on the issues to be presented at hearing, which shall weigh against executive director participation; and]~~

~~[(C) whether the draft permit contains any provision that has been included by the executive director to address an applicant's compliance history, which shall weigh in support of executive director participation.]~~

~~[(d)]~~ The executive director is a party in all contested case hearings concerning permitting matters. The executive director's participation ~~[as a party under subsection (b) or (c) of this section]~~ shall be ~~[for the sole purpose of providing information]~~ to complete the administrative record and support the executive director's position developed in the underlying proceeding.

~~[(e) When the executive director participates as a party in a contested case hearing concerning a permitting matter before the com-~~

mission or SOAH, the executive director may not assist an applicant in meeting its burden of proof unless the applicant is eligible to receive assistance because:]

[(1) the applicant is a qualifying local governmental entity; or]

[(2) the applicant is a non-profit entity; and]

[(3) there is a significant public need for the permitting action to avoid adverse impact to human health or the environment.]

[(f) The executive director may elect to participate as a party for the purpose of assisting an applicant in meeting its burden of proof in accordance with subsection (e) of this section notwithstanding the provisions of subsections (a) - (d) of this section.]

[(g) The executive director must notify all parties and the SOAH judge of his intention to participate as a party to a contested case hearing concerning a permitting matter in writing or on the record as soon as practicable, but not later than one week after the end of the preliminary hearing.]

[(h) The executive director's decision on participation as a party in contested case hearing concerning a permitting matter and the executive director's decision on whether an applicant is eligible to receive assistance in accordance with subsection (e) of this section are not subject to review by the commission or SOAH].

[(i) This section does not apply to matters in which the executive director is a party in accordance with §80.109(b)(1) of this title (relating to Designation of Parties).]

[(j) For purposes of this section:]

[(1) "qualifying local governmental entity" means a district, authority, county, or municipality that demonstrates that it lacks the technical, legal, and financial resources to support its application in the contested case hearing process; and]

[(2) "small business" means a small business as defined by §70.9(b)(1) and (2) of this title (relating to Installment Payment of Administrative Penalty).]

[(3) "non-profit entity" shall mean those entities which are defined in 26 United States Code, §501(c)(3) and (4).]

[(k) The executive director shall record his decision on party participation and the grounds for his decision under this section on a case-by-case basis.]

[(l) The executive director shall on an annual basis compile the records required by subsection (k) of this section and present this information to the commission in a written report.]

[(m) Notwithstanding the requirements of subsections (a) and (c) of this section regarding executive director party participation, the executive director shall participate as a party if directed to do so by the commission.]

*§80.109. Designation of Parties.*

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no person [other than the executive director, as provided in §80.108 of this title (relating to Executive Director Party Status in Permit Hearings),] will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.

(1) The executive director is a mandatory party to all commission proceedings concerning matters in which the executive director bears the burden of proof, and in the following commission proceedings:

(A) matters concerning Texas Water Code (TWC), §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; and Texas Local Government Code, Chapters 375 and 395;

(B) matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D of this title (relating to Resolution of Contract Claims); and

(C) matters under TWC, Chapter 26, Subchapter I, and Chapter 334, Subchapters H and L of this title (relating to Reimbursement Program and Overpayment Prevention).

(2) In addition to subsection (b)(1) of this section, the executive director is always [may also be] a party in contested case hearings concerning permitting matters, pursuant to, and in accordance with, the provisions of §80.108 of this title (relating to Executive Director Party Status in Permit Hearings).

(3) The public interest counsel of the commission is a party to all commission proceedings.

(4) The applicant is a party in a hearing on its application.

(5) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and §55.203 of this title (relating to Determination of Affected Person). Notwithstanding any other law, a state agency, except a river authority, may not be a party to a hearing on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant.

[(6) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.]

[(7) The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.]

(6) [(8)] The parties to a contested enforcement case include:

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain an underground injection control or Texas Pollutant Discharge Elimination System permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES authorization, any other party granted permissive intervention by the judge. In exercising discretion whether to permit intervention, the judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(7) [(9)] The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(8) [(10)] The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

(9) [(11)] The parties to a post-closure order contested case are limited to:

(A) the executive director;

(B) the applicant(s); and

(C) the Public Interest Counsel.

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding. Unless otherwise ordered by the judge, each group of aligned participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

*§80.117. Order of Presentation.*

(a) In all proceedings, the moving party has the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage other parties will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(b) The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and[~~, if named as a party,~~] the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

(c) In all contested enforcement case hearings, the executive director has the right to open and close. In all such cases, the executive director shall be allowed to close with his rebuttal.

*§80.131. Interlocutory Appeals and Certified Questions.*

(a) No interlocutory appeals may be made to the commission by a party to a proceeding before a judge except that in an enforcement action a party may seek an interlocutory appeal to the commission on jurisdictional issues only.

(b) On a motion by a party or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party's ability to present its case. Policy questions for certification purposes include, but are not limited to:

(1) the commission's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to the proceeding; or

(3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(c) If a question is certified, the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties. [~~In a contested case hearing concerning a permitting matter, the judge shall serve the executive director with a copy of the request.~~] Within five days after the request is filed, [~~the executive director and~~] all parties to the proceeding may file briefs or replies. [~~Copies of all briefs and replies shall be served on the executive director as provided in §1.11 of this title (relating to Service on Judge, Parties, and Interested Persons). The executive director shall be allowed to file briefs and replies within the prescribed time frames.~~] The chief clerk shall provide copies of the request and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the request will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge[~~, the executive director,~~] and all parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the question for consideration within 15 days after filing, the request is denied by operation of law.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0779

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## SUBCHAPTER D. DISCOVERY

### 30 TAC §80.151

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§80.151. Discovery Generally.*

(a) Discovery shall be conducted according to the Texas Rules of Civil Procedure, unless commission rules provide or the judge orders otherwise. The Rules of Civil Procedure shall be interpreted consistently with this chapter, the Texas Water Code, the Texas Health and Safety Code, and the APA. Drafts of prefiled testimony are not discoverable.

(b) Discovery in contested case hearings using prefiled testimony.

(1) This subsection is applicable to contested case hearings for applications which are subject to the jurisdiction of the State Office of Administrative Hearings (SOAH) under 1 TAC §155.51 (relating to Jurisdiction), except for:

(A) contested case hearings using prefiled testimony where all discovery was completed before September 1, 2011;

(B) water ratemaking proceedings; and

(C) sewer ratemaking proceedings.

(2) All discovery on a party must be completed before the deadline for that party to submit its prefiled testimony.

(3) In cases where all parties share the same deadline for submission of prefiled testimony, a single deadline for completion of discovery shall apply to all parties.

(4) If parties have different deadlines for the submission of prefiled testimony, the deadline to complete discovery on a party shall be no later than the final deadline for that party to submit prefiled testimony. After a party's final deadline to submit its prefiled testimony in a contested case, that party is no longer subject to discovery from other parties in the case.

(5) The requirements of this subsection do not relieve a party's duty to supplement its discovery responses as required by Texas Rules of Civil Procedure, §193.5 and §195.6.

(c) All other contested case hearings are governed by this section as it existed immediately before the effective date of this section and the rule is continued in effect for that purpose.

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

Filed with the Office of the Secretary of State on November 4, 2011.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0779

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## SUBCHAPTER F. POST HEARING PROCEDURES

### 30 TAC §80.257, §80.261

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

*§80.257. Pleadings Following Proposal for Decision.*

(a) Pleadings. Unless right of review has been waived, any party may within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. [~~For permit hearings in which the executive director has not participated as a party, the commission or general counsel may request in writing that the executive director file briefs concerning legal or policy issues.~~] The request shall be served on the parties and the judge, shall specify the issues to be briefed and shall set reasonable deadlines for the executive director's response and the parties replies to that response, avoiding delay of the matter to the extent practicable. Proposed findings of fact may be filed when permitted or requested by the commission. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the proposal of decision.

(b) Change of filing deadlines. On his own motion or at the request of a party, the general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates (preferably a range of dates) and must indicate whether the judge and the parties agree on the proposed dates.

*§80.261. Scheduling Commission Meetings [~~Meeting~~].*

(a) The chief clerk, in coordination with the judge, shall schedule motions by parties requiring commission action and the presentation of the proposal for decision. The judge, when transmitting the proposal for decision, shall notify the [~~executive director and the~~] parties

of the date of the commission meeting and the deadlines for the filing of exceptions and replies. The general counsel, either by agreement of the parties and the judge, or on the general counsel's own motion, may reschedule the presentation of the proposal for decision. The chief clerk shall send notice of the rescheduled meeting date to the parties[~~, and, if not also a party, to the executive director~~] no later than ten days before the rescheduled meeting.

(b) Consistent with notices required by law, the commission may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare.

(c) The commission may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

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 Commission on Environmental Quality
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# CHAPTER 328. WASTE MINIMIZATION AND RECYCLING

## SUBCHAPTER J. TELEVISION EQUIPMENT RECYCLING PROGRAM

**30 TAC §§328.161, 328.163, 328.165, 328.167, 328.169, 328.171, 328.173, 328.175, 328.177, 328.179, 328.181, 328.183, 328.185, 328.187, 328.189, 328.191, 328.193, 328.195, 328.197**

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§328.161, 328.163, 328.165, 328.167, 328.169, 328.171, 328.173, 328.175, 328.177, 328.179, 328.181, 328.183, 328.185, 328.187, 328.189, 328.191, 328.193, 328.195, and 328.197.

Background and Summary of the Factual Basis for the Proposed Rules

Senate Bill (SB) 329, passed by the 82nd Legislature, 2011, requires the commission to implement a television equipment recycling program based on individual manufacturer responsibility and shared responsibility among consumers, retailers, and the government of this state. The legislation authorizes the commission to adopt rules to help implement the program. Adopting rules would help the TCEQ to implement the program more efficiently. The legislation also states that the commission must adopt any rules required to implement SB 329 by May 1, 2012.

Section by Section Discussion

The proposal would amend Chapter 328 by adding new Subchapter J, Television Equipment Recycling Program.

*§328.161, Purpose*

Proposed new §328.161 explains that the purpose of proposed new Subchapter J is to help establish a comprehensive, convenient, and environmentally sound program for the collection and recycling of television equipment.

*§328.163, Applicability and Effective Dates*

Proposed new §328.163 describes the television equipment that is covered by proposed new Subchapter J. Proposed new §328.163(b)(2) clarifies that the subchapter does not apply to a display device that is peripheral to a computer and contains a television tuner, if that device is collected and recycled by its manufacturer in accordance with Subchapter I of Chapter 328. The language in SB 329 could be interpreted to exempt all of a manufacturer's covered television equipment from the requirements of Subchapter J if they make one product that is collected and recycled in accordance with the Computer Equipment Recycling Program (CERP). A manufacturer who makes covered television equipment in addition to the display device referenced in §328.163(b)(2) would still be required to provide for the collection and recycling of their covered television equipment.

Proposed new §328.163(i) allows retailers to sell television equipment acquired before April 1, 2013 without incurring a penalty. This proposed change to SB 329 allows retailers to sell inventory acquired prior to the commission's publication of its Internet Web site list of manufacturers who are in compliance with Subchapter J, thereby avoiding the unintended consequence of prohibiting retailers from ordering or selling covered television equipment after the statutory deadline of September 1, 2012 and before the commission's publication of its Internet Web site list on April 1, 2013.

The proposed section specifies the effective dates for the requirements in §§328.171, 328.173, 328.175, 328.177, 328.179, 328.181, and 328.185.

*§328.165, Definitions*

Proposed new §328.165 defines terms. The commission proposes to add to the definition of "brand" the language referenced in SB 329, which is the same language used to define "brand" in Subchapter I of Chapter 328. Providing the specific language for the definition adds clarity to this subchapter.

The commission also proposes to add a definition of "recycler" for use in this subchapter in order to clarify that entities that only collect or separate equipment for recycling (for example, a local government conducting a collection event or an entity separating equipment into categories to send to a recycler) would not be classified as a recycler, and therefore would not be subject to proposed new §328.181 and §328.193.

*§328.167, Sales Prohibition*

The commission proposes the same sales prohibition as contained in SB 329, prohibiting the sale of new covered television equipment that has not been labeled in compliance with proposed new §328.169.

*§328.169, Manufacturer's Labeling Requirement*

Proposed new §328.169 follows the legislation's requirement that manufacturers may sell only covered television equipment that is permanently affixed with a readily-visible label of the manufacturer's brand.

*§328.171, Manufacturer's Registration and Reporting*

Proposed new §328.171 lists the registration and reporting requirements that apply to manufacturers of covered television equipment. The registration fee requirement of proposed new §328.171(a)(2) and the reporting requirement of proposed new §328.171(d) do not apply to a manufacturer of covered television equipment participating in a manufacturer recycling leadership program (RLP) under proposed new §328.175. Except where noted, the provisions of §328.171 are consistent with SB 329.

Proposed new §328.171(a) adds to SB 329 specific requirements on how a manufacturer should complete and submit their registration information to the commission. These additions clarify what is required of a manufacturer as part of their registration and will help ensure manufacturer compliance with this subchapter.

Proposed new §328.171(d)(1) differs from SB 329 by requiring a manufacturer who does not track the weight of covered television equipment it sells by state to report the total "weight" of covered television equipment it sells nationally; SB 329 states that a manufacturer may report the total "amount" of covered television equipment sold nationally. This change clarifies how a manufacturer should report its annual sales of covered television equipment and will ensure consistency among manufacturer reports.

Proposed new §328.171(d)(3) adds to SB 329 a requirement that a manufacturer must provide documentation that the collection, reuse, and recycling of the collected covered television equipment complies with §328.193. Manufacturers participating in an RLP are required to provide the same documentation, and this addition will maintain consistency in requirements for all manufacturers.

*§328.173, Manufacturer's Recovery Plan and Related Responsibilities*

The commission proposes new §328.173, which requires manufacturers who are not participating in a manufacturer RLP under proposed new §328.175 to submit a recovery plan to the commission. The rule language in proposed new §328.173 adds two elements to the minimal requirements for a recovery plan delineated in SB 329: 1) information for consumers on how and where to return the manufacturer's television equipment; and 2) a statement indicating that the manufacturer has, or will have, a compliant collection program by April 1, 2013. These additions clarify the responsibilities of the manufacturer and will allow the commission to determine which manufacturers are eligible for inclusion on its publicly available Internet Web site list of television manufacturers in accordance with proposed new §328.185.

*§328.175, Manufacturer Recycling Leadership Program*

Proposed new §328.175 lists the responsibilities of a manufacturer of covered television equipment that participates in an RLP. Except where noted, the provisions of §328.175 are consistent with SB 329.

Proposed new §328.175(d)(2) adds language to the requirements in SB 329, clarifying that an RLP may include a system where the consumer returns covered television equipment by mail only if the system provides for packaging that will prevent any spillage in case of breakage.

Proposed new §328.175(g) adds to the language contained in SB 329 by requiring each RLP to provide the commission with a list of manufacturers who are participating in the program as of January 1 of that year, clarifying that to be considered a participant in an RLP for a given year, a manufacturer must be a member of the program from the first day of the year. This addition will help ensure that all RLP participants adhere to the same standards; without this deadline, some manufacturers may interpret the rule to mean that they could join an RLP at any time during the year and still benefit from the registration fee and reporting exemptions.

The commission also proposes new §328.175(g) by requiring that an RLP submit a list of the 200 sites or programs planned by the program participants for the current year, and documentation that the RLP has established a public education program regarding collection, reuse, and recycling opportunities that exist in this state for covered television equipment. These additions will help the commission ensure that an RLP will meet the requirements of this subchapter. Further, a manufacturer participating in an RLP must have a compliant public education plan in order to be listed on the commission's Internet Web site list of manufacturers. This addition is necessary for the commission to determine whether a participant in an RLP is eligible for inclusion on the Internet Web site list.

*§328.177, Recycling Leadership Program Collection Report*

Proposed new §328.177 lists the requirements for an RLP when submitting their biennial collection report to the commission. Proposed new §328.177(b)(3) clarifies SB 329 by specifying that the required collection report must document the weight of covered television equipment that each individual manufacturer or RLP collected in the two preceding "calendar years;" the language in SB 329 states only "year." Proposed new §328.177(b)(3) also requires an RLP to separate the two preceding years in the biennial report by year. These additional requirements will help ensure consistency in the commission's legislative report since manufacturers not participating in an RLP must report annually.

Proposed new §328.177(b)(5) adds a requirement to the language in SB 329 that an RLP's collection report include documentation that a financial incentive of equal or greater value to any fee charged at the time of recycling is provided by the television manufacturer, if applicable. This addition will help the commission ensure that an RLP is offering a financial incentive of equal or greater value to a fee charged at the time of recycling, if a fee is charged.

Proposed new §328.177(b)(6) adds a requirement to the language in SB 329 that an RLP's collection report include documentation that a participating manufacturer has, either individually or through the RLP, implemented a public education program regarding collection, reuse, and recycling opportunities for covered television equipment in this state. This addition will help the commission ensure that an RLP is meeting the public education requirements of SB 329.

*§328.179, Retailer Responsibilities*

The retailer responsibilities in proposed new §328.179 are largely unchanged from SB 329, prohibiting retailers from ordering or selling products from a television manufacturer that is not included on the commission's Internet Web site list and requiring retailers to provide consumers written information published by the commission regarding the legal disposition and recycling of television equipment.

The commission proposes new §328.179(a) defining "order" for the purposes of Subchapter J. When used in Subchapter J, "order" is considered to be the entire amount of covered television equipment requested from a manufacturer at one time for the

purpose of sale by the retailer. This addition clarifies how a potential enforcement action could be calculated against a retailer who orders and sells television equipment from a manufacturer that is not on the commission's Internet Web site list of manufacturers and will help ensure clear understanding and implementation of the rules.

*§328.181, Recycler Responsibilities*

Proposed new §328.181 lists recycler responsibilities under Subchapter J. The commission proposes new §328.181 to require recyclers to certify that they are in compliance with the standards adopted under §328.193. Proposed new §328.181(b)(1) adds specific requirements for a recycler's certification. This language tracks 30 TAC Chapter 305, Consolidated Permits, but is specific to recyclers of television equipment. This addition is consistent with the requirements of the CERP and will help maintain consistency for recyclers of electronic equipment.

Proposed new §328.181(b)(5) clarifies the language of SB 329 by requiring recyclers to report to the commission by January 31 the total weight of covered television equipment "received, recycled, and disposed of" during the preceding "calendar year;" SB 329 requires the report to document the total weight of covered television equipment "received and recycled" during the preceding "year" only. The addition of the word "calendar" will ensure that all recyclers report for the same time period. Requiring recyclers to report the amount of covered television equipment that was disposed of will help the commission ensure recycler compliance with this subchapter.

*§328.183, Liability*

Proposed new §328.183 tracks the language of SB 329 regarding liability verbatim, stating that a television manufacturer, retailer, or recycler of covered television equipment is not liable for information in any form that a consumer leaves on covered television equipment that is collected or recycled under Subchapter J.

*§328.185, Commission Responsibilities*

Proposed new §328.185 lists the responsibilities of the commission under Subchapter J. Proposed new §328.185(a)(1) adds to the language of SB 329 the phrase "if applicable" where appropriate to differentiate between different prerequisites for inclusion on the commission's Internet Web site list of television manufacturers. This addition clarifies that not all manufacturers are subject to the same requirements. Manufacturers in an RLP are not required to have an approved recovery plan or pay the annual registration fee, and manufacturers who do not participate in an RLP are not required to implement a public education program.

Proposed new §328.185(a)(2) adds to the list of manufacturers who will be included on the commission's Internet Web site list of manufacturers, as required by SB 329, those who manufacture a display device that is peripheral to a computer and contains a television tuner, who collect and recycle the device in accordance with Subchapter I. The commission proposes this addition to avoid the possible unintended consequence of excluding manufacturers who comply with Subchapter I from inclusion on the list, thereby prohibiting retailers from ordering or selling their brand of covered television equipment pursuant to §328.179(a).

Proposed new §328.185(e) adds language to SB 329, stating that inclusion on the commission's Internet Web site list does not constitute a determination by the commission that a television manufacturer's actual practices are in compliance with this subchapter or other law.

Proposed new §328.185(g) clarifies the language in SB 329 by stating that the market share allocation provided to affected manufacturers establishes their recycling responsibility for the following year. Affected manufacturers will be provided their market share allocation before the new year begins.

Proposed new §328.185(j) regarding the commission's biennial report to the legislature is largely unchanged from SB 329. The only proposed modifications are section references that are specific to the proposed rules.

*§328.187, Enforcement*

Proposed new §328.187 is largely unchanged from SB 329, listing the responsibilities of the commission in enforcing this subchapter. The proposed modifications are section references that are specific to the proposed rule.

*§328.189, Financial and Proprietary Information*

Proposed new §328.189 tracks the language of SB 329 regarding financial and proprietary information verbatim, stating that financial or proprietary information submitted to the commission under this subchapter is exempt from public disclosure under Texas Government Code, Chapter 522.

*§328.191, Consumer Responsibilities*

Proposed new §328.191 tracks the language of SB 329 regarding consumer responsibilities verbatim, placing the responsibility for any information in any form left on a consumer's covered television equipment that is collected or recycled on the consumer. Proposed new §328.191 also encourages consumers to learn about recommended methods for recycling covered television equipment.

*§328.193, Management of Collected Television Equipment*

The commission proposes new §328.193 regarding the management of covered television equipment. SB 329 requires the commission to adopt either the standards provided by "Electronics Recycling Operating Practices" as approved by the board of directors of the Institute of Scrap Recycling Industries, Inc. (ISRI), April 25, 2006, or other standards from a comparable nationally recognized organization. The commission proposes to adopt the portions of the April 25, 2006, ISRI standards that fall under the commission's jurisdiction.

Adopting the portions of the ISRI standards that fall under the commission's jurisdiction, rather than other standards from a comparable nationally recognized organization, would provide regulatory consistency to recyclers because the same standards are used in the CERP. It would also help the commission to more efficiently implement the program in that investigators would have a consistent set of standards to use when reviewing a recycler. Using a different set of standards could have a negative impact on small businesses; in particular, recyclers would be required to comply with two different sets of standards for electronics recycling.

TCEQ staff researched standards from other nationally recognized organizations, including the R2, RIOS, and e-Stewards standards. The RIOS standards were last revised in March of 2006, making them less current than the proposed April 2006 ISRI standards. Staff also determined that much of the R2 and e-Stewards standards fall outside of the commission's jurisdiction. The commission could not require a recycler to attain certifi-

cation from an entity if the commission does not have jurisdiction over all standards used for the certification.

Further, the proposed portions of the ISRI standards are as protective of the environment as the portions of the R2 and e-Stewards standards where the commission does have jurisdiction. Recycling facilities already face a number of regulations under the commission's jurisdiction that are meant to ensure the safe management of waste and adopting an additional set of standards would not increase that protection. TCEQ staff have found no correlation between certification by a private entity and their compliance with TCEQ rules.

In addition, the proposed section includes a provision whereby if the United States Environmental Protection Agency (EPA) adopts similar standards that were deemed an acceptable substitute by the commission, the commission may, by rule, revoke the ISRI standards and adopt the EPA standards.

*§328.195, Federal Preemption; Expiration*

Proposed new §328.195 tracks the language of SB 329 regarding federal preemption and expiration verbatim, explaining that the commission may adopt an agency statement that interprets a national program established by federal law that meets the purposes of Subchapter J as preemptive of Subchapter J.

*§328.197, Amount of Penalties*

Proposed new §328.197 is largely unchanged from SB 329. The proposed modifications are to provide more detail regarding the assessment and amount of penalties available under Subchapter J.

Fiscal Note: Costs to State and Local Government

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the commission or for other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rulemaking implements SB 329 and establishes a television equipment collection and recycling program.

The proposed rulemaking would specify requirements for the new television equipment collection and recycling program. Even though the rulemaking would specify requirements for the implementation of the program, the proposed rules generally mirror requirements that already exist in statute. In order to implement SB 329, the TCEQ would be required to: 1) maintain a public Internet Web site and toll-free telephone number; 2) educate consumers; 3) provide information to counties and municipalities regarding the collection and recycling of television equipment; 4) determine the annual state recycling rate of covered television equipment and provide registered television manufacturers with their annual market share allocation; 5) ensure that manufacturers, retailers, and recyclers are in compliance with the proposed rules and statutory requirements; 6) adopt standards for the recycling or reuse of covered television equipment; and 7) provide biennial reports on the program to the commission's legislative oversight committees.

Costs for the commission to implement the consumer education requirements, reporting requirements, investigation and enforcement activities, and to determine the annual state recycling rate and each manufacturer's market share allocation are not expected to be significant and would be absorbed using current resources.

The proposed rules require the commission to maintain a toll-free telephone number that provides consumers with information about television recycling opportunities in the state. The proposed rules also require the commission to publish on the Internet a list of television manufacturers whose recovery plans have been approved by the commission, who have certified that their public education programs are in full compliance with commission rules, and who are in compliance with the registration and fee requirements. Costs for the commission to maintain a toll-free telephone number and to maintain a public Internet Web site are not expected to be significant and would be funded through the newly created Television Recycling Account. SB 329 established a new Television Recycling Account in the General Revenue Fund. This account would consist of an annual $2,500 registration fee paid by television manufacturers that would be collected by the commission and deposited into the new account. Use of the funds in the new account is restricted by statute to the operation of a public Internet Web site and a toll-free telephone number. The registration fee would not be collected from manufacturers who choose to participate in an RLP.

The commission is not able to estimate how much registration fee revenue would be collected and deposited into the new Television Recycling Account due to the fact that staff is not able to estimate the number of manufacturers who will choose to participate in an RLP. There are estimated to be between 60 and 80 television manufacturers that would be subject to the annual registration fee. If 60 manufacturers pay the annual registration fee, then the commission could collect up to $150,000 each year which could be used to operate the toll-free number and the public Internet Web site. However, it may be that the fee collections will fall short of these estimated amounts, in which case the commission will have to use whatever funding is available in order to operate the toll-free number and the Web site.

Some local governments offer television equipment recycling as a service to their residents. Local governments may benefit from being able to set up partnerships with manufacturers to collect television equipment and thus decrease the amount of collections by those local governments. Any costs savings are not expected to be significant.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be enhanced protection of the environment, public health, and safety through the implementation of programs to collect and recycle used television equipment. The proposed rulemaking would help lessen the amount of valuable television equipment components and resources sent to landfills, reducing the need to extract and process virgin materials.

Manufacturers, retailers, recyclers, consumers, and the TCEQ would be affected by the proposed rulemaking. The proposed rules would specify requirements for the implementation of the television equipment recycling program, but would not create significant additional requirements over those that already exist in statute.

The proposed rules are not expected to result in significant fiscal implications for consumers, though in the end consumers may see slight price increases for the purchase of new covered television equipment. The proposed rulemaking is also expected to allow consumers to obtain information about television recycling and methods for recycling covered television equipment.

Consumers could obtain this information by visiting the TCEQ's or the manufacturer's Web site or by calling the TCEQ's or the manufacturer's toll-free telephone numbers. Consumers should also have expanded options for recycling used television equipment at little to no additional costs.

No significant fiscal implications are expected for manufacturers. Manufacturers affected by the proposed rulemaking would be expected to recoup any additional costs through price adjustments to retailers and consumers. The proposed rules would require television manufacturers to pay an annual $2,500 registration fee to the commission. There are estimated to be between 60 and 80 television manufacturers that would be subject to the provisions of the proposed rules. The $2,500 registration fee would not apply to television manufacturers who participate in an RLP. Because it is not known how many manufacturers would participate in an RLP, it is not known how many of the 60 to 80 manufacturers would pay the registration fee.

Each manufacturer of covered television equipment sold in Texas who does not participate in an RLP must submit to TCEQ a recovery plan to collect, reuse, and recycle covered television equipment. Each individual or group that submits a recovery plan must collect, reuse, and recycle the quantity of covered television equipment computed by TCEQ as the market share allocation. The television manufacturer may collect and recycle its market share allocation through operation of its program individually or in partnership with other television manufacturers as long as the collection methods allow a consumer to recycle television equipment without paying a separate fee at the time of recycling. It is assumed there will be costs to develop and implement the recovery plan, but the commission is not able to determine what those costs would be for an individual manufacturer. It is further assumed that if it is more cost effective to participate in an RLP, the manufacturer would choose that option.

Costs are also anticipated for manufacturers to participate in an RLP, though it is assumed that these costs would be spread over a large group of participants and therefore diluted to a certain extent. It is expected that there may be additional costs to implement a public education campaign, set up a collection system that provides at least 200 individual collection sites, and pay collection sites and recyclers. Manufacturers would be expected to recoup any additional costs through price adjustments to retailers and consumers.

Fiscal implications for retailers of covered television equipment are not expected to be significant. Retailers include those who sell televisions in Texas, as well as Internet retailers. The rules would prohibit retailers from selling products from manufacturers who are not on TCEQ's list of registered manufacturers. The proposed rules require a person who is a retailer of covered television equipment to provide to consumers in writing the information published by TCEQ regarding the legal disposition and recycling of television equipment. This information can be included with the sales receipt, as part of the packaging of the equipment, or through a toll-free telephone number and address of an Internet Web site provided to consumers. The proposed rules do not require a retailer to collect covered television equipment for recycling.

Some new costs for recyclers engaged in the business of recycling covered television equipment in the state may be anticipated, though in general they are not expected to be significant. The rules would require recyclers to register with the TCEQ, certify that they are in compliance with TCEQ standards, and certify that they recycle all accepted covered television equipment in accordance with TCEQ standards. Recyclers would also be required to maintain a written record of the weight of all covered television equipment received under the television equipment recycling program and the disposition of that equipment. Finally, the rules would require recyclers to annually report to the TCEQ the total weight of covered television equipment received and recycled under the television equipment recycling program within the preceding 12 months. Any additional costs would depend on what steps, if any, the recycler would have to take to come into compliance with these requirements.

Small Business and Micro-Business Assessment

Adverse fiscal implications may be anticipated for some small or micro-businesses under the proposed rules, but these fiscal implications are not expected to be significant. Program staff did not identify any television manufacturers that were thought to be small businesses. It is not known how many retailers would meet the definition of a small or micro-business, but costs to those retailers are expected to be minimal. Those retailers that are small businesses would be affected by the rules since they will only be permitted to sell covered television equipment that is on the TCEQ list of manufacturers. They will also be required to provide television equipment recycling information to consumers.

An estimated 40 recyclers are small or micro-businesses and could see additional costs due to additional record keeping and reporting requirements under the proposed rules. The recyclers will be required to register annually under the program and report to the TCEQ. Some recyclers may realize additional costs if they have to adopt new recycling standards in order to comply with the program requirements. Any additional costs would depend on what steps, if any, the recycler would have to take to come into compliance with these requirements. It could also be assumed that recyclers will recoup any increases in their costs through increased rates assessed to their customers (television manufacturers).

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the rules are proposed in order to comply with the legislative requirements of the new television equipment recycling program created by SB 329.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" as defined in the statute.

A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent

of the proposed rulemaking is to help establish a comprehensive, convenient, and economically sound program for the collection and recycling of television equipment. Furthermore, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety. The proposed rulemaking affords television manufacturers the opportunity to establish recovery programs tailored to their individual needs. The flexibility of the proposed rulemaking will allow manufacturers to develop the most cost-effective means of meeting the recycling requirements. This should prevent the proposed rulemaking from adversely affecting the economy or a sector of the economy in a material way. The commission concludes that the proposed rulemaking does not meet the definition of a major environmental rule.

In addition to the fact that the proposed rulemaking does not meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a). Texas Government Code, §2001.0225 applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) was adopted solely under the general powers of the agency instead of under a specific state law.

First, applicable federal standards for the collection and recycling of covered television equipment do not currently exist. SB 329, §3(a), 82nd Legislature, 2011, authorizes the commission to adopt any rules required to implement the statute. Second, the proposed rulemaking is in direct response to the previously mentioned bill and does not exceed its requirements. Third, the proposed rulemaking does not 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. Finally, the proposed rulemaking will be adopted under the authority of SB 329, §3(a), 82nd Legislature, 2011, which authorizes the commission to adopt any rules required to implement the statute. Therefore, the commission does not adopt the rules solely under the commission's general powers.

The commission invites public comment on the draft regulatory impact analysis determination. Written comments may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

Takings Impact Assessment

The commission evaluated these proposed rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The commission determined that the proposed rulemaking does not constitute a taking. The specific purpose of these proposed rules is to help establish a comprehensive, convenient, and economically sound program for the collection and recycling of television equipment. This rulemaking substantially advances that stated purpose by establishing specific requirements for the collection, reuse, and recycling of covered television equipment.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Covered television equipment is not real property. The proposed rules do not affect a landowner's right in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to real property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rules.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 13, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-028-328-AD. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Cynthia Carter, Pollution Prevention and Education Section, (512) 239-3143.

Statutory Authority

The new sections are proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under this code and other laws of this state; and TWC, §5.105, which authorizes the commission to adopt rules as necessary to carry out its powers and duties under the TWC. The new sections are also proposed under Texas Health and Safety Code (THSC), §§361.011, 361.017, and 361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act; THSC, §361.022 and §361.023, which set

public policy in the management of municipal solid waste and hazardous waste to include reuse or recycling of waste; and THSC, §§361.971 - 361.992 and TWC, §7.052(b-1) and (b-2), as amended by the 82nd Legislature, 2011, which authorizes the commission to adopt rules to help create a recycling program for covered television equipment.

The proposed new sections implement THSC, §§361.971 - 361.992 and TWC, §7.052(b-1) and (b-2), as amended by the 82nd Legislature, 2011.

*§328.161. Purpose.*

(a) The purpose of this subchapter is to help establish a comprehensive, convenient, and environmentally sound program for the collection and recycling of television equipment.

(b) The program is based on individual television manufacturer responsibility and shared responsibility among consumers, retailers, and the government of this state.

*§328.163. Applicability and Effective Dates.*

(a) Except as provided by this section and Texas Health and Safety Code, §361.991, this subchapter applies only to covered television equipment that is:

(1) offered for sale or sold to a consumer in this state; or

(2) used by a consumer in this state and returned for recycling.

(b) This subchapter does not apply to:

(1) computer equipment as that term is defined by §328.135 of this title (relating to Definitions);

(2) a display device that is peripheral to a computer and contains a television tuner, if that device is collected and recycled by its manufacturer in accordance with Subchapter I of this chapter (relating to Computer Equipment Recycling Program);

(3) any part of a motor vehicle, including a replacement part;

(4) a device that is functionally or physically part of or connected to another system or piece of equipment:

(A) designed and intended for use in an industrial, governmental, commercial, research and development, or medical setting, including diagnostic monitoring or control equipment; or

(B) used for security, sensing, monitoring, antiterrorism, or emergency services purposes;

(5) a device that is contained in exercise equipment intended for home use or an appliance intended for home use, including a clothes washer, clothes dryer, refrigerator, refrigerator and freezer, microwave oven, conventional oven or range, dishwasher, room air conditioner, dehumidifier, and air purifier;

(6) a telephone of any type;

(7) a personal digital assistant;

(8) a global positioning system;

(9) a consumer's lease of covered television equipment or a consumer's use of covered television equipment under a lease agreement; or

(10) the sale or lease of covered television equipment to an entity when the television manufacturer and the entity enter into a contract that effectively addresses the recycling of equipment that has reached the end of its useful life.

(c) This subchapter may not be enforced until July 1, 2012.

(d) A registration and, except as provided by §328.175 of this title (relating to Manufacturer Recycling Leadership Program), registration fee required by §328.171(a)(2) of this title (relating to Manufacturer's Registration and Reporting) is required to be submitted for the first time by January 31, 2013. A report required by §328.171(d) of this title is required to be submitted for the first time by January 31, 2014.

(e) A recovery plan required by §328.173(b) of this title (relating to Manufacturer's Recovery Plan and Related Responsibilities) is required to be submitted for the first time by January 31, 2013.

(f) Documentation required by §328.175(g) of this title is required to be submitted for the first time by January 31, 2013.

(g) A collection report required by §328.177(a) of this title (relating to Recycling Leadership Program Collection Report) is required to be submitted for the first time by January 31, 2015.

(h) A retailer of covered television equipment is not required to provide the information required by §328.179(b) of this title (relating to Retailer Responsibilities) until July 1, 2012.

(i) Notwithstanding §328.179 of this title, a retailer of television equipment may sell television equipment inventory that the retailer acquired before April 1, 2013 without incurring a penalty.

(j) A registration required by §328.181(b) of this title (relating to Recycler Responsibilities) is required to be submitted for the first time by January 31, 2013. A recycler is required to submit the report required by §328.181(b)(5) of this title for the first time by January 31, 2014.

(k) The commission shall prepare and post the list required by §328.185(a) of this title (relating to Commission Responsibilities) for the first time by April 1, 2013.

(l) The commission shall establish the state recycling rate, in accordance with §328.185(f) of this title, for the first time by November 1, 2013.

(m) The commission shall provide applicable television manufacturers the television manufacturer's market share allocation, in accordance with §328.185(g) of this title, for the first time by December 1, 2013.

(n) The commission shall prepare and submit the report required by §328.185(j) of this title, for the first time by March 1, 2014.

*§328.165. Definitions.*

The following terms, when used in this subchapter, have the following meanings.

(1) Brand--The name, symbol, logo, trademark, or other information that identifies a whole product rather than the components of the product.

(2) Consumer--An individual who uses covered television equipment that is purchased primarily for personal or home business use.

(3) Covered television equipment--The following equipment marketed to and intended for consumers:

(A) a direct view or projection television with a viewable screen of nine inches or larger whose display technology is based on cathode ray tube, plasma, liquid crystal, digital light processing, liquid crystal on silicon, silicon crystal reflective display, light-emitting diode, or similar technology; or

(B) a display device that is peripheral to a computer that contains a television tuner.

(4) Market share allocation--The quantity of covered television equipment, by weight, that an individual television manufacturer submitting a recovery plan under §328.173 of this title (relating to Manufacturer's Recovery Plan and Related Responsibilities) is responsible for collecting, reusing, and recycling, as computed by the commission under §328.185 of this title (relating to Commission Responsibilities).

(5) Recycler--A person who separates collected equipment and refurbishes that equipment for reuse, or processes equipment to be returned to use in the form of raw materials or products. The term does not include an entity that solely collects or separates television equipment for recycling.

(6) Recycling--Any process by which equipment that would otherwise become solid waste or hazardous waste is collected, separated, and refurbished for reuse or processed to be returned to use in the form of raw material or products. The term does not include incineration.

(7) Retailer--A person who owns or operates a business that sells new covered television equipment by any means directly to a consumer. The term does not include a person who, in the ordinary course of business, regularly leases, offers to lease, or arranges for leasing of merchandise under a rental-purchase agreement.

(8) Television--An electronic device that contains a tuner that locks onto a selected carrier frequency and is capable of receiving and displaying video programming from a broadcast, cable, or satellite source.

(9) Television manufacturer--A person that:

(A) manufactures covered television equipment under a brand the person owns or is licensed to use;

(B) manufactures covered television equipment without affixing a brand;

(C) resells covered television equipment produced by other suppliers under a brand the person owns or is licensed to use;

(D) manufactures covered television equipment, supplies it to any person within a distribution network that includes a wholesaler or retailer, and benefits from the sale of the covered television equipment through that distribution network; or

(E) assumes the responsibilities of a television manufacturer under this subchapter.

*§328.167. Sales Prohibition.*

A person may not offer for sale in this state new covered television equipment unless the equipment has been labeled in compliance with §328.169 of this title (relating to Manufacturer's Labeling Requirement).

*§328.169. Manufacturer's Labeling Requirement.*

A television manufacturer may sell or offer for sale in this state only covered television equipment that is labeled with the television manufacturer's brand. The label must be permanently affixed and readily visible.

*§328.171. Manufacturer's Registration and Reporting.*

(a) General provisions.

(1) A television manufacturer of covered television equipment shall register with the agency, on authorized agency forms or electronic submission in accordance with subsection (c) of this section, except as provided by §328.175 of this title (relating to Manufacturer Recycling Leadership Program). Initial registration is required by January 31, 2013.

(2) A television manufacturer of covered television equipment shall renew its registration annually and is subject to the registration fee and payment requirements. The registration fee each year is $2,500 to be paid on or before January 31 of each year, starting January 31, 2013. A manufacturer's failure to properly or timely register does not exempt the manufacturer from such fee and payment requirements.

(3) A manufacturer may designate a legally authorized representative to complete and submit the required registration information. However, the manufacturer remains responsible for compliance with the provisions of this section by such representative.

(4) The registration or registration renewal must include:

(A) a list of all brands the television manufacturer sells or offers for sale in this state regardless of whether the television manufacturer owns or is licensed to use the brand; and

(B) contact information for the person the commission may contact regarding the television manufacturer's activities to comply with this subchapter.

(b) Changes or additional information.

(1) The manufacturer shall provide written notice to the executive director of the following:

(A) change in manufacturer information (e.g., legally authorized representative, mailing address, or telephone number); and

(B) change in list of all brands the television manufacturer sells or offers for sale in this state regardless of whether the television manufacturer owns or is licensed to use the brand.

(2) Notice of any change or additional information must be submitted on the appropriate agency form that has been completed in accordance with this section.

(3) Notice of any change or additional information must be submitted to the executive director within 30 days from the date of the occurrence of the change or addition.

(c) Required Form for Providing Manufacturer's Registration Information.

(1) Manufacturers shall provide the required information on the current agency registration form or approved electronic submission.

(2) The manufacturer is responsible for ensuring that the registration form is fully complete and accurate. The form must be dated and signed by the manufacturer or a legally authorized representative of the manufacturer, and must be submitted to the agency in accordance with the time frames established in this chapter.

(3) When any of the required manufacturer's registration information submitted to the executive director is determined to be incomplete or inaccurate (including illegible or unclear information), the executive director may require the manufacturer to submit additional information. A manufacturer shall submit any such required additional information within 30 days of receipt of such request.

(d) Except as provided by §328.175 of this title, not later than January 31 of each year, each registered television manufacturer of covered television equipment shall report to the commission:

(1) the total weight of covered television equipment for which the television manufacturer is responsible that was sold in this state during the preceding calendar year or, if the manufacturer does not track the weight of covered television equipment it sells by state, the

television manufacturer may report the total weight of covered television equipment the television manufacturer sold nationally in the preceding calendar year;

(2) the total weight of covered television equipment the television manufacturer collected, recycled, and reused in this state during the preceding calendar year; and

(3) documentation that the collection, reuse, and recycling of the collected covered television equipment complies with §328.193 of this title (relating to Management of Collected Television Equipment).

*§328.173. Manufacturer's Recovery Plan and Related Responsibilities.*

(a) This section does not apply to a television manufacturer that participates in a recycling leadership program described by §328.175 of this title (relating to Manufacturer Recycling Leadership Program).

(b) Not later than the first January 31 that occurs after the date the television manufacturer first registers with the commission under §328.171 of this title (relating to Manufacturer's Registration and Reporting), each television manufacturer of covered television equipment sold in this state shall, individually or as a member of a group of television manufacturers, submit to the commission a recovery plan to collect, reuse, and recycle covered television equipment.

(c) An individual television manufacturer that submits a recovery plan under subsection (b) of this section shall collect, reuse, and recycle covered television equipment. Beginning with the television manufacturer's second year of registration, the individual television manufacturer shall collect, reuse, and recycle the quantity of covered television equipment computed by the commission as the television manufacturer's market share allocation.

(d) A group of television manufacturers that submits a recovery plan under subsection (b) of this section shall collect, reuse, and recycle covered television equipment. Beginning with the second year of registration for a group of television manufacturers, the group of television manufacturers shall collect, reuse, and recycle a quantity of covered television equipment equal to the sum of the combined market share allocations of the group's participants.

(e) A recovery plan under subsection (b) of this section must include at a minimum:

(1) a statement of whether the television manufacturer intends to collect and recycle its market share allocation through operation of its plan, individually or in partnership with other television manufacturers;

(2) beginning with the television manufacturer's second year of registration, the total weight of covered television equipment collected, reused, and recycled by or on behalf of the television manufacturer during the preceding calendar year;

(3) collection methods that allow a consumer to recycle covered television equipment without paying a separate fee at the time of recycling;

(4) information for the consumer on how and where to return the television equipment labeled with the manufacturer's brand(s). This information must include, at a minimum, an Internet link that consumers can access to find out specifically how and where to return the television equipment labeled with the manufacturer's brand(s). If the Internet link is going to change, the manufacturer shall notify the commission of what the new Internet link will be 30 days in advance; and

(5) a statement indicating that the manufacturer has, or will have, a compliant collection program by April 1, 2013.

(f) The commission shall review the recovery plan for satisfaction of the requirements of this subchapter. If the registration and recovery plan are complete, the commission shall include the television manufacturer on the commission's Internet Web site listing as provided by §328.185 of this title (relating to Commission Responsibilities). The commission may reject the recovery plan if it does not meet all requirements of this subchapter.

*§328.175. Manufacturer Recycling Leadership Program.*

(a) A group of television manufacturers may establish a recycling leadership program to provide collection, transportation, and recycling infrastructure for covered television equipment in this state.

(b) A recycling leadership program must provide at least 200 individual collection sites or programs in this state in a manner described by subsection (d) of this section where a consumer may return covered television equipment for reuse or recycling.

(c) A television manufacturer may not charge a separate fee at the time of recycling under this section unless at the time of recycling a financial incentive of equal or greater value to the fee charged is provided by the television manufacturer.

(d) Collection methods that may be used by a recycling leadership program under subsection (b) of this section for recycling of covered television equipment include the following:

(1) a system by which the television manufacturer, an entity designated by the television manufacturer, or another private or public sector entity associated with the television manufacturer offers a consumer a physical collection site to return covered television equipment;

(2) a system by which the television manufacturer, an entity designated by the television manufacturer, or another private or public sector entity associated with the television manufacturer offers the consumer a method for returning covered television equipment by mail, as long as the system provides for packaging that would prevent any spillage in case of breakage; and

(3) a system by which the television manufacturer, an entity designated by the television manufacturer, or another private or public sector entity associated with the television manufacturer holds a collection event where the consumer may return covered television equipment.

(e) A television manufacturer of covered television equipment sold in this state that is participating in a recycling leadership program for covered television equipment as of January 1 of any year is not subject during that year to:

(1) the registration fees and registration renewal fees required by §328.171(a) of this title (relating to Manufacturer's Registration and Reporting); and

(2) the reporting requirements of §328.171(d) of this title.

(f) A television manufacturer of covered television equipment that is sold in this state that participates in a recycling leadership program shall individually or through the recycling leadership program establish and implement a public education program regarding collection, reuse, and recycling opportunities that exist in this state for covered television equipment. The public education program must:

(1) inform consumers about the collection, reuse, and recycling opportunities for covered television equipment available in this state;

(2) work with the commission and other interested parties to develop educational materials that inform consumers about collection, reuse, and recycling opportunities available in this state;

(3) use television manufacturer-developed customer outreach materials, which may include packaging inserts, television manufacturers' Internet Web sites, and other communication methods, to inform consumers about collection, reuse, and recycling opportunities for covered television equipment available in this state; and

(4) use television manufacturer-developed customer outreach materials to provide rural communities with a centralized Internet-based information center that provides information for those communities about:

(A) best practices for collection, reuse, and recycling of covered television equipment; and

(B) collection events and other recycling opportunities in those communities and surrounding areas.

(g) Not later than January 31 of each year, each recycling leadership program must provide to the commission:

(1) a list of the television manufacturers participating in the program as of January 1 of that year;

(2) documentation that the recycling leadership program has established a public education program regarding collection, reuse, and recycling opportunities that exist in this state for covered television equipment; and

(3) a list of the 200 sites or programs planned by the recycling leadership program participants for the current year. A map of the sites or programs may be included with the list.

*§328.177. Recycling Leadership Program Collection Report.*

(a) Not later than January 31 of every other year beginning with the television manufacturer's second year of registration, a television manufacturer of covered television equipment sold in this state that is participating in a recycling leadership program under §328.175 of this title (relating to Manufacturer Recycling Leadership Program) shall, individually or as a member of the recycling leadership program, submit to the commission a collection report regarding the television manufacturer's collection, reuse, and recycling of covered television equipment.

(b) The collection report must include:

(1) an inventory of covered television equipment collection, reuse, and recycling opportunities that are currently available to consumers through the individual television manufacturer or the recycling leadership program in this state;

(2) documentation of collection opportunities available to consumers in counties with populations of less than 50,000, including an analysis of the number of collection sites available to consumers in those counties compared to the number of opportunities available to consumers in those counties to purchase new covered television equipment;

(3) the amount by weight of the covered television equipment that the individual television manufacturer or the recycling leadership program collected in the two preceding calendar years, separated by year;

(4) documentation that the collection, reuse, and recycling of the collected covered television equipment complies with §328.193 of this title (relating to Management of Collected Television Equipment);

(5) documentation that a financial incentive of equal or greater value to a fee charged at the time of recycling is provided by the television manufacturer, if a television manufacturer does charge a separate fee at the time of recycling; and

(6) documentation, including an Internet address, that a television manufacturer of covered television equipment that is sold in this state that participates in a recycling leadership program has individually or through the recycling leadership program established and implemented a public education program regarding collection, reuse, and recycling opportunities that exist in this state for covered television equipment.

(c) The inventory of covered television equipment collection, reuse, and recycling opportunities required by subsection (b)(1) of this section may be submitted in the form of a map noting the location of the opportunities.

(d) The collection report may include a listing of other existing collection and recycling infrastructure for covered television equipment not associated with the recycling leadership program, including electronic recyclers and repair shops, recyclers of other appropriate commodities, reuse organizations, not-for-profit corporations, retailers, and other suitable operations, including local government collection events, if available.

*§328.179. Retailer Responsibilities.*

(a) A retailer may order and sell only products from a television manufacturer that is included on the list published under §328.185 of this title (relating to Commission Responsibilities). For purposes of this subchapter, an order is considered to be the entire amount of covered television equipment requested from a manufacturer at one time for the purpose of sale by the retailer. A retailer shall consult that list before ordering covered television equipment in this state. A retailer is considered to have complied with this subsection and may sell a product in the retailer's inventory if, on the date the product was ordered from the television manufacturer, the television manufacturer was listed on the Internet Web site described by §328.185(a) of this title.

(b) A retailer of covered television equipment shall provide to consumers in writing the information published by the commission regarding the legal disposition and recycling of television equipment. The information may be included with the sales receipt or as part of the packaging of the equipment. Alternatively, the retailer may provide the information required by this subsection through a toll-free telephone number and address of an Internet Web site provided to consumers.

(c) This subchapter does not require a retailer to collect covered television equipment for recycling.

*§328.181. Recycler Responsibilities.*

(a) This section does not apply to a television manufacturer.

(b) A person who is engaged in the business of recycling covered television equipment in this state shall:

(1) Register with the commission and certify, as follows, that the person is in compliance with the standards adopted under §328.193 of this title (relating to Management of Collected Television Equipment).

(A) All certifications shall be signed as follows:

*(i)* For a corporation, the application shall be signed by a responsible corporate officer. For purposes of this clause, a responsible corporate officer means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business func-

tion, or any other person who performs similar policy or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Corporate procedures governing authority to sign certifications may provide for assignment or delegation to applicable corporate positions rather than to specific individuals.

*(ii)* For a partnership or sole proprietorship, the certification shall be signed by a general partner or the proprietor, respectively.

*(iii)* For a municipality, state, federal, or other public agency, the certification shall be signed by either a principal executive officer or a ranking elected official. For purposes of this clause, a principal executive officer of a federal agency includes the chief executive officer of the agency, or a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., regional administrator of the United States Environmental Protection Agency).

(B) A person signing the certification shall make the following certification: "I certify that (insert name of person who is engaged in the business of recycling covered television equipment in this state) is in compliance with the standards adopted under Title 30 of the Texas Administrative Code §328.193 (relating to Management of Collected Television Equipment). I certify under penalty of law that this document and any attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(C) All certifications shall be signed by a person described in subparagraph (A) of this paragraph or by a duly authorized representative of that person. A person is a duly authorized representative only if:

*(i)* the authorization is made in writing by a person described in subparagraph (A) of this paragraph;

*(ii)* the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity or for environmental matters for the applicant, such as the position of plant manager, operator, environmental manager, or a position of equivalent responsibility. (A duly authorized representative may be either a named individual or any individual occupying a named position); and

*(iii)* the written authorization is submitted to the executive director.

(D) If an authorization under this section is no longer accurate because of a change in individuals or position, a new authorization satisfying the requirements of this section must be submitted to the executive director prior to or together with any certifications to be signed by an authorized representative.

(2) On or before January 31 of each year renew the registration with the commission and certify, per paragraph (1) of this subsection, the person's continued compliance with §328.193 of this title.

(3) Recycle all covered television equipment accepted for recycling in accordance with §328.193 of this title.

(4) Maintain a written log recording the weight of all covered television equipment received by the person and the disposition of that equipment.

(5) Annually report to the commission by January 31 the total weight or volume of covered television equipment received, recycled, and disposed of by the person in the preceding calendar year.

*§328.183. Liability.*

(a) A television manufacturer, retailer, or person who recycles covered television equipment is not liable in any way for information in any form that a consumer leaves on covered television equipment that is collected or recycled under this subchapter.

(b) This subchapter does not exempt a person from liability under other law.

*§328.185. Commission Responsibilities.*

(a) The commission shall publish on a publicly accessible Internet Web site a list of television manufacturers:

(1) whose recovery plans have been approved by the commission, if applicable; who have certified that their public education programs are in full compliance with this subchapter, if applicable; and who are in compliance with the registration and fee requirements of this subchapter, if applicable; or

(2) who manufacture a display device that is peripheral to a computer and contains a television tuner; who collect and recycle the device in accordance with Subchapter I of this chapter (relating to Computer Equipment Recycling Program); and who do not manufacture any other device subject to this subchapter.

(b) The commission shall remove television manufacturers no longer in compliance under subsection (a) of this section from the Internet Web site once each fiscal quarter.

(c) The commission shall educate consumers regarding the collection and recycling of covered television equipment.

(d) The commission shall host or designate another person to host an Internet Web site and shall provide a toll-free telephone number to provide consumers with information about the recycling of covered television equipment, including best management practices and information about or links to information about:

(1) television manufacturers' collection and recycling programs, including television manufacturers' recovery plans; and

(2) covered television equipment collection events, collection sites, and community television equipment recycling programs.

(e) Information about collection and recycling provided on a television manufacturer's publicly available Internet Web site and through a toll-free telephone number does not constitute a determination by the commission that the television manufacturer's recovery plan or actual practices are in compliance with this subchapter or other law. The commission's list under subsection (a) of this section does not constitute a determination by the commission that a television manufacturer's actual practices are in compliance with this subchapter or other law.

(f) Not later than November 1 of each year, the commission shall establish the state recycling rate by computing the ratio of the weight of total returns of covered television equipment in this state by television manufacturers submitting a recovery plan under §328.173 of this title (relating to Manufacturer's Recovery Plan and Related Responsibilities) to the total weight of covered television equipment sold

in this state by television manufacturers submitting a recovery plan under §328.173 of this title during the preceding year.

(g) Not later than December 1 of each year, the commission shall compute and provide to each registered television manufacturer submitting a recovery plan under §328.173 of this title the television manufacturer's market share allocation for collection, reuse, and recycling for the following year. A television manufacturer's market share allocation equals the weight of the television manufacturer's covered television equipment sold in this state during the preceding calendar year multiplied by the state recycling rate determined under subsection (f) of this section.

(h) In any year in which more than one recycling leadership program is implemented under §328.175 of this title (relating to Manufacturer Recycling Leadership Program), the commission shall review all active recycling leadership programs established under this subchapter to ensure the programs are operating in a manner consistent with the goals of this subchapter, including a balanced recycling effort. Based on the commission's review, the commission may make recommendations to the legislature on ways to improve the balance of the recycling effort.

(i) The commission shall provide to each county and municipality of this state information regarding the legal disposal and recycling of covered television equipment. The information must be provided in writing.

(j) Biennial Report to Legislature.

(1) The commission shall compile information from television manufacturers and issue an electronic report to the committee in each house of the legislature having primary jurisdiction over environmental matters not later than March 1 of each even-numbered year.

(2) The report must include:

(A) collection information provided to the commission by each television manufacturer's report required by §328.171 of this title (relating to Manufacturer's Registration and Reporting) or §328.175 of this title, as applicable;

(B) a summary of comments that have been received from stakeholders such as television manufacturers, electronic equipment recyclers, local governments, and nonprofit organizations;

(C) any recommendations under subsection (h) of this section; and

(D) any other information that would assist the legislature in evaluating the effectiveness of this subchapter.

*§328.187. Enforcement.*

(a) The commission may conduct audits and inspections to ensure compliance with this subchapter and rules adopted under this subchapter.

(b) The commission and the attorney general, as appropriate, shall enforce this subchapter and, except as provided by subsections (d) and (e) of this section, take enforcement action against a television manufacturer, a retailer, or a person who recycles covered television equipment.

(c) The executive director or the attorney general may institute a suit under Texas Water Code, §7.032, to enjoin an activity related to the sale of covered television equipment in violation of this subchapter.

(d) The commission shall issue a warning notice to a person on the person's first violation of this subchapter. The person must comply with this subchapter not later than the 60th day after the date the warning notice is issued.

(e) A retailer who receives a warning notice from the commission that the retailer's inventory violates this subchapter because it includes covered television equipment from a television manufacturer that is not in compliance with this subchapter must bring the inventory into compliance with this subchapter not later than the 60th day after the date the warning notice is issued.

*§328.189. Financial and Proprietary Information.*

Financial or proprietary information submitted to the commission under this subchapter is exempt from public disclosure under Texas Government Code, Chapter 552.

*§328.191. Consumer Responsibilities.*

(a) A consumer is responsible for any information in any form left on the consumer's covered television equipment that is collected or recycled.

(b) A consumer is encouraged to learn about recommended methods for recycling covered television equipment that has reached the end of its useful life by visiting the commission's and television manufacturers' Internet Web sites or calling their toll-free telephone numbers.

*§328.193. Management of Collected Television Equipment.*

(a) Covered television equipment collected under this subchapter must be disposed of or recycled in a manner that complies with federal, state, and local law.

(b) The commission adopts, as standards for recycling or reuse of covered television equipment under this subchapter, the following portions of the standards in "Electronics Recycling Operating Practices" as approved by the board of directors of the Institute of Scrap Recycling Industries (ISRI), Incorporated, April 25, 2006. The remaining portions of the standards are voluntary unless required by other law. The adopted standards apply to covered television equipment recycled or reused in this state. If at any time the United States Environmental Protection Agency (EPA) adopts standards for recycling or reuse of television equipment that are determined by the commission to be an acceptable substitute, the commission may, by rule, revoke the ISRI standards and adopt the EPA standards.

(1) General requirements for recyclers.

(A) Following all efforts to refurbish or reuse covered television equipment, the remaining covered television equipment shall be manually dismantled for reusable components or processed for recycling either in accordance with §328.4(b) of this title (relating to Limitations on Storage of Recyclable Materials) for those facilities subject to and not exempted from that section, or in accordance with the following conditions for those facilities exempt from or not subject to §328.4(b) of this title.

*(i)* The facility can show that the material is potentially recyclable and has an economically feasible means of being recycled.

*(ii)* Every six months, the amount of material that is processed for recycling (as defined in §328.2 of this title (relating to Definitions)), or transferred to a different site for recycling, equals at least 50% by weight or volume of the material accumulated at the beginning of the six-month period. "Every six months" starts, for a new recycling facility, 180 days after opening; for an existing recycling facility, 180 days after the facility, under this subchapter, starts providing services to a manufacturer. In calculating the percentage or turnover, the percentage requirements shall be applied to each material of the same type.

(B) Recyclers shall only dispose of covered television equipment that cannot be refurbished; reused; or, in accordance with

Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), §330.11(e) of this title (relating to Notification Required), and Subchapter A of this chapter (relating to Purpose and General Information), recycled.

(C) For all transfers of covered television equipment intended for recycling, recyclers shall maintain commercial contracts, or equivalent commercial arrangements, that shall include:

*(i)* covered television equipment quantity and type;

*(ii)* packaging requirements; and

*(iii)* recycling methods and specifications.

(D) Recyclers shall maintain records for a minimum of three years; or longer if required by local, state, or federal law; including any of the following which are applicable:

*(i)* manifests;

*(ii)* bills of lading;

*(iii)* waste disposal records; and

*(iv)* records that document:

*(I)* if the covered television equipment is sent to a facility affiliated with (as defined in §328.2 of this title) the recycler, the facility's location, and the condition of the covered television equipment (refurbished, reusable, recyclable, or to be determined); and

*(II)* if the covered television equipment is sent to a facility not affiliated with (as defined in §328.2 of this title) the recycler, the location of the first unaffiliated facility to which the covered television equipment is sent and the condition of the covered television equipment (refurbished, reusable, recyclable, or to be determined).

(E) Recyclers shall maintain and possess a written work practice that specifically addresses, at least, the following:

*(i)* lead;

*(ii)* mercury;

*(iii)* beryllium;

*(iv)* cadmium;

*(v)* batteries;

*(vi)* polychlorinated biphenyls; and

*(vii)* free-flowing fluids such as oils and lubricants.

(F) Recyclers shall ensure that covered television equipment is stored and processed in a manner that minimizes the potential release of any hazardous substance into the environment.

(G) Recyclers shall package all covered television equipment designated for reuse in a manner that protects against damage and minimizes the potential for releases of hazardous substances during storage and transportation. Recyclers must package all covered television equipment designated for processing in a manner that minimizes the potential for releases of hazardous substances during storage and transportation.

(H) The covered television equipment recycling facility shall operate in accordance with the closure and financial-assurance requirements of §328.5 of this title (relating to Reporting and Recordkeeping Requirements), unless exempted under §328.5 of this title.

(2) Manual dismantling and mechanical processing at a covered television equipment recycling facility.

(A) Following all efforts to refurbish or reuse covered television equipment, the remaining covered television equipment should be dismantled for useable components or commodities; processed for recycling in accordance with the following conditions; or properly disposed of in accordance with paragraph (1)(B) of this subsection.

*(i)* The facility can show that the material is potentially recyclable and has an economically feasible means of being recycled.

*(ii)* Every six months, the amount of material that is processed for recycling (as defined in §328.2 of this title), or transferred to a different site for recycling, equals at least 50% by weight or volume of the material accumulated at the beginning of the six-month period. "Every six months" starts, for a new recycling facility, 180 days after opening; for an existing recycling facility, 180 days after the facility, under this subchapter, starts providing services to a manufacturer. In calculating the percentage of turnover, the percentage requirements shall be applied to each material of the same type.

(B) Recyclers shall have a written, up-to-date plan for responding to and reporting pollutant releases, including accidents, spills, fires, or explosions.

(C) Hazardous waste shall be managed, recycled, and disposed of in accordance with Chapter 335 of this title.

*§328.195. Federal Preemption; Expiration.*

(a) If federal law establishes a national program for the collection and recycling of covered television equipment and the commission determines that the federal law substantially meets the purposes of this subchapter, the commission may adopt an agency statement that interprets the federal law as preemptive of this subchapter.

(b) This subchapter expires on the date the commission issues a statement under this section.

*§328.197. Amount of Penalties.*

(a) The amount of the penalty assessed against a manufacturer that does not label its covered television equipment or adopt and implement a recovery plan as required by §328.169 of this title (relating to Manufacturer's Labeling Requirement) or §328.173 of this title (relating to Manufacturer's Recovery Plan and Related Responsibilities) as applicable, may not exceed $10,000 for the second violation or $25,000 for each subsequent violation.

(b) Except as provided by subsection (a) of this section, the amount of the penalty for a violation of this subchapter may not exceed $1,000 for the second violation or $2,000 for each subsequent violation.

(c) A penalty under this section is in addition to any other penalty that may be assessed for a violation of Texas Health and Safety Code, Chapter 361, Subchapter Y or Z.

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

Filed with the Office of the Secretary of State on November 4, 2011.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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## CHAPTER 334. UNDERGROUND AND ABOVEGROUND STORAGE TANKS

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §334.5 and §334.84; and proposes new §334.19.

Background and Summary of the Factual Basis for the Proposed Rules

The TCEQ Sunset legislation, House Bill (HB) 2694, was adopted during the 82nd Legislature, 2011, and signed by the Governor on June 17, 2011. Included in the legislation were statutory changes addressing petroleum storage tank (PST) regulation. This rulemaking is required to address several of the statutory changes: underground storage tank (UST) delivery prohibition; State Lead tank removal authorization; and the setting of the PST delivery fee.

Section by Section Discussion

*§334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems*

The commission proposes to amend §334.5(b). The term "delivery prohibition" refers to the prohibition of persons making deliveries of fuel or other regulated substances into USTs that have not been issued a delivery certificate. A delivery certificate is issued when a tank owner or operator submits a registration and self-certification form to the TCEQ attesting to compliance with administrative and technical requirements for their tanks. Rulemaking on this issue is required to bring Texas into compliance with the federal Energy Policy Act of 2005 (Pub.L. 109-58, August 8, 2005, 119 Stat. 294, codified at 42 United States Code, §15801) (Energy Act). The Energy Act states: "Beginning 2 years after the date of enactment of this section, it shall be unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank at a facility which has been identified by the Administrator or a State implementing agency to be ineligible for such delivery, deposit, or acceptance." Since Texas has a federally approved state PST program, it is required to implement delivery prohibition. Assessment of administrative penalties against persons for unlawful deliveries is expected to deter fuel deliveries to out-of-compliance PST facilities.

Delivery prohibition, also referred to as common carrier liability, is not new for Texas, which began January 1, 1990. Although common carrier liability was removed from statute with Texas Senate Bill 485 (79th Legislature, 2005) and from rules on June 2, 2006 (see 31 TexReg 4529), the recent TCEQ Sunset legislation effectively reinstated it. However, the TCEQ Sunset legislation did not replace language removed by Senate Bill 485 in 2005 in Texas Water Code (TWC), §7.156, relating to criminal liability, which had made unauthorized delivery a Class A misdemeanor. Therefore, this proposal reinstates administrative liability for common carriers and does not address criminal or misdemeanor liability.

Although the proposed changes to §334.5 regarding delivery prohibition deletes the term "owner or operator" and inserts the term "common carrier" the substantive effect of this proposed change is not to remove owner/operator liability because existing §334.8(c)(5)(A) states that the owner or operator must make available a valid delivery certificate to a common carrier before delivery of a regulated substance may be accepted. Thus, within Subchapter A, §334.5, actions or obligations of a common carrier with regard to making deliveries are addressed, while §334.8 continues to address owners' and operators' obligations with regard to delivery certificates and acceptance of deliveries. Both aspects of delivery prohibition (delivery and acceptance) are required under the Energy Act.

*§334.19, Fee on Delivery of Petroleum Product*

The commission proposes new §334.19, relating to the setting of the PST delivery fee. Revenue from this fee is deposited to the Petroleum Storage Tank Remediation (PSTR) Account 655, described in TWC, §26.3574. Under that section, a fee is imposed on the delivery of a petroleum product that has been removed from a bulk facility storage tank for delivery directly into a cargo tank or a barge to be transported to another location for distribution or sale in the state. The fee amounts were set as specific dollar amounts in statute to correspond with cargo tank capacity. For example, the current statutory fees are $3.75 for each delivery into a cargo tank having a capacity of less than 2,500 gallons; $7.50 for 2,500 to 5,000 gallons; $11.75 for 5,000 to 8,000 gallons; $15 for 8,000 to 10,000 gallons; and $7.50 for each increment of 5,000 gallons delivered into a cargo tank having a capacity of more than 10,000 gallons. These fee amounts were adjusted by statutory changes in prior legislation.

However, in HB 2694, the TCEQ Sunset legislation amended the statutory fees to caps (i.e., *not more than* $3.75) and directed the commission by rule to "set the fee in an amount not to exceed the amount necessary to cover the agency's costs of administering this subchapter, as indicated by the amount appropriated by the legislature from the petroleum storage tank remediation account for that purpose." In the past, the TCEQ was not required to state the PST delivery fee in rule. However, the Texas Comptroller of Public Accounts' (Comptroller's) rules on this subject did state the statutorily-set fee amounts (see 34 TAC §3.151, "Imposition, Collection, and Bonds or Other Security of the Fee"). The TCEQ Sunset legislation directed the TCEQ to set the amount of the fee, with the Comptroller continuing to collect it.

Since the statute requires the TCEQ to set the fees in an amount not to exceed the amount necessary to cover costs of administering the program, the TCEQ must adjust the fee rate on an ongoing basis, as appropriate, to comply with this statutory requirement. Therefore, in this rulemaking, the TCEQ is proposing to set the fee at an amount to secure sufficient revenue to support the current appropriations and other fund obligations, while allowing for the fee to be adjusted based on relevant factors such as anticipated future costs, appropriations, and fund obligations. To account for the expedited timeframe necessary for future fee adjustments within the statutory cap and based on appropriations, the proposed rules would allow the fee to be adjusted in future years without initiating rulemaking by the TCEQ. Rather, the proposed rule would allow for a process including but not limited to notification in the *Texas Register* with receipt of public comment. In this manner, the Comptroller would be able to rely on an official statement by the TCEQ of the fee amount necessary to achieve the required revenue based on the legislature's appropriation. The TCEQ solicits specific comment on the amount of the fee, and in particular on the proposal reflected in the rule that the agency would adjust the fee as necessary to comply with the statutory requirement through notification in the *Texas Register* and not through a full rulemaking process.

*§334.84, Corrective Action by the Agency*

The commission proposes to amend §334.84, relating to State Lead authorization for removal of UST systems at facilities which

meet certain criteria, including a determination of financial inability of the tank owner or operator to remove the tank and the assessment of the potential risk of contamination from the site. This change is being made to implement HB 2694, §4.17 and §4.18. The statutory change to TWC, §26.351 was intended to clarify that section of the statute. Under that section, the commission was clearly authorized to undertake corrective action "in response to a release or a threatened release" under certain conditions. The conditions were: if the owner or operator "is unwilling," "cannot be found," "is unable" or "more expeditious corrective action is necessary." However, the term "threatened release" was not defined. In addition, TWC, §26.351(a), the subsection defining corrective action to include tank removal, referred only to corrective action being done "in response to a release." This subsection did not mention "threatened release." One interpretation was that the TCEQ State Lead program was authorized to remove tanks only as part of corrective action where a release had already been confirmed (by another party). However, additional ambiguity existed since the statute already defined, "risk-based corrective action" in TWC, §26.342(15) as including *"site assessment* or site remediation (emphasis added)." Thus, it was questionable whether "corrective action" by State Lead could include "assessment" to determine whether tanks had leaked. The TCEQ Sunset legislation clarified the authorization for the TCEQ to undertake corrective action to remove an underground or aboveground storage tank.

In accordance with the legislation, rules will authorize tank system removal when the tank: 1) is not in compliance with the requirements of this chapter; 2) is temporarily out of service or out of operation; 3) presents a contamination risk; and 4) is owned or operated by a person who is financially unable to remove the tank. The proposed rules describe the factors for determining financial inability and for the assessment of the potential risk of contamination from the site. Also, the term "out of service" in the statute is being clarified in the rule as referring to "temporarily out of service as described in 30 TAC §334.54(a) or out of operation as defined in 30 TAC §334.2(71)." This language is intended to avoid confusion because the phrase "out of service" is not defined; however, commission rules already have several defined terms relating to tank status, such as "in operation," "in service," "out of operation," "temporary removal from service," and "permanent removal from service."

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency as a result of the administration or enforcement of the proposed rules. The proposed rules implement certain provisions of HB 2694 including the reauthorization of the PST Delivery Fee, which was scheduled to expire August 31, 2011. Other state agencies and units of local government that own or operate PSTs are expected to pay lower PST delivery fees than in previous years as a result of the proposed rules.

This rulemaking would implement HB 2694, §§4.16 - 4.19, 82nd Legislature, by amending Chapter 334. The changes would reinstate common carrier liability; allow the removal of underground or aboveground storage tanks under certain circumstances; set the PST delivery fee; and allow for a process to revise the fee as needed. The proposed rules concerning common carrier liability are required to comply with the federal Energy Policy Act of 2005, and they prohibit the delivery of regulated substances to out of compliance PST facilities.

*PST Delivery Fee*

The PST delivery fee had been set to expire on August 31, 2011. HB 2694 reauthorized the collection of the fee in Account 655 - Petroleum Storage Tank Remediation and required the agency to set the rates in rule so that revenue collected covers the cost of administering the program. Rates under agency rule could not exceed the maximum rates found in TWC, §23.3574. PST delivery fee rates will continue to correspond to cargo tank capacity as was done in the past, but the rates will be set to only allow the agency to recoup the cost of administering the program, including fund obligations, as well as the Comptroller's cost of collection. Revenue will be collected by the Comptroller. The rates charged under the proposed rules are expected to be approximately 27% less for the next five years than current rates.

As a result of the proposed rate structure, agency revenue in Account 655 is estimated to be $28.3 million in Fiscal Year 2012, $22.4 million in Fiscal Year 2013, $22.7 million in Fiscal Year 2014, and $23.1 million in Fiscal Year 2015. Revenue collected under the proposed rules will be less than would have been collected under the previous rate structure. However, since the proposed rules continue the collection of the PST delivery fee, the agency will be able to continue to administer the PST program. In addition, the agency will be allowed to remove noncompliant USTs through the State Lead program since the proposed rules expand the scope of activity for which the PST delivery fee can be used.

*Administrative Penalties*

The proposed rules reinstate common carrier liability and authorize the agency to assess administrative penalties for violations if regulated substances are delivered to out of compliance PST facilities. Federal regulations require the agency to prohibit these types of deliveries. Penalties for violations are set in the agency's penalty policy, and the amount of a penalty depends on the type of violation.

*Impact on Other State Agencies and Units of Local Government*

The agency estimates that there are 1,200 storage tanks owned or operated by other state agencies and 4,800 owned or operated by units of local government. USTs owned by governmental entities would include those used in operating and maintaining vehicle fleets. Under the proposed rules, these governmental entities will continue to pay the PST delivery fee. However, the rates of the delivery fee set in the proposed rules are an estimated 27% lower than the fees established in prior years. The exact amount of reduction in the PST delivery fee for each governmental entity will depend on the cargo tank capacity of the USTs owned or operated. Cumulatively, state agencies are expected to pay $500,000 less per year under the proposed rate structure, and the statewide reduction in PST delivery fee revenue for units of local government is expected to be $2 million less once the proposed rates are in effect.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be continued protection of the environment and public health and safety through continued removal of noncompliant USTs and prevention of releases of regulated substances to the environment since owners and operators of PSTs will be required to comply with technical standards in order to receive fuel deliveries.

The proposed rules are not expected to have a fiscal impact on most individuals, but individuals that own or operate PSTs should expect to experience the same fiscal impacts as those experienced by large and small businesses.

The agency estimates that there could be as many as 9,900 USTs owned or operated by large businesses. These large businesses may be affected by the proposed rules to the extent that the PST delivery fee is paid by them. However, the PST delivery fee will be assessed at rates that are approximately 27% lower than rates charged in prior years. The proposed PST delivery fee imposed on large businesses will depend on cargo tank capacity. Statewide rates for large businesses are expected to be $4 million less per year once the proposed rates are in effect.

The proposed rules will also benefit owners or operators of noncompliant USTs who are financially unable to remove them. The proposed rules will allow the PST delivery fee revenues, as appropriated, to be used to remove USTs through the State Lead program if noncompliant owners are financially unable to remove these USTs and there is a risk of contamination.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rules. Approximately 2,030 storage tanks are thought to be owned by small or micro-businesses. Small businesses will continue to pay the PST delivery fee under the proposed rules, but statewide, small businesses are expected to pay $900,000 less per year than they paid in previous years once the proposed rates are in effect.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to protect the environment, comply with federal regulations, and implement state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule intended 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.

Regarding the first part of that definition, the specific intent of this rulemaking is to "protect the environment or reduce risks to human health from environmental exposure": 1) by ensuring that unauthorized USTs (i.e., tanks which have not been issued a delivery certificate by the TCEQ based on a self-certification of compliance with administrative and technical tank rules) do not receive deliveries of regulated substances by reinstating liability of persons who make deliveries to such tanks; 2) by implementing the petroleum products delivery fee which funds the PSTR account, pursuant to TWC, §26.3573 and §26.3574, to support the agency's PST regulatory program, whose purpose is to both prevent and remediate releases from USTs into the environment; and 3) by clarifying the agency's authority to address existing releases or prevent future releases by removing out-of service USTs where there is a contamination risk and the tanks are owned or operated by a person who is financially unable.

However, the second part of the definition of a "major environmental rule" is not met: the proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The term "material" means "having real importance or great consequence" in contrast to incidental or insignificant impact.

With regard to delivery prohibition, the proposed rules do not have an adverse effect, as described, for the reason that no additional cost is imposed on common carriers when they ascertain whether a PST facility has a valid, current delivery certificate. They may view paper copies of the delivery certificate or view the agency's Web site to determine whether a site has a delivery certificate. PST facility owners and operators are already required to ensure that a delivery certificate is made available for the common carrier to view. Thus, there are no costs associated with common carrier compliance with delivery prohibition.

With regard to the setting of the petroleum product delivery fee, there are no adverse effects as described above for the reason that the amount of the fee is being reduced. This reduction will likely benefit the economy, productivity, competition, and jobs, without adversely affecting the environment or public health, since the fee is being continued at a rate sufficient to meet the central PST Program functions of preventing and addressing releases. Under language in the TCEQ Sunset legislation, TWC, §26.3574(b-1) states that the commission by rule shall set the amount of the fee in an amount not to exceed the amount necessary to cover the agency's costs of administering this subchapter, as indicated by the amount appropriated by the legislature from the PST remediation account for that purpose. Because the legislative intent is that the fee no longer brings in more revenue than is needed to support appropriations and fund obligations, economic savings or benefits will be seen by the payers of the fee, and possibly indirectly by other consumers if savings are passed on.

Lastly, regarding the clarifying of the TCEQ's authority to remove out-of-service USTs when there is a contamination risk and an owner/operator is financially unable, there are no adverse impacts on 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 TCEQ Sunset legislation added new subsection TWC, §26.351(c-1), which clarified that the commission may undertake corrective action to remove an underground or aboveground storage tank that: 1) is not in compliance with the requirements of this chapter; 2) is out of service; 3) presents a contamination risk; and 4) is owned or operated by a person who is financially unable to remove the tank.

Because funding for this authority comes from the appropriation from the PSTR account, no additional or different funds will be required above existing appropriations. Therefore, this aspect of

the rule will not cause a material adverse effect on 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. Rather, the removal of noncompliant tanks which pose a risk has a direct beneficial effect on the environment and public health and safety, while indirectly having a possible benefit on the economy by returning properties with potential environmental hazards to productive use.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), 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." None of these four elements is applicable; the proposed rule package does not exceed any federal or state requirements, nor exceed delegation agreements or contracts. The proposed rules are made to implement specific statutory amendments made during the recent TCEQ Sunset legislation and are not proposed solely under the general powers of the agency.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rules and performed an assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rules is to implement statutory changes relating to PSTs made with the recent TCEQ Sunset legislation. More specifically, the rule proposal has the purposes of: 1) ensuring that unauthorized USTs (i.e., tanks which have not been issued a delivery certificate by the TCEQ based on a self-certification of compliance with administrative and technical tank rules) do not receive deliveries of regulated substances by reinstating liability of persons who make deliveries to such tanks; 2) implementing the petroleum products delivery fee which funds the PSTR account, pursuant to TWC, §26.3573 and §26.3574, and which is used to support the agency's PST regulatory program, whose purpose is to both prevent and remediate releases from USTs into the environment; and 3) clarifying the agency's authority to address existing releases or prevent future releases by removing out of service USTs where there is a contamination risk and the tanks are owned or operated by a person who is financially unable. The proposed rules would substantially advance these stated purposes by amending and adding to rule sections to: 1) allow for administrative penalties against persons who deliver to unauthorized tanks; 2) continue the petroleum products delivery fee at appropriate amounts; and 3) allow the agency to remove USTs under the appropriate circumstances.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because the proposed rules in total are a government action which: is taken in response to a real and substantial threat to public health and safety; is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose.

Regarding the first criterion, the rules are taken in response to a real and substantial threat to public health and safety. First, the storage of regulated substances in USTs poses a potential threat to the environment that must be regulated, and the regulatory changes being proposed in this rulemaking address that potential threat by prohibiting persons from delivering to unauthorized tanks. Second, implementing the statutory continuation of the petroleum products delivery fee at appropriate amounts is necessary to support the regulatory program that remediates and prevents UST contamination. Third, the rules implement the statutory authority for the agency to remove USTs when a threat is being posed by a noncompliant, out of service tank whose owner or operator is financially unable.

Regarding the second criterion, the proposed rules are designed to significantly advance the health and safety purpose by creating disincentives for persons making deliveries to unauthorized tanks; by continuing to fund a program which both prevents and cleans up releases; and by allowing for direct action by the commission to remove USTs under certain critical circumstances. Regarding the third criterion, the proposed rules do not impose a greater burden than is necessary to achieve the health and safety purpose because: 1) there is no significant burden to common carriers to check delivery certificate status before making deliveries; 2) there is no burden associated with the measured and carefully tailored reduction of the petroleum products delivery fee; and 3) there is no burden associated with the TCEQ taking direct action to remove tanks under circumstances when private parties are financially unable to do so. In summary, this action is exempt under Texas Government Code, §2007.003(b)(13).

Nevertheless, the commission further performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The proposed rules implement statutory changes made by the TCEQ Sunset legislation by reinstating the PST delivery prohibition, extending the petroleum products delivery fee, and clarifying the agency's authority to remove noncompliant and out of service USTs which pose a contamination risk and are owned or operated by persons who are financially unable. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rules. There are no burdens imposed on private real property from these proposed rules and the benefits to society of implementing the proposed rules are: 1) the effect of decreasing the likelihood of regulated substances being delivered to USTs which may cause releases; 2) the effect of continuing the fee which funds the PST program whose goal is to prevent and remediate releases from tank systems; and 3) the effect of allowing certain USTs which pose a threat to be removed by the commission. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore, must be consistent with all applicable CMP goals

and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include two of the goals listed in 31 TAC §505.12: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs. Because this rulemaking: a) prevents deliveries to unauthorized tanks; b) continues the fee to fund the PST program to prevent and remediate releases from PSTs and; c) allows direct action by the commission to remove USTs which pose a risk in appropriate circumstances, it will therefore aid in ensuring that releases to the environment continue to be addressed. This rulemaking is consistent with the goals of protecting and preserving coastal environments.

None of the CMP policies stated in 31 TAC §501.13 are relevant to, nor are they adversely affected by, the proposed rules for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances. Additionally, none of the specific policies described in 31 TAC §§501.16 - 501.34 apply to this rulemaking.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any CNRAs.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on Wednesday, December 14, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-038-334-WS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Jonathan Walling, Petroleum Storage Tank and Dry Cleaner Remediation Program Section, (512) 239-2295.

## SUBCHAPTER A. GENERAL PROVISIONS

### 30 TAC §334.5, §334.19

Statutory Authority

The amendment and new section are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks; TWC, §26.3467(d), which requires the commission to make rules relating to the duty to ensure certification of a tank before delivery; and TWC, §26.3574(b-1), which requires the commission to set the amount of the petroleum products delivery fee.

The proposed amendment and new section implement changes in laws of this state made during the 82nd Legislature, 2011, with the passage of the TCEQ Sunset legislation, House Bill 2694, in particular changes made to TWC, §26.3467 and §26.3574.

*§334.5. General Prohibitions for Underground Storage Tanks (USTs) and UST Systems.*

(a) Design prohibitions. On or after September 1, 1987, no person may install or have installed an underground storage tank (UST) system for the purpose of storing or otherwise containing regulated substances unless such UST system, whether of single-wall or double-wall construction, meets the following standards.

(1) The UST system must prevent releases due to corrosion or structural failure for the operational life of the UST system.

(2) All components of the UST system must be either cathodically protected against corrosion, constructed of noncorrodible material, constructed of a steel material which has been clad with a noncorrodible material, or must be otherwise designed and constructed in a manner that prevents the release of any stored substances.

(3) The UST system must be constructed of, or lined with, a material that is compatible with the stored substance.

(b) Delivery prohibitions.

(1) Concerning UST systems which the tank owner or operator must self-certify under §334.8(c) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems), the following applies.

(A) Except as provided under subparagraphs (B) and (C) of this paragraph, no common carrier (as defined in §334.2 of this title (relating to Definitions)) shall deposit any regulated substance into [~~owner or operator of~~] a UST system regulated under this chapter [~~shall allow the deposit of any regulated substance into that UST system~~] unless that owner or operator has a valid, current delivery certificate issued by the agency covering that UST system.

(B) For new or replacement UST systems, only during the initial period ending 90 days after the date that a regulated substance is first deposited into the new or replacement system(s), a common carrier may accept, as adequate to meet the requirements of subparagraph

(A) of this paragraph documentation that the owner or operator has a "temporary delivery authorization," as defined in §334.8(c)(5)(D) of this title, issued by the agency for the facility at which the new or replacement UST system(s) exist [~~will be considered adequate to meet the requirements of subparagraph (A) of this paragraph~~].

(C) It is an affirmative defense to the imposition of an administrative penalty for a violation of subparagraph (A) of this paragraph that the person delivering a regulated substance into an UST relied on:

*(i)* a valid paper delivery certificate presented by the owner or operator of the UST or displayed at the facility associated with the UST;

*(ii)* a temporary delivery authorization presented by the owner or operator of the UST or displayed at the facility associated with the UST; or

*(iii)* registration and self-certification information for the UST obtained from the commission's Internet Web site not more than 30 days before the date of delivery.

(2) Concerning UST systems which are not required to be self-certified compliant at a given time under §334.8(c) of this title, but which are required to be registered under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems), the following applies.

(A) Except as provided under subparagraph (B) of this paragraph, no person (as defined in §334.2 of this title) shall deposit any regulated substance into a [~~owner or operator of a~~] UST system regulated under this chapter [~~shall allow the deposit of any regulated substance into that UST system~~] unless that owner or operator has a valid, current registration certificate issued by the agency covering that UST system.

(B) The prohibition referenced in subparagraph (A) of this paragraph is not applicable to deliveries into a new or replacement UST system occurring within 30 days of the first deposit of regulated substances.

(3) Concerning both types of delivery prohibition referenced in this subsection, the following documentation is considered adequate:

(A) the original valid, current document issued by the agency; or

(B) a legible copy of the valid, current document issued by the agency.

*§334.19. Fee on Delivery of Petroleum Product.*

(a) A fee is imposed on the delivery of a petroleum product on withdrawal from bulk of that product as provided by this subsection and pursuant to Texas Water Code, §26.3573. "Withdrawal from bulk means" the removal of a petroleum product from a bulk facility storage tank for delivery directly into a cargo tank or a barge to be transported to another location other than another bulk facility for distribution or sale in this state. Each operator of a bulk facility on withdrawal from bulk of a petroleum product shall collect from the person who orders the withdrawal a fee in an amount determined as follows, subject to future adjustments made under subsection (b) of this section:

(1) $2.75 for each delivery made after June 30, 2012 into a cargo tank having a capacity of less than 2,500 gallons.

(2) $5.50 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 2,500 gallons or more but less than 5,000 gallons.

(3) $8.65 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 5,000 gallons or more but less than 8,000 gallons.

(4) $11 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 8,000 gallons or more but less than 10,000 gallons and;

(5) $5.50 for each increment of 5,000 gallons or any part thereof delivered after June 30, 2012 into a cargo tank having a capacity of 10,000 gallons or more.

(b) TCEQ may adjust the fee rates in subsection (a) of this section through an appropriate notification process, such as but not limited to *Texas Register* publication with public comment, based on the agency's cost of administering this chapter, but not to exceed the maximum rates set by Texas Water Code, §26.3574. The projected rates will account for the biennial appropriations to the agency from the Petroleum Storage Tank Remediation Account Number 655, as well as fund obligations for Account Number 655, with projected revenue from the fee based on such factors as estimated fuel sales, population growth, consumer price index, and gas production.

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

Filed with the Office of the Secretary of State on November 4, 2011.

TRD-201104792
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 239-0779

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## SUBCHAPTER D. RELEASE REPORTING AND CORRECTIVE ACTION

### 30 TAC §334.84

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.352, which directs the commission to adopt rules establishing the requirements for maintaining evidence of financial responsibility for taking corrective action in response to a release from a UST; and TWC, §26.351(c-2), which requires the commission to adopt rules to implement rules regarding the commission's undertaking of corrective action to remove a UST.

The proposed amendment implements changes in laws of this state made during the 82nd Legislature, 2011, with the pas-

sage of the Sunset Legislation in House Bill 2694, in particular changes made to TWC, §26.351 and §26.3573.

*§334.84. Corrective Action by the Agency.*

(a) The agency may undertake corrective action in response to a release or a threatened release if:

(1) the owner or operator of the aboveground storage tank (AST) or underground storage tank (UST) is unwilling to take appropriate corrective action;

(2) the owner or operator of the AST or UST cannot be found;

(3) the owner or operator of the AST or UST, in the opinion of the agency, is unable to take the corrective action necessary to protect the public health and safety and/or the environment;

(4) the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571; has been granted such extension by the executive director; has applied to the agency in writing on an agency application form not later than July 1, 2011, to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program administered by the commission; and has agreed on the application form to allow access to that site to state personnel and state contractors. Once the executive director places such a site in the state lead program, the eligible owner or operator of that site is not liable to the commission for any corrective action costs incurred by the state lead program with regard to the site, unless the statutorily allowable maximum cost per site is exceeded; or

(5) notwithstanding any other provision of this subchapter, the executive director determines that more expeditious corrective action than is provided by this subchapter is necessary to protect the public health and safety or the environment.

(b) The agency may retain agents to perform corrective action it considers necessary to carry out the provisions of this chapter. The agents shall operate under the direction of the executive director.

(c) The agency shall generate a written response either accepting or denying the application of an eligible owner or operator, who has applied to the agency in accordance with the requirements of subsection (a)(4) of this section to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program, within 30 calendar days, as practicable, of the date that application is received by the agency's state lead program.

(d) The commission may undertake corrective action to remove a UST or AST that:

(1) is not in compliance with the requirements of this chapter;

(2) is temporarily out of service as described in §334.54(a) of this title (relating to Temporary Removal from Service) or out of operation as defined in §334.2(71) of this title (relating to Definitions);

(3) presents a contamination risk. A determination of the potential risk of contamination from a site may be made by the executive director based on such factors including, but not limited to, estimated age of the tank system; status as secured or non-secured; presence, absence, whether known or unknown, of regulated substances in the tank system; length of time the tank system has been out of service; location, including proximity to sensitive receptors; and any other relevant information regarding the UST system; and

(4) is owned or operated by a person who is financially unable to remove the tank. A determination of financial inability under this section may be made by the executive director based on such factors including, but not limited to, a tank owner or operator's financial statements; federal or state income tax returns; gross and net income for each of the three preceding years; net worth for each of the three preceding years; current cash flow position; long-term liabilities; the liquidity of assets; and any other data requested by the executive director, which in the opinion of the executive director is relevant to a determination of the ability of the tank owner or operator to fund proper removal of UST systems from service pursuant to §334.55 of this title (relating to Permanent Removal from 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.

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Kathleen C. Decker
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# TITLE 40. SOCIAL SERVICES AND ASSISTANCE

## PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

### CHAPTER 700. CHILD PROTECTIVE SERVICES

### SUBCHAPTER C. ELIGIBILITY FOR CHILD PROTECTIVE SERVICES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§700.315, 700.316, 700.320, 700.323, and 700.328 - 700.330; the repeal of §§700.317 - 700.319, 700.321, 700.327, 700.331 - 700.333, and 700.346; and new §§700.331, 700.346 and 700.347, relating to eligibility for child protective services, in its chapter governing Child Protective Services. The purpose of the changes is to update eligibility rules: (1) to incorporate a new placement setting referred to as "Supervised independent Living;" (2) create one Extended Foster Care program in response to federal guidance and state legislative changes related to extended foster care, return to care, and trial independence; and (3) to delete unnecessary provisions covered by federal law, simplify language and bring the rules into conformity with current practice.

The Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 ("Fostering Connections"), authorized state Title IV-E agencies to claim Federal Financial Participation (FFP) for young adults who choose to remain in foster care between the ages of 18 and 21 in order to receive additional support for their transition to independence. In recognition of the needs of this population, Fostering Connections further authorized states to claim FFP for young adults in foster care who reside in certain supervised independent living settings, referred to in these rules as "Supervised Independent Living" or "SIL" placements. This was accomplished through a change in the federal definition of a child-care institution for young adults

to include "a supervised setting in which the individual is living independently." (See 42 U.S.C. §672(c)). SIL placements will be offered to young adults who are in the extended foster care program as a placement option along with other traditional foster care placements.

Following guidance from the federal Administration for Children and Families issued July 9, 2010 on the SIL placement option as well as other aspects of Fostering Connections (See Program Instruction ACYF-CB-PI-10-11, July 9, 2010, page 9), DFPS has worked with HHSC to develop appropriate rate methodologies for SIL providers and to complete other necessary implementation steps, including the proposed adoption of these rules. DFPS anticipates being able to offer the SIL placement option to young adults in extended foster care beginning September 1, 2012.

Because the characteristics of SIL placements differ in part from existing foster care placements, DFPS is amending its rules to address the new placement setting. The rate-setting methodology for SIL placements, using pro forma rate analysis, was proposed to this Council at the June Council meeting, and HHSC anticipates holding a rate hearing concerning the proposal in September of this year.

The federal guidance on Fostering Connections referenced above also made FFP available to states for young adults who age out of foster care and temporarily live independently of the foster care system, but who later return to foster care for additional support. (See PI-10-11 at 5-7.) The federal guidance deems such youth to be engaged in a trial independence (TI) period during their absence from foster care and provides for the continuation of Title IV-E eligibility for youth who return to foster care within a minimum of six months, up to a maximum of 12 months if a court has ordered a TI period of 12 months. Prior to this federal guidance, Title IV-E funding was generally not available to young adults who leave the foster care system and later return to foster care. As a result, DFPS's current "Return to Care" program for young adults who return to foster care after age 18 is entirely state-funded and serves only those young adults who participate in a relatively limited set of educational/vocational options, e.g., the program was not available for young adults in college or who were working.

In addition, the July 2010 federal guidance clarified certain conditions that must apply to all young adults in extended foster care in order to receive FFP, the most significant of which is that the family court must continue to have jurisdiction over the youth while the youth is in extended foster care and during any TI period. In order to maximize FFP for extended foster care the Texas Legislature enacted amendments to the Texas Family Code that incorporate the federal guidance. Specifically, Article 63 of Senate Bill 1 and Article 11 of House Bill 79, of the First Called Session of the 82nd Legislative Session amended Subchapter G, Chapter 263 Family Code to automatically extend the court's jurisdiction over all youth in extended foster care, and to continue such jurisdiction during a TI period of not less than six months, or for such longer period as the court may order up to a maximum of 12 months.

Because the concept of TI from PI-10-11 is a broadening of FFP to the states for the extended foster care program, Texas will, in a fiscally neutral manner, be able to combine what had been referred to as the "Return to Care" program into one Extended Foster Care program that will permit young adults to remain in care or return to care during or after a TI period, up until the young adult's 21st birthday, so long as a DFPS-approved placement is available and the young adult meets the eligibility criteria contained in these amended rules, including agreeing to monthly caseworker visits and continued court oversight.

In addition to the above changes, DFPS is updating a number of the rules in Chapter 700, Subchapter C of this title (relating to Eligibility for Child Protective Services), as there are multiple provisions that unnecessarily duplicate controlling federal law, are inconsistent with current practices, and lead to confusion.

A summary of the changes is described below.

The amendment to §700.315 updates the section to include the extended foster care program and clarifies language.

The amendment to §700.316: (1) updates placement and care and age requirements to reflect adults in extended foster care; (2) adds SIL placements (via the definition of a "child-care institution") as a placement type that can receive foster care maintenance payments; (3) incorporates requirements regarding foster family homes that move out of state; (4) deletes resource and income requirements, because they are not eligibility criteria for foster care and relate instead to offsets covered by §700.330; (5) deletes lump sum provision as it offers no substantive clarification to the public; (6) deletes unnecessary provisions related to the prior extended foster care program and moves criteria for the current program to new §700.346; (7) clarifies that aging out youth in DADS guardianship are eligible for foster care maintenance payments but are not otherwise subject to the same eligibility requirements as the general extended foster care population; (8) specifies situations in which a child is ineligible for any foster care assistance; and (9) clarifies and updates terminology and cites.

Section 700.317 and §700.318 are repealed because the rules offer no clarification or guidance that is not contained in controlling federal law and state law respectively.

Section 700.319 is repealed because it is not necessary.

Section 700.320 is updated to reflect current practice.

Section 700.321 is repealed because it is an unnecessary repetition of the federal guidance on point.

The amendment to §700.323: (1) strengthens and clarifies controls on the approval process for temporary absences from non-emergency foster care; (2) deletes the distinction between authorized and non-authorized absences; and (3) adds that foster care providers are not entitled to reimbursement during a young adult's TI.

Section 700.327 is repealed because it is not needed.

The amendment to §700.328: (1) consolidates current subsections (a) and (d) and eliminates unnecessary language addressed by DFPS residential contracts; (2) updates the consolidated subsection for current practice, including changes to accommodate the Foster Care Redesign project; (3) updates the rule to reflect that rate setting is now conducted by HHSC and DFPS no longer has any authority to exempt a provider from the cost reporting requirements for DFPS contractors; (4) adds SIL providers and Single Source Continuum Contractors to the rule and makes clarifying edits to ensure consistency in terminology; and (5) updates terminology.

The amendment to §700.329 clarifies existing language.

The amendment to §700.330: (1) clarifies the rule by bringing it into conformity with current practice and simplifying language; and (2) ensures consistency with state law prohibiting any deduction from money earned by a child in foster care.

Section 700.331 is repealed and proposed as new. New §700.331: (1) consolidates current §700.331 and §700.332 into one rule: (2) brings the language into conformity with current practice; and (3) better notifies the public of DFPS' practices with respect to SSI income. As a result of the change §700.332 is also repealed.

Section 700.333 is repealed because it is not needed.

Section 700.346 is repealed and proposed as new. New §700.346: (1) provides for a unified extended foster care program with a single set of eligibility criteria; (2) provides that participation in the program is contingent on the availability of an approved placement; (3) clarifies eligibility criteria and brings the criteria into conformity with current practice; (4) clarifies that youth can transition between eligible activities in extended foster care; and (5) provides that young adults may return to extended foster care if they satisfy the eligibility criteria for the extended foster care program.

New §700.347 provides criteria for a young adult to enter and remain in a SIL placement or be moved to another placement.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 that youth who have aged out of foster care can avail themselves of a SIL living option that more closely resembles that of their non-foster-care peers, that young adults will have greater access to extended foster care without any increase in costs to the state due to maximization of federal funding, and that eligibility for foster care assistance is clarified for the public generally. There will be no effect on large, small, or micro-businesses because the proposed changes do not impose new requirements on any business and do not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

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

To solicit input on SIL prior to the public comment period, provider workgroup meetings were held from March 2009 to July 2009. A survey was sent out to residential providers and foster parents to solicit input on appropriate supervision of youth (both minor and young adults). A Request for Information (RFI 530-1--0002) was released in October of 2009, and a public forum was held on November 23, 2009. It is anticipated that a draft Request for Proposal (RFP) for SIL will be issued later this year.

Questions about the content of the proposal may be directed to Larry Burgess at (512) 438-5320 in DFPS's Child Protective Services Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-438, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

**40 TAC §§700.315, 700.316, 700.320, 700.323, 700.328 - 700.331, 700.346, 700.347**

The amendments and new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement P.L. 110-351, Fostering Connections Act, which provides for the use of Title IV-E for SIL placements; Texas Family Code §264.101, which provides for the payment of foster care maintenance for young adults 18 and older who are meeting certain employment or educational criteria; and Article 63 of Senate Bill 1 and Article 11 of House Bill 79 of the 1st Called Session of the 82nd Texas Legislature, which provide for extended court jurisdiction during trial independence and for certain court hearings for young adults in extended foster care.

*§700.315. Foster Care Assistance.*

(a) There are three types of foster care assistance provided to eligible children [~~in the conservatorship of DFPS, or in DFPS care pursuant to §700.316(a)(1)(D) and (E) of this title (relating to General Eligibility Requirements for Foster Care Assistance)~~]:

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

(b) The Title IV-E foster care assistance program provides foster care maintenance payments and Medicaid coverage to children who meet the requirements contained in §700.316 of this title (relating to General Eligibility Requirements for Foster Care Assistance) and who meet all eligibility requirements for payment of Title IV-E foster care maintenance payments under Title IV-E of the Social Security Act [~~and §700.317 of this title (relating to Additional Eligibility Requirements for Title IV-E Foster Care Assistance)~~].

(c) The state-paid foster care assistance program provides foster care maintenance payments and Medicaid coverage to children who meet the requirements contained in §700.316 of this title [~~and §700.318 of this title (relating to Additional Eligibility Requirements for State-Paid Foster Care Assistance)~~] but are not eligible for Title IV-E foster care assistance.

(d) MAO provides Medicaid benefits to children [~~in DFPS's managing conservatorship~~] who meet the requirements contained in §700.316(b) [~~of §700.316(c)~~] of this title but are not otherwise eligible for Title IV-E or state-paid foster care assistance.

(e) Other [~~All other~~] financial resources to which a child is entitled must be used before any type of foster care assistance is used to pay for the cost of a child's foster care, as provided in §700.330 of this title (relating to Billing and Payment for Foster Care Assistance).

*§700.316. General Eligibility Requirements for Foster Care Assistance.*

(a) A [~~The~~] child or young adult [~~youth~~] must meet all of the following criteria to be eligible for Title IV-E or state-paid foster care assistance.

(1) Responsibility for placement and care. Except as provided in subsection (c) of this section, the [~~The~~] Texas Department of Family and Protective Services (DFPS) must have [~~the~~] responsibility for the child's placement and care. This requirement is met if:

(A) (No change.)

(B) DFPS takes possession of the [a] child under Texas Family Code Chapter 262 [§262.204];

(C) (No change.)

(D) The young adult was [youth is] in DFPS's conservatorship on the day before turning 18, [immediately preceding his 18th birthday, and:]

*[(i)]* [has capacity and] has signed a voluntary Extended Foster Care Agreement, and meets all of the eligibility requirements in §700.346 of this title (relating to Extended Foster Care); or

*[(ii)* lacks capacity and the Texas Department of Aging and Disability Services (DADS) has applied for and is granted guardianship; or]

(E) The child lives with a parent who is receiving extended foster care assistance, except that in some instances the parent may be required to apply for Medicaid on the child's behalf [The youth qualifies as a return to care youth] under §700.346 of this title [(relating to Return to Foster Care)].

(2) Age[, educational, and vocational requirements].

[(A)] The child must be under [less than] 18 years old, unless he or she qualifies for extended foster care assistance under §700.346 of this title.[;]

[(B) The youth qualifies as a return to care youth under §700.346 of this title; or]

[(C) If a youth in foster care turns 18 years old, and is receiving foster care assistance, the youth's eligibility for foster care assistance ends on the last day of the month of his 18th birthday, unless one of the following conditions is satisfied:]

*[(i)* The youth is enrolled in and attending full time a high school or a program leading toward a high school diploma. In this case the youth's eligibility is extended until the end of the month the youth completes or withdraws from high school, or the end of the month in which the youth turns 22 years old, whichever comes first;]

*[(ii)* The youth has been accepted for admission to a college or vocational program that does not begin immediately. In this case the youth's eligibility is extended for a period not to exceed three and one-half months following the end of the month in which the youth graduates from high school or obtains a General Equivalence Diploma ("GED");]

*[(iii)* The youth is enrolled in and attending GED classes full time and is expected to complete the classes by his 19th birthday. In this case the youth's eligibility is extended until the end of the month the youth completes or withdraws from the classes, or the end of the month in which the youth turns 19 years old, whichever comes first;]

*[(iv)* The youth is enrolled in and attending full time a vocational or technical training program and is expected to complete the program before his 21st birthday. In this case the youth's eligibility is extended until the end of the month the youth completes or withdraws from the program, or the end of the month in which the youth turns 21 years old, whichever comes first; or]

*[(v)* The youth receives a GED, enrolls in a vocational or technical training program before his 18th birthday, and is expected to complete the program before or during the month of his 19th birthday. In this case the youth's eligibility for Title IV-E foster care eligibility is extended until the end of the month in which he completes or withdraws from the program, or the end of the month in which the youth turns 19 years old, whichever comes first.]

(3) Placement. The child must be receiving care [in Texas] in a placement that [licensed or verified foster home or a licensed or certified residential child-care operation approved for DFPS foster-care assistance, except in the following circumstances]:

(A) Meets the definition of "foster family home" or "child-care institution" as those terms are defined by 42 U.S.C. §672(c); and

(B) Is approved by DFPS. If the child is in foster family care and the foster family moves out of state with the agreement of DFPS, the child's eligibility for foster care assistance will be reviewed every 90 days for continued DFPS approval and to determine continued eligibility.

[(A) The child is in permanent foster family care and the foster family moves out of state. The foster family must secure foster care licensing in the new state of residence within 90 days, or the child's eligibility for foster care assistance will be terminated until appropriate licensing is secured. The DFPS program director may grant one extension of no more than 60 days, but only if it is clear that the foster family will be licensed in the additional time;]

[(B) The child is removed from an out-of-state adoptive or foster care placement; and DFPS determines that another out-of-state placement will better meet the child's needs than a return to Texas; or]

[(C) Under the service plan, the child is to be reunited with his biological family and must move out-of-state in order to live near the family.]

[(4) Resources. The child must not have equity in real or personal property in excess of:]

[(A) $10,000 if the child does not receive Supplemental Security Income (SSI); or]

[(B) $2,000 if the child receives SSI.]

[(5) Income. The child's monthly income must be less than the daily rate paid to the residential child-care operation for the child's maintenance. Countable income includes SSI; Retirement, Survivors, and Disability Insurance (RSDI); Veterans Administration (VA) benefits; any other dependent or survivor's income; funds resulting from the child's Indian heritage; or other income from private sources. The following types of income are not counted in determining eligibility:]

[(A) Earnings of a child who is a:]

*[(i)* full-time student; or]

*[(ii)* part-time student working less than 30 hours per week;]

[(B) Money given as a gift on an irregular basis by the parent to the child;]

[(C) Educational scholarships, loans, or grants provided to the child for purposes other than regular maintenance; and]

[(D) Child support payments received by or forwarded to the Office of the Attorney General.]

[(6) Lump-sum Income. Non-recurring lump-sum payments must be handled in accordance with all applicable state and federal laws and regulations. Lump sums placed in a trust inaccessible to the child do not affect a child's foster care eligibility.]

[(7) Social Security number. If eligible, the child must have, or must have applied for, a Social Security number.]

[(8) Additional Requirements. The child must meet the additional requirements for Title IV-E or state-paid foster care assistance

described in §§700.317, 700.318, and 700.346 of this title (relating to Additional Eligibility Requirements for Title IV-E Foster Care Assistance, Additional Eligibility Requirements for State-Paid Foster Care Assistance, and Return to Foster Care), as applicable.]

[(b) The following conditions determine the type of foster care assistance for which a youth qualifies if remaining in foster care past age 18 years:]

[(1) If the youth is enrolled in and attending full time a high school, GED classes, or a vocational or technical training program, and is scheduled to graduate or obtain a GED before or during the month of his 19th birthday, and the youth is not a ward of DADS, the youth's extension of foster care can remain Title IV-E until he completes or withdraws from high school, the GED classes, or the vocational or technical program, or the end of the month of the youth's 19th birthday, whichever comes first;]

[(2) If the youth is enrolled in and attending full time a high school or a program leading toward a high school diploma, but is not scheduled to graduate by his 19th birthday, the youth's foster care can be extended as state-paid until the end of month the youth completes or withdraws from high school, or the end of the month in which the youth turns 22 years old, whichever comes first;]

[(3) If the youth is enrolled in and attending full time a vocational or technical training program and is not expected to complete the program by his 19th birthday, the youth's foster care may be extended as state-paid and may continue until the end of the month the youth completes or withdraws from the program, or the end of the month the youth turns 21 years old, whichever comes first;]

[(4) If the youth is eligible for the return to care program as specified under §700.346(a)(2)(A)(iii) of this title, the foster care is state-paid at the Basic Service Level, or the facility's lowest contracted rate;]

[(5) If the youth is eligible for the return to care program as specified under §700.346(a)(2)(A)(i) and (ii) of this title, the foster care is state-paid at the appropriate service level; or]

[(6) If the youth is eligible for the extension of foster care assistance as specified in subsection (a)(2)(C)(ii) of this section, the extension of foster care is state-paid at the appropriate service level.]

(b) [(c)] In order to qualify for Medical Assistance Only (MAO), a child must meet the following requirements:

(1) DFPS must have responsibility for the child's placement and care, as defined in subsection (a)(1) of this section. The child may be in a licensed or unlicensed placement, as long as he or she remains in DFPS's managing conservatorship and is not eligible for [receiving] Medicaid through another program.

(2) The child must be under the age of 18 years.

(c) A young adult who was previously under the placement and care responsibility of DFPS on the day before turning 18 and who is under guardianship of the Department of Aging and Disability Services (DADS) on or after turning 18 is eligible for continued foster care maintenance payments as provided under §700.346 of this title except that:

(1) Once the guardian has been appointed, DFPS will file a notice of termination of the family court's jurisdiction, and the guardian is not required to agree to an extension of the family court's jurisdiction, under Texas Family Code Chapter 263, Subchapter G, as the probate court has continual oversight of the young adult's case;

(2) Case management, including monthly caseworker visits, are handled by the DADS guardian; and

(3) The young adult does not sign a Voluntary Extended Foster Care Agreement; rather, the guardian agrees to the appropriateness of the extended foster care placement on the young adult's behalf and complies with any corresponding documentation requirements DFPS may establish.

(d) Notwithstanding any other provision in this section, a child is not eligible for foster care assistance, including any costs associated with the provision of medical care, if:

(1) DFPS was named conservator of the child (or the minor parent of a child described in subsection (a)(1)(C) of this section) in a legal proceeding in which DFPS did not seek to be awarded managing conservatorship of the child;

(2) The child is placed in a detention center or facility awaiting a detention hearing; or

(3) The child is placed by a court having juvenile justice or criminal jurisdiction in a public institution as defined at 42 CFR §435.1009, or a residential child-care facility as defined in Human Resources Code, §42.002, as the result of a juvenile justice or criminal proceeding, adjudication, or conviction.

(e) For the purposes of this subchapter, references to the term "child" also refer to a young adult who is receiving extended foster care assistance as provided in §700.346 of this title, unless the context clearly indicates otherwise.

[(d) In addition to the eligibility criteria for continued foster care benefits after age 18 years under subsection (b) of this section, a youth who turns 18 years of age on or after October 1, 2010, while in the conservatorship of DFPS, or who is continuing to receive foster care benefits under subsection (b) of this section on or after October 1, 2010, is eligible for continued foster care benefits through the end of the month in which the youth turns 21 years of age, so long as sufficient documentation is provided on a periodic basis as required by the terms of the youth's Extended Foster Care Agreement to demonstrate that the youth is:]

[(1) regularly attending high school or enrolled in a program leading toward a high school diploma or high school equivalence certificate;]

[(2) regularly attending an institution of higher education or a post-secondary vocational or technical program;]

[(3) actively participating in a program or activity that promotes, or removes barriers to, employment;]

[(4) employed for at least 80 hours per month; or]

[(5) incapable of performing any of the activities listed in paragraphs (1) - (4) of this subsection due to a documented medical condition, as further described in subsection (e) of this section.]

[(e) There is a presumption that a youth is capable of the activities listed in subsection (d)(1) - (4) of this section. The presumption can be rebutted only if sufficient documentation is provided to verify the medical condition and that the medical condition renders the youth incapable of those activities. Such documentation of a medical condition might include a determination of disability from SSA, a determination of mental retardation, or a statement from a medical doctor. In addition, documentation must also verify the activities of daily living that the youth is rendered incapable of performing as a result of that medical condition.]

*§700.320. Eligibility in Medical Facilities before Placement.*

(a) A child in a medical facility is eligible for medical assistance only (MAO) if:

(1) The [the] child meets the general eligibility requirements specified in §700.316(b) [§700.316(c)] of this title (relating to General Eligibility Requirements for Foster Care Assistance); and

(2) DFPS plans to place the child outside the home in a residential child-care [foster care] facility or relative placement as soon as the child leaves the medical facility. DFPS must proceed with the planned placement unless [the child dies in the medical facility or] there is a change in the court order or some other event occurs that clearly precludes making the placement.

(b) (No change.)

*§700.323. Continuation of Foster Care Payments During Absences from Care.*

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

(d) If a child is temporarily absent [child's temporary absence] from non-emergency foster care [is authorized by DFPS], DFPS may continue to pay the foster care provider, if the payment is approved as follows: [for not more than 30 days during the child's absence, unless a greater period of payment is approved by the Child Protective Services (CPS) program administrator. DFPS may pay for not more than 90 days of care during a child's authorized absence if the CPS program administrator approves.]

(1) The appropriate Child Protective Services (CPS) regional supervisor and program director must approve payment for an absence of not more than 14 days;

(2) The regional program administrator must approve payment for an absence between 15 and 30 days;

(3) The CPS regional director and the CPS Director of Placement must approve payment for an absence between 31 and 90 days; and

(4) In unusual circumstances, payments may continue for an [authorized] absence of longer than 90 days with prior written approval by the CPS assistant commissioner or designee. [director. If a child's temporary absence from non-emergency care is not authorized by DFPS, DFPS may pay for not more than 15 additional days of care during the child's unauthorized absence.]

(e) A foster care provider with whom a child was placed prior to beginning a trial independence period, as defined in Texas Family Code, §263.601, is not entitled to a continuation of foster care payments during the trial independence period.

*§700.328. Foster Care Maintenance Payments.*

(a) Other than in a catchment area in which the Department of Family and Protective Services (DFPS) contracts with a Single Source Continuum Contractor, all providers of 24-hour residential child care, including foster family homes verified by DFPS, general residential operations, residential treatment centers, independent foster family homes, independent foster group homes, Supervised Independent Living (SIL) providers, child-placing agencies, and any other entity that meets the definition of "child-care institution" under 42 U.S.C. §672 must complete a contract or agreement with DFPS in order to receive foster care maintenance payments.

[(a) To receive foster care maintenance payments, private child care facilities must be approved by the Texas Department of Family and Protective Services (DFPS) for participation.]

[(b) DFPS's foster care rates will be determined by the service level that the child needs, subject to adjustments based on the extent to which other services provided by outside parties meet the child's needs or on other factors consistent with the child's needs. In the rate structure, rates are based on analysis of cost reports and other pertinent financial and statistical information including statistics published by the United States Department of Agriculture (USDA) on the expenditures on a child by families. DFPS's determination of a child's service level is based upon the child's characteristics, as described in DFPS's application form, and the descriptions of service levels.]

(b) [(c)] DFPS's foster care rates [Foster care maintenance payments are intended to cover the child's basic needs, not the needs of the provider, unless meeting provider needs is necessary for meeting the child's needs. The rates for foster care payments] are approved by the Health and Human Services Commission in accordance with 1 TAC §355.7103 (relating to Rate-Setting Methodology for 24-Hour Residential Child-Care Reimbursements) and 1 TAC §355.7105 (relating to Reimbursement Methodology for Supervised Independent Living). Except as otherwise provided in those rules, the foster care payment rate is tied to the child's service level.

[(d) To participate in DFPS's foster care assistance program, all DFPS and non-DFPS families and private, nonprofit and for-profit facilities, group homes, and child-placing agencies must complete a contract or agreement with DFPS. The contract or agreement must be signed by the foster care provider and DFPS and will be in effect for a designated period stated in writing in the contract or agreement. At the expiration of this period, the contract will continue according to its then-current terms until either party terminates the contract, or until DFPS notifies the provider of a change, at which point, the contract ends, and a new contract begins if the provider agrees to the new terms. This agreement will be expressed in writing.]

(c) [(e)] Any entity that receives foster care maintenance payments in accordance with subsection (a) of this section [Upon DFPS's request, these families, facilities, group homes, and child-placing agencies] must accept DFPS's Common Application for Placement of Children in Residential Child Care as the uniform assessment form and application for admission. [a DFPS application form as complete and sufficient application for a child's placement.]

(d) General residential operations, residential treatment centers, independent foster family [Facilities, group] homes, independent foster group homes, SIL providers, Single Source Continuum Contractors, and child-placing agencies that receive payment from DFPS either directly or indirectly must submit [a completed] cost reports in compliance with 1 TAC §355.7101 (relating to Cost Determination Process) and as specified in the entity's contract or agreement with DFPS. [report. These cost reports are used to set foster care rates for all service levels and emergency shelters. Reimbursement for a facility, group home, or child-placing agency serving all service levels is contingent on the completion and submittal of the cost report to DFPS.] Failure to complete and submit a cost report is grounds for placing a hold on payments to the provider [providers] or for terminating the contract or agreement.

[(f) DFPS may exempt a family, facility, group home, or child-placing agency from the cost report requirement if extenuating circumstances make it impossible for the facility, group home, or child placing agency to comply. A letter stating the reason(s) for requesting an exemption from completing the cost report must be submitted in writing to DFPS. DFPS will, in its sole discretion, make a determination about whether to grant the exemption.]

*§700.329. Effective Dates of Foster Care Maintenance Payments.*

(a) (No change.)

(b) The Department of Family and Protective Services (DFPS) pays for the calendar day on which a child is placed, but not for the calendar day on which the child is discharged. [The effective date for discontinuing payments for foster care is the date before the day the child leaves the facility.]

(c) DFPS [~~The Texas Department of Family and Protective Services~~] does not pay two different facilities for foster care assistance for the same child on the same date.

*§700.330. Billing and Payment for Foster Care Assistance.*

(a) The Department of Family and Protective Services (DFPS) will offset the costs of foster care assistance by utilizing any resources available to the child in excess of applicable resource limits and any sources of a child's income that are designated for the child's maintenance and support. Such sources of income include but are not limited to: Supplemental Security Income (SSI); Retirement, Survivors, and Disability Insurance (RSDI); Veterans Administration (VA) benefits; any other dependent or survivor's income; funds resulting from the child's Indian heritage; or other income from private sources designated for the child's support and maintenance. However, income earned by the foster child as a result of the child's employment while under the placement and care responsibility of DFPS cannot be used to pay for the child's care. [~~The child's countable income is deducted from the foster care assistance rate on a month-to-month basis.~~]

(b) DFPS [~~The Texas Department of Family and Protective Services (DFPS)~~] foster care billing staff use the IMPACT System to pay foster care assistance [~~DFPS foster homes and contracted facilities~~].

(c) If a county pays for foster care for the care of a child who is ineligible for state-provided foster care assistance or if a child's funds are used, the rate must be the same rate as DFPS pays [~~for the same service level~~].

*§700.331. Effect of SSI Eligibility on Foster Care Payments.*

(a) A child who receives Supplemental Security Income (SSI) benefits is eligible for state-paid foster care assistance, subject to offset as described in subsection (c) of this section and §700.330 of this title (relating to Billing and Payment for Foster Care Assistance).

(b) A foster care provider is eligible to receive state foster care payments for a child who is receiving SSI benefits only to the extent the cost of foster care exceeds the amount of the SSI benefits. Under no circumstances may a foster care provider receive a full foster care payment and the full SSI monthly benefit or any amount in excess of the applicable foster care reimbursement, as the foster care reimbursement is reduced dollar-for-dollar by SSI benefit amount.

(c) A child is not entitled to receive both SSI benefits and Title IV-E foster care assistance. However, Department of Family and Protective Services may make a decision to suspend SSI benefits for children who are Title IV-E eligible, in order to maximize federal funding.

*§700.346. Extended Foster Care.*

(a) Subject to the availability of a placement approved by Department of Family and Protective Services (DFPS), a young adult may receive foster care assistance if all of the following eligibility requirements are met:

(1) The young adult meets the requirements of §700.316 of this title (relating to General Eligibility Requirements for Foster Care Assistance);

(2) The young adult turned 18 years of age while in the temporary or permanent managing conservatorship of the DFPS;

(3) The young adult signs and continues to abide by the terms of a Voluntary Extended Foster Care Agreement, including monthly caseworker visits and participation in all required extended foster care review hearings under Subchapter G of Chapter 263, Texas Family Code;

(4) The young adult provides sufficient documentation on a periodic basis as required by the terms of the young adult's Voluntary Extended Foster Care Agreement to demonstrate that within 30 days of turning 18, the young adult is engaged in an eligible activity. For the purposes of this section, an "eligible activity" includes:

(A) Regularly attending high school or a program leading toward a high school diploma or high school equivalence certificate;

(B) Regularly attending an institution of higher education or a post-secondary vocational or technical program;

(C) Actively participating in a program or activity that promotes, or removes barriers to, employment;

(D) Being employed for at least 80 hours per month; or

(E) Being incapable of performing any of the activities listed in subparagraphs (A) - (D) of this paragraph due to a documented medical condition, as further described in subsection (b) of this section; and

(5) A young adult who is eligible for SSI, RSDI, or another monthly benefit designated for the young adult's maintenance and support agrees to allow DFPS to use any benefits received to offset the young adult's cost of care pursuant to a voluntary extended foster care financial agreement.

(b) There is a presumption that a young adult is capable of the activities listed in subsection (a)(4)(A) - (D) of this section. The presumption can be rebutted if sufficient documentation is provided to verify the medical condition and that the medical condition renders the young adult incapable of those activities. Such documentation of a medical condition might include a determination of disability from SSA, a determination of mental retardation, or a statement from a medical doctor that verifies the activities of daily living that the young adult is rendered incapable of performing as a result of the medical condition.

(c) Eligibility for extended foster care assistance ends on the earlier of the date a young adult ceases to meet the eligibility requirements of this section or the end of the month of the young adult's 21st birthday, except that a young adult who is otherwise eligible may continue to receive benefits until the young adult's 22nd birthday if the young adult is regularly attending high school or a program leading toward a high school diploma or high school equivalence certificate.

(d) A young adult who qualifies for extended foster care under this section may transition between eligible activities for a period not to exceed 30 days. A transition period in excess of 30 days, including a failure to provide sufficient documentation of participation in an eligible activity, will be considered a cessation of eligibility and will result in the termination of extended foster care assistance.

(e) A young adult may return to extended foster care at any time prior to the month before the young adult's 21st birthday, provided all the requirements in subsections (a) - (c) of this section are met.

*§700.347. Supervised Independent Living Placements.*

(a) In order for a young adult to be placed in a Supervised Independent Living (SIL) Placement the following must occur:

(1) The young adult must be determined eligible for the extended foster care program as provided in §700.346 of this title (relating to Extended Foster Care);

(2) The young adult must be approved by Department of Family and Protective Services (DFPS) for the SIL placement; and

(3) There must be an SIL placement approved by DFPS available.

(b) During the SIL placement the young adult must continue to meet the eligibility requirements of the extended foster care program as set forth in §700.346 of this title.

(c) If at any time the SIL placement is not meeting the needs of the young adult, the young adult is not functioning well or not following the rules of the placement, or the placement is otherwise inappropriate, DFPS has the option to place the young adult in another SIL placement or another foster care placement.

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

Filed with the Office of the Secretary of State on November 1, 2011.

TRD-201104706
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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**40 TAC §§700.317 - 700.319, 700.321, 700.327, 700.331 - 700.333, 700.346**

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement P.L. 110-351, Fostering Connections Act, which provides for the use of Title IV-E for SIL placements; Texas Family Code §264.101, which provides for the payment of foster care maintenance for young adults 18 and older who are meeting certain employment or educational criteria; and Article 63 of Senate Bill 1 and Article 11 of House Bill 79 of the 1st Called Session of the 82nd Texas Legislature, which provide for extended court jurisdiction during trial independence and for certain court hearings for young adults in extended foster care.

*§700.317. Additional Eligibility Requirements for Title IV-E Foster Care Assistance.*

*§700.318. Additional Eligibility Requirements for State-Paid Foster Care Assistance.*

*§700.319. Effective Date of Eligibility.*

*§700.321. AFDC Domicile for Children Relinquished at Birth and Children Born to Incarcerated Mothers.*

*§700.327. Eligibility for Four Months of Medicaid Coverage Following Denial of Title IV-E Foster Care Assistance.*

*§700.331. Effect of SSI Eligibility on State-Paid Foster Care.*

*§700.332. Effect of SSI Eligibility on Title IV-E Foster Care.*

*§700.333. Effect of SSI Eligibility on MAO.*

*§700.346. Return to Foster Care.*

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

Filed with the Office of the Secretary of State on November 1, 2011.

TRD-201104707
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## SUBCHAPTER F. RELEASE HEARINGS

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), the repeal of §§700.601 - 700.605; and new §§700.601 - 700.608, concerning release hearings, in its chapter governing Child Protective Services (CPS). The purpose of the proposal is to improve DFPS's ability to prevent abuse or neglect of children and vulnerable adults by decentralizing the process of releasing CPS findings to outside parties that have control over a designated perpetrator's access to children and vulnerable adults. Also, the rules in this subchapter have been changed to question and answer format for a more plain English approach to make the rules easier to read and understand.

New §700.601: (1) clarifies the definition of "release" by naming certain entities to which abuse or neglect finding information can be disclosed (such as employers and licensing boards) and specifying that disclosure may be made if the designated perpetrator has access to children and/or vulnerable adults; (2) adds new definitions for a "designated perpetrator" and "sustained perpetrator" for clarity; (3) adds a new definition for "vulnerable adults" which is a new basis to release abuse or neglect finding information when there is a risk of harm; (4) deletes unnecessary language; and (5) updates terminology.

New §700.602: (1) decentralizes the release process by changing the approval authority to the Managing Regional Attorney and Regional Director for the region that issued the abuse or neglect finding; and (2) clarifies and updates terminology.

New §700.603: (1) revises to whom the designated perpetrator sends a request for an appeal; (2) clarifies that the designated perpetrator is responsible for notifying DFPS of any change in address; (3) deletes from the repealed rule any CPS discretionary administrative review requirements; and (4) clarifies and updates terminology.

New §700.604 deletes from the repealed rule CPS discretionary administrative review requirements and clarifies and updates terminology.

New §700.605 describes the process DFPS will take once a release hearing is requested by a designated perpetrator.

New §700.606 describes the procedural rules that will be followed in a release hearing conducted by the State Office of Administrative Hearings (SOAH).

New §700.607 describes what actions a SOAH Administrative Law Judge may take regarding a CPS finding.

New §700.608 describes what happens when a designated perpetrator fails to appear at a release hearing that the designated perpetrator requested.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 that decisions about whether to release findings will be made quicker, thus supporting the preventing of abuse or neglect by persons who have previously abused or neglected children and may pose a risk to any child or vulnerable adult under his or her care. There will be no effect on large, small, or micro-businesses because the proposed changes do not impose new requirements on any business and do not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

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

Questions about the content of the proposal may be directed to Kay Love at (512) 438-3305 in DFPS's Child Protective Services Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-451, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

**40 TAC §§700.601 - 700.605**

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §40.002.

*§700.601. Definitions.*

*§700.602. Sustained Conclusions about Designated Perpetrators and Designated Victims/Perpetrators.*

*§700.603. Releasing Information about Designated Perpetrators or Designated Victims/Perpetrators to Outside Parties.*

*§700.604. Notice Requirements for Releasing Information to Outside Parties.*

*§700.605. Prerequisites for Release Hearings.*

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

Filed with the Office of the Secretary of State on November 2, 2011.

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Gerry Williams
General Counsel
Department of Family and Protective Services
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For further information, please call: (512) 438-3437

**40 TAC §§700.601 - 700.608**

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §40.002.

*§700.601. What do the following words and terms mean when used in this subchapter?*

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

(1) Designated Perpetrator--An individual whom the Department of Family and Protective Services (DFPS) has designated as a perpetrator or victim/perpetrator of child abuse or neglect as specified in §700.512(b)(2) - (3) of this title (relating to Conclusions about Roles).

(2) Release--The disclosure of information about a designated perpetrator to any party outside DFPS, including employers, licensing boards, and other entities who have control over an individual's access to children and/or vulnerable adults, without the consent of the designated perpetrator. For purposes of this subchapter, however, the term "release" does not apply to disclosures required by law, including those made pursuant to authority as set forth in §700.203 of this title (relating to Access to Confidential Information Maintained by the Texas Department of Family and Protective Services (DFPS)) and/or Texas Family Code §261.201.

(3) Release hearing--Also commonly known as a Due Process Hearing, provides a designated perpetrator an opportunity to appeal a decision by DFPS to release information about him/her. It is a formal administrative legal proceeding before an administrative law judge of the State Office of Administrative Hearings to determine whether a Child Protective Services finding of abuse or neglect of a child against a designated perpetrator is appropriate.

(4) Sustained Perpetrator--A designated perpetrator becomes a sustained perpetrator when:

(A) a Release (Due Process) Hearing under this subchapter (relating to Release Hearings) is held and an administrative law

judge has determined that there is a preponderance of the evidence to sustain DFPS's conclusion that the designated perpetrator is responsible for abuse or neglect of a child; or

(B) DFPS provides the designated perpetrator written notice of the right to request a Release (Due Process) Hearing, and the designated perpetrator either:

*(i)* Waives his/her right to appeal in writing; or

*(ii)* Fails to request in writing a hearing within 15 calendar days after receiving notice of that right.

(5) Vulnerable adult--This term includes:

(A) a disabled person with a physical, mental, or developmental disability that substantially impairs the person's ability to provide adequately for the person's care or protection, and who is 18 years of age or older or under 18 years of age and who has had the disabilities of minority removed (Human Resources Code, §48.002); or

(B) a person age 65 years or older.

*§700.602. When may DFPS release information about a designated perpetrator to outside parties?*

(a) Subject to the limitations specified in subsections (b) and (c) of this section, the Department of Family and Protective Services (DFPS) has the authority to conduct a release via a Non-Emergency or an Emergency Release.

(b) Before a Non-Emergency or Emergency Release is conducted, the release must be approved by:

(1) the Managing Regional Attorney for the region that issued the abuse or neglect finding; and

(2) the Regional Director for the region that issued the abuse or neglect finding. Before approving the release, the Regional Director must consult with the appropriate Managing Regional Attorney.

(c) For a Nonemergency Release, before DFPS may conduct a release, DFPS's conclusion about the designated perpetrator must be sustained as specified in §700.601(4) of this title (relating to What do the following words and terms mean when used in this subchapter?).

(d) For an Emergency Release, DFPS may conduct a release when there is evidence that the risk of harm to one or more children or vulnerable adults is both substantial and immediate. During an Emergency Release, DFPS acts as quickly as possible and without regard for the timing of an appeal by the designated perpetrator. In other words, DFPS will release the information before the abuse or neglect conclusion is sustained. However, notice of the release in compliance with §700.603 of this title (relating to What are the notice requirements for a designated perpetrator when DFPS releases information to outside parties?) will be sent to the designated perpetrator before the release is conducted. This notice will offer the designated perpetrator a release hearing after the release has been conducted.

*§700.603. What are the notice requirements for a designated perpetrator when DFPS releases information to outside parties?*

(a) Written notice. When the Department of Family and Protective Services (DFPS) decides to release information about a designated perpetrator as specified in §700.602 of this title (relating to When may DFPS release information about a designated perpetrator to outside parties?), DFPS must give the designated perpetrator written notice of DFPS's decision to release the information. DFPS must give the designated perpetrator written notice without regard to the designated perpetrator's previous receipt of written notice of the investigation findings.

(b) No additional notice. If DFPS's conclusion is about a sustained perpetrator (meaning the designated perpetrator has already been sustained as specified in §700.601(4) of this title (relating to What do the following words and terms mean when used in this subchapter?)), DFPS has the authority to release the same information again without additional notice to the sustained perpetrator.

(c) Prior approval by attorney. Before the written notice is provided to the designated perpetrator, it must be approved by the Managing Regional Attorney for the region that issued the abuse and/or neglect finding.

(d) Certified mail. DFPS must send the notice via certified mail with a return receipt requested, unless staff determines that a faster form of written notice is required.

(e) What the notice must include. DFPS's notice must include:

(1) a specification of the investigation findings as defined in §700.511 and §700.512 of this title (relating to Disposition of the Allegations of Abuse or Neglect and Conclusions about Roles);

(2) notice of DFPS's decision to release information about the designated perpetrator to the specific outside parties, which may include employers, licensing boards, and other entities who have control over his access to children or vulnerable adults;

(3) notice, when applicable, that the information will be released on an emergency basis before an appeal can be completed;

(4) notice that:

(A) the designated perpetrator has a right to appeal the decision to release information about him/her;

(B) to appeal the decision, the designated perpetrator must submit two copies of a written request for an appeal;

(C) the two copies of the designated perpetrator's written request for an appeal must be:

*(i)* postmarked within 15 days after the individual receives DFPS's written notice; and

*(ii)* sent to:

*(I)* the DFPS Docket Clerk; and

*(II)* the Regional Director for the region that issued the abuse/neglect finding; and

(D) the designated perpetrator is responsible for providing the Docket Clerk with written notification of any change in address that occurs after having requested a release hearing;

(5) notice that failure to appeal the decision may result in DFPS's release of the information now and in the future to other outside parties without the designated perpetrator's consent and without additional notice to the designated perpetrator at any time in the future;

(6) notice of the designated perpetrator's right to:

(A) review all audiotapes and videotapes included in DFPS's investigation record, if any; and

(B) request a copy of all the written documentation included in DFPS's investigation record;

(7) notice of DFPS's obligation to delete the following information from all written documentation that DFPS provides to the designated perpetrator:

(A) the name of the person who reported the abuse or neglect that DFPS investigated; and

(B) any other information that is confidential by law; and

(8) notice that the designated perpetrator's request for a copy of the written documentation included in the investigation record may be denied if:

(A) releasing the documentation would jeopardize an ongoing criminal investigation or proceeding; or

(B) the attorney representing DFPS in a lawsuit has determined that the documentation must be withheld.

*§700.604. When must DFPS arrange a release hearing for a designated perpetrator?*

The Department of Family and Protective Services (DFPS) arranges for a release hearing to be conducted when the following two actions have taken place:

(1) DFPS has notified the designated perpetrator of DFPS's decision to release information as specified in §700.603 of this title (relating to What are the notice requirements for a designated perpetrator when DFPS releases information to outside parties?); and

(2) the designated perpetrator has filed a written appeal of the decision to release within 15 days after receiving notice of that decision to release.

*§700.605. What happens after a designated perpetrator requests a release hearing?*

(a) After a designated perpetrator requests a release hearing, DFPS will ask the State Office of Administrative Hearings (SOAH) to appoint an administrative law judge to conduct proceedings necessary to make a final decision in the case.

(b) After SOAH assigns a docket number to your case:

(1) DFPS will send notice of the hearing, by regular and certified mail, to the designated perpetrator's last known address as shown by our records; or

(2) If the Docket Clerk has received written notice of representation from an attorney who will be representing the designated perpetrator at the hearing, DFPS will send the notice of the hearing to the attorney in a manner allowed under the rules referenced in §700.606 of this title (relating to How is a release hearing conducted?).

(c) The designated perpetrator is responsible for providing the Docket Clerk with written notification of any change in address that occurs after having requested a release hearing.

*§700.606. How is a release hearing conducted?*

A release hearing is conducted according to the following procedural rules which are incorporated into this rule by reference:

(1) Rules of the State Office Administrative Hearings (SOAH) found at 1 TAC Chapters 155, 157, and 161 (relating to Rules of Procedure, Temporary Administrative Law Judge, and Requests for Records);

(2) The Texas Government Code, Chapter 2001, Administrative Procedures Act (APA) rules, to the extent that they do not conflict with the SOAH rules; and

(3) The Texas Rules of Civil Procedure, to the extent that they do not conflict with the SOAH or APA rules.

*§700.607. What actions may an Administrative Law Judge (ALJ) take regarding a finding of Child Protective Services (CPS)?*

The ALJ may uphold, reverse, or alter a CPS finding of abuse or neglect.

(1) If the ALJ reverses the finding, then CPS will notify any previously notified outside parties of the outcome of the hearing. CPS will also change the role of the person from designated perpetrator to "no role" and "Reason to Believe" finding to "Ruled Out".

(2) If the ALJ upholds the finding, then CPS will conduct a release if it has not already been done on an emergency basis. CPS will also change the person's role from designated perpetrator to sustained perpetrator of child abuse and/or neglect.

(3) If the ALJ alters the CPS finding, then CPS will follow the direction outlined in the Order.

*§700.608. What happens if the designated perpetrator fails to appear at the release hearing?*

If the designated perpetrator fails to appear at the release hearing, the administrative law judge may enter a default decision that upholds the finding of abuse or neglect.

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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Gerry Williams
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Department of Family and Protective Services
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## SUBCHAPTER O. FOSTER AND ADOPTIVE HOME DEVELOPMENT

### 40 TAC §700.1501

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), an amendment to §700.1501, concerning decisions on foster home applications, in its Child Protective Services chapter. The purpose of the amendment is to correctly state the current practice of reviewing requests for variances and waivers to minimum standards for relative foster homes. The Residential Child Care Licensing Division is responsible for the review of all requests for variances and waivers to minimum standards, including the request made for relative foster homes. As a regulated child placing agency (CPA), the Foster and Adoptive Home Development (FAD) program of CPS does not have the statutory authority to process its own waiver and variance requests.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed 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.

Ms. Brown 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 that the public will better understand FAD's practices because the rule will correctly state the current practice for processing waivers and variances. There will be no effect on large, small, or micro-businesses because the proposed change does not impose new requirements on any business and does not require the purchase of any new

equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed section.

HHSC has determined that the proposed amendment 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, Government Code.

Questions about the content of the proposal may be directed to Terri Parsons at (512) 438-4793 in DFPS's Child Protective Services Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-445, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042(i) and §42.048(c), which grants the authority to promulgate minimum standards for CPAs regarding waivers and variances.

*§700.1501. Decision on Foster Home Applications.*

(a) To be accepted as a foster home, the home must meet the department's minimum standards, and the Texas Department of Family and Protective [~~and Regulatory~~] Services (DFPS) [~~(TDPRS)~~] must have determined, through the foster-home screening [~~and study~~], that the parents can provide adequate care for foster children in the department's managing conservatorship and that they will follow the department's policies for discipline of these children as specified in §700.1502(2)(K) of this title (relating to Foster and Adoptive Home Inquiry and Screening).

(b) Relative homes verified to provide foster care services to related children must meet the same requirements as non-relative foster homes. The Residential Child-Care Licensing Division of DFPS [~~Director of Child Protective Services, or his designee,~~] will consider requests for waivers and variances to minimum standards for relative foster homes on a case-by-case basis in accordance with applicable statutes, rules, and policies on waiver and variance requests for foster homes. [~~The Director of Child Protective Services, or his designee, shall use the criteria followed by TDPRS's Child Care Licensing Division when reviewing and approving non-relative foster home variance requests.~~]

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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Gerry Williams
General Counsel
Department of Family and Protective Services
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For further information, please call: (512) 438-3437

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## CHAPTER 732. CONTRACTED SERVICES
## SUBCHAPTER L. CONTRACT ADMINISTRATION

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§732.203, 732.226, and 732.238, concerning how long may a contract period last and when may the contract be renewed, may subcontracts be used to provide goods and services, and will DFPS make advance payment for contracted social services; the repeal of §732.214 and §732.229, concerning is the Department required to conduct a debriefing and is there a procurement protest or appeal procedure available; and new §732.229, concerning may an unsuccessful vendor request a debriefing or file a procurement protest, in its Contracted Services chapter. The purpose of the proposal is to update the contracting rules.

The amendment to §732.203: (1) increases from 54 to 60 months the total period of time that a competitively procured contract may last; (2) creates a waiver process that allows the Commissioner of DFPS to extend a contract beyond 60 months if doing so is in the best interests of the state and enforcement of the 60-month rule would create an undue hardship for DFPS; and (3) deletes an obsolete paragraph regarding outsourcing.

Section 732.214 is repealed, and the information is proposed in new §732.229.

The amendment to §732.226 eliminates the programmatic/ancillary dichotomy DFPS uses to review and approve subcontracts and allows DFPS to retain the right to approve or disapprove of the use of any particular subcontractor.

Section 732.229 is repealed and proposed as new. New §732.229: (1) combines the current procurement debriefing rule (§732.214) into this rule, which is modeled on the protest rules of HHSC, the Texas Attorney General, and the Texas Comptroller; (2) adds definitions to clarify the terms and positions involved in the initial protest and the appeal process; (3) clarifies when and how a provider may protest; and (4) adds timeframes so DFPS will have definite timeframes to comply with in cases of protests.

The amendment to §732.238 broadens the circumstances under which DFPS may make advance payments to contractors.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 to provide greater clarity in rules governing DFPS procurements and contracts, including when and how a provider may protest an award of a contract. There will be no effect on large, small, or micro-businesses because the proposed changes do not impose new requirements on any business and do not require the purchase of any new

equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

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

Questions about the content of the proposal may be directed to Jared Davis at (512) 438-5647 in DFPS's Legal Services Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-448, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

**40 TAC §§732.203, 732.226, 732.229, 732.238**

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement Human Resources Code §40.058.

*§732.203. How long may a contract period last and when may the contract be renewed?*

(a) A [~~At the Department's option, a~~] contract procured through competitive methods cannot [~~may be renewed annually as along as the total period of the contract does not~~] exceed 60 [~~54~~] months without being subject to a new procurement. The Commissioner of DFPS may waive this requirement if granting a waiver would be in the State's best interests and if 60 months maximum timeframe would create an undue hardship for DFPS.

(b) DFPS [~~The Department~~] may renew [~~annually for an indefinite number of years~~] a contract procured by noncompetitive methods for an indefinite number of years as long as DFPS conducts [~~; however,~~] a periodic review at least every five years [~~, not less often than every four years or the time specified in the waiver authorizing noncompetitive procurement, whichever is less, must be made and documented~~] to determine if competition is necessary or possible.

(c) Renewal of a contract is not automatic; the contract may be renewed at DFPS's [~~the Department's~~] option, when authorized, and when it is in DFPS's [~~the Department's~~] best interests.

~~[(d) For outsourcing the delivery of substitute care, case management services, and the evaluation of the provision of these services, the Department may competitively procure contracts containing:]~~

~~[(1) an initial contract period not to exceed 60 months; and]~~

~~[(2) two renewal options with each option not exceeding 24 months.]~~

*§732.226. May subcontracts be used to provide goods and services?*

(a) Subcontracts, for the purposes of this rule, are contracts for providing a part or all of the services procured by DFPS [~~program components~~]. Such contracts are between the party contracting with DFPS [~~the Department~~] and the subcontractor. [~~Subcontractors for ancillary or support services, such as janitorial services, are not covered by this rule.~~]

~~[(b) Contractors must obtain the Department's approval of program subcontracts. No subcontract will be approved unless it contains a clause that the subcontractor agrees to accept and abide by all terms and conditions imposed on subcontractors under the primary contract between the Department and the contractor.]~~

(b) [~~(c)~~] The contractor must agree to require its [~~program~~] subcontractor(s), if any, to accept and abide by each of the terms [~~provisions~~] of the contract with DFPS that apply to the services being provided by the subcontractor [~~the Department~~].

(c) [~~(d)~~] The contractor must notify DFPS of its intent to subcontract and the names of any subcontractors. DFPS retains the right to disapprove the use of any subcontractor. [~~agree to refrain from entering into any program subcontract(s) for services without prior approval or waiver of the right of approval in writing by the Department of the subcontractor's qualifications to perform and meet the standards fixed by the contract and its attached plans of operation.~~]

*§732.229. May an unsuccessful vendor request a debriefing or file a procurement protest?*

(a) The following words and terms, when used in this section, will have the following meaning unless the context clearly indicates otherwise:

(1) DFPS--The Department of Family and Protective Services, an agency of the state.

(2) Director--The person designated by the Commissioner of DFPS to review a particular procurement protest. If the Commissioner of DFPS has not designated anyone, then "Director" will refer to the DFPS Director of Procurement.

(3) General Counsel--Office of General Counsel of DFPS.

(4) Protestor--Any actual or prospective bidder, applicant, respondent, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract and has filed a formal protest in accordance with subsections (c) - (f) of this section.

(5) Appellant--A protestor or interested party who has filed an appeal of a Director's determination to the General Counsel in accordance with subsection (i) of this section.

(b) Upon request, unsuccessful vendors are entitled to request a debriefing, which is an informal review of an award or a tentative award during which DFPS provides information concerning the strengths and weaknesses of their response, bid, or application in comparison to the evaluation criteria stated in the solicitation instrument. Although an unsuccessful vendor may request an oral debriefing, only DFPS's written debriefing serves as the official response.

(c) DFPS provides a protestor the opportunity to request a formal review of an award or tentative award under the following circumstances:

(1) DFPS made an award under a competitive procurement method and the applicant was not selected for the award;

(2) DFPS made an award under a formal provider enrollment solicitation and the applicant was not selected for an award; or

(3) DFPS made a purchase or award under a sole source or emergency procurement.

(d) To formally protest a protestor must send a statement that:

(1) Is in writing and notarized;

(2) Includes a precise description of the relevant facts;

(3) Identifies the statutes, Health and Human Services Commission (HHSC) rules, or DFPS rules regarding contracts that the action complained of is alleged to have violated;

(4) Includes a specific description of each action by DFPS that the protesting party alleges to have violated the statutes, HHSC rules, or DFPS rules identified in paragraph (3) of this subsection;

(5) Identifies the issues to be resolved;

(6) Identifies any authority that supports the protest;

(7) Is submitted to the DFPS Director of Procurement; and

(8) Is received by the DFPS Director of Procurement within 10 working days after the protesting party knows, or should have known, of the occurrence of the action that is protested.

(e) Formal protests will be resolved through the use of procedures that are described in subsections (c) - (k) of this section.

(f) In the event of a timely protest under this section, DFPS will not proceed further with the solicitation or award of the contract unless the Director, after consultation with the General Counsel, makes a written determination that the contract must be awarded without delay, to protect the best interests of the state.

(g) If the protest is resolved by mutual agreement, then the protestor and the Director will sign an agreement acknowledging resolution of the protest.

(h) If the protest is not resolved by mutual agreement, then the Director will consider all relevant information contained in the protest and issue a written determination on the protest.

(1) If the Director determines that no violation of rules or statutes has occurred, the Director will inform the protestor within 30 days of receiving the protest by letter, which sets forth the reasons for the determination and of the appeal process requirements.

(2) If the Director determines that a violation of statutes or the rules has occurred, the Director will inform the protestor within 30 days of receiving the protest by letter, which sets forth the reasons for the determination (including the provisions that were violated) and the corrective action that DFPS will take. If DFPS has awarded a contract, then corrective action may include voiding the contract.

(i) The Director's determination of a protest may be appealed by the protestor to the General Counsel. The appeal must be in writing and must be received by the General Counsel no later than 10 working days after the receipt of the Director's determination. The scope of appeal is limited to a review of the Director's determination.

(j) The General Counsel will review the Director's determination and issue a written determination on the appeal. The General Counsel's written determination constitutes the final administrative action of DFPS and will be sent to the appellant and the Director.

(k) A protestor's or appellant's failure to meet the requirements of this section invalidates the protest or appeal.

*§732.238. Will DFPS make advance payment for contracted social services? [~~Advance Payment for Contracted Social Services.~~]*

DFPS [~~The department~~] may make advance payments to contractors for contracted social services subject to the following limitations:

[~~(1) The contractor must be a private, nonprofit legal entity.~~]

(1) [~~(2)~~] Funds designated for advance payments must be available for DFPS [~~the department~~] to make advance payments to contractors.

(2) [~~(3)~~] The contractor must use the advance payments for operating expenses allowed under an existing DFPS [~~social services~~] contract [~~for services to eligible clients. The contractor must not use advance payments for needs assessments, planning, or construction~~].

(3) [~~(4)~~] A contract must be in effect before DFPS [~~the department~~] makes an advance payment.

[~~(5) The contractor must post bond acceptable to the department before or at the time the contract is executed. The amount of the bond may not be less than the total amount of the advance payment. All bonds must contain a Texas loss payable rider payable to the department.~~]

[~~(A) If the contractor offers a blanket employee dishonesty bond, it must cover all positions including those of subcontractors; or~~]

[~~(B) The contractor must certify that only those people named in the bond have access to funds; or~~]

[~~(C) The subcontractor may have a separate bond.~~]

(4) [~~(6)~~] The advance payment for each [~~specific~~] contract is based on need and must not be more than 15% of the contractors' total compensation from DFPS under the contract [~~allowable reimbursable expenditure for 45 days~~].

(5) [~~(7)~~] DFPS [~~The department~~] may adjust the advance payment amount based on the contractor's cash outflow and service level variations.

(6) [~~(8)~~] The contractor must liquidate the advance payment either at the end of each contract period consistent with the terms of each specific contract or at other times determined necessary by DFPS [~~the department~~]. The contract period begins with the contract's effective date and ends with its termination date.

(7) [~~(9)~~] DFPS will not make [~~The department stops making~~] advance payments to a contractor if the contractor has not liquidated the advance payment for the previously contracted period according to the terms of the contract.

(8) [~~(10)~~] DFPS [~~The department~~] may impose additional limitations if the limitations do not conflict with this section.

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

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Gerry Williams
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Department of Family and Protective Services
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**40 TAC §732.214, §732.229**

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Family and Protective Services or in the Texas Register*

*office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement Human Resources Code §40.058.

*§732.214. Is the Department required to conduct a debriefing?*

*§732.229. Is there a procurement protest or appeal procedure available?*

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 743. MINIMUM STANDARDS FOR SHELTER CARE

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§743.3, 743.7, 743.105, 743.107, and 743.201; new §743.109; and the repeal of §§743.301, 743.303, 743.305, 743.307, 743.309, 743.401, 743.403, 743.405, 743.407, 743.409, 743.411, 743.501, 743.503, 743.505, 743.507, 743.509, 743.511, 743.513, 743.515, 743.517, 743.519, 743.601, 743.603, 743.605, 743.607, 743.701, and 743.703, in its Minimum Standards for Shelter Care chapter. The purpose of the proposal is to implement legislation passed in the 82nd Legislative Session. Senate Bill 1178 adds Subchapter G, relating to Shelter Care, to Chapter 42 of the Human Resources Code, so that shelter care can be regulated separately from other types of child day care. The result is a certificate of compliance for shelter care facilities rather than a license, limited inspection and investigations, and fewer minimum standards. This new subchapter in the law largely reflects the subchapter already in place for the regulation of employer-based day care. DFPS is proposing significant changes to Chapter 743 to mirror the law. A summary of the changes is described below.

The amendment to §743.3 changes a cross reference because the rule currently referenced is being repealed and proposed as a new rule.

The amendment to §743.7 deletes requirements that are not reflective of the new law for shelter care facilities. Deleted requirements include posting the last inspection or investigation results, posting emergency evacuation plans, and maintaining liability insurance. Another change clarifies that Child Care Licensing expects shelter care facilities to comply with all applicable laws and rules.

The amendment to §743.105 deletes the requirement for primary caregivers to obtain fingerprint-based criminal history checks.

The amendment to §743.107 deletes the requirement for shelter care facility employees to sign the affidavit required by Human Resources Code §42.059.

New §743.109 relocates the information in current §743.301, which is repealed. This moves the rule into a new subchapter within Chapter 743, since the other rules in the subchapter with §743.301 are being repealed.

The amendment to §743.201 makes the rule consistent with Human Resources Code §42.063, which is specifically referenced in the new subchapter of Human Resources Code Chapter 42 that focuses on the regulation of shelter care facilities.

Subchapter D consisting of §§743.301, 743.303, 743.305, 743.307, and 743.309 is repealed. The new subchapter in Human Resources Code Chapter 42 specifically for shelter care facilities limits Child Care Licensing's authority to promulgate minimum standards for shelter care. Most of the requirements in Subchapter D, such as activities and discipline, do not fit within the new law's parameters for shelter care minimum standards, so the subchapter is repealed. The one rule currently in this subchapter that still applies is proposed as new §743.109.

Subchapter E consisting of §§743.401, 743.403, 743.405, 743.407, 743.409, and 743.411 is repealed. The new subchapter in Human Resources Code Chapter 42 specifically for shelter care facilities limits Child Care Licensing's authority to promulgate minimum standards for shelter care. None of the requirements in Subchapter E, such as nutrition and environmental health, fit within the new law's parameters for shelter care minimum standards, so the subchapter is repealed.

Subchapter F consisting of §§743.501, 743.503, 743.505, 743.507, 743.509, 743.511, 743.513, 743.515, 743.517, and 743.519 is repealed. The new subchapter in Human Resources Code Chapter 42 specifically for shelter care facilities limits Child Care Licensing's authority to promulgate minimum standards for shelter care. None of the requirements in Subchapter F, such as fire safety, fit within the new law's parameters for shelter care minimum standards, so the subchapter is repealed.

Subchapter G consisting of §§743.601, 743.603, 743.605, and 743.607 is repealed. The new subchapter in Human Resources Code Chapter 42 specifically for shelter care facilities limits Child Care Licensing's authority to promulgate minimum standards for shelter care. None of the requirements in Subchapter G, such as furnishings and activity space, fit within the new law's parameters for shelter care minimum standards, so the subchapter is repealed.

Subchapter H consisting of §743.701 and §743.703 is repealed. The new subchapter in Human Resources Code Chapter 42 specifically for shelter care facilities limits Child Care Licensing's authority to promulgate minimum standards for shelter care. None of the requirements in Subchapter H, such as diaper changing and feeding infants, fit within the new law's parameters for shelter care minimum standards, so the subchapter is repealed.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 that shelters will have more flexibility to provide needed services to their clients. There will be no effect on large, small, or micro-businesses because the proposed changes do not impose new requirements on any business and do not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

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

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-442, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

## SUBCHAPTER A. DEFINITIONS AND SERVICES

**40 TAC §743.3, §743.7**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.3. What do certain words and terms mean in this chapter?*

The following words have the following meanings in this chapter:

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

(4) Primary Caregiver--A caregiver that is also responsible for being available to other caregivers during any child-care hours of operation and for ensuring that all children in care are adequately supervised per §743.109 [~~§743.301~~] of this title (relating to How many caregivers are required?).

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

*§743.7. What are my operational responsibilities?*

You must:

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

(4) Allow us to inspect your operation during its hours of operation, as outlined in §745.8407(6) [~~§745.8407(3)~~] of this title (relating to When will Licensing inspect and/or investigate an operation?);

(5) Post at your operation the:

(A) Permit we issue you; and

[~~(A) Your license;~~]

[~~(B) The letter or form from the most recent Licensing inspection or investigation;~~]

(B) [~~(C)~~] [~~The~~] Licensing notice *Keeping Children Safe;* [~~and~~]

[~~(D) Emergency and evacuation relocation plans;~~]

(6) (No change.)

(7) Maintain true, current, accurate, and complete records at your operation for us to review, as required by this chapter and any other applicable law or rule; and

[~~(8) Maintain liability insurance as required by the Human Resources Code, §42.049; and~~]

(8) [~~(9)~~] Comply with the applicable Child Care Licensing laws found in Chapter 42 of the Human Resources Code, the applicable minimum standards, and other applicable law and rule [~~rules in this chapter~~].

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

Filed with the Office of the Secretary of State on November 2, 2011.

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Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## SUBCHAPTER B. PERSONNEL AND TRAINING

**40 TAC §§743.105, 743.107, 743.109**

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.105. What are the background check requirements?*

(a) (No change.)

(b) You must request a fingerprint-based criminal history check for[~~:~~]

[~~(1) Primary caregivers; and~~]

[~~(2)~~] any [~~Any~~] person who requires a background check under subsection (a) of this section, if that person has lived outside of Texas any time during the previous five years or there is reason to believe other criminal history exists.

(c) - (f) (No change.)

*§743.107. What personnel records are required?*

[~~(a)~~] For primary caregivers, caregivers, and supplemental caregivers, you must have a record at the operation that includes at least:

(1) Proof that the person meets the age and education requirements in §743.101 of this title (relating to What are the minimum qualifications?);

(2) Proof of required background check(s); and

(3) Documentation that training requirements have been met.

[~~(b) If the person is also an employee of your operation, the person's record must include the affidavit required by the Human Resources Code, §42.059.~~]

*§743.109. How many caregivers are required?*

(a) At least one primary caregiver must be on duty and available to other caregivers during all child-care hours of operation.

(b) Each primary caregiver or caregiver may not be responsible for more than 12 children five years old or younger. Children under one year old count as two children.

(c) Each primary caregiver or caregiver may not be responsible for more than 28 children six years old and older.

(d) When age groups are mixed, there must be at least one primary caregiver or caregiver per 20 children, with no more than 12 children in the group five years old or younger.

(e) The primary caregiver is responsible for ensuring that all children in care are adequately supervised.

(f) If a child is attending a therapeutic activity, which the child would attend whether or not he was in your child-care program, the child is not considered to be in the child-care program for the duration of the therapeutic activity.

(g) If a child is attending an activity sponsored by a volunteer organization, which the child would attend whether or not he was in your child-care program, the child is not considered to be in the child-care program for the duration of the activity sponsored by the volunteer organization.

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

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For further information, please call: (512) 438-3437

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## SUBCHAPTER C. SERIOUS INCIDENT REPORTING

### 40 TAC §743.201

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.201. When must I report a serious incident to Licensing?*

(a) You must report the following types of serious incidents if they occur when the child is in your child-care program. The reports must be made to the following entities, and the reporting must be within the specified time frames:
Figure: 40 TAC §743.201(a)

(b) You must report the following types of serious incidents involving your operation or an employee to the following entities within the specified time frame:
Figure: 40 TAC §743.201(b)

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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Gerry Williams
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## SUBCHAPTER D. PROGRAM REQUIREMENTS

### 40 TAC §§743.301, 743.303, 743.305, 743.307, 743.309

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Family and Protective Services or in the Texas Register*

*office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.301. How many caregivers are required?*

*§743.303. If I am subject to regulation, is there a limit on the number of hours a child may be in my care?*

*§743.305. Are there activity plan requirements?*

*§743.307. What activities must I provide for children?*

*§743.309. What discipline techniques may be used with children in care?*

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

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Gerry Williams
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## SUBCHAPTER E. HEALTH

### 40 TAC §§743.401, 743.403, 743.405, 743.407, 743.409, 743.411

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.401. What must I do if a child has a contagious illness?*

*§743.403. What are the nutrition and hydration requirements for children?*

*§743.405. What steps must I take to ensure a healthy environment?*

*§743.407. What does Licensing mean when it refers to "sanitizing"?*

*§743.409. What is a disinfecting solution?*

*§743.411. May I use a dishwasher or washing machine to sanitize items?*

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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Gerry Williams
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## SUBCHAPTER F. SAFETY

### 40 TAC §§743.501, 743.503, 743.505, 743.507, 743.509, 743.511, 743.513, 743.515, 743.517, 743.519

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.501. What are the safety requirements?*

*§743.503. What are the requirements for emergency procedures?*

*§743.505. What are the fire safety requirements?*

*§743.507. Must I have a fire-extinguishing system?*

*§743.509. Where must I mount fire extinguishers?*

*§743.511. How often must I inspect and service the fire extinguisher(s)?*

*§743.513. Must I have a smoke-detection system?*

*§743.515. How often must I have an electronic smoke alarm system tested?*

*§743.517. How must smoke detectors be installed?*

*§743.519. How often must the smoke detectors be tested?*

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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Gerry Williams
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Department of Family and Protective Services
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## SUBCHAPTER G. SPACE AND EQUIPMENT

### 40 TAC §§743.601, 743.603, 743.605, 743.607

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.601. What furnishings and equipment must I provide?*

*§743.603. What are the requirements for toilets and sinks?*

*§743.605. How much activity space must I have for children?*

*§743.607. What are the requirements for outdoor recreation space and equipment?*

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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Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## SUBCHAPTER H. INFANT AND TODDLER CARE

### 40 TAC §743.701, §743.703

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§743.701. Are there specific requirements for feeding infants?*

*§743.703. What equipment must I have for diaper changing?*

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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Gerry Williams
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# CHAPTER 744. MINIMUM STANDARDS FOR SCHOOL-AGE AND BEFORE OR AFTER-SCHOOL PROGRAMS

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§744.105, 744.201, 744.305, 744.603, 744.1309, 744.1311, 744.1319, 744.1327, and 744.1331; the repeal of §§744.1329, 744.2651, 744.2653, and 744.2655; and new §§744.2651, 744.2653, 744.2655, 744.2663, and 744.2665, in its Minimum Standards for School-Age and Before or After-School Programs chapter. The purpose of the proposal is to implement legislation passed in the 82nd Legislative Session. House Bill (H.B.) 434 requires a child-care facility or registered family home to: (1) follow the directions of a child's health-care professional when providing to a child in care specialized medical assistance; and (2) maintain a copy of any written directions from the health-care professional for a reasonable period of time. H.B. 1615 restricts under what circumstances medication may be given to a child. Except in a medical emergency, a child day care operation must have parental consent before giving a child a prescription or over-the-counter medication. Senate Bill (S.B.) 260 increases orientation, pre-service, and annual training requirements for day care centers. S.B. 265 requires training in certain child-care operations to be relevant to the age of children for whom care is provided and adds trainer minimum qualifications. All training outlined in this section of the law must be conducted by a person who meets one of seven options for minimum qualifications. S.B. 471 requires day care centers to have specific policies and one hour of training related to child abuse and neglect. A summary of the changes is described below.

The amendment to §744.105 broadens the definition of health-care professional beyond its current purpose of only describing those professionals that can provide vaccinations. This will make it more germane to H.B. 1615.

The amendment to §744.201 specifies that all provisions for training must comply with the training requirements in these minimum standards.

The amendment to §744.305 requires the operation to notify Child Care Licensing when a new individual becomes a controlling person at the operation or an individual that was previously a controlling person ceases to be a controlling person at the operation.

The amendment to §744.603 adds to the list of contents required for a child's record: (1) medication administration records; and (2) health-care professional orders or recommendations for specialized medical assistance. The amendment also states how long the records must be kept. These changes are a result of H.B. 434 and H.B. 1615.

The amendment to §744.1309 clarifies that annual training for caregivers and site directors must be relevant to the age of the children for whom the person provides care. This is required by S.B. 265.

The amendment to §744.1311 clarifies that annual training for operation and program directors must be relevant to the age of the children for whom the operation provides care. Another proposed change deletes a limit on self-instructional training. Now that all self-instructional training must be developed by a person who meets one of the qualifications outlined in S.B. 265, it is no longer necessary to limit self-instructional training.

The amendment to §744.1319 adds the trainer minimum qualifications outlined in S.B. 265, which states that training must be conducted by a person who meets one of seven options for minimum qualifications. The amendment also clarifies that self-instructional training must be developed by a person who meets one of the listed trainer qualifications. Section 744.1329 is repealed because it is no longer necessary to limit self-instructional training.

The amendment to §744.1327 revises the cross reference to §744.1319.

The amendment to §744.1331 requires that the trainer qualifications be included in training documentation, so that Child Care Licensing staff can monitor for compliance with the law.

The name of Subchapter L, Safety Practices, Division 2, Medication and Medical Assistance, is changed. The new name of Division 2 reflects additions to the division related to specialized medical assistance.

Section 744.2651 is repealed and proposed as new. New §744.2651 defines "medication" to include non-prescription medication. The circumstances under which a program may administer medication to a child, which were previously included in this rule, are incorporated into proposed changes to §744.2653 and §744.2655.

Section 744.2653 is repealed and proposed as new. New §744.2653 lists the authorization requirements for all medications, which include: (1) written permission from a parent or telephone permission for a one-time dose; (2) re-authorization at least annually; and (3) prohibition against a parent authorizing more medication than what is prescribed or than what is included in the medication's label instructions.

Section 744.2655 is repealed and proposed as new. In addition to the record keeping requirements for medications, the new rule expands the requirements moved from current §744.2651 and §744.2653 to include that medication can only be given according to label instructions or as directed by a health-care professional.

New §744.2663 defines specialized medical assistance.

New §744.2665 requires the operation to follow the recommendations or orders of the child's health-care professional when providing specialized medical assistance to a child in care and requires the operation to maintain any written orders or recommendations in the child's record for at least three months after the health-care professional has indicated that the specialized medical assistance is no longer needed. These changes are required by H.B. 434.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 that caregivers and directors in School-Age and Before or After-School Programs will have a better understanding of when medications may be given to children, how specialized medical assistance must be provided, and who must provide the needed training, and therefore provide better care to Texas children. There will be no effect on large, small, or micro-businesses because the proposed changes do not impose new requirements on any business and do not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

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

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-442, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

## SUBCHAPTER A. PURPOSE AND DEFINITIONS

### 40 TAC §744.105

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.042(e)(8)(A), which provides that a "health care provider" can provide directions for specialized medical assistance required by a child.

*§744.105. What do certain words and terms mean in this chapter?*

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or unless the context clearly indicates otherwise. In addition, the following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) - (26) (No change.)

(27) Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nurse Examiners, a licensed vocational nurse (LVN), licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of his license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

[~~(27) Health-care professional--A licensed physician, licensed or registered nurse, or other licensed medical personnel providing comprehensive preventive, diagnostic, or therapeutic medical care to the child. This does not include medical doctors or medical personnel where immunizations and contraindications to immunizations are outside the scope of the licensed practice, such as chiropractors, homeopaths, podiatrists; or medical practitioners not licensed to practice in the United States.~~]

(28) - (48) (No change.)

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

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## SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION
## DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

### 40 TAC §744.201

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.0421 and §42.0426, which provide training and orientation requirements.

*§744.201. What are my responsibilities as the permit holder?*

You are responsible for the following:

(1) (No change.)

(2) Developing written personnel policies, including job descriptions, job responsibilities and requirements; [~~, and making~~]

(3) Making provisions for training that comply with Division 4, Subchapter D of this chapter (relating to Personnel);

(4) [~~(3)~~] Designating an operation director, program director, or site director, as applicable, who meets minimum standard qualifications as specified in Subchapter D of this chapter [~~(relating to Personnel)~~];

(5) [~~(4)~~] Reporting and ensuring your employees and volunteers report suspected abuse, neglect, or exploitation directly to DFPS and may not delegate this responsibility, as required by the Texas Family Code §261.101;

(6) [~~(5)~~] Ensuring all information related to background checks is kept confidential as required by the Human Resources Code §40.005(d) and (e);

(7) [~~(6)~~] Ensuring parents have the opportunity to visit the operation any time during your hours of operation to observe their child, program activities, the building, grounds, and the equipment without having to secure prior approval;

(8) [~~(7)~~] Maintaining liability insurance as required by the Human Resources Code, §42.049, if we license you to care for 13 or more children;

(9) [~~(8)~~] Complying with the child-care licensing law found in Chapter 42 of the Human Resources Code, the applicable minimum standards, and other applicable rules in the Texas Administrative Code; and

(10) [~~(9)~~] Reporting to DFPS any Department of Justice substantiated complaints related to Title III of the American with Disabilities Act, which applies to commercial public accommodations.

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

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## DIVISION 2. REQUIRED NOTIFICATIONS

**40 TAC §744.305**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.072(g), which now extends the controlling persons concept to all child-care operations.

*§744.305. What other situations require notification to Licensing?*

(a) You must notify us as soon as possible, but no later than two days after:

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

(4) A county or district attorney accepts an indictment or information regarding an official complaint against an employee alleging commission of any crime noted in §745.651 of this title (relating to What types of criminal convictions may preclude a person from being present in an operation?); [~~and~~]

(5) The occurrence of any other situation which places a child at risk, such as forgetting a child in an operation vehicle or on the playground or not preventing a child from wandering away from the operation unsupervised; and [~~.~~]

(6) A new individual becomes a controlling person at your operation, or an individual that was previously a controlling person ceases to be a controlling person at your operation.

(b) (No change.)

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

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## SUBCHAPTER C. RECORD KEEPING
## DIVISION 1. RECORDS OF CHILDREN

**40 TAC §744.603**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8)(B), which requires a child-care facility or registered child-care home to maintain directions from a health-care provider for a "reasonable time;" and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§744.603. What records must I have for children in my care and how long must I keep them?*

(a) You must maintain the following records for each child enrolled in your operation:

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

(5) Licensing *Incident/Illness Report* form; [~~and~~]

(6) Sign-in and sign-out tracking information as specified in §744.627 of this title (relating to Must I have a system for signing children in and out of my care?);[~~.~~]

(7) Medication administration records; and

(8) A copy of any health-care professional recommendations or orders for providing specialized medical assistance to the child.

(b) These records must at a minimum be kept at the operation and [~~must~~] be available during your hours of operation for the following periods of time:

(1) Medication administration records for three months after administering the medication;

(2) Health-care professional recommendations or orders for three months after the health-care professional has indicated that the specialized medical assistance is no longer needed; and

(3) All other records noted in subsection (a) of this section for [~~at least~~] three months after the child's last day in care.

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

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## SUBCHAPTER D. PERSONNEL
## DIVISION 4. PROFESSIONAL DEVELOPMENT

### 40 TAC §§744.1309, 744.1311, 744.1319, 744.1327, 744.1331

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.0421 and §42.0426, which provide training and orientation requirements.

*§744.1309. How many clock hours of annual training must be obtained by caregivers and site directors?*

(a) Each caregiver and site director must obtain at least 15 clock hours of training each year relevant to the age of the children for whom the person provides care. The 15 clock hours of annual training are exclusive of orientation, pre-service training requirements, CPR and first aid, transportation safety training, and high school child-care work-study classes.

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

*§744.1311. How many clock hours of training must an operation director or a program director obtain each year?*

(a) An operation director and/or [~~and or~~] a program director must obtain at least 20 clock hours of training each year relevant to the age of the children for whom the operation provides care. The 20 clock hours of annual training are exclusive of CPR and first aid, orientation, pre-service, and transportation safety training requirements.

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

(g) The director may obtain clock hours or CEUs from the same sources as caregivers.[~~, with the following exceptions:~~]

(h) [~~(1)~~] Training hours may not be earned for presenting training to others, with the exception of up to two hours of training on transportation safety.[~~; and~~]

[~~(2) No more than 10 of the required 20 clock hours of annual training may be obtained through self-instructional training.~~]

*§744.1319. Must the training for my caregivers and the director meet certain criteria?*

(a) Training may include clock hours or CEUs provided by [~~obtained through~~]:

(1) A training provider registered with the Texas Early Care and Education Career Development System's Texas Trainer Registry, maintained by the Texas Head Start State Collaboration Office;

(2) An instructor who teaches early childhood development or another relevant course at a secondary school or institution of higher education accredited by a recognized accrediting agency;

(3) An employee of a state agency with relevant expertise;

(4) A physician, psychologist, licensed professional counselor, social worker, or registered nurse;

(5) A person who holds a generally recognized credential or possesses documented knowledge relevant to the training the person will provide; or

(6) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has been awarded a Child Development Associate (CDA) credential; or

(B) Holds at least an associate's degree in child development, early childhood education, or a related field.

[~~(1) Workshops or courses offered by local school districts, colleges or universities, or Licensing;~~]

[~~(2) Conferences;~~]

[~~(3) Self-instructional materials, excluding CPR and first aid;~~]

[~~(4) Planned learning opportunities provided by child-care associations or Licensing; or~~]

[~~(5) Planned learning opportunities provided by professional consultants, such as those listed on the Texas Trainer Registry, or by a director or caregiver with specialized training or knowledge on the subject matter that meets minimum standard qualifications.~~]

(b) Training may include clock hours or CEUs obtained through self-instructional materials, if the materials were developed by a person who meets one of the qualifications in subsection (a) of this section.

(c) Self-instructional training may not be used for CPR or first-aid certification.

(d) [~~(b)~~] All training must include:

(1) Specifically stated learning objectives;

(2) A curriculum, which includes experiential or applied activities;

(3) An evaluation/assessment tool to determine whether the person has obtained the information necessary to meet the stated objectives; and

(4) A certificate of successful completion from the training source.

*§744.1327. What is self-instructional and instructor-led training?*

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

(c) Both self-instructional and instructor-led training must also include the components listed in §744.1319(d) [~~§744.1319(b)~~] of this title (relating to Must the training for my caregivers and the director meet certain criteria?).

*§744.1331. What documentation must I provide to Licensing to verify that training requirements have been met?*

(a) Except as provided in this section, you must maintain original certificates documenting CPR/first-aid and annual training in each employee's personnel record at the operation. To be counted toward compliance with the minimum standards, the trainer or training source must provide the participant with an original certificate or letter showing:

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

(4) The trainer's name, or the source of the training for self-instructional training; [~~and~~]

(5) The trainer's qualifications, in compliance with §744.1319 of this title (relating to Must the training for my caregivers and the director meet certain criteria?); and

(6) [~~(5)~~] Length of the training specified in clock hours, CEUs, or college credit hours, as appropriate.

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

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

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**40 TAC §744.1329**

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

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.0421 and §42.0426, which provide training and orientation requirements.

*§744.1329. How many annual training clock hours may caregivers obtain from self-instructional materials?*

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 L. SAFETY PRACTICES
## DIVISION 2. MEDICATION

**40 TAC §§744.2651, 744.2653, 744.2655**

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8), which contains requirements regarding directions from a child's health care provider concerning specialized medical treatment for a child in care; and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§744.2651. May I administer medication to children at my operation?*

*§744.2653. If a child has a recurring medical problem, who may sign an authorization to administer the medication as needed?*

*§744.2655. What records must I keep when I administer medication to a child in my care?*

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

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## DIVISION 2. MEDICATION AND MEDICAL ASSISTANCE

**40 TAC §§744.2651, 744.2653, 744.2655, 744.2663, 744.2665**

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8), which contains requirements regarding directions from a child's health-care provider concerning specialized medical treatment for a child in care; and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§744.2651. What does "medication" refer to in this division?*

In this division, medication means:

(1) A prescription medication; or

(2) A non-prescription medication, excluding topical ointments such as sunscreen.

*§744.2653. What authorization must I obtain before administering a medication to a child in my care?*

(a) Authorization to administer medication to a child in your care must be obtained from the child's parent:

(1) In writing, signed and dated;

(2) In an electronic format that is capable of being viewed and saved; or

(3) By telephone to administer a single dose of a medication.

(b) Authorization to administer medication expires on the first anniversary of the date the authorization is provided.

(c) The child's parent may not authorize you to administer medication in excess of the medication's label instructions or the directions of the child's health-care professional.

(d) Parent authorization is not required if you administer a medication to a child in a medical emergency to prevent the death or serious bodily injury of the child, provided that you administer the medication as prescribed, directed, or intended.

*§744.2655. How must I administer medication to a child in my care?*

(a) Medication must be given:

(1) As stated on the label directions; or

(2) As amended in writing by the child's health-care professional.

(b) Medication must:

(1) Be in the original container labeled with the child's full name and the date brought to the operation;

(2) Be administered only to the child for whom it is intended; and

(3) Not be administered after its expiration date.

(c) When you administer medication to a child in your care, you must record the following:

(1) Full name of the child to whom the medication was given;

(2) Name of the medication;

(3) Date, time, and amount of medication given; and

(4) Full name of the employee administering the medication.

(d) You must keep all medication records for at least three months after administering the medication.

*§744.2663. What is specialized medical assistance?*

Specialized medical assistance is any medical assistance other than medication. Examples include, but are not limited to, assisting with an apnea monitor, protective helmet, or leg brace.

*§744.2665. What are my requirements regarding specialized medical assistance?*

(a) If a child in your care requires specialized medical assistance, then you are required to provide the specialized medical assistance as recommended or ordered by a health-care professional.

(b) If you are provided with a written copy of the health-care professional's recommendations or orders, you must maintain this written information in the child's record for at least three months after the health-care professional has indicated that the specialized medical assistance is no longer needed.

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 745. LICENSING

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§745.21, 745.33, 745.37, 745.115, 745.117, 745.243, 745.503, 745.505, 745.509, 745.601,

745.615, 745.901, 745.903, 745.905, 745.907, 745.911, 745.913, 745.8407, 745.8605, 745.8805, 745.8835, 745.8875, and 745.9037; and new §745.696 and §745.8427, in its Licensing chapter. The purpose of the proposal is to implement legislation passed during the 82nd Legislative Session.

House Bill (H.B.) 1615 adds new §42.065 to Chapter 42 of the Human Resources Code. This new section restricts under what circumstances medication may be given to a child. Except in a medical emergency, a child day-care operation must have parental consent before giving a child a prescription or over-the-counter medication.

H.B. 3051 adds new §42.041(f) to Chapter 42 of the Human Resources Code, which extends the "parents on the premises" exemption for child day-care operations. A child day-care operation, located in a county with a population of 800,000 or more that is adjacent to an international border, is now exempt if it provides care for each child no more than 15 hours a week so that a person may attend an educational class provided by a nonprofit entity.

Senate Bill (S.B.) 76 adds Chapter 313 to the Labor Code, and Human Resources Code §42.0523. This new chapter addresses relative child care under a listed family home permit. The child care can now occur in the child's own home under specific circumstances, although the address on the permit must still be the child-care provider's home address.

S.B. 78 adds Subchapter W, Adverse Licensing, Listing, or Registration Decisions, to Chapter 531 of the Government Code. This new law compels state health and human services agencies to maintain and share information regarding facility permits that have bee denied, revoked, or suspended. The new law allows the health and human services agencies to use the shared records to deny a permit to an applicant who has already been denied, revoked, or suspended by another agency. Records must be kept for at least 10 years.

S.B. 1178 includes many changes to Child Care Licensing. The changes to Chapter 42 of the Human Resources Code: (1) increase flexibility for a municipality to maintain their exempt status; (2) expand the "controlling person" concept to all child-care facilities and family homes, not just residential operations. (The "controlling person" designation allows Child Care Licensing, and with S.B. 78 other Health and Human Services Agencies, to track and take action against individual persons who have been an administrative or governing body official in an operation that had a license denied, revoked, or suspended.); (3) expand the circumstances under which Child Care Licensing can conduct investigations in listed family homes to include a reported risk of immediate health or safety danger to children in care; (4) allow Child Care Licensing to automatically suspend a listed family home for not submitting required background checks, then automatically revoke the listing if not corrected within six months. These actions are not subject to due process; (5) allow Child Care Licensing to automatically suspend any permit for not paying required annual fees, then automatically revoke the permit if not corrected within six months. These actions are not subject to due process; (6) add school-age and before or after-school programs to the child-care facilities that must have fingerprint-based background checks on all staff; (7) add substitute employees to the list of persons at a regulated child-care operation that must undergo a background check; (8) expand monetary penalties to listed family homes; (9) amend §42.072(e) so that an applicant denied a permit for a child-care operation may not continue to operate during appeal of the decision; (10) add Subchapter G, relating to shelter care, so that shelter care can be regulated separately from other types of child day care. The result is a certificate of compliance rather than a license, limited inspection and investigations, and fewer minimum standards. This new subchapter largely reflects the subchapter already in place for the regulation of employer-based day care; (11) amends Chapter 43 of the Human Resources Code to allow adverse action against a residential child care licensed administrator based on a criminal history relevant to the duties of a licensed administrator, such as fraud or embezzlement; and (12) amends the Government Code to allow easier access to a person's fingerprints on file with the Department of Public Safety for the purpose of conducting background checks.

A summary of the changes is described below.

The amendment to §745.21: (1) changes a cross reference to §745.901, as the title of this rule is proposed for change; and (2) updates the definition of "minimum standards" to include Chapter 743, Shelter Care, Chapter 744, School-Age and Before or After-School Programs, and the minimum standards in this chapter related to Employer-Based Child Care.

The amendment to §745.33 adds a subsection to describe the circumstances under which a listed family home may now provide care in the child's own home.

The amendment to §745.37 changes the permit type for shelter care from a license to a compliance certificate.

The amendment to §745.115: (1) incorporates the flexibility added to the law for municipal recreation programs. Under certain conditions, these programs can now accept public comment through their web site rather than having a previously required annual public hearing; and (2) updates a reference to the Texas Commission on Alcohol and Drug Abuse, so that the rule now refers to the Department of State Health Services.

The amendment to §745.117 adds the exemption for "parents on the premises." As required in H.B. 3051, a child day-care operation, located in a county with a population of 800,000 or more that is adjacent to an international border, is now exempt if it provides care for a child no more than 15 hours a week so that a person may attend an educational class provided by a nonprofit entity. Also, a cross reference to another subsection of this rule is corrected.

The amendment to §745.243: (1) adds the Controlling Person Form as a required part of the application packet for all permit types; (2) clarifies that care provided in the child's own home under a listed family home permit is not subject to a listing fee; (3) reflects that shelter care facilities will now have their own application form, specific to the permit type; and (4) deletes portions of the shelter care application packet that will no longer apply, such as proof of liability insurance. These changes are the result of S.B. 76 and S.B. 1178.

The amendment to §745.503 clarifies that a listed family home in which a relative child-care provider cares for the child in the child's own home is exempt from fees, as required by S.B. 76.

The amendment to §745.505: (1) clarifies that a listed family home in which a relative child-care provider cares for the child in the child's own home is exempt from fees; and (2) adds the automatic suspension and revocation of a license for non-payment of annual license fees. These changes are required by S.B. 76 and S.B. 1178 respectively.

The amendment to §745.509, which outlines fees for licensed operations, notes that a license may be automatically suspended or revoked if required annual fees are not paid.

The amendment to §745.601 adds a definition for substitute employee. The definition for substitute employee is a person on the premises of a child-care operation for the purpose of fulfilling an employee or caregiver role in the absence of an employee or caregiver usually present at the operation.

The amendment to §745.615, which outlines who must have a background check: (1) adds substitute employees/caregivers to the list of persons who must have a background check; and (2) adds staff of a school-age or before or after-school program to the list of persons who must have a fingerprint-based background check. This change is the result of S.B. 1178.

New §745.696 states that any specific crimes that may affect a person's ability to be a licensed administrator and whether that person is eligible for a risk evaluation will be available on the DFPS public website. This list will include additional crimes that relate to the duties of a licensed administrator but may not prevent a person from being employed at a child-care operation, like money laundering and Medicaid fraud. This change is the result of S.B. 1178.

The title of Subchapter G is revised. The new title deletes the word "residential" because controlling persons are no longer limited to residential child-care operations. The revised title is "Controlling Person and Certain Employment Prohibited."

The amendment to §745.901, which defines controlling persons: (1) removes the word "residential" to broaden the applicability of this rule to all child-care operations; (2) clarifies that the spouse of a sole proprietor is considered a controlling person; (3) clarifies that the primary caregiver at a child-care home and the primary caregiver's spouse are considered controlling persons; and (4) lists day care directors and licensed administrators as examples of persons who manage a child-care operation.

The amendments to §745.903 and §745.905 remove "residential" from the rules to broaden the applicability of these rules to all child-care operations.

The amendment to §745.907, which outlines the consequences for being designated by Child Care Licensing as a controlling person: (1) removes the word "residential" from the rule to broaden the applicability of this rule to all child-care operations; and (2) deletes a paragraph prohibiting employment of a person sustained as a controlling person. A change in the law, through S.B. 1178, now allows a sustained controlling person to seek employment in a regulated child-care operation, but not as a controlling person for the operation (only as a caregiver or other non-controlling employee).

The amendment to §745.911: (1) allows a sustained controlling person to seek employment in a regulated child-care operation, but not as a controlling person for the operation; (2) deletes the word "residential" from the rule to broaden the applicability of this rule to all child-care operations; and (3) clarifies that DFPS may now use information regarding a person who was a controlling person for a facility that had its license revoked, suspended, or terminated by another health and human services agency when determining whether the person may be a controlling person at an operation, as required by S.B. 78.

The amendment to §745.913, which describes how Child Care Licensing determines whether a person is eligible to be a controlling person: (1) adds checking to see if the person was a controlling person for a facility that had its license revoked, suspended, or terminated by another health and human services agency; and (2) deletes the word "residential" to broaden the applicability of this rule to all child-care operations.

The amendment to §745.8407, which lists when Child Care Licensing may conduct an inspection or investigation in each operation type, revises listed family homes as follows: (1) adds inspection to ensure that care is being provided within the limits of the permit issued; (2) adds that Child Care Licensing may investigate due to an allegation of an immediate health or safety risk to children in care; (3) adds that Child Care Licensing may investigate due to an allegation that the home administered medication to a child in violation of new Human Resources Code §42.065 (regarding parental consent for medications); and (4) clarifies that an investigation may occur due to an allegation that the home is caring for four or more unrelated children or receiving compensation for four or more unrelated children. Another change adds shelter care as a separate category, with inspections only prior to issuance or as part of an investigation, and investigations only related to alleged abuse/neglect or alleged deficiency related to a Licensing statute or rule.

New §745.8427 lists the compliance expectations for listed family homes. Listed family homes do not have minimum standards. However, there are now multiple requirements in law with which listed family homes must comply. Therefore, Child Care Licensing proposes this rule to summarize and clarify the compliance expectations for listed family homes.

The amendment to §745.8605, which lists circumstances under which Child Care Licensing can take remedial action: (1) deletes references to residential child care from sections related to controlling persons and/or a history of remedial action, since these now apply to all operation types; (2) clarifies that remedial action may be taken if controlling person information is not submitted to Child Care Licensing as required in §745.903; and (3) adds a paragraph to reference denying a permit based on the person having a revoked, suspended, or terminated permit through another state agency.

The amendment to §745.8805 clarifies that automatic suspension or revocation for non-payment of fees is not subject to administrative review, per S.B. 1178.

The amendment to §745.8835 clarifies that automatic suspension or revocation for non-payment of fees is not subject to due process hearings, per S.B. 1178.

The amendment to §745.8875 clarifies that an operation may not continue to operate while appealing the denial of a license.

The amendment to §745.9037, which lists the circumstances under which Child Care Licensing may take remedial action against a licensed administrator or licensed administrator applicant, adds a criminal conviction relevant to the duties of a licensed administrator and references new proposed §745.696.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 that children in regulated day care will have better safety protections because (1) medications will only be given with parental consent; (2) persons that have previously had permits denied, revoked, or suspended will

no longer be able to obtain similar permits in other licensed areas and agencies; (3) applicants denied a permit may no longer operate pending an appeal of the denial; (4) adverse actions may be taken against a licensed administrator based on criminal history relevant to his duties; and (5) background checks will be conducted in all School-Age and Before or After-School Programs. A revision to §745.615, which outlines who must submit to background checks, adds staff of a School-Age and Before or After-School program to the list of persons who must have a fingerprint-based criminal history check.

On average, a child day care center submits approximately 16.6 FBI fingerprint checks per year. Fingerprint-based criminal history checks cost $44.20 and are paid by the individual requiring the check or by the associated child-care operation. This amount is a collection of several fees: (1) The FBI charges $19.25 to conduct a fingerprint check. (2) DPS charges $15 to conduct a fingerprint check (the FBI will not conduct a fingerprint check until the requesting state conducts one). (3) The private contractor who collects fingerprints in Texas charges a $9.95 processing fee (this is a fee set in the contract between the private contractor and DPS).

In addition, new employees may have an estimated travel cost associated with obtaining a fingerprint scan. The cost may range from a negligible amount (for those living in metropolitan areas near a contractor site), to a maximum of $51, for those living in the most rural areas. It is assumed that these costs are most often borne by the person undergoing the fingerprint-based criminal history check; however, some School-Age and Before or After-School Programs may cover these costs.

However, it is assumed that a large majority of the School-Age and Before or After-School Programs are already conducting fingerprint-based criminal history checks. Senate Bill 68 (during the 81st Legislature) created the School-Age and Before or After-School Programs, a new classification of licensed day care operations. Many operations meeting these new definitions had been regulated previously as day-care centers and had the option of converting their day-care center permits to School-Age and Before or After-School Programs permits by August 31, 2011. A total of 527 centers converted their permits by the end of June 2011. Day-care centers were already required to conduct fingerprint-based criminal history checks, so it is assumed that the day-care centers that opted for conversion to a School-Age and Before or After-School Program permit were already meeting this fingerprint-based criminal history requirement and continue to meet the requirement. There were also a total of 174 new operations that obtained a permit to operate as a School-Age and Before or After-School Program through the end of June 2011.

The DFPS fiscal year (FY) 2010 data book reflects 9,436 licensed child-care centers in Texas, many of which are either a small business or micro-business as defined in Chapter 2006, Government Code. Chapter 2006 defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than $6 million in annual gross receipts. A small business that has no more than 20 employees is further defined as a micro-business. Based on surveys of child-care providers, DFPS estimates that roughly 55% of child-care centers are for-profit businesses and that roughly 70% are independently owned. Approximately 98% of child-care centers have fewer than 100 employees and roughly 68% have no more than 20 employees. It is assumed that the survey respondents would also be a representative sample of School-Age and Before or After-School Program providers, and the results of the survey are current for rulemaking estimates in 2011. Chapter 2006 requires that an agency prepare a Regulatory Flexibility Analysis (RFA) for any rule that has a negative economic impact on small businesses, unless consideration of alternative methods of achieving the rule's purpose would not be consistent with the health, safety, and environmental and economic welfare of the state. Because the changes to §745.615 that result in possible adverse economic impact to small businesses are required by §42.056, Human Resources Code, these changes are considered *per se* necessary for the health and safety of the children served by child-care centers subject to these rules. Accordingly, no RFA was prepared prior to proposal of these rules.

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

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-441, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

## SUBCHAPTER A. PRECEDENCE AND DEFINITIONS

## DIVISION 3. DEFINITIONS FOR LICENSING

### 40 TAC §745.21

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations.

*§745.21. What do the following words and terms mean when used in this chapter?*

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

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

(12) Controlling person--As defined in §745.901 of this title (relating to Who is a controlling person at [~~in~~] a [~~residential~~] child-care operation?).

(13) - (24) (No change.)

(25) Minimum standards--The rules contained in Chapters 727 of this title (relating to Licensing of Maternity Facilities), 743 of this title (relating to Minimum Standards for Shelter Care, 744 of this title (relating to Minimum Standards for School-Age and Before or After-School Programs), 746 of this title (relating to Minimum Standards for Child-Care Centers), 747 of this title (relating to Minimum Stan-

dards for Child-Care Homes), 748 of this title (relating to General Residential Operations and Residential Treatment Centers), 749 of this title (relating to Child-Placing Agencies), 750 of this title (relating to Independent Foster Homes), Division 11 (relating to Employer-Based Child Care) of Subchapter D of this chapter (relating to Application Process), and Subchapter I of this chapter (relating to Maternity Home Minimum Standards), which are minimum requirements for permit holders that are enforced by DFPS to protect the health, safety and well-being of children.

(26) - (37) (No change.)

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

Filed with the Office of the Secretary of State on November 1, 2011.

TRD-201104708
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## SUBCHAPTER B. CHILD CARE AND OTHER OPERATIONS THAT WE REGULATE

**40 TAC §745.33, §745.37**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.0523, which explicitly addresses Licensing's ability to list relative child-care providers; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§745.33. What is child day care?*

Child day care means the care, supervision, training, or education of:

(1) An [~~an~~] unrelated child or children under 14 years old for less than 24 hours per day that occurs in a place other than the child's own home, including [~~.~~ ~~This definition includes~~] child day care provided to school-age children before and/or after the customary school day; or [~~.~~]

(2) A related child or children under 14 years old for less than 24 hours per day that occurs in the caregiver's or child's home if the care is provided:

(A) Under the auspices of a listed family home; and

(B) In full compliance with Chapter 313 of the Labor Code, including providing care in the child's home only if:

*(i)* Care is provided for a disabled child, which may include the child's siblings;

*(ii)* Care is provided for a child under 18 months of age, which may include the child's siblings;

*(iii)* Care is provided for a child of a parent 18 years or younger;

*(iv)* Care is provided for a child of a parent 19 years of age and the parent is fully enrolled in a secondary school in a program leading toward a high school diploma;

*(v)* Care is provided when the parent's work schedule necessitates child-care services during the evening, overnight, or on the weekend and taking the child outside of the child's home would be disruptive to the child; or

*(vi)* The Texas Workforce Commission determines that other child-care provider arrangements are not available in the community.

*§745.37. What specific types of operations does Licensing regulate?*

The charts in paragraphs (1), (2), and (3) of this section list the types of operations for child day care and residential child care that we regulate. Maternity homes, child-placing agencies, and foster homes verified by a child-placing agency are included in the residential child-care chart.

(1) (No change.)

(2) Types of Child Day-Care Operations on and after September 1, 2003.
Figure: 40 TAC §745.37(2)

(3) (No change.)

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

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## SUBCHAPTER C. OPERATIONS THAT ARE EXEMPT FROM REGULATION
## DIVISION 2. EXEMPTIONS FROM REGULATION

**40 TAC §745.115, §745.117**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.041(f), which provides certain municipalities with the ability to receive public comments related to a recreation program through the municipality's public website; and another HRC §42.041(f), which limits the number of hours that certain parents on the premises programs can provide care and remain exempt.

*§745.115. What programs regulated by other governmental entities are exempt from Licensing regulation?*
The following programs and facilities are exempt from our regulation:
Figure: 40 TAC §745.115

*§745.117. Which programs of limited duration are exempt from Licensing regulation?*
The following programs of limited-duration are exempt from our regulation:
Figure: 40 TAC §745.117

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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Gerry Williams
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Department of Family and Protective Services
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## SUBCHAPTER D. APPLICATION PROCESS
## DIVISION 3. SUBMITTING THE APPLICATION MATERIALS

### 40 TAC §745.243

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.072(g), which now extends the controlling persons concept to all childcare operations; and HRC Chapter 42, Subchapter G, which addresses Licensing's regulation of temporary shelter day-care facilities.

*§745.243. What does a completed application for a permit include?*
Application forms vary according to the type of permit. We will provide you with the required forms. Contact your local Licensing office for additional information. The following table outlines the requirements for a completed application:
Figure: 40 TAC §745.243

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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Gerry Williams
General Counsel
Department of Family and Protective Services
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For further information, please call: (512) 438-3437

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## SUBCHAPTER E. FEES

### 40 TAC §§745.503, 745.505, 745.509

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.0523, which explicitly addresses Licensing's ability to list relative child-care providers; and HRC §42.054(f), which provides for an automatic suspension and revocation of a permit for provider's failure to pay fees.

*§745.503. Is anyone exempt from paying fees?*

(a) Certified or state-run operations are exempt from paying fees listed in §745.501 of this title (relating to What type of fees may Licensing charge me?).

(b) A listed family home in which a relative child-care provider cares for the child(ren) in the child(ren)'s own home is exempt from paying fees listed in §745.501 of this title.

(c) The following residential child-care operations must pay application fees but are exempt from all other fees listed in §745.501 of this title:

(1) Independent foster family homes and foster group homes;

(2) Nonprofit operations that provide residential child care for children in the managing conservatorship of DFPS [~~PRS~~] during the 12-month period immediately preceding the anniversary date of the permit; and

(3) Nonprofit operations that provide residential child care and do not charge for that care.

*§745.505. What fees must I pay to list my family home and maintain the listing?*

(a) The following chart contains the fees required for listed family homes, when the fees are due, and the consequences for failure to pay the fees on time. Note that for listed family homes the fees for background checks are included in the $20 application and annual fees.
Figure: 40 TAC §745.505(a)

(b) A listed family home in which a relative child-care provider cares for the child(ren) in the child(ren)'s own home is exempt from paying fees.

*§745.509. What fees must I pay to apply for and maintain a license for an operation?*
The following chart contains fees required for licenses, (including child day-care and residential child-care operations, child-placing agencies, and maternity homes), when the fees are due, and the consequences for failure to pay the fees on time:
Figure: 40 TAC §745.509

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

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## SUBCHAPTER F. BACKGROUND CHECKS
## DIVISION 1. DEFINITIONS

**40 TAC §745.601**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.056(l), which addresses background checks for substitute employees.

*§745.601. What words must I know to understand this subchapter?*
These words have the following meanings:

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

(7) Substitute employee--A person on the premises of a child-care operation for the purpose of fulfilling an employee or caregiver role in the absence of an employee or caregiver usually present at the operation.

(8) [~~(7)~~] Unsupervised access--The person is allowed to be with children without the presence of a qualified caregiver.

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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Gerry Williams
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## DIVISION 2. REQUESTING BACKGROUND CHECKS

**40 TAC §745.615**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.056(a-2), which provides that certain types of operations must submit fingerprints for background checks; and HRC §42.056(l), which addresses background checks for substitute employees.

*§745.615. On whom must I request background checks?*

(a) You must request a name-based criminal history check and a DFPS central registry check for:

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

(7) Each person 14 years of age or older, other than a client in care, who will regularly or frequently be staying or working at an operation or prospective adoptive home while children are in care; [~~and~~]

(8) Applicants for a child-care administrator's license; and [~~.~~]

(9) Each substitute employee, unless you confirm that the organization providing the substitute employee has completed a background check for the person through DFPS within the last 24 months.

(b) In addition:

(1) Before placing a child for whom DFPS is the managing conservator with the agency or in the home, a child-placing agency, independent foster home, and independent foster group home that will accept the placement of children in the conservatorship of DFPS must request a fingerprint-based criminal history check request for:

(A) Any person who applies to be a foster or adoptive parent, including a person that has previously adopted a child unless the person is also verified as a foster or adoptive home; [~~and~~]

(B) Any person acting as a caregiver for foster children in the foster home, including a substitute employee; and

(C) [~~(B)~~] Any person 18 years of age or older living in the home of a foster or adoptive parent applicant.

(2) A child-care center, before or after-school program, or school-age program must request a fingerprint-based criminal history check for each person who is required to have a name-based background check under subsection (a) of this section unless the person only meets subsection (a)(7) of this section of the name-based check requirements.

(3) (No change.)

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

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

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Gerry Williams
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Department of Family and Protective Services
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## DIVISION 4. EVALUATION OF RISK BECAUSE OF A CRIMINAL CONVICTION OR A CENTRAL REGISTRY FINDING OF CHILD ABUSE OR NEGLECT

**40 TAC §745.696**

The new section is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC §43.005, which provides DFPS with the authority to adopt rules for the regulation of administrators; and HRC §43.010(a)(6)(B), which allows DFPS to take remedial action against an administrator's license for criminal history relevant to an administrator's duties.

*§745.696. What criminal history and central registry findings are relevant to a person's ability to be a licensed administrator?*

(a) Information regarding specific crimes that may affect a person's ability to be a licensed administrator and whether the person is eligible for a risk evaluation will be available on DFPS public website at www.dfps.state.tx.us/Child_Care/.

(b) A central registry finding outlined in §745.695 of this title (relating to In what circumstances can someone with a central registry finding be present in a child-care operation?) may affect a person's ability to be a licensed administrator.

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

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## SUBCHAPTER G. CONTROLLING PERSON AND CERTAIN EMPLOYMENT PROHIBITED

**40 TAC §§745.901, 745.903, 745.905, 745.907, 745.911, 745.913**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.072(g), which now extends the controlling persons concept to all child-care operations; HRC §42.062, concerning prohibited employment and service for sustained controlling persons; and Chapter 531, Government Code, which requires state Health and Human Services agencies to share certain information.

*§745.901. Who is a controlling person at a [~~residential~~] child-care operation?*

(a) A controlling person of a [~~residential~~] child-care operation is any:

(1) Owner of the operation or member of the governing body of the operation, including, as applicable, an executive, an officer, a board member, a partner, [~~or~~] a sole proprietor and the sole proprietor's spouse, or the primary caregiver at a child-care home and the primary caregiver's spouse;

(2) Person who manages, administrates, or directs the operation or its governing body, including a day care director or a licensed administrator; or

(3) (No change.)

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

*§745.903. When must I submit to Licensing information about a person whom I consider to be a controlling person at my [~~residential~~] child-care operation?*

We will provide you with a Controlling Person Form. You must provide us information on the form about each person that is a controlling person at your operation as defined in §745.901(a) of this title (relating to Who is a controlling person at a [~~residential~~] child-care operation?). You must complete and submit this form to your local Licensing office:

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

*§745.905. When will Licensing designate someone at my [~~residential~~] child-care operation as a controlling person?*

(a) We will designate each person who meets the definition of a controlling person in §745.901(a) of this title (relating to Who is a controlling person at a [~~residential~~] child-care operation?) as a controlling person at your operation when:

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

(b) (No change.)

*§745.907. What are the consequences of Licensing designating me as a controlling person?*

(a) If we designate you as a controlling person:

(1) We may not issue you a permit to operate a [~~residential~~] child-care operation for five years after our designation is sustained; and

(2) You may not be the controlling person at a [~~residential~~] child-care operation for five years after the designation is sustained. [~~; and~~]

[~~(3) A residential child-care operation may not employ you for five years after the designation is sustained.~~]

(b) Our designation of you as a controlling person is sustained when the revocation or voluntary closure described in §745.905 of this title (relating to When will Licensing designate someone at my child-care operation as a controlling person?) is final and:

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

(c) Another state agency may deny your application for a permit based on information obtained from us, as outlined in Chapter 531 of the Government Code, Subchapter W (relating to Adverse Licensing, Listing, or Registration Decisions).

*§745.911. In what other circumstances may a person not serve as a controlling person at my operation [~~I not employ someone because of his previous involvement with a residential child-care operation~~]?*

(a) A [~~You may not employ a~~] person may not serve as a controlling person [~~in any capacity to work~~] in a [~~residential~~] child-care operation if [~~we denied the person a permit because the~~]:

(1) We denied the person a permit because the person [~~Person~~] is barred from operating a [~~residential~~] child-care operation in another state; or

(2) We denied the person a permit because the person's [~~Person's~~] permit to operate a [~~residential~~] child-care operation in another state was revoked.

(b) The person is prohibited from serving as a controlling person [~~employment~~] in a [~~residential~~] child-care operation on or after the denial referred to in subsection (a) of this section is final.

(c) When you submit an application for a permit, we will also consider whether the person was a permit holder, controlling person, or otherwise listed on the application for a permit for a facility that had its permit denied, revoked, suspended, or terminated by another state health and human services agency in the last 10 years, as outlined in Chapter 531 of the Government Code, Subchapter W (relating to Adverse Licensing, Listing, or Registration Decisions). Depending upon the circumstances that led to the previous permit denial, suspension, revocation, or termination and the person's relationship to that facility, we may determine that this person may not serve as a controlling person for your child-care operation.

(d) [~~(c)~~] If the person is no longer barred from operating [~~in the other state~~] or is subsequently allowed to operate [~~in the other state~~], then [~~you may employ~~] the person may serve as a controlling person if approved by Licensing.

*§745.913. When does Licensing check whether someone is ineligible to serve as a controlling person [~~for employment~~] at my [~~residential~~] child-care operation?*

(a) When you submit an application for a permit, we will determine whether any person on your application or listed as a controlling person for your operation was a permit holder, controlling person, or otherwise listed on the application for a permit for a facility that had its permit denied, revoked, suspended, or terminated by another state health and human services agency in the last 10 years, as outlined in Chapter 531 of the Government Code, Subchapter W (relating to Adverse Licensing, Listing, or Registration Decisions).

(b) [~~(a)~~] When you submit a Controlling Person Form to us, at any time, we will check to see if any person listed on the form is a sustained controlling person or if the person was denied a [~~residential~~] permit due to compliance history in another state.

[~~(b) When you submit a Request for Criminal History and Central Registry Check for staff as required under §745.615 of this title (relating to On whom must I request background checks?), we will check whether the person is ineligible for employment at your operation for reasons noted under §745.907 of this title (relating to What are the consequences of Licensing designating me as a controlling person?) or §745.911 of this title (relating to In what other circumstances may I not employ someone because of his previous involvement with a residential child-care operation?).~~]

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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Gerry Williams
General Counsel
Department of Family and Protective Services
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For further information, please call: (512) 438-3437

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## SUBCHAPTER K. INSPECTIONS AND INVESTIGATIONS

## DIVISION 1. OVERVIEW OF INSPECTIONS AND INVESTIGATIONS

**40 TAC §745.8407, §745.8427**

The amendment and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective

Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment and new section implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.044(c-1), which expands Licensing's investigation authority for listed child-care homes; HRC §42.065, concerning the administration of medication in child-care operations that operate for less than 24 hours; and HRC §42.209, concerning Licensing's authority to inspect temporary shelter day-care facilities.

*§745.8407. When will Licensing inspect and/or investigate an operation?*

Please refer to the following chart:
Figure: 40 TAC §745.8407

*§745.8427. What are the expectations for a listed family home?*

A listed family home must:

(1) Operate within the limits of its permit;

(2) Ensure that each child is free from abuse, neglect, and exploitation while in care;

(3) Ensure that there is no immediate risk to the health or safety of a child while in care;

(4) Ensure that any medication given to a child in care is administered according to §42.065 of the Human Resources Code;

(5) Request background checks as required in Subchapter F of this chapter (relating to Background Checks);

(6) Pay all required fees as outlined in Subchapter E of this chapter (relating to Fees); and

(7) Comply with all other applicable rule and law.

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

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## SUBCHAPTER L. REMEDIAL ACTIONS
## DIVISION 1. OVERVIEW OF REMEDIAL ACTIONS

### 40 TAC §745.8605

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.072(g), concerning controlling persons; and Chapter 531, Government Code, which requires state Health and Human Services agencies to share certain information.

*§745.8605. When can Licensing take remedial action against me?*

We can impose a remedial action any time we find one of the following:

(1) - (13) (No change.)

(14) A failure to submit information to us within two days of a change in your controlling persons, as required in §745.903 of this title (relating to When must I submit to Licensing information about a person whom I consider to be a controlling person at my child-care operation?);

(15) [~~(14)~~] For residential child-care operations on [~~On~~] or after September 1, 2005, and all other child-care operations on or after September 1, 2011:

(A) We revoked your permit [~~to operate a residential child-care operation~~]; or

(B) You voluntarily closed your [~~residential child-care~~] operation or relinquished your permit after receiving notice of our intent to take adverse action against your permit or that we were taking adverse action against your permit;

(16) [~~(15)~~] You apply for a permit [~~to operate a residential child-care operation~~] after we designate you as a controlling person, but before the designation is sustained;

(17) [~~(16)~~] It is within five years since your designation as a controlling person has been sustained;

(18) [~~(17)~~] You apply for a permit to operate a [~~residential~~] child-care operation, and you are barred from operating a [~~residential~~] child-care operation in another state;

(19) [~~(18)~~] You apply for a permit to operate a [~~residential~~] child-care operation, and your permit to operate a [~~residential~~] child-care operation in another state was revoked;

(20) You apply for a permit to operate a child-care operation, and your permit to operate was revoked, suspended, or terminated by another Texas state agency as outlined in Chapter 531 of the Government Code, Subchapter W (relating to Adverse Licensing, Listing, or Registration Decisions);

(21) [~~(19)~~] You apply for a permit to operate a [~~residential~~] child-care operation and:

(A) You fail to comply with public notice and hearing requirements as set forth in §745.277 of this title (relating to What will happen if I fail to comply with public notice and hearing requirements?); or

(B) The results of the public hearing meet one of the criteria set forth in §745.279 of this title (relating to How may the results of a public hearing affect my application for a permit or a request to amend my permit?);

(22) [~~(20)~~] You operate a [~~residential~~] child-care operation, and that operation discharges or retaliates against an employee, client,

resident, or other person because the person or someone on behalf of the person files a complaint, presents a grievance, or otherwise provides in good faith, information relating to the misuse of restraint or seclusion at the operation;

(23) [~~(21)~~] A reason set forth in Human Resources Code, §42.078; or

(24) [~~(22)~~] A failure to pay an administrative penalty under Human Resources Code, §42.078.

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

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## SUBCHAPTER M. ADMINISTRATIVE REVIEWS AND DUE PROCESS HEARINGS
## DIVISION 1. ADMINISTRATIVE REVIEWS

**40 TAC §745.8805**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.054(f), which provides for an automatic suspension and revocation of a permit for provider's failure to pay fees; and HRC §42.052(j-1), which says that an automatic suspension or revocation of a listing because the provider failed to request background checks.

*§745.8805. Under what circumstances may I request an administrative review?*

(a) You may request an administrative review when:

(1) We determine that your operation is not exempt from our regulation;

(2) We deny your operation a waiver or variance;

(3) We cite your operation with a deficiency, and you disagree with the citation;

(4) We take remedial action against your operation, however, remedial actions initially implemented through a court order and emergency suspensions and closures conducted pursuant to §42.073 of the Human Resources Code are not subject to an administrative review;

(5) We have determined that you are an immediate threat or danger to the health or safety of children;

(6) We have designated you as a perpetrator of child abuse, neglect, or exploitation;

(7) We take remedial action against your Child Care Administrator's License; or

(8) We intend to designate you as a Controlling Person.

(b) Automatic suspension or revocation is not subject to administrative review.

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

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## DIVISION 2. DUE PROCESS HEARINGS

**40 TAC §745.8835**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.054(f), which provides for an automatic suspension and revocation of a permit for provider's failure to pay fees; and HRC §42.052(j-1), which says that an automatic suspension or revocation of a listing because the provider failed to request background checks.

*§745.8835. When can I request a due process hearing?*

(a) You may request a due process hearing in the following situations:

(1) When we have designated you as a perpetrator of child abuse or neglect;

(2) When we are going to release the fact that you are a perpetrator due to a Child Protective Services or Adult Protective Services finding of child abuse or neglect;

(3) When we determine you or your operation is an immediate threat or danger to the health or safety of children;

(4) When we are taking adverse action against your operation;

(5) When we designate you as a controlling person at a residential operation;

(6) When we impose an administrative penalty against you; or

(7) If you are a licensed administrator, when we deny, revoke, suspend, or refuse to renew your license.

(b) Automatic suspension or revocation is not subject to a due process hearing.

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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Gerry Williams
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## DIVISION 3. OPERATIONS PENDING THE ADMINISTRATIVE REVIEW AND DUE PROCESS HEARING

**40 TAC §745.8875**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.072(e), which no longer allows an operation to operate pending the appeal of a denial.

*§745.8875. If Licensing takes adverse action against me, may I continue to operate pending the outcome of an administrative review and/or a due process hearing?*

Whether you may operate pending the outcome of an administrative review and/or due process hearing depends upon the type of adverse action being taken against you:[.]

(1) If we denied your permit, you [~~may or~~] may not operate; and [~~depending upon the following conditions:~~]
[~~Figure: 40 TAC §745.8875(1)~~]

(2) (No change.)

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

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## SUBCHAPTER N. ADMINISTRATOR LICENSING
## DIVISION 5. REMEDIAL ACTIONS

**40 TAC §745.9037**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §43.005, which provides DFPS with the authority to adopt rules for the regulation of administrators; and HRC §43.010(a)(6)(B), which allows DFPS to take remedial action against an administrator's license for criminal history relevant to an administrator's duties.

*§745.9037. Under what circumstances may Licensing take remedial action against my administrator's license or administrator's license application?*

(a) We may take remedial action against your administrator's license or administrator's license application if you:

(1) - (5) (No change.)

(6) Have a criminal history or central registry record that:[~~would~~]

(A) Would prohibit you from working in a child-care facility as specified in Subchapter F of this chapter (relating to Background Checks); or

(B) Is relevant to the duties of a licensed administrator, as outlined in §745.696 of this title (relating to What criminal history and central registry findings are relevant to a person's ability to be a licensed administrator?);

(7) - (8) (No change.)

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

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

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## CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§746.105, 746.201, 746.305, 746.501, 746.603, 746.1301, 746.1303, 746.1305, 746.1307, 746.1309, 746.1311, 746.1317, 746.1325, and 746.1329; the repeal of §§746.1327, 746.3801, 746.3803, and 746.3805; and new §§746.3801, 746.3803, 746.3805, 746.3813, and 746.3815, in its Minimum Standards for Child-Care Centers chapter. The purpose of the proposal is to implement legislation passed in the 82nd Legislative Session. House Bill (H.B.) 434 requires a child-care facility or registered family home to: (1) follow the directions of a child's health-care professional when providing to a child in care specialized medical assistance; and (2) maintain a copy of any written directions from the health-care professional for a reasonable period of time. H.B. 1615 restricts under what circumstances medication may be given to a child. Except in a medical emergency, a child day-care operation must have parental consent before giving a child a prescription or over-the-counter medication. Senate Bill (S.B.) 260 increases orientation, pre-service, and annual training requirements for day care centers. S.B. 265 requires training in certain child-care operations to be relevant to the age of children for whom care is provided, and adds trainer minimum qualifications to Human Resources Code §42.0421. All training outlined in this section of the law must be conducted by a person who meets one of seven options for minimum qualifications. S.B. 471 requires day care centers to have specific policies and training related to child abuse and neglect. S.B. 1178 adds the requirement that a day care center must make a notification to Licensing when a new individual becomes a "controlling person" at the center, or an individual that was previously a controlling person ceases to be a controlling person at the center. A summary of the changes is described below.

The amendment to §746.105 broadens the definition of health-care professional beyond its current purpose of only describing those professionals that can provide vaccinations. This will make the definition more germane to H.B. 1615.

The amendment to §746.201 specifies that all provisions for training must comply with the training requirements in these minimum standards.

The amendment to §746.305 implements S.B. 1178, which adds the requirement that a day care center must make a notification to Licensing when a new individual becomes a "controlling person" at the center or an individual that was previously a controlling person ceases to be a controlling person at the center.

The amendment to §746.501 adds the requirement to have an operational policy on preventing and responding to abuse and neglect of children. Specific policy content is required, which mirrors the new law, as required by S.B. 471.

The amendment to §746.603 adds to the list of contents required for a child's record: (1) medication administration records; and (2) health-care professional orders or recommendations for specialized medical assistance. The amendment also states how long the records must be kept. These changes are a result of H.B. 434 and H.B. 1615.

The amendment to §746.1301 updates the rule to reflect the changes in S.B. 260, which require orientation within seven days of hire and increased hours of pre-service and annual training.

The amendment to §746.1303 references orienting employees to the policy now required on preventing and responding to abuse and neglect of children (see description of §746.501 in this preamble). This ensures a thorough orientation for employees and makes the rules more consistent. This is required by S.B. 471.

The amendment to §746.1305 deletes the references to a specific number of training hours, as the number of hours is already specified in §746.1301.

The amendment to §746.1307 changes the caregiver exemption for pre-service training from six months of prior experience or equivalent training to two years and clarifies that the previous training must be 24 clock hours of training at another regulated child-care center. This is required by S.B. 260.

The amendment to §746.1309 outlines annual training requirements for caregivers and is revised as follows: (1) The rule currently specifies 15 hours of annual training, but 24 hours is now required in the law. Therefore, the rule is updated to reflect this increased requirement. (2) New law requires one hour of annual training on prevention, recognition, and reporting of child abuse/neglect. This is added to the rule, including the specific training content outlined in law. (3) A phrase is added to clarify that training must be relevant to the age of children for whom the caregiver is providing care.

The amendment to §746.1311 outlines annual training requirements for day care center directors and is revised as follows: (1) The rule currently specifies 20 hours of annual training, but 30 hours is now required in the law. Therefore, the rule is updated to reflect this increased requirement. (2) New law requires one hour of annual training on prevention, recognition, and reporting of child abuse/neglect. This is added to the rule, including the specific training content outlined in law. (3) A phrase is added to clarify that training must be relevant to the age of children for whom the center is providing care. (4) A limit on self-instructional training is deleted. Now that all self-instructional training must be developed by a person who meets one of the qualifications outlined in S.B. 265, it is no longer necessary to limit self-instructional training.

The amendment to §746.1317 adds the trainer minimum qualifications outlined in S.B. 265, which states that training must be conducted by a person who meets one of seven options for minimum qualifications. The amendment also clarifies that self-instructional training must be developed by a person who meets one of the listed trainer qualifications.

Also, §746.1327 is repealed because it is no longer necessary to limit self-instructional training.

The amendment to §746.1325 revises the cross-reference to §746.1317.

The amendment to §746.1329 requires that trainer qualifications be included in training documentation, so that Child Care Licensing staff can monitor for compliance with the law.

Subchapter S, Safety Practices, Division 2, Medications and Medical Assistance, is renamed. The new name of Division 2 reflects additions to the division related to specialized medical assistance.

Section 746.3801 is repealed and proposed as new. New §746.3801 defines "medication" to include non-prescription medication. The circumstances under which a day care center may administer medication to a child, which were previously included in this rule, are incorporated into proposed changes to §746.3803 and §746.3805.

Section 746.3803 is repealed and proposed as new. New §746.3803 lists the authorization requirements for all medications, which include: (1) written permission from a parent or telephone permission for a one-time dose; (2) re-authorization at least annually; and (3) prohibition against a parent authorizing more medication than what is prescribed or than what is included in the medication's label instructions.

Section 746.3805 is repealed and proposed as new. In addition to the record keeping requirements for medications, the new rule expands the requirements moved from current §746.3801 and §746.3803 to include that medication can only be given according to label instructions or as directed by a health-care professional.

New §746.3813 defines specialized medical assistance.

New §746.3815 requires the operation to follow the recommendations or orders of the child's health-care professional when providing to a child in care specialized medical assistance and requires the operation to maintain any written orders or recommendations in the child's record for at least three months after the health-care professional has indicated that the specialized medical assistance is no longer needed. These changes are required by H.B. 434.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 that providers will have a better understanding of when medications may be given to children, how specialized medical assistance must be provided, and caregivers and directors in day care centers will receive more training, and therefore provide better care to Texas children. Proposed changes to §§746.1301 (relating to What training must I ensure that my employees have?), 746.1309 (relating to How many clock hours of annual training must be obtained by caregivers?), and 746.1311 (relating to How many clock hours of training must my child-care center director obtain each year?) potentially have an adverse economic impact on providers. However, Child Care Licensing is sensitive to the impact that proposed legislative mandated changes may have on families as well as providers, particularly in the current economic climate. Accordingly, in proposing changes to minimum standards, every effort has been made to bring training options for low or no cost to providers. In a partnership with AgriLife Texas Cooperative Extension (a part of the Texas A&M University system), Child Care Licensing has online free of charge tutorials for caregivers and consumers. Tutorials focus on the healthy and safe care of infants and toddlers. There are nine courses (15 clock hours) for Professional Development Training for Infant and Toddler Caregivers. Also, there are eight courses (10 hours) for parents and families who care for young children. Online courses were produced using funds provided under the American Recovery and Reinvestment Act of 2009.

The proposed changes to §746.1301 increase pre-service training hours from 8 to 24 hours, increase annual training for caregivers from 15 to 24 hours, and increase annual training for directors from 20 hours to 30 hours. The proposed changes to §746.1309 reflect the increase in annual training for caregivers and require one hour of annual training on prevention, recognition, and reporting of child abuse/neglect. The proposed changes to §746.1311 reflect the increase in annual training for directors and require one hour of annual training on prevention, recognition, and reporting of child abuse/neglect. An analysis of the fiscal impact to child-care providers that will result from the increased training requirements is detailed when discussing the impact to businesses.

There are no direct costs to persons other than child-care providers as a result of the proposed rules; however, consumers of child-care services may experience nominal increases in the cost of care to the extent that any given child-care center passes any increased costs of training on to its consumers. The amount of such increase, if any, is impossible to estimate given the variability in the number of staff trained by each child-care center, the discretion that each center will have in how it delivers training to minimize costs, and the extent to which each child-care center absorbs any increased costs without increasing its rates.

There will be a fiscal impact to businesses (child-care centers), including small and micro-businesses, as a result of the rule amendments that impose increased training requirements. Increased training requirements may result in two types of increased costs - the cost of providing the instruction itself and the cost of the hourly wages paid to the caregiver while undergoing the training.

Instruction may be provided by local resource and referral agencies or may be provided in-house - with the average per hour cost ranging from $0 per hour when training is available in the community at no-cost, to a high of $20 per hour for group instruction provided to caregivers by a local resource and referral agency. For purposes of the rules discussed below that increase training hours for caregivers, average hourly instructional costs are estimated to be $10 per hour. The average hourly wage for a caregiver is $7.98, based on data gathered from the Texas Workforce Commission Occupational Employment Statistics semiannual survey of Texas employers.

Currently §746.1301 requires 8 hours of pre-service training, but amendments to §42.0421, Human Resources Code enacted by the 82nd Legislature in S.B. 260 now require 24 hours of pre-service training for employees who have not previously been trained or have less than two years of child-care experience. For each caregiver who must receive the additional 16 hours of pre-service training, it is estimated that child-care centers will experience an average additional one-time cost of $160 in instructional costs and $127.68 in hourly wages paid to the caregiver while undergoing the training.

Currently §746.1309 requires 15 hours of annual training for all caregivers, but amended §42.0421, Human Resources Code, now requires 24 hours of annual training. For each caregiver who must receive the additional 9 hours of annual training, it is estimated that child-care centers will experience an additional

annual cost of $90 in instructional costs and $71.82 in hourly wages paid to the caregiver while undergoing the training.

Currently §746.1311 requires 20 hours of annual training for directors, but amended §42.0421, Human Resources Code, now requires 30 hours. Licensing assumes that training provided for directors will typically not be provided in-house and that the level of expertise of trainers is usually higher for training provided to directors than for training provided to caregivers. Using these assumptions, Licensing estimates that the average cost of hourly training for directors is $25. The hourly wage of a director is $15.50, based on data gathered from the Texas Workforce Commission Occupational Employment Statistics semiannual survey of Texas employers. Accordingly, for each director who must receive the additional 10 hours of annual training, it is estimated that child-care centers will experience an additional annual cost of $250 in instructional costs and $155 in hourly wages paid to the director while undergoing the training.

The DFPS fiscal year (FY) 2010 data book reflects 9,436 licensed child-care centers in Texas, many of which are either a small business or micro-business as defined in Chapter 2006, Government Code. Chapter 2006 defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is further defined as a micro-business. Based on surveys of child-care providers, DFPS estimates that roughly 55% of child-care centers are for-profit businesses and that roughly 70% are independently owned. Approximately 98% of child-care centers have fewer than 100 employees and roughly 68% have no more than 20 employees. Chapter 2006 requires that an agency prepare a Regulatory Flexibility Analysis (RFA) for any rule that has a negative economic impact on small businesses, unless consideration of alternative methods of achieving the rule's purpose would not be consistent with the health, safety, and environmental and economic welfare of the state. Because the changes to §§746.1301, 746.1309, and 746.1311 that result in possible adverse economic impact to small businesses are required by §42.0421, Human Resources Code, these changes are considered per se necessary for the health and safety of the children served by child-care centers subject to these rules. Accordingly, no RFA was prepared prior to proposal of these rules.

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

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-442, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

## SUBCHAPTER A. PURPOSE AND DEFINITIONS

**40 TAC §746.105**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.042(e)(8)(A), which provides that a "health-care provider" can provide directions for specialized medical assistance required by a child.

*§746.105. What do certain words and terms mean when used in this chapter?*

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or unless the context clearly indicates otherwise. In addition, the following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) - (31) (No change.)

(32) Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nurse Examiners, a licensed vocational nurse (LVN), licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of his license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

~~[(32) Health-care professional--A licensed physician, licensed or registered nurse, or other licensed medical personnel providing comprehensive preventive, diagnostic, or therapeutic medical care to the child. This does not include medical doctors or medical personnel where immunizations and contraindications to immunizations are outside the scope of the licensed practice, such as chiropractors, homeopaths, podiatrists; or medical practitioners not licensed to practice in the United States.]~~

(33) - (49) (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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Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION
## DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

**40 TAC §746.201**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.0421 and §42.0426, which provide training and orientation requirements.

*§746.201. What are my responsibilities as the permit holder?*

You are responsible for the following:

(1) (No change.)

(2) Developing written personnel policies, including job descriptions, job responsibilities, and requirements; [~~and making~~]

(3) Making provisions for training that comply with Division 4, Subchapter D of this chapter (relating to Personnel);

(4) [~~(3)~~] Designating a child-care center director who meets minimum standard qualifications and has daily, on-site responsibility for the operation of the child-care center;

(5) [~~(4)~~] Reporting and ensuring your employees and volunteers report suspected abuse, neglect, or exploitation directly to DFPS and may not delegate this responsibility as required by the Texas Family Code, §261.101;

(6) [~~(5)~~] Ensuring all information related to background checks is kept confidential as required by the Human Resources Code, §40.005(d) and (e);

(7) [~~(6)~~] Ensuring parents have the opportunity to visit the child-care center any time during the child-care center's hours of operation to observe their child, program activities, the building, the grounds, and the equipment without having to secure prior approval;

(8) [~~(7)~~] Maintaining liability insurance as required by the Human Resources Code, §42.049, if we license you to care for 13 or more children;

(9) [~~(8)~~] Complying with the child-care licensing law found in Chapter 42 of the Human Resources Code, the applicable minimum standards, and other applicable rules in the Texas Administrative Code; and

(10) [~~(9)~~] Reporting any Department of Justice substantiated complaints related to Title III of the Americans with Disabilities Act, which applies to commercial public accommodations, to DFPS.

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

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## DIVISION 2. REQUIRED NOTIFICATION

**40 TAC §746.305**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.072(g), which now extends the controlling persons concept to all child-care operations.

*§746.305. What other situations require notification to Licensing?*

(a) You must notify us as soon as possible, but no later than two days after:

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

(4) A county or district attorney accepts an indictment or information regarding an official complaint against an employee alleging commission of any crime noted in §745.651 of this title (relating to What types of criminal convictions may preclude a person from being present in an operation?); [~~and~~]

(5) The occurrence of any other situation, which places a child at risk, such as forgetting a child in a center vehicle or on the playground or not preventing a child from wandering away from the child-care center unsupervised; and [~~.~~]

(6) A new individual becomes a controlling person at your operation, or an individual that was previously a controlling person ceases to be a controlling person at your operation.

(b) (No change.)

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

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## DIVISION 4. OPERATIONAL POLICIES

**40 TAC §746.501**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.04261, which requires training related to the recognition and prevention of the abuse or neglect of children.

*§746.501. What written operational policies must I have?*

You must develop written policies that at a minimum address each of the following:

(1) - (22) (No change.)

(23) Your emergency preparedness plan; [~~and~~]

(24) Your provisions to provide a comfortable place with a seat in your center or within a classroom that enables a mother to breastfeed her child. In addition, your policies must inform parents that they have the right to breastfeed or provide breast milk for their child while in care; and[~~.~~]

(25) Preventing and responding to abuse and neglect of children, including:

(A) Required annual training for employees;

(B) Methods for increasing employee and parent awareness of issues regarding child abuse and neglect, including warning signs that a child may be a victim of abuse or neglect;

(C) Methods for increasing employee and parent awareness of prevention techniques for child abuse and neglect;

(D) Strategies for coordination between the center and appropriate community organizations; and

(E) Actions that the parent of a child who is a victim of abuse or neglect should take to obtain assistance and intervention.

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. RECORD KEEPING
## DIVISION 1. RECORDS OF CHILDREN

**40 TAC §746.603**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8)(B), which requires a child-care facility or registered child-care home to maintain directions from a health-care provider for a "reasonable time;" and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§746.603. What records must I have for children in my care and how long must I keep them?*

(a) You must maintain the following records for each child enrolled in your child-care center:

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

(7) Licensing *Incident/Illness Report* form; [~~and~~]

(8) Sign-in and sign-out logs; [~~.~~]

(9) Medication administration records; and

(10) A copy of any health-care professional recommendations or orders for providing specialized medical assistance to the child.

(b) These records must at a minimum be kept at the child-care center and must be available during hours of operation and for the following periods of time:

(1) Medication administration records for three months after administering the medication;

(2) Health-care professional recommendations or orders for three months after the health-care professional has indicated that the specialized medical assistance is no longer needed; and

(3) All other records noted in subsection (a) of this section for [~~at least~~] three months after the child's last day in care.

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

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## SUBCHAPTER D. PERSONNEL

## DIVISION 4. PROFESSIONAL DEVELOPMENT

**40 TAC §§746.1301, 746.1303, 746.1305, 746.1307, 746.1309, 746.1311, 746.1317, 746.1325, 746.1329**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.0421 and §42.0426, which provide training and orientation requirements; and HRC §42.04261, which requires training related to the recognition and prevention of the abuse or neglect of children.

*§746.1301. What training must I ensure that my employees have?*

(a) You must make sure that each employee has the following training:

(1) Orientation to the child-care center for all employees, within seven days of employment for an employee hired after September 1, 2011;

(2) Pre-service training, unless there is documentation of exemption from the training, in the amount of:

(A) Eight clock hours for caregivers hired prior to September 1, 2011; or

(B) 24 [~~Eight~~] clock hours [~~of pre-service training, or documentation of exemption,~~] for caregivers hired after September 1, 2011;

(3) 24 [~~15~~] clock hours of annual training for caregivers;

(4) 30 [~~20~~] clock hours of annual training for the director; and

(5) CPR and first aid as specified in this division.

(b) For caregivers hired after September 1, 2011:

(1) Eight clock hours of the required 24 clock hours for pre-service training must be completed before a caregiver is given responsibility for a group of children; and

(2) The remaining 16 hours of pre-service training must be completed within 90 days of employment.

*§746.1303. What should orientation to my child-care center include?*

Your orientation for employees must include at least the following:

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

(3) An overview of your policy on preventing and responding to abuse and neglect of children [~~symptoms of child abuse, neglect, and sexual abuse and the responsibility for reporting these~~];

(4) - (5) (No change.)

*§746.1305. What must be covered in [~~the eight clock hours of~~] pre-service training for caregivers?*

(a) Pre-service [~~Before a caregiver can be counted in the child/caregiver ratio, the caregiver must complete eight clock hours of pre-service~~] training for caregivers must cover [~~that covers~~] the following areas:

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

(b) (No change.)

*§746.1307. Are any caregivers exempt from the pre-service training?*

Yes. A caregiver is exempt from the pre-service training requirements if he has: [~~Caregivers with at~~]

(1) At least two years [~~six months~~] prior experience in a regulated child-care center; or

(2) Documentation of at least 24 clock hours of training at another regulated child-care center [~~with documentation of equivalent child-care training are exempt from the pre-service training requirements~~].

*§746.1309. How many clock hours of annual training must be obtained by caregivers?*

(a) Each caregiver must obtain at least 24 [~~15~~] clock hours of training each year relevant to the age of the children for whom the caregiver provides care. The 24 [~~15~~] clock hours of annual training are exclusive of orientation, pre-service training requirements, CPR and first aid, transportation safety training, and high school child-care work-study classes.

(b) (No change.)

(c) At least one clock hour of annual training must focus on prevention, recognition, and reporting of child abuse and neglect, including:

(1) Factors indicating a child is at risk for abuse or neglect;

(2) Warning signs indicating a child may be a victim of abuse or neglect;

(3) Internal procedures for reporting child abuse or neglect; and

(4) Community organizations that have training programs available to child-care center staff members, children, and parents.

(d) [~~(c)~~] The remaining clock hours of annual training must be in one or more of the following topics:

(1) Care of children with special needs;

(2) Child health (for example, nutrition and activity);

(3) Safety;

(4) Risk management;

(5) Identification and care of ill children;

(6) Cultural diversity for children and families;

(7) Professional development (for example, effective communication with families, time and stress management);

(8) Preventing the spread of communicable diseases;

(9) Topics relevant to the particular age group the caregiver is assigned (for example, caregivers assigned to an infant or toddler group should receive training on biting and toilet training);

(10) Planning developmentally appropriate learning activities;

(11) Observation and assessment;

(12) Attachment and responsive care giving; and

(13) Minimum standards and how they apply to the caregiver.

(e) [~~(d)~~] If a caregiver provides care for children younger than 24 months of age, one hour of that caregiver's annual training must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome;

(2) Preventing sudden infant death syndrome; and

(3) Understanding early childhood brain development.

(f) [~~(e)~~] A caregiver who transports a child whose chronological or developmental age is younger than nine years old must meet additional training requirements, as outlined in §746.1316 of this title (relating to What additional training must a person have in order to transport a child in care?).

*§746.1311. How many clock hours of training must my child-care center director obtain each year?*

(a) The child-care center director must obtain at least 30 [~~20~~] clock hours of training each year relevant to the age of the children for whom the child-care center provides care. The 30 [~~20~~] clock hours of annual training are exclusive of CPR and first aid, orientation, pre-service training requirements, and transportation safety.

(b) (No change.)

(c) At least one clock hour of annual training must focus on prevention, recognition, and reporting of child abuse and neglect, including:

(1) Factors indicating a child is at risk for abuse or neglect;

(2) Warning signs indicating a child may be a victim of abuse or neglect;

(3) Internal procedures for reporting child abuse or neglect; and

(4) Community organizations that have training programs available to child-care center staff members, children, and parents.

(d) [~~(c)~~] A director with five or fewer years of experience as a designated director of a child-care center must also complete at least six clock hours of the annual training in management techniques, leadership, or staff supervision.

(e) [~~(d)~~] A director with more than five years of experience as a designated director of a child-care center must complete at least three clock hours of the annual training in management techniques, leadership, or staff supervision.

(f) [~~(e)~~] If the center provides care for children younger than 24 months of age, one hour of the annual training must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome;

(2) Preventing sudden infant death syndrome; and

(3) Understanding early childhood brain development.

(g) [~~(f)~~] The remainder of the 30 [~~20~~] clock hours of annual training must be selected from the training topics specified in §746.1309(d) [~~§746.1309(c)~~] of this title (relating to How many clock hours of annual training must be obtained by caregivers?).

(h) [~~(g)~~] If the center transports a child younger than nine years old, the director must complete two hours of annual training on transportation safety in addition to the other training requirements.

(i) [~~(h)~~] The director may obtain clock hours or CEUs from the same sources as caregivers. [~~, with the following exceptions:~~]

(j) [~~(1)~~] Training hours may not be earned for presenting training to others, with the exception of up to two hours of training on transportation safety. [~~; and~~]

[~~(2) No more than ten of the required 20 clock hours of annual training may be obtained through self-instructional training.~~]

*§746.1317. Must the training for my caregivers and the director meet certain criteria?*

(a) Training may include clock hours or CEUs provided by [~~obtained through~~]:

(1) A training provider registered with the Texas Early Care and Education Career Development System's Texas Trainer Registry, maintained by the Texas Head Start State Collaboration Office;

(2) An instructor who teaches early childhood development or another relevant course at a secondary school or institution of higher education accredited by a recognized accrediting agency;

(3) An employee of a state agency with relevant expertise;

(4) A physician, psychologist, licensed professional counselor, social worker, or registered nurse;

(5) A person who holds a generally recognized credential or possesses documented knowledge relevant to the training the person will provide;

(6) A director at your child-care center who has demonstrated core knowledge in child development and caregiving if:

(A) Providing training to his own staff; and

(B) Your child-care center has not been on probation, suspension, emergency suspension, or revocation in the two years preceding the training or been assessed an administrative penalty in the two years preceding the training; or

(7) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has been awarded a Child Development Associate (CDA) credential; or

(B) Holds at least an associate's degree in child development, early childhood education, or a related field.

[~~(1) Workshops or courses offered by local school districts, colleges or universities, or Licensing;~~]

[~~(2) Conferences;~~]

[~~(3) Self-instructional materials, excluding CPR and first aid;~~]

[~~(4) Planned learning opportunities provided by child-care associations or Licensing; or~~]

[~~(5) Planned learning opportunities provided by professional consultants, such as those listed on the Texas Trainer Registry, or by a child-care center director or caregiver with specialized training or knowledge on the subject matter that meets minimum standard qualifications.~~]

(b) Training may include clock hours or CEUs obtained through self-instructional materials, if the materials were developed by a person who meets one of the qualifications in subsection (a) of this section.

(c) Self-instructional training may not be used for CPR or first-aid certification.

(d) [~~(b)~~] All training must include:

(1) Specifically stated learning objectives;

(2) A curriculum, which includes experiential or applied activities;

(3) An evaluation/assessment tool to determine whether the person has obtained the information necessary to meet the stated objectives; and

(4) A certificate of successful completion from the training source.

*§746.1325. What is self-instructional and instructor-led training?*

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

(c) Both self-instructional and instructor-led training must also include the components listed in §746.1317(d) [~~§746.1317(b)~~] of this title (relating to Must the training for my caregivers and the director meet certain criteria?).

*§746.1329. What documentation must I provide to Licensing to verify that training requirements have been met?*

(a) Except as provided in this section, you must maintain original certificates documenting CPR/first-aid and annual training in each employee's personnel record at the child-care center. To be counted toward compliance with the minimum standards, the trainer or training source must provide the participant with an original certificate or letter showing:

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

(4) The trainer's name, or the source of the training for self-instructional training; [~~and~~]

(5) The trainer's qualifications, in compliance with §746.1317 of this title (relating to Must the training for my caregivers and the director meet certain criteria?); and

(6) [~~(5)~~] Length of the training specified in clock hours, CEUs, or college credit hours, as appropriate.

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

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

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Gerry Williams
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**40 TAC §746.1327**

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

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.0421 and §42.0426, which provide training and orientation requirements.

*§746.1327. How many annual training clock hours may caregivers obtain from self-instructional materials?*

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 S. SAFETY PRACTICES
## DIVISION 2. MEDICATIONS

**40 TAC §§746.3801, 746.3803. 746.3805**

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8), which contains requirements regarding directions from a child's health-care provider concerning specialized medical treatment for a child in care; and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§746.3801. May I administer medication to children at my child-care center?*

*§746.3803. If a child has a recurring medical problem, may the parent sign an authorization to administer the medication as needed?*

*§746.3805. What records must I keep when I administer medication to a child in my care?*

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

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## DIVISION 2. MEDICATIONS AND MEDICAL ASSISTANCE

**40 TAC §§746.3801, 746.3803, 746.3805, 746.3813, 746.3815**

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8), which contains requirements regarding directions from a child's health-care provider concerning specialized medical treatment for a child in care; and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§746.3801. What does "medication" refer to in this division?*

In this division, medication means:

(1) A prescription medication; or

(2) A non-prescription medication, excluding topical ointments such as diaper ointment or sunscreen.

*§746.3803. What authorization must I obtain before administering a medication to a child in my care?*

(a) Authorization to administer medication to a child in your care must be obtained from the child's parent:

(1) In writing, signed and dated;

(2) In an electronic format that is capable of being viewed and saved; or

(3) By telephone to administer a single dose of a medication.

(b) Authorization to administer medication expires on the first anniversary of the date the authorization is provided.

(c) The child's parent may not authorize you to administer medication in excess of the medication's label instructions or the directions of the child's health-care professional.

(d) Parent authorization is not required if you administer a medication to a child in a medical emergency to prevent the death or serious bodily injury of the child, provided that you administer the medication as prescribed, directed, or intended.

*§746.3805. How must I administer medication to a child in my care?*

(a) Medication must be given:

(1) As stated on the label directions; or

(2) As amended in writing by the child's health-care professional.

(b) Medication must:

(1) Be in the original container labeled with the child's full name and the date brought to the operation;

(2) Be administered only to the child for whom it is intended; and

(3) Not be administered after its expiration date.

(c) When you administer medication to a child in your care, you must record the following:

(1) Full name of the child to whom the medication was given;

(2) Name of the medication;

(3) Date, time, and amount of medication given; and

(4) Full name of the employee administering the medication.

(d) You must keep all medication records for at least three months after administering the medication.

*§746.3813. What is specialized medical assistance?*

Specialized medical assistance is any medical assistance other than medication. Examples include, but are not limited to, assisting with an apnea monitor, protective helmet, or leg brace.

*§746.3815. What are my requirements regarding specialized medical assistance?*

(a) If a child in your care requires specialized medical assistance, then you are required to provide specialized medical assistance as recommended or ordered by a health-care professional.

(b) If you are provided with a written copy of the health-care professional's recommendations or orders, you must maintain this written information in the child's record for at least three months after the health-care professional has indicated that the specialized medical assistance is no longer needed.

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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Gerry Williams
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For further information, please call: (512) 438-3437

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## CHAPTER 747. MINIMUM STANDARDS FOR CHILD-CARE HOMES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§747.105, 747.303, 747.603, 747.1301, 747.1303, 747.1307, 747.1309, 747.1315, 747.1323, and 747.1327; the repeal of §§747.1325, 747.3601, 747.3603, and 747.3605; and new §§747.3601, 747.3603, 747.3605, 747.3613, and 747.3615, in its Minimum Standards for Child-Care Homes chapter. The purpose of the proposal is to implement legislation passed in the 82nd Legislative Session. House Bill (H.B.) 434 requires a child-care facility or registered family home to: (1) follow the directions of a child's health-care professional when providing a child in care specialized medical assistance; and (2) maintain a copy of any written directions from the health-care professional for a reasonable period of time. H.B. 1615 restricts under what circumstances medication may be given to a child. Except in a medical emergency, a child day-care operation must have parental consent before giving a child a prescription or over-the-counter medication. Senate Bill (S.B.) 260 increases orientation and annual training requirements for home-based day cares. S.B. 265 requires training in certain child-care operations to be relevant to the age of children for whom care is provided, and adds trainer minimum qualifications to Human Resources Code §42.0421. All training outlined in this section of the law must be conducted by a person who meets one of seven options for minimum qualifications. S.B. 1178 expands the "controlling person" concept to all child-care facilities and family homes, not just residential operations. A summary of the changes is described below.

The amendment to §747.105 broadens the definition of health-care professional beyond its current purpose of only describing those professionals that can provide vaccinations. This will make the definition more germane to H.B. 1615.

The amendment to §747.303 implements S.B. 1178, which adds the requirement that a child-care home must notify Child-Care Licensing within two days when a new individual becomes a "controlling person" at the home, or an individual that was previously a controlling person ceases to be a controlling person.

The amendment to §747.603 adds to the list of contents required for a child's record: (1) medication administration records; and (2) health-care professional orders or recommendations for specialized medical assistance. The amendment also states how long the records must be kept. These changes are a result of H.B. 434 and H.B. 1615.

The amendment to §747.1301 updates the training requirement for caregivers in home-based day cares. S.B. 260 requires that orientation must be completed within seven days of hire, and increases annual training hours for licensed child-care homes to 24 hours. Previously, it was 15 hours.

The amendment to §747.1303 increases to 30 clock hours the annual training requirement for the owner/primary care giver of a home based daycare.

The amendment to §747.1307 deletes references to a specific number of annual training hours, since the hours are already specified in proposed changes to §747.1301. Also, a phrase is added to clarify that training must be relevant to the age of children for whom the caregiver is providing care.

The amendment to §747.1309 requires 30 hours of annual training requirements for the primary caregiver of a home-based day care. Previously the amount was 20 hours. Also, a phrase is added to clarify that training must be relevant to the age of children for whom the caregiver is providing care. These changes are the result of S.B. 260 and S.B. 265. Also, a cross reference to the title of §747.1307 is changed in this rule.

The amendment to §747.1315 adds the trainer minimum qualifications outlined in S.B. 265, which states that training must be conducted by a person who meets one of seven options for minimum qualifications. The amendment also clarifies that self-instructional training must be developed by a person who meets one of the listed trainer qualifications. Also, §747.1325 is repealed because it is no longer necessary to limit self-instructional training.

The amendment to §747.1323 changes the cross-reference to §747.1315.

The amendment to §747.1327 requires that the trainer qualifications be included in training documentation, so that Child Care Licensing staff can monitor for compliance with the law.

The remaining changes are made in Subchapter S, Safety Practices, Division 2, Medication and Medical Assistance. The new name of Division 2 reflects additions to the division related to specialized medical assistance.

Section 747.3601 is repealed and proposed as new. New §747.3601 defines "medication" to include non-prescription medication. The circumstances under which a home-based day care may administer medication to a child, which were previously included in this rule, are incorporated into proposed changes to §747.3603 and §747.3605.

Section 747.3603 is repealed and proposed as new. New §747.3603 lists the authorization requirements for all medications, which include: (1) written permission from a parent, or telephone permission for a one-time dose; (2) re-authorization at least annually; and (3) prohibition against a parent authorizing more medication than what is prescribed or than what is included in the medication's label instructions.

Section 747.3605 is repealed and proposed as new. In addition to the record keeping requirements for medications, the new rule expands the requirements moved from current §747.3601 and §747.3603 to include that medication can only be given according to label instructions or as directed by a health-care professional.

New §747.3613 defines specialized medical assistance.

New §747.3615 requires the operation to follow the recommendations or orders of the child's health-care professional when providing to a child in care specialized medical assistance, and requires the operation to maintain any written orders or recommendations in the child's record for at least three months after the health-care professional has indicated that the specialized medical assistance is no longer needed. These changes are required by H.B. 434.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown has also determined that for each year of the first five years that the proposed sections will be in effect, the public benefit anticipated as a result of the rule changes will be that care-

givers in home-based day-cares will have a better understanding of when medications may be given to children, how specialized medical assistance must be provided, receive more training, and therefore provide better care to Texas children. DFPS identified the proposed changes to §747.1301 (relating to What training must I ensure that my caregivers have?) and §747.1303 (relating to What training must I have?) as potentially having an adverse economic impact on licensed and registered child-care homes. Child Care Licensing is sensitive to the impact that proposed legislative mandated changes may have on families as well as providers, particularly in the current economic climate. Accordingly, in proposing changes to minimum standards, every effort has been made to bring training options for low or no cost to providers. In a partnership with AgriLife Texas Cooperative Extension (a part of the Texas A&M University System), Child Care Licensing has online free of charge tutorials for caregivers and consumers. Tutorials focus on the healthy and safe care of infants and toddlers. There are nine courses (15 clock hours) for Professional Development Training for Infant and Toddler Caregivers. Also, there are eight courses (10 hours) for parents and families who care for young children. Online courses were produced using funds provided under the American Recovery and Reinvestment Act of 2009.

The proposed change to §747.1301 increases the hours of annual training for caregivers in licensed child-care homes from 15 to 24 hours. The proposed change to §747.1303 increases the hours of annual training for the owner/primary caregiver of a home-based day-care from 20 to 30 hours of training. The anticipated economic cost to persons who are required to comply with the proposed sections is outlined below.

There are no direct costs to persons other than child-care providers as a result of the proposed rules; however, consumers of child-care services may experience nominal increases in the cost of care to the extent that any given child-care home passes any increased costs of training on to its consumers. The amount of such increase, if any, is impossible to estimate given the variability in the number of staff trained by each child-care home, the discretion that each home will have in how to minimize training costs, and the extent to which each child-care home absorbs any increased costs without increasing its rates.

There will be a fiscal impact to businesses, including small and micro-businesses, as a result of the rule amendments that impose increased training requirements. Increased training requirements may result in two types of increased costs - the cost of providing the instruction itself, and the cost of the hourly wages paid to the caregiver while undergoing the training.

Instruction may be provided by local resource and referral agencies or may be provided in-house - with the average per hour cost ranging from $0 per hour when training is available in the community at no-cost, to a high of $20 per hour for group instruction provided to caregivers by a local resource and referral agency. For purposes of the rules discussed below that increase training hours for caregivers, average hourly instructional costs are estimated to be $10 per hour. The average hourly wage for a caregiver is $7.98, based on data gathered from the Texas Workforce Commission Occupational Employment Statistics semiannual survey of Texas employers.

Currently, §747.1301 requires 15 hours of annual training in child-care homes, but amendments to §42.0421, Human Resources Code enacted by the 82nd Legislature in S.B. 260 now require 24 hours of annual training. For each caregiver who must receive the additional 9 hours of training, it is estimated that child-care homes will experience an average additional one-time cost of $90 in instructional costs, and $71.82 in hourly wages paid to the caregiver while undergoing the training.

Currently, §747.1303 requires 20 hours of annual training for home owner/primary caregiver, but amended §42.0421, Human Resources Code, now requires 30 hours. Child Care Licensing assumes that training provided for the home owner/primary caregiver will typically not be provided in-house and that the level of expertise of trainers is usually higher than training provided to employees. Using these assumptions, Child Care Licensing estimates that the average cost of hourly training for directors is $25. The hourly wage of a director is $15.50, based on data gathered from the Texas Workforce Commission Occupational Employment Statistics semiannual survey of Texas employers. Accordingly, for each home owner/primary caregiver who must receive the additional 10 hours of annual training, it is estimated that child-care homes will experience an additional annual cost of $250 in instructional costs, and $155 in hourly wages paid to the primary caregiver while undergoing the training.

The DFPS fiscal year (FY) 2010 data book reflects 1,684 Licensed Child Care Homes and 6,537 Registered Family Homes, most of which are either a small business or micro-business as defined in Chapter 2006, Government Code. Chapter 2006 defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is further defined as a micro-business. DFPS estimates that the vast majority of Child-Care Homes and Registered Family Homes are for-profit businesses, independently owned, and have no more than 20 employees. Chapter 2006 requires that an agency prepare a Regulatory Flexibility Analysis (RFA) for any rule that has a negative economic impact on small businesses, unless consideration of alternative methods of achieving the rule's purpose would not be consistent with the health, safety, and environmental and economic welfare of the state. Because the changes to §747.1301 and §747.1303 that result in possible adverse economic impact to small businesses are required by §42.0421, Human Resources Code, these changes are considered *per se* necessary for the health and safety of the children served by child-care centers subject to these rules. Accordingly, no RFA was prepared prior to proposal of these rules.

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

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.Mcdonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-443, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

## SUBCHAPTER A. PURPOSE AND DEFINITIONS

### 40 TAC §747.105

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Com-

missioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC §42.042(e)(8)(A), which provides that a "health care provider" can provide directions for specialized medical assistance required by a child.

*§747.105. What do certain words and terms mean when used in this chapter?*

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or unless the context clearly indicates otherwise. In addition, the following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) - (32) (No change.)

(33) Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nursing, a licensed vocational nurse (LVN), licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of his license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

[(33) Health-care professional--A licensed physician, licensed or registered nurse, or other licensed medical personnel providing comprehensive preventive, diagnostic, or therapeutic medical care to the child. This does not include medical doctors or medical personnel where immunizations and contraindications to immunizations are outside the scope of the licensed practice, such as chiropractors, homeopaths, podiatrists; or medical practitioners not licensed to practice in the United States.]

(34) - (50) (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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Gerry Williams
General Counsel
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For further information, please call: (512) 438-3437

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## SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION
## DIVISION 2. REQUIRED NOTIFICATIONS

**40 TAC §747.303**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes Department of Family and Protective Service to adopt rules related to the regulation of child-care operations; and HRC §42.072(g), which now extends the controlling persons concept to all child-care operations.

*§747.303. What other situations require notification to Licensing?*

(a) You must notify us as soon as possible, but no later than two days after:

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

(4) A county or district attorney accepts an indictment or information regarding an official complaint against a household member or caregiver alleging commission of any crime noted in §745.651 of this title (relating to What types of criminal convictions may preclude a person from being present in an operation?); [and]

(5) The occurrence of any other situation that places a child at risk, such as forgetting a child in a vehicle or not preventing a child from wandering away from your child-care home unsupervised; and[.]

(6) A new individual becomes a controlling person at your operation, or an individual that was previously a controlling person ceases to be a controlling person at your operation.

(b) (No change.)

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

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## SUBCHAPTER C. RECORD KEEPING
## DIVISION 1. RECORDS OF CHILDREN

**40 TAC §747.603**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the

Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8)(B), which requires a child-care facility or registered child-care home to maintain directions from a healthcare provider for a "reasonable time;" and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§747.603. What records must I have for the children in my care and how long must I keep them?*

(a) You must maintain the following records for each child enrolled in your child-care home:

(1) - (5) (No change.)

(6) Hearing and vision screening results, if applicable; [and]

(7) Licensing *Incident/Illness Report* form;[.]

(8) Medication administration records; and

(9) A copy of any health-care professional recommendations or orders for providing specialized medical assistance to the child.

(b) These records must at a minimum be kept at the child-care home and available for review during operating hours and for the following periods of time:

(1) Medication administration records for three months after administering the medication;

(2) Health-care professional recommendations or orders for three months after the health-care professional has indicated that the specialized medical assistance is no longer needed; and

(3) All other records noted above for [at least] three months after the child's last day in care.

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

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## SUBCHAPTER D. PERSONNEL
## DIVISION 4. PROFESSIONAL DEVELOPMENT

**40 TAC §§747.1301, 747.1303, 747.1307, 747.1309, 747.1315, 747.1323, 747.1327**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC §42.0421 and §42.0426, which provide training and orientation requirements.

*§747.1301. What training must I ensure that my caregivers have?*

You must make sure that each caregiver has the following training:

(1) Orientation to your child-care home as specified in §747.1305 of this title (relating to What should orientation to my child-care home include?), within seven days of employment for a caregiver hired after September 1, 2011;

(2) 15 clock hours of annual training for a caregiver in a registered family home, as specified in §747.1307 of this title (relating to What topics must the [15 clock hours of] annual training for caregivers include?); [and]

(3) 24 clock hours of annual training for a caregiver in a licensed child-care home as specified in §747.1307 of this title; and

(4) [(3)] CPR and first-aid training as specified in §747.1313 [§746.1313] of this title (relating to Who must have first-aid and CPR training?).

*§747.1303. What training must I have?*

You must have the following training:

(1) (No change.)

(2) 30 [20] clock hours of annual training; and

(3) (No change.)

*§747.1307. What topics must the [15 clock hours of] annual training for caregivers include?*

(a) Each caregiver counted in the child/caregiver ratio on more than ten separate occasions in one training year, as specified in §747.1311 of this title (relating to When must the annual training be obtained?) must obtain annual training relevant to the age of the children for whom the caregiver provides care. [at least 15 clock hours of training annually. The 15 clock hours are]

(b) Annual training is exclusive of CPR, first aid, orientation, transportation safety, and any training received through a high school child-care work-study program.[;]

(c) [(b)] At least six clock hours of annual training must be in one or more of the following topics:

(1) Child growth and development;

(2) Guidance and discipline;

(3) Age-appropriate curriculum; and

(4) Teacher-child interaction.[;]

(d) [(c)] The remaining clock hours of annual training must be in one or more of the following topics:

(1) Care of children with special needs;

(2) Child health (for example, nutrition and physical activity);

(3) Safety;

(4) Risk management;

(5) Identification and care of ill children;

(6) Cultural diversity of children and families;

(7) Professional development (for example, effective communication with families, time and stress management);

(8) Preventing the spread of communicable diseases;

(9) Topics relevant to the particular ages of children in care (for example, caregivers working with infants or toddlers should receive training on biting and toilet training);

(10) Planning developmentally appropriate learning activities;

(11) Observation and assessment;

(12) Attachment and responsive care giving; and

(13) Minimum standards and how they apply to the caregiver.[~~; and~~]

(e) [~~(d)~~] If the home provides care for a child younger than 24 months, one hour of annual training must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome;

(2) Preventing sudden infant death syndrome; and

(3) Understanding early childhood brain development.

(f) [~~(e)~~] A caregiver who transports a child whose chronological or developmental age is younger than nine years old must meet additional training requirements as outlined in §747.1314 of this title (relating to What additional training must a person have in order to transport a child in care?).

*§747.1309. What training topics must be included in my annual training as the primary caregiver?*

(a) You must obtain at least 30 [~~20~~] clock hours of training annually that is: [~~.~~]

(1) Relevant to the age of the children for whom you provide care;

(2) [~~(1)~~] Exclusive [~~The 20 clock hours of annual training are exclusive~~] of the Licensing pre-application interview, CPR and first-aid training, and transportation safety training; and

(3) [~~(2)~~ ] Not [~~Training hours may not be~~] earned for presenting training to others.

(b) (No change.)

(c) A primary caregiver with five or fewer years of experience as a primary caregiver in a licensed or registered child-care home must complete at least six of the 30 [~~20~~] clock hours in management techniques, leadership, or staff supervision.

(d) A primary caregiver with more than five years of experience as a primary caregiver in a licensed or registered child-care home must complete at least three of the 30 [~~20~~] clock hours in management techniques, leadership, or staff supervision.

(e) (No change.)

(f) The remainder of annual training hours must be selected from the training topics specified in §747.1307(d) [~~§747.1307(c)~~] of this title (relating to What topics must the [~~15 clock hours of~~] annual training for caregivers include?).

(g) (No change.)

*§747.1315. Must child-care training meet certain criteria?*

(a) Training may include clock hours or CEUs provided by [~~obtained through~~]:

(1) A training provider registered with the Texas Early Care and Education Career Development System's Texas Trainer Registry, maintained by the Texas Head Start State Collaboration Office;

(2) An instructor who teaches early childhood development or another relevant course at a secondary school or institution of higher education accredited by a recognized accrediting agency;

(3) An employee of a state agency with relevant expertise;

(4) A physician, psychologist, licensed professional counselor, social worker, or registered nurse;

(5) A person who holds a generally recognized credential or possesses documented knowledge relevant to the training the person will provide;

(6) A director at your licensed child-care home or a registered family home provider who has demonstrated core knowledge in child development and caregiving, if:

(A) Providing training to his own staff; and

(B) Your operation has not been on probation, suspension, emergency suspension, or revocation in the two years preceding the training or been assessed an administrative penalty in the two years preceding the training; or

(7) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has been awarded a Child Development Associate (CDA) credential; or

(B) Holds at least an associate's degree in child development, early childhood education, or a related field.

[~~(1) Workshops offered by local school districts, colleges or universities, or Licensing;~~]

[~~(2) Conferences on early childhood or early child development;~~]

[~~(3) Self-instructional materials, excluding CPR and first aid;~~]

[~~(4) Planned learning opportunities provided by child-care associations or Licensing; or~~]

[~~(5) Planned learning opportunities provided by community resources, professional consultants, such as those listed on the Texas Trainer Registry, or a primary caregiver who meets minimum standard qualifications.~~]

(b) Training may include clock hours or CEUs obtained through self-instructional materials, if the materials were developed by a person who meets one of the qualifications in subsection (a) of this section.

(c) Self-instructional training may not be used for CPR or first-aid certification.

(d) [~~(b)~~] All training must include:

(1) Specifically stated learning objectives;

(2) A curriculum, which includes experiential or applied activities;

(3) An evaluation/assessment tool to determine whether the person has obtained the information necessary to meet the stated objectives; and

(4) A certificate of successful completion from the training source.

*§747.1323. What is self-instructional and instructor-led training?*

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

(c) Both self-instructional and instructor-led training must also include the components listed in §747.1315(d) [~~§747.1315(b)~~] of this title (relating to Must child-care training meet certain criteria?).

*§747.1327. What documentation must I provide to Licensing to verify that training requirements have been met?*

(a) Except as provided in this section, you must maintain original certificates documenting training in each caregiver's personnel record at your child-care home. To be counted toward compliance with the minimum standards, the trainer or training source must provide the participant with an original certificate or letter showing:

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

(4) The trainer's name, or the source of the training for self-instructional training; [~~and~~]

(5) The trainer's qualifications, in compliance with §747.1315 of this title (relating to Must child-care training meet certain criteria?); and

(6) [~~(5)~~] Length of the training specified in clock hours, CEUs, or college credit hours, as appropriate.

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

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

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Gerry Williams
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**40 TAC §747.1325**

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

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; and HRC §42.0421 and §42.0426, which provide training and orientation requirements.

*§747.1325. How many annual training clock hours may be obtained from self-instructional materials?*

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 S. SAFETY PRACTICES
## DIVISION 2. MEDICATION

**40 TAC §§747.3601, 747.3603, 747.3605**

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

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8), which contains requirements regarding directions from a child's health care provider concerning specialized medical treatment for a child in care; and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§747.3601. May I administer medications to children at my child-care home?*

*§747.3603. If a child has a recurring medical problem, may the parent sign an authorization to administer the medication as needed?*

*§747.3605. What records must I keep when I administer medication to a child in my care?*

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

Filed with the Office of the Secretary of State on November 1, 2011.

TRD-201104728
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## DIVISION 2. MEDICATION AND MEDICAL ASSISTANCE

**40 TAC §§747.3601, 747.3603, 747.3605, 747.3613, 747.3615**

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042, which authorizes Department of Family and Protective Services to adopt rules related to the regulation of child-care operations; HRC §42.042(e)(8), which contains requirements regarding directions from a child's health care provider concerning specialized medical treatment for a child in care; and HRC §42.065, which provides guidelines for administering medication in a licensed, registered, or listed child-care home or center.

*§747.3601. What does "medication" refer to in this division?*

In this division, medication means:

(1) A prescription medication; or

(2) A non-prescription medication, excluding topical ointments such as diaper ointment or sunscreen.

*§747.3603. What authorization must I obtain before administering a medication to a child in my care?*

(a) Authorization to administer medication to a child in your care must be obtained from the child's parent:

(1) In writing, signed and dated;

(2) In an electronic format that is capable of being viewed and saved; or

(3) By telephone to administer a single dose of a medication.

(b) Authorization to administer medication expires on the first anniversary of the date the authorization is provided.

(c) The child's parent may not authorize you to administer medication in excess of the medication's label instructions or the directions of the child's health-care professional.

(d) Parent authorization is not required if you administer a medication to a child in a medical emergency to prevent the death or serious bodily injury of the child, provided that you administer the medication as prescribed, directed, or intended.

*§747.3605. How must I administer medication to a child in my care?*

(a) Medication must be given:

(1) As stated on the label directions; or

(2) As amended in writing by the child's health-care professional.

(b) Medication must:

(1) Be in the original container labeled with the child's full name and the date brought to the operation;

(2) Be administered only to the child for whom it is intended; and

(3) Not be administered after its expiration date.

(c) When you administer medication to a child in your care, you must make a record of the following:

(1) Full name of the child to whom the medication was given;

(2) Name of the medication;

(3) Date, time, and amount of medication given; and

(4) Full name of the caregiver administering the medication, if it is not the primary caregiver.

(d) You must keep all medication records for at least three months after administering the medication.

*§747.3613. What is specialized medical assistance?*

Specialized medical assistance is any medical assistance other than medication. Examples include, but are not limited to, assisting with an apnea monitor, protective helmet, or leg brace.

*§747.3615. What are my requirements regarding specialized medical assistance?*

(a) If a child in your care requires specialized medical assistance, then you are required to provide specialized medical assistance as recommended or ordered by a health-care professional.

(b) If you are provided with a written copy of the health-care professional's recommendations or orders, you must maintain this written information in the child's record for at least three months after the health-care professional has indicated that the specialized medical assistance is no longer needed.

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

Filed with the Office of the Secretary of State on November 1, 2011.

TRD-201104729
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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# CHAPTER 748. GENERAL RESIDENTIAL OPERATIONS

## SUBCHAPTER F. TRAINING AND PROFESSIONAL DEVELOPMENT

## DIVISION 6. ANNUAL TRAINING

**40 TAC §748.941**

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), an amendment to §748.941, concerning what are the instructor requirements for providing annual training, in its General Residential Operations chapter. The purpose of the amendment is to implement legislation passed during the 82nd Legislative Session. Senate Bill (S.B.) 265 adds minimum qualifications for instructors that provide training required by Human Resources Code §42.0421. Transportation safety training is required by Human Resources Code §42.0421(e).

The amendment to §748.941 clarifies that transportation safety training for General Residential Operations must be conducted by an instructor that meets one of seven options for minimum training qualifications, which are consistent with the new law.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed 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.

Ms. Brown 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 that staff of operations will receive transportation safety training from qualified instructors. There will be no effect on large, small, or micro-businesses because the proposed change does not impose new requirements on any business and does not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed section.

HHSC has determined that the proposed amendment 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, Government Code.

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-444, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.0421(f), which provides qualifications for certain trainers.

*§748.941. What are the instructor requirements for providing annual training?*

(a) Except for transportation safety training, the [~~The~~] annual training instructors must meet the same requirements in §748.869(a), (c), and (d) [~~§748.869 (c) and (d)~~] of this title (relating to What are the instructor requirements for providing pre-service training?).

(b) Transportation safety training must be provided by:

(1) A training provider registered with the Texas Early Care and Education Career Development System's Texas Trainer Registry, maintained by the Texas Head Start State Collaboration Office;

(2) An instructor who teaches early childhood development or another relevant course at a secondary school or institution of higher education accredited by a recognized accrediting agency;

(3) An employee of a state agency with relevant expertise;

(4) A physician, psychologist, licensed professional counselor, social worker, or registered nurse;

(5) A person who holds a generally recognized credential or possesses documented knowledge relevant to the training the person will provide; or

(6) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has been awarded a Child Development Associate credential; or

(B) Holds at least an associate's degree in child development, early childhood education, or a related field.

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

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104776
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## CHAPTER 749. CHILD-PLACING AGENCIES

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§749.339, 749.931, 749.939, and 749.2967, in its Child-Placing Agencies chapter. The purpose of the amendments is to implement legislation passed during the 82nd Legislative Session. Senate Bill (S.B.) 471 requires child-placing agencies to have specific policies and training related to child abuse and neglect. Senate Bill (S.B.) 265 adds minimum qualifications for instructors that provide training required by Human Resources Code §42.0421. Transportation safety training for child-placing agencies is required by Human Resources Code §42.0421(e). House Bill (H.B.) 2560 prohibits Child Care Licensing from banning handguns in foster parent vehicles if the handgun is in the possession and control of

the foster parent and the foster parent is licensed to carry the handgun. A summary of the changes is described below.

The amendment to §749.339 adds the requirement that a child-placing agency must have a policy on preventing, recognizing, and responding to abuse and neglect of children, as required by S.B. 471. Specific policy content is also required, which mirrors the new law.

The amendment to §749.931 requires one hour of annual training for child-placing agency employees on preventing, recognizing, and responding to abuse and neglect of children. Specific policy content is required, which mirrors the new law.

The amendment to §749.939 clarifies that transportation safety training for child-placing agencies must be conducted by an instructor that meets one of seven listed options for minimum training qualifications, which are consistent with the new law.

The amendment to §749.2967 clarifies that caregivers may transport a child in a vehicle where a handgun is present if: (1) the handgun is in the possession and control of the caregiver; and (2) the caregiver is licensed to carry the handgun under Subchapter H, Chapter 411, of the Government Code.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown 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 that staff of child-placing agencies will receive more training and information related to preventing, recognizing, and responding to child abuse/neglect, and transportation training will be of a higher quality because it will be provided by more highly qualified training staff as required by law. The one hour of additional annual training that is required for preventing, recognizing, and responding to child abuse/neglect will have no anticipated economic impact to business because the training can be incorporated into the already required number of annual training hours. Therefore, there is no anticipated fiscal impact to persons or small, micro, and large businesses as a result of the proposed rule changes, because the proposed rule changes should not affect the cost of doing business, do not impose new requirements on any business, and do not require the purchase of any new equipment or any increased staff time in order to comply.

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

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.McDonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-444, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

## SUBCHAPTER C. ORGANIZATION AND ADMINISTRATION
## DIVISION 8. POLICIES AND PROCEDURES

**40 TAC §749.339**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.0421(f), which provides qualifications for certain trainers.

*§749.339. What child-care policies must I develop?*

You must develop policies that describe:

(1) - (16) (No change.)

(17) Transitional living policies, if applicable; [~~and~~]

(18) Preventing, recognizing, and responding to abuse and neglect of children, including:

(A) Required annual training for employees;

(B) Methods for increasing employee and parent awareness of issues regarding child abuse and neglect, including warning signs that a child may be a victim of abuse or neglect;

(C) Methods for increasing employee and parent awareness of prevention techniques for child abuse and neglect;

(D) Strategies for coordination between the center and appropriate community organizations; and

(E) Actions that the parent of a child who is a victim of abuse or neglect should take to obtain assistance and intervention; and

(19) [~~(18)~~] If applicable, the policy required by §749.2961(a)(2) of this title (relating to Are weapons, firearms, explosive materials, and projectiles permitted in a foster home?).

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

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104777
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## SUBCHAPTER F. TRAINING AND PROFESSIONAL DEVELOPMENT
## DIVISION 6. ANNUAL TRAINING

**40 TAC §749.931, §749.939**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042, which authorizes DFPS to make rules related to the regulation of child-care operations; HRC §42.04261, which requires training related to the recognition and prevention of the abuse or neglect of children; and HRC §42.0421(f), which provides qualifications for certain trainers.

*§749.931. What are the annual training requirements for caregivers and employees?*

(a) Caregivers and employees must complete the following training hours:

Figure: 40 TAC §749.931(a)

(b) (No change.)

*§749.939. What are the instructor requirements for providing annual training?*

(a) Except for transportation safety training, the [~~The~~] annual training instructors must meet the same requirements in §749.869(a), (c) and (d) [~~§749.869(c) and (d)~~] of this title (relating to What are the instructor requirements for providing pre-service training?).

(b) Transportation safety training must be provided by:

(1) A training provider registered with the Texas Early Care and Education Career Development System's Texas Trainer Registry, maintained by the Texas Head Start State Collaboration Office;

(2) An instructor who teaches early childhood development or another relevant course at a secondary school or institution of higher education accredited by a recognized accrediting agency;

(3) An employee of a state agency with relevant expertise;

(4) A physician, psychologist, licensed professional counselor, social worker, or registered nurse;

(5) A person who holds a generally recognized credential or possesses documented knowledge relevant to the training the person will provide; or

(6) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has been awarded a Child Development Associate credential; or

(B) Holds at least an associate's degree in child development, early childhood education, or a related field.

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

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104778
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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## SUBCHAPTER O. FOSTER HOMES: HEALTH AND SAFETY REQUIREMENTS, ENVIRONMENT, SPACE AND EQUIPMENT
## DIVISION 3. WEAPONS, FIREARMS, EXPLOSIVE MATERIALS, AND PROJECTILES

### 40 TAC §749.2967

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042, which authorizes DFPS to adopt rules related to the regulation of child-care operations; and HRC §42.042(e-1), which allows a foster parent licensed to carry a concealed handgun to carry the gun with him or her when transporting a foster child.

*§749.2967. May a caregiver transport a child in a vehicle where firearms, other weapons, explosive materials, or projectiles are present?*

(a) A caregiver may transport a child in a vehicle where firearms (other than [~~not~~] handguns), other weapons, explosive materials, or projectiles are present if:

(1) All firearms are not loaded;

(2) The firearms, other weapons, explosive materials, or projectiles are inaccessible to the child; and

(3) Possession of the firearm is legal.

(b) A caregiver may transport a child in a vehicle where a handgun is present if:

(1) The handgun is in the possession and control of the caregiver; and

(2) The caregiver is licensed to carry the handgun under Subchapter H, Chapter 411, of the Government Code.

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

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104779

Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: December 18, 2011
For further information, please call: (512) 438-3437

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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 13. CULTURAL RESOURCES

### PART 8. TEXAS FILM COMMISSION

### CHAPTER 122. TEMPORARY USE OF STATE BUILDINGS AND GROUNDS BY TELEVISION OR FILM PRODUCTION COMPANIES

**13 TAC §122.2**

The Texas Film Commission withdraws the proposed amendment to §122.2 which appeared in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4762).

Filed with the Office of the Secretary of State on November 4, 2011.

TRD-201104794
Evan E. Fitzmaurice
Director
Texas Film Commission
Effective date: November 4, 2011
For further information, please call: (512) 463-9200

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## TITLE 16. ECONOMIC REGULATION

### PART 1. RAILROAD COMMISSION OF TEXAS

### CHAPTER 12. COAL MINING REGULATIONS

### SUBCHAPTER G. SURFACE COAL MINING AND RECLAMATION OPERATIONS, PERMITS, AND COAL EXPLORATION PROCEDURES SYSTEMS

### DIVISION 2. GENERAL REQUIREMENTS FOR PERMITS AND PERMIT APPLICATIONS

**16 TAC §12.108**

The Railroad Commission of Texas withdraws the proposed amendment to §12.108 which appeared in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7109).

Filed with the Office of the Secretary of State on November 8, 2011.

TRD-201104844
Mary Ross McDonald
Director, Pipeline Safety Division
Railroad Commission of Texas
Effective date: November 8, 2011
For further information, please call: (512) 475-1295

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# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 1. ADMINISTRATION

## PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

## CHAPTER 355. REIMBURSEMENT RATES

## SUBCHAPTER H. REIMBURSEMENT METHODOLOGY FOR 24-HOUR CHILD CARE FACILITIES

### 1 TAC §355.7105

The Texas Health and Human Services Commission (HHSC) adopts new §355.7105, concerning Reimbursement Methodology for Supervised Independent Living, in its Reimbursement Rates chapter. The rule is adopted without changes to the proposed text as published in the September 2, 2011, issue of the *Texas Register* (36 TexReg 5531) and, therefore, will not be republished.

Background and Justification

The Supervised Independent Living (SIL) program is a new program developed by the Department of Family and Protective Services (DFPS). The SIL program will serve approved young adults in foster care to allow them to practice independent living skills before leaving foster care. DFPS will contract for SIL housing for youth with minimal supervision and minimal case management services in a variety of housing settings including, but not limited to, apartments, dorm settings at General Residential Operations (GROs), dorm settings at colleges, shared housing, and host homes. SIL providers will not be licensed, but will meet the identified needs of the young adults in their SIL program through contract provisions.

The rule is adopted to describe the rate methodology for the SIL service.

Comments

The 30-day comment period ended October 3, 2011. During this period, HHSC received no comments regarding the proposed rule.

Legal Authority

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104731
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: December 1, 2011
Proposal publication date: September 2, 2011
For further information, please call: (512) 424-6900

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## SUBCHAPTER J. PURCHASED HEALTH SERVICES

## DIVISION 13. CHEMICAL DEPENDENCY TREATMENT FACILITY SERVICES

### 1 TAC §355.8241

The Texas Health and Human Services Commission (HHSC) adopts the amendment to §355.8241, concerning the Medicaid reimbursement methodology for chemical dependency treatment facilities, without changes to the proposed text as published in the August 19, 2011, issue of the *Texas Register* (36 TexReg 5166) and will not be republished.

Background and Justification

The amendment is adopted as a result of an initiative by HHSC to update rules and remove outdated references. In addition, the amendment replaces an obsolete reimbursement methodology with a revised reimbursement methodology that reflects current rate determination practices.

Comments

The 30-day public comment period ended September 18, 2011. During this period, HHSC did not receive any comments regarding the proposed amendment.

Legal Authority

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

medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104745
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 22, 2011
Proposal publication date: August 19, 2011
For further information, please call: (512) 424-6900

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## DIVISION 31. AMBULANCE SERVICES

### 1 TAC §355.8600

The Texas Health and Human Services Commission (HHSC) adopts the amendment to §355.8600, concerning Medicaid Reimbursement for Ambulance Services, without changes to the proposed text as published in the August 19, 2011, issue of the *Texas Register* (36 TexReg 5167) and will not be republished.

Background and Justification

The Centers for Medicare and Medicaid Services (CMS) recently approved an amendment to the Texas Medicaid State Plan allowing governmental ambulance providers to submit an annual cost report and receive payment of the federal share up to their costs. This change was made as a result of concerns expressed by ground and air ambulance providers regarding the rates paid for ambulance services. The amendment is adopted to change the methodology used to set ambulance services rates for governmental ambulance providers to allow for cost reconciliation and cost settlement based on total allowable Medicaid costs, in response to the change in the state plan.

The amendment describes the reimbursement methodology for both private and public ambulance providers, allowing for enrolled and approved governmental providers to submit an annual cost report for allowable Medicaid costs. The amendment also describes the cost reporting requirement, cost report due date, and reconciliation process for governmental ambulance providers. There are no changes to the reimbursement methodology currently in place for private ambulance providers.

Comments

The 30-day comment period ended September 19, 2011. During this period, HHSC received comments from the City of Houston Fire Department (HFD) and from Coveler & Katz PC on behalf of Harris County Emergency Services District Number 11 regarding the proposed amendments to the rule. A summary of each comment and HHSC's responses follow:

Comment: The HFD requested the cost settlement and reconciliation be changed to allow a payment of 80 percent of the calculated settlement amount be paid to the HFD upon completion of HHSC's desk review or one month after the submittal of its cost report, and the remaining 20 percent of the calculated settlement amount be paid to the HFD no later than six months after submission of the cost report.

Response: Currently ambulance providers participating in this program receive interim payments through HHSC's Medicaid claims administrator, the Texas Medicaid & Healthcare Partnership (TMHP), for transports and treatment of Medicaid recipients. The purpose of the cost report is to supplement payments to eligible governmental entities once the cost report is submitted, desk reviewed, and approved for payment. HHSC did not change the proposed rule in response to this comment.

Comment: HFD requested to use a cash basis of accounting for expenditures and revenues.

Response: HHSC adheres to the cost determination rules, which address the methodology utilized for public providers. The cost determination rule at 1 Texas Administrative Code §355.105(b)(1), regarding General Reporting and Documentation Requirements, Methods, and Procedures, addresses the methodology utilized for public providers. HHSC did not change the proposed rule in response to this comment.

Comment: HFD requested that the final rule include a provision that the initial reporting period for providers that have submitted all requested information for the application process be the period from October 1, 2010, to September 30, 2011.

Response: CMS has approved a Texas Medicaid state plan amendment (SPA) that allows eligible governmental providers to participate in the ambulance supplemental payment process. The effective date of the SPA is August 1, 2011. Thus, enrolled ambulance providers will be eligible to submit a cost report for the first reporting period from August 1, 2011 (the effective date of the SPA) to September 30, 2011. Subsequent cost reports will be based on the federal fiscal year, October 1 through September 30. HHSC did not change the proposed rule in response to this comment.

Comment: HFD requested HHSC remove the requirement to report hours by position on the cost report.

Response: CMS required HHSC to include language in the SPA that states that the cost report used for calculating supplemental payments will be approved by CMS. The Emergency Ambulance Program cost report has been approved by CMS to include reported hours by position. HHSC did not change the proposed rule in response to this comment.

Comment: Coveler & Katz PC on behalf of Harris County Emergency Services District No. 11 requested a change to the rule that would allow a governmental agency that is not a provider to report the public expenditures related to ambulance services they contract for to provide services for their citizens.

Response: The proposed rule language intentionally limited the qualification for these payments to public providers that both owned and operated the ambulance company using their own employees. HHSC did not change the proposed rule in response to this comment.

Legal Authority

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

authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 7, 2011.

TRD-201104820
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 27, 2011
Proposal publication date: August 19, 2011
For further information, please call: (512) 424-6900

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# TITLE 4. AGRICULTURE

## PART 1. TEXAS DEPARTMENT OF AGRICULTURE

### CHAPTER 1. GENERAL PROCEDURES

### SUBCHAPTER O. HOME-DELIVERED MEAL GRANT PROGRAM

**4 TAC §§1.951 - 1.953, 1.955, 1.956**

The Texas Department of Agriculture (department) adopts amendments to §§1.951 - 1.953, 1.955 and 1.956, pertaining to the administration and making of grant awards for the Texan Feeding Texans - Home-Delivered Meal Grant Program (HDM Program). Section 1.952 is adopted with changes to the proposed text as published in the September 16, 2011, issue of the *Texas Register* (36 TexReg 6088) and will be republished. Sections 1.951, 1.953, 1.955 and 1.956 are adopted without changes and will not be republished.

The amendments are intended to improve this relatively new program's ease of use for home-delivered meal providers. Additionally, the amendments will reduce the risk of misuse of state funds by better targeting program compliance, through monitoring and by encouraging new providers, or those that have a higher risk for noncompliance, to seek assistance from the department before problems arise with the administration of their grants. Also, it is anticipated that the result of these amendments will be to: clarify that effective October 1, 2011, the DRI standard will apply to all organizations that receive funding through Texas Department of Aging and Disability Services (DADS); clarify that a dietary consultant may be employed directly by a provider of home-delivered meals; reduce the number of providers that are required to repay all or part of their grant funds because of administrative, financial or program deficiencies, and ensure that all program funds are spent properly by eligible organizations for their designated purpose - delivering meals to homebound disabled and elderly individuals, sixty years old or older; clarify that HDM Program grants will be reduced proportionately to all organizations if a county makes grants of less than 25 cents per meal for each person at least 60 years of age who resides in that county, according to the most recent federal decennial census; and clarify that an organization's HDM Program application must include the total number of meals delivered to elderly persons or persons with a disability by the organization, allocated and specified for each county served by the organization.

Currently, menus need to be certified by a registered dietician. The amendment to §1.951(3) allows providers to utilize a person with a baccalaureate degree in a relevant field to approve menus. The amendment to §1.951(3) expands the definition of a dietary consultant to includes a person with a baccalaureate degree with major studies in food and nutrition, dietetics, or food service management, who is currently employed by a home-delivered meal organization.

The amendments to §1.951(8) and §1.956 adopt the Dietary Reference Intakes (DRI) nutritional standards established by DADS. This is to better align with regulations DADS imposes on those agencies receiving assistance from DADS, many of whom also participate in the HDM Program. Under current law, each meal described on a provider's menu must meet one-third of the Recommended Dietary Allowance (RDA) nutritional standards. The amendments to §1.951(8) and §1.956 adopt the DRI nutritional standards, so that department standards remain as consistent as possible with DADS standards. Organizations providing meals and receiving funding through DADS will be required by DADS to meet the DRI standard effective October 1, 2011. The department will continue to apply the RDA standards to all organizations that do not receive funding through DADS; however, the majority, but not all, of the providers in the HDM Program also receive funding through DADS.

The amendment to §1.952(c) will allow the department to fund HDM grant awards in two equal payouts, one on February 1 of the calendar year and the other on August 1 of the calendar year. This should reduce program risk by allowing sufficient time for desk monitoring of high-risk grantees, will give the department flexibility in administering grant awards, and will give providers an opportunity to cure any administrative, financial or program deficiencies before the proposed payment of the second grant installment. Additionally, the amendment specifies a number of serious administrative, financial or program deficiencies that may result in delay, withholding and/or revoking an HDM Program award. Ultimately, the expected result of these proposed amendments are to reduce the number of providers that are required to repay all or part of their grant funds because of administrative, financial or program deficiencies, and to ensure that all program funds are spent properly by eligible organizations for their designated purpose - delivering meals to homebound disabled and elderly individuals, sixty years old or older.

The amendment to §1.953(c) clarifies that HDM Program grants will be proportionately reduced to all organizations in a particular county if that county makes grants of less than 25 cents per meal for each person at least 60 years of age, according to the most recent federal decennial census.

The amendment to §1.955(b)(3)(F) clarifies that the total number of meals delivered, as stated on the application, must be allocated by county for the preceding state fiscal year, including those meals that were not fully funded by DADS.

Comments were received on the proposed amendments to §1.952(c) from the Meals on Wheels Association of Texas (MOWAT). In regard to §1.952(c)(2), MOWAT recommended that the term "rosters" be replaced by "records". MOWAT believes that by replacing the word, "rosters" with the word "records" the rules will allow for the various recordkeeping processes home delivered meal providers utilize. MOWAT further noted that for some, the word "rosters" may imply a physical

list whereas many providers maintain a computer database and the ability to generate a list on an as-needed basis with all necessary client identification. The department agrees with this comment and is adopting §1.952(c)(2) with the recommended change.

In regard to §1.952(c)(5), MOWAT recommended that the department eliminate the requirement that program participants provide "route or delivery sheets" to document meal delivery. MOWAT noted that many meal programs do not keep route or delivery sheets. MOWAT believes that the requirement to keep adequate records should be sufficient and that there should not be a requirement to also keep route or delivery sheets. MOWAT also noted that the Texas Department of Aging and Disability Services accepts various methodologies to document meal delivery and it feels that maintaining route sheets on every meal delivery would add an unnecessary burden to providers, especially those with large numbers of volunteers involved in the delivery. The department agrees with this comment and recommendation and has adopted §1.952(c)(5) with the recommended changes.

The amendments are adopted pursuant to §12.042 of the Texas Agriculture Code (Code), which requires the department to establish a home-delivered meal grant program, and §12.016 of the Agriculture Code, which allows the department to adopt rules as necessary for the administration of its powers and duties under the Code.

*§1.952. Administration of the Program.*

(a) The Department annually shall determine:

(1) the total amount of money available for grants under this subchapter;

(2) the number of residents at least 60 years of age in this state, according to the most recent federal decennial census; and

(3) the number of residents at least 60 years of age in each county in this state, according to the most recent federal decennial census.

(b) Subject to §1.953 of this title (relating to County Grant Required) and subsection (d) of this section, the Department shall make grants in an amount equal to one dollar for each meal that each Approved Organization delivered to Homebound Elderly persons or persons with a Disability in the county in the preceding State Fiscal Year that was not Fully Funded.

(c) The Department shall make grant award not later than February 1 of each calendar year to each Approved Organization. Fifty percent (50%) of such grant awarded shall be allocated and distributed to each Approved Organization on or before February 1 of each calendar year. The remaining fifty percent (50%) of such grant award shall be allocated and distributed to each Approved Organization on or before August 1 of each calendar year. Notwithstanding any other provision of this subchapter, the Department may deny, revoke, suspend, or withhold a grant award for misuse of grant funds, or failure to comply with any requirement or section of this subchapter, including, without limitation, failure to:

(1) have or utilize adequate intake processes and/or procedures, including intake forms, to qualify individuals as eligible for assistance in accordance with this subchapter;

(2) keep and maintain adequate client records, by county, that identify the names, addresses, and telephone numbers of all individuals qualified as homebound or disabled individuals eligible under this subchapter;

(3) keep and maintain adequate records that support the total number of home-delivered meals an Approved Organization claims it delivers to homebound or disabled individuals eligible for assistance under this subchapter;

(4) keep and maintain adequate records that support the total number of home-delivered meals an Approved Organization claims it delivers in support of its application;

(5) keep and maintain adequate records that document meals delivered under this subchapter with identifying information on the recipient of each meal;

(6) keep and maintain an accounting system and records in accordance with Generally Accepted Accounting Principals;

(7) obtain and comply with all health and other permits required under this subchapter, including failure to keep and maintain adequate records pertaining to such health and other permits;

(8) obtain a county grant as required by this subchapter, including failure to keep and maintain adequate records pertaining to such county grant;

(9) have a dietary consultant review the dietary content of all menus or meal plans for all meals delivered by an Approved Organization with grant funds awarded under this subchapter, to ensure that those meals meet the Registered Dietary Allowance or Dietary Reference Intakes as required by this subchapter, including failure to keep and maintain adequate records pertaining to such registered dietician, such as name, address, and telephone number;

(10) keep and maintain a bank account in the name of the Approved Organization, including failure to keep and maintain adequate records pertaining to such bank account; or

(11) keep and maintain adequate records of all expenses that an Approved Organization claims are allowable expenses under this subchapter.

(d) Except as provided by §1.953 of this title, and subsections (b) and (f) of this section, grants from the Department to Approved Organizations in a county in a State Fiscal Year may not exceed an amount determined by the following formula: CR x (TD/SR), where "CR" is the number of residents at least 60 years of age in the county; "TD" is the total amount of money appropriated to the Department for that State Fiscal Year to make grants, less the Department's administrative expenses; and "SR" is the number of residents at least 60 years of age in this state.

(e) If more than one "Approved Organization" delivers meals in a county, the Department shall reduce the grants proportionally to each qualifying organization in that county so that the total amount of the grants to the organizations does not exceed the amount described by subsection (d) of this section.

(f) If the total amount of the grants made statewide by the Department under subsection (b) of this section is less than the amount appropriated to fund the program under this section in a State Fiscal Year, the Department shall use the unspent funds to proportionally increase the grants to each Approved Organization.

(g) The Department may use up to five percent of the appropriated funds for administration of the 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 November 2, 2011.

TRD-201104785
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: November 22, 2011
Proposal publication date: September 16, 2011
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 D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

### 16 TAC §25.93

The Public Utility Commission of Texas (commission) adopts an amendment to §25.93, relating to Quarterly Wholesale Electricity Transaction Reports, with changes to the proposed text as published in the May 27, 2011, issue of the *Texas Register* (36 TexReg 3238).

The amendment will eliminate the requirement that reports are filed quarterly with the commission. Instead, wholesale sellers will retain the wholesale transaction information and submit the information to the commission upon request. This rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). This amendment is adopted under Project Number 39349.

The commission received comments on the proposed amendment from Brazos Electric Power Cooperative (Brazos Electric), the Steering Committee of Cities Served by Oncor (Cities), Joint Commenters, the City of Austin d/b/a Austin Energy (Austin Energy), Southwestern Public Service (SPS), Luminant Energy Company (Luminant), and Texas Industrial Energy Consumers (TIEC). The Joint Commenters consisted of Exelon Corporation; IPR-GDF SUEZ North America; J Aron & Company; Kiowa Power Partners, LLC; PSEG Energy Resources & Trade LLC; Shell Energy North America (US), L.P.; Tenaska Frontier Partners, Ltd; Tenaska Gateway Partners Ltd; Tenaska Power Services Co.; and Topaz Power Holdings, LLC.

*Comment Overview*

With the exception of Cities, all commenters supported the proposed amendment. Commenters generally agreed that the Quarterly Wholesale Electricity Transaction Reports are no longer useful and necessary for the accomplishment of their intended purpose of allowing commission staff to monitor transactions in the wholesale market. Cities argued that the elimination of the quarterly reporting requirement would decrease the commission's ability to perform market surveillance functions, and reflects a lessening of scrutiny of market power abuse and a reduced emphasis on detection of market manipulation. Cities raises three concerns: first, that it is unclear how the commission can identify which entities should be requested to supply transaction data if the data is not available to be reviewed in the first place; second, that eliminating the requirement for reporting will increase the chance of noncompliance with the requirement to retain the data; and third, a comprehensive assessment of market power requires an assessment of the totality of the market, and is not consistent with relying upon selective requests for data.

Joint Commenters requested that the commission clarify that the data elements in a Full Report are those posted in "Instructions and List of Data Elements for Quarterly Wholesale Electricity Transaction Reports," currently listed as Version 7 on the commission's website.

*Commission Response*

The amendment eliminates the requirement that Wholesale Electricity Transaction Reports are filed quarterly with the commission, but still requires wholesale sellers of electricity to retain their wholesale transaction information and submit the information to the commission upon request from the Executive Director. The commission disagrees with Cities' contention that this will decrease the commission's ability to perform market surveillance functions and reflects a reduced emphasis on market oversight. The commission will still retain the necessary access to the information necessary to evaluate market transactions and to work with the Electric Reliability Council of Texas (ERCOT) and the independent market monitor (IMM) to analyze potential market power abuses. The commission is confident that market participants will submit information as required, as these entities will be subject to enforcement action if the information is not provided. Finally, the commission agrees with the Joint Commenters that the elements of the Full Report are those listed in the latest version of "Instructions and List of Data Elements for Quarterly Wholesale Electricity Transaction Reports," as posted on the commission's website.

*Section 25.93(c)*

Luminant recommended deleting the Proposed Rule's definitions for "Full Report" and "Public Report," as Luminant stated that the proposed amendment appeared to contemplate that wholesale sellers would submit the wholesale electricity transaction data directly to commission staff and a report would not be filed with Central Records. If the commission determines that the definitions for "Full Report" and "Public Report" should remain, then Luminant suggested moving the definition of "Transaction" to subsection (c)(3) so that the internal cross reference in §25.503(k)(2)(A) will reference the correct rule provision.

*Commission Response*

The commission believes that the definitions for "Full Report" and "Public Report" should remain as written to facilitate understanding of the types of reports that are required by the commission. Reports must still be filed with Central Records; therefore, the rule will retain these definitions. The commission agrees that the definition of "Transaction" should be moved to subsection (c)(3) so that the internal cross reference in §25.503(k)(2)(A) will reference the correct rule provision.

*Section 25.93(d)*

Luminant pointed out that in the current nodal market, ERCOT collects a substantial amount of information, as the vast majority of real-time transactions now occur through ERCOT, yet the

transaction data reported by wholesale sellers of electricity remains the same under the proposed rule as was required under the zonal market. Luminant suggested that the rule be revised so that the commission obtains this market data from ERCOT, and wholesale participants only provide information on what ERCOT does not possess, such as wholesale transaction data related to bilateral transactions. Luminant also suggested that data relating to ancillary service transactions, which are directed by ERCOT, also be obtained from ERCOT. Luminant stated that the collection of this data is the most onerous; under the zonal market, wholesale sellers were able to obtain enough detail from the ERCOT extracts to facilitate the reporting of this data, but in the nodal market, the ERCOT extracts do not provide the same details, and wholesale sellers must independently perform the aggregation calculations to comply with the reporting requirements. Luminant also stated that the request for information from wholesale sellers, when the information is readily available from ERCOT, runs counter to the public benefits specified in this rulemaking.

Joint Commenters stated that the rule referred to "information related to all wholesale electricity transactions" but that a potentially narrower term--"transaction information"--is also used to describe the scope of information provided to the commission. In addition, Joint Commenters requested that the commission clarify that the three-year retention period required by §25.503(k)(2)(A) and (3) apply to all information included in the Full Report. Furthermore, Joint Commenters requested clarification that wholesale sellers provide all information in a Full Report that is requested by the Executive Director, or a portion of a Full Report, if a portion is all that is requested.

Brazos Electric, Joint Commenters, and Luminant stated that the rule should allow for a longer period of time to respond to requests for the wholesale information. Brazos Electric stated that the requirement should be changed to 14 days. Joint Commenters and Luminant requested that the response period be lengthened to 45 days to provide the information if requested.

*Commission Response*

The commission disagrees with Luminant's request that commission staff obtain transaction data directly from ERCOT. In order to maintain a clear line of accountability for key transactional data, the commission believes that the wholesale sellers should provide information related to all its wholesale electricity transactions, including both the bilateral transactional data that are not scheduled through ERCOT and the transactions that are arranged through ERCOT, upon request from the commission's Executive Director or the Executive Director's designee.

The commission agrees with the Joint Commenters that the description of the information should be consistent throughout the rule and removes the term "transaction information" and replaces it with "information related to all wholesale electricity transactions." The commission also agrees with the suggestion to clarify that information related to all wholesale electricity transactions should be retained for three years. The commission clarifies that the wholesale seller should submit information related to all wholesale transactions, or a subset of wholesale transactions, for the period requested by the Executive Director or the Executive Director's designee, in the format currently specified in the "Instructions and List of Data Elements for Quarterly Wholesale Electricity Transaction Reports" on the commission's website, in order to provide a full record for analysis by the commission.

The commission agrees to extend the response deadline to 45 days to allow wholesale sellers more time to respond to requests for wholesale transaction data for purposes of requests for information made under this section. The commission clarifies that the response deadline for information requested under this section does not affect the commission's authority to request information, or the deadline for an entity to provide information, pursuant to an investigation, contested case proceeding, or any other rule.

*Section 25.93(e)*

Luminant disagreed with the proposal to eliminate the requirement that reports be submitted on standard format compact disks (CDs) in favor of purely an electronic filing, stating that the rule should include a more detailed explanation of how wholesale sellers should submit reports to the commission that would maintain the report's confidentiality. Until the commission can maintain the confidentiality of electronically submitted information, Luminant stated that the elimination of the CD filing requirement would be problematic and suggested that the rule allow for the CD filing until such time as electronic filings can be accomplished through a secure website.

Joint Commenters and TIEC recommended that all references to "file" be revised to "submit" or "report," since the rule contemplates that reports would only be submitted electronically and not filed with Central Records. The Joint Commenters recommended deletion of subsection (e)(3) to conform this rule to other commission rules describing the procedure for submitting information. Joint Commenters requested that the commission specify that it will provide notice to affected market participants if the commission makes any change to the current format set out in the "Instructions and List of Data Elements for Quarterly Wholesale Electricity Transaction Reports," and that any change would have an effective date no less than 60 days after such notice. Joint Commenters also requested clarification of whether the rule will still require the submission of a public version of the report, whether commission software will allow for the submission of two reports, one confidential and one public, and whether all submissions could be done electronically only, without the submission of a CD.

*Commission Response*

The commission agrees that the current electronic data retention framework used by the commission's Central Records does not allow secure electronic filing of data. Therefore, until the commission develops procedures and systems for electronic filing of confidential data, the commission will eliminate the electronic filing of reports. Instead, the commission will require filing of the report by CD with Central Records, so that a wholesale seller may designate the report as confidential under §22.71. Therefore, because a wholesale seller will still be required to file a CD copy of the report with Central Records, the commission declines to change references of "filing" to "submit" or "report." The commission also declines to include any language in this rule relating to changes in the "Instructions and List of Data Elements for Quarterly Wholesale Electricity Transaction Reports." Any significant changes to this form will be handled through the form revision process pursuant to §22.80, which provides for notice and opportunity to comment on proposed changes. Because the method to file the report will remain the same as is currently required, except for filing the report electronically, the commission declines to make any other changes to this subsection.

*Section 25.93(g)*

Luminant suggested revisions to affirmatively protect confidential information. TIEC stated that there should be adequate measures in place to ensure that companies that submit reports electronically will be able to request confidential information in the treatment of sensitive information.

*Commission Response*

The commission disagrees that specific language is needed in this rule to address the confidentiality of filed information. Repealed §25.93(g) repeats requirements that the commission already follows under the Texas Public Information Act when dealing with information filed confidentially. The repeal of subsection (g) will not lessen the protections for confidential information under the Texas Public Information Act, and it is intended that information filed under this section and designated as confidential will be treated as such. Subsection (e) provides that reports shall be filed according to §22.71, which provides for submitting materials designated as confidential. Wholesale sellers may utilize those provisions if they wish to designate a report as confidential. In addition, because of the removal of the requirement that reports be submitted electronically, no measures need to be put into place to protect an electronic filing.

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (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 §39.001, which requires competitive rather than regulatory methods for achieving the goals of Chapter 39, finds that electric services and their prices should be determined by customer choices and the normal forces of competition, and finds that the competitive process should be protected in a manner that ensures the confidentiality of competitively sensitive information; PURA §39.101, which establishes that customers are entitled to protection from unfair, misleading, or deceptive practices and grants the commission the authority to adopt and enforce rules to carry out this provision and to ensure that retail customer protections are established that afford customers safe, reliable, and reasonably priced electricity; PURA §39.155, which grants the commission the authority to require reporting, in a manner that ensures the confidentiality of competitively sensitive information, by each person, municipally owned utility, electric cooperative, and river authority that owns generation facilities and offers electricity for sale in this state, any information necessary for the commission to assess market power or the development of a competitive retail market in the state; PURA §39.157, which requires the commission to monitor market power; PURA §40.004, which authorizes the commission to require reports of municipally owned utility operations to the extent necessary to determine information relating to market power; and PURA §41.004, which authorizes the commission to require reports of electric cooperative operations to the extent necessary to determine information relating to market power.

Cross Reference to Statutes: PURA §§14.002, 39.001, 39.101, 39.155, 39.157, 40.004, and 41.004.

*§25.93. Wholesale Electricity Transaction Information.*

(a) Purpose. The purposes of this section are to:

(1) Deter market power abuses and anticompetitive behavior by increasing wholesale market transparency with respect to bilateral contracts for delivery of electricity; and

(2) Improve the commission's ability to investigate allegations of market power abuse and anticompetitive behavior that may arise with respect to the wholesale electricity market.

(b) Application.

(1) This section applies to any person, municipally owned utility, electric cooperative and river authority that owns electric generation facilities and offers electricity for sale in this state. This section also applies to power marketers as defined in §25.5 of this title (relating to Definitions).

(2) This section applies to all wholesale transactions for the sale of electricity that begin or terminate in Texas, or occur entirely within Texas, including areas of the state not served by the Electric Reliability Council of Texas (ERCOT).

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

(1) Contract--An agreement for the wholesale provision of energy or capacity under specified prices, terms, and conditions. A contract governs the financial aspects of an electricity transaction.

(2) Full Report--A Wholesale Transaction Report that contains all information required by this rule including information that the Wholesale Seller of Electricity claims is confidential or Protected Information. If the Wholesale Seller of Electricity does not claim confidentiality or Protected Information status for any of the information in its Full Report then the Full Report will be treated as a Public Report.

(3) Transaction--The provision of a specific quantity of energy or the commitment of a specific amount of generating capacity for a specific period of time from a wholesale seller of electricity to a customer, whether pursuant to a contract, a market operated by an independent organization as defined in the Public Utility Regulatory Act §39.151(b), or any other provision of electricity or commitment of reserve capacity.

(4) Protected information--Information contained in a Wholesale Electricity Transaction Report that comports with the requirements for exception from disclosure under the Texas Public Information Act (TPIA).

(5) Public Report--A Wholesale Transaction Report that contains all information required by this rule except information that the Wholesale Seller of Electricity claims is confidential or Protected Information.

(6) Wholesale seller of electricity--Any power generation company, power marketer, municipally owned utility, electric cooperative, river authority, or other entity that sells power at wholesale.

(d) Wholesale Electricity Transaction Reports.

(1) Wholesale sellers of electricity shall retain information related to all wholesale electricity transactions with a point of delivery or point of receipt in Texas, including intermediate transactions involving electricity generated in Texas or electricity ultimately delivered to customers in Texas, and file with the commission, within 45 days of a request by the Executive Director or the Executive Director's designee, information related to all wholesale electricity transactions, or a requested subset of this information, for a specified period of time. Wholesale sellers of electricity shall retain information related to all wholesale electricity transactions for three years, as specified in §25.503 of this title (relating to Oversight of Wholesale Market Participants). Nothing in this section limits the ability of the commission to obtain information, or the deadline for an entity to provide informa-

tion, pursuant to an investigation, contested case proceeding, or any other rule.

(2) Reports shall provide contact information for the reporting entity, information on each wholesale electricity contract, and information on each transaction of electricity from the reporting entity to another party.

(A) Contact information shall include company name, address, telephone number, and facsimile machine number, if available; name, position, and telephone number of person attesting to the report; and the time period covered by the report.

(B) Each wholesale seller of electricity must file information on each contract for electricity that is in effect during the reporting period, including those that will continue to be in effect past the end of the reporting period. Information shall include the name of purchaser, contract execution and termination dates, time period over which the contract is in effect, product type, price, and applicable information about where the power was generated, delivered, and received.

(C) Each wholesale seller of electricity must file information on each transaction. Information shall include the time period over which the transaction was conducted; applicable information about where the power was generated, delivered, and received; product name; transaction quantity; price; total transaction charges; and cross-reference to a contract reported under subparagraph (B) of this paragraph. If the period of a transaction extends outside of the reporting period, the report shall include only the portion of the transaction that occurred during the reporting period.

(D) Reporting parties may aggregate the following types of transactions:

*(i)* A municipally owned utility may aggregate data on the portion of its generation that it used to serve its native load. The aggregated number should be in total MWh for the reporting period, and need not include price.

*(ii)* A generation cooperative may aggregate data on cost-based sales to a distribution cooperative. The aggregated number should be in total MWh sold to each distribution cooperative for the reporting period, and need not include price.

*(iii)* A river authority may aggregate data on cost-based sales to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting period, and need not include price.

*(iv)* A qualifying facility may aggregate data on sales of electricity to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting period, and need not include price.

*(v)* Any reporting entity may aggregate data on sales of electricity or capacity to an independent system operator for balancing energy service, ancillary capacity services, or other services required by the independent system operator. This subparagraph includes sales by an entity that is qualified to sell the reporting entity's capacity and electricity to the independent system operator. The aggregated number should be in total MWh provided under each type of service for the reporting period, and need not include price.

(e) Filing procedures. Wholesale sellers of electricity shall file the Wholesale Electricity Transaction Reports using forms, templates, and procedures approved by the commission. The commission may also approve the use of forms and templates issued by federal agencies for reporting information similar to that required under this section. Reports shall be filed according to §22.71 of this title (relating to Filing of Pleadings, Documents and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission) except as specified in this subsection.

(1) A Full Report shall be submitted on standard-format compact disks (two copies) without a paper hard copy.

(2) If a Full Report is filed containing information that the Wholesale Seller of Electricity claims is confidential or is Protected Information, a Public Report shall also be submitted on standard-format compact disks (two copies).

(3) Information required under subsection (d)(2)(A) of this section along with attestations and other necessary documents shall be filed in hard copy form (two copies).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 1, 2011.

TRD-201104701
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 21, 2011
Proposal publication date: May 27, 2011
For further information, please call: (512) 936-7223

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# TITLE 22. EXAMINING BOARDS

## PART 15. TEXAS STATE BOARD OF PHARMACY

### CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

**22 TAC §§283.7, 283.8, 283.11**

The Texas State Board of Pharmacy adopts amendments to §283.7, concerning Examination Requirements, §283.8, concerning Reciprocity Requirements, and §283.11, concerning Examination Retake Requirements. The amendments are adopted without changes to the proposed text as published in the September 23, 2011, issue of the *Texas Register* (36 TexReg 6232).

The adopted amendments clarify the expiration date for a passing grade on a licensure examination; outline the requirements for applicants diagnosed with dyslexia seeking reasonable accommodations; and remove requirements no longer needed.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2011.

TRD-201104797
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: November 24, 2011
Proposal publication date: September 23, 2011
For further information, please call: (512) 305-8028

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## CHAPTER 291. PHARMACIES
## SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

**22 TAC §291.34**

The Texas State Board of Pharmacy adopts amendments to §291.34, concerning Records. The amendments are adopted without changes to the proposed text as published in the September 23, 2011, issue of the *Texas Register* (36 TexReg 6233).

The adopted amendments implement the provisions of House Bill 2069, passed during the 82nd Regular Session of the Texas Legislature, allowing pharmacist to "accelerate refills" and dispense up to a 90 day supply of a dangerous drug if the total amount dispensed does not exceed the amount authorized on the prescription, patient consents to the change, physician is notified, physician does not specify that it is medically necessary to dispense the initial quantity, the drug is not a psychotropic, and the patient is at least 18 years old; clarify the prescription drug order information for prescriptions issued by advanced practice nurses or physician assistants and remove the requirements for identification to be on the prescription order; clarify the prescription recordkeeping requirements; specify that the supervising physician's name must be recorded for prescriptions issued by advanced practice nurses, physician assistants, or pharmacists; and update the recordkeeping requirements for transferred prescriptions maintained in a data processing system.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2011.

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# TITLE 28. INSURANCE

# PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

## CHAPTER 141. DISPUTE RESOLUTION--BENEFIT REVIEW CONFERENCE

**28 TAC §141.2, §141.3**

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §141.2 and §141.3, relating to Canceling or Rescheduling a Benefit Review Conference and Failure to Attend a Benefit Review Conference. The Division adopts the amendments to §141.2 and §141.3 with changes to the proposed text as published in the September 2, 2011, issue of the *Texas Register* (36 TexReg 5624). These changes, which are more fully discussed below, are in response to public testimony and written comment provided on the proposed amendments. These changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for the amendments is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis for the rule, a summary of the comments received from interested parties, the names of entities that commented and whether they were in support of or in opposition to the adoption of the rule, and the reasons why the Division agrees or disagrees with the comments and recommendations.

During the development of these rules, the Division published an informal draft of the adopted amendments on the Division's website from June 27, 2011 until July 18, 2011. The Division received 10 informal comments. The Division made several changes to the proposal as a result of the informal comments.

After the publication of the proposal in the *Texas Register,* the Commissioner conducted a public hearing on the proposed amendments on September 20, 2011. Six individuals provided public testimony at this hearing. The public comment period for the proposed amendments ended on October 3, 2011. The Division received 11 written public comments.

The rule revisions to §141.2 and §141.3 are necessary to implement certain amendments in House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605) that affect benefit review conferences (BRCs).

Section 15 of HB 2605 made several amendments to Labor Code §410.028. First, HB 2605 amended Labor Code §410.028 to require the Commissioner to adopt rules necessary to imple-

ment and enforce Labor Code §410.028, including rules that define "good cause" and establish deadlines for requesting that a BRC be rescheduled. Second, HB 2605 amended Labor Code §410.028 to require a request to reschedule a BRC under that section to be submitted by the party and evaluated by the Division in the same manner that the initial request for a BRC was submitted and evaluated under Labor Code §410.023. Finally, HB 2605 amended Labor Code §410.028 to provide that a party forfeits the party's entitlement to attend a BRC on the issue in dispute if the party fails to request that a BRC be rescheduled in the time required by Commissioner rule or fails to attend a BRC without good cause as defined by Commissioner rule. This amendment further provides that there will not be a forfeiture of the entitlement to attend a subsequent BRC on the issue in dispute if the benefit review officer is authorized to schedule an additional BRC under Labor Code §410.026(b).

These adopted amendments amend §141.2 and §141.3. Section 141.2 governs the canceling or rescheduling of a BRC, and §141.3 governs the failure to attend a BRC. These amendments divide each rule into a subsection (a) and a subsection (b). Adopted subsection (a) of each rule is the previous rule which will apply to a request for a BRC filed before December 1, 2011. Adopted subsection (b) of each rule is the new rule which will apply to a request for a BRC filed on or after December 1, 2011. Adopted subsection (b) of each rule continues many of the provisions contained in the previous rule but also contains provisions that are designed to implement Section 15 of HB 2605 such as provisions defining "good cause" and provisions establishing deadlines for requesting that a BRC be rescheduled. The Division has divided the rules in this manner in order to provide a clear transition point at which the new rule will be applied to requests to cancel or reschedule a BRC. This will ensure clarity to the system on which rules will apply to any given situation.

These adopted amendments comply with the requirement of HB 2605 to define "good cause" for cancelling or rescheduling a BRC. Adopted §141.2(b)(1) defines "good cause" for cancelling or rescheduling a BRC prior to the scheduled BRC, and adopted §141.3(b)(1) defines "good cause" for rescheduling a BRC when a party has failed to attend the scheduled BRC. Under adopted §141.2(b)(1), "good cause" is defined to mean objective facts beyond the control of a party, which reasonably prevent a party from attending the BRC, or would prevent the BRC from accomplishing its purpose, such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute; or objective facts which make the BRC unnecessary. Under adopted §141.3(b)(1), "good cause" is defined to mean objective facts beyond the control of a party, which reasonably prevented the party from attending the BRC, prevented the party from requesting the Division to cancel or reschedule in advance of the BRC, and, if applicable, prevented the party from filing a request to reschedule within the third-business day after failing to attend the scheduled BRC and justifies the subsequent delay in filing the request to reschedule. These adopted amendments provide that a determination of "good cause" will be at the discretion of the benefit review officer and will be determined on a case-by-case basis. For requests to cancel or reschedule under adopted §141.2(b)(1), the benefit review officer will also take into consideration prejudice to the parties.

There are many references and definitions of "good cause" and "just cause" in the legal literature. They tend to fall into one of two categories. One, the definitions are very general and require the Judge to apply the general language to a specific circumstance on a case by case basis. Two, the definitions are very specific to a particular context, such as contract employment termination and are not generally applicable outside of that context. However, there are common elements to many of the definitions. They usually require a sense of equity, a circumstance outside of a party's control and a reasonable relationship to the legal benefit requested.

The Division did not find an existing definition that fit the BRC context well. The Division developed the "good cause" definitions in these adopted rules using a "reasonable person" standard and common elements in other "good cause" definitions. The elements of the definitions were selected for the following reasons. The Division chose "objective facts" because they are subject to verification. The Division chose "beyond the control of a party" because a party should not benefit from circumstances they created or could have reasonably avoided or prevented. "Reasonably prevent a party from attending the BRC," "prevent the BRC from accomplishing its purpose," "make the BRC unnecessary," "prevented the party from attending the benefit review conference," "prevented the party from requesting the Division to cancel or reschedule in advance of the benefit review conference," and "prevented the party from filing a request to reschedule within the third-business day after failing to attend the scheduled benefit review conference and justifies the subsequent delay in filing the request to reschedule" were chosen to create a logical nexus between the "objective facts" and the consequences in terms of attendance at the BRC.

The adopted amendments also comply with the requirements in HB 2605 to establish deadlines for requesting that a BRC be rescheduled. First, adopted §141.2(b) establishes deadlines for requesting to reschedule or cancel a BRC prior to the time of the scheduled BRC. Adopted §141.2(b)(3) continues the provisions in the previous §141.2 that give the parties the unrestricted right to cancel or reschedule a BRC within 10 days of the date the notice of setting is received. After this 10-day period, adopted §141.2(b)(4) requires the parties to establish "good cause" in the request to cancel or reschedule. The Division has continued these time deadlines because they have been in use by the system for many years and they have proven to be a workable time deadlines. Second, adopted §141.3(b) establishes time deadlines for filing a request to reschedule a BRC when there is a failure to attend. Adopted §141.3(b)(3) provides that a request to reschedule when there is a failure to attend a BRC must be in writing and in the form prescribed by the Division, and filed with the Division as soon as practicable, but no later than the close of the third business day after the scheduled BRC. A three-business-day deadline is necessary because it provides the requestor a sufficient amount of time to prepare the request to reschedule the BRC. It also helps prevent an undue delay in the resolution of the disputed issue because it requires the party who failed to attend the scheduled BRC to promptly submit a request to reschedule if the party wants the opportunity to attend the BRC. The adopted rule also takes into account that there may be situations, such as incapacitation, where a party may not be able to submit a request to reschedule the BRC within the three-business-day deadline. A party in this situation must justify in its showing of "good cause" why the party failed to meet the three-day timeframe and must also justify the subsequent delay in filing the request.

The adopted amendments, specifically adopted §141.2(b)(5), also clarify the status of a dispute when a party cancels a BRC without simultaneously rescheduling the conference. The adopted amendments provide that under these circumstances

the dispute will be considered withdrawn. There is an additional requirement for a request to cancel a BRC that is subject to §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating). The requestor must obtain the agreement of the other party in accordance with the provisions of §130.12(b)(3). These adopted amendments are necessary because they further the prompt and efficient resolution of disputes that arise in the workers' compensation system, which is consistent with the stated legislative goals for the system under §402.021(b)(5) to "minimize the likelihood of disputes and resolve them promptly and fairly when identified." The Division, by statute, is responsible for administering the dispute resolution process and ensuring that disputes raised by the parties are resolved promptly and fairly. The Division sets the date for a BRC, and the statutes that govern the BRC process allow the Division some flexibility for rescheduling the BRC if the party requesting to reschedule the BRC can show "good cause" for why the BRC should be rescheduled. However, the dispute resolution process prescribed by statute and adopted rules contemplates that disputes will be resolved and not allowed to linger in the system with an indefinite status. The amendments made by these rules support the clear legislative goals in the Labor Code to require the prompt and fair resolution of claim disputes through the use of an administrative dispute resolution process administered by the Division (i.e., BRCs, Contested Case Hearings, Appeals Panel). Additionally, these legislative goals are supported by the statutory requirements for parties to show documentation of their efforts to resolve disputes prior to initiating the process; to exchange necessary information with the opposing party and be prepared at the BRC; to continue to hold a BRC if a party fails to attend; and to show "good cause" to cancel or reschedule a BRC. Altogether, these statutory and rule requirements provide a mechanism for parties to resolve claim disputes quickly and fairly through an administrative dispute resolution process rather than through costly and time-consuming litigation.

*Adopted amendments to §141.2.* The adopted amendments to §141.2 divide the section into a new subsection (a) and (b). Subsection (a) is previous §141.2 renumbered to conform to the new section organization, is adopted to apply to BRCs requested before December 1, 2011, and is intended to maintain the status-quo for requests submitted before December 1, 2011. Adopted subsection (b) contains adopted new amendments that will govern requests to cancel or reschedule a BRC in cases where the BRC was requested on or after December 1, 2011.

Adopted new subsection (b)(1) defines "good cause" for cancelling or rescheduling a BRC prior to the scheduled BRC. "Good cause" is defined to mean objective facts beyond the control of a party, which reasonably prevent a party from attending the BRC, or would prevent the BRC from accomplishing its purpose, such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute; or objective facts which make the BRC unnecessary. These adopted amendments provide that a determination of "good cause" will be at the discretion of the benefit review officer and will be determined on a case-by-case basis, taking into account prejudice to the other party. These adopted amendments are necessary to comply with the HB 2605 requirement to define "good cause" for rescheduling a BRC.

Adopted new subsection (b)(2) provides that the Division may cancel or reschedule a BRC at any time before the BRC on its own motion, at the request of the party who requested the conference, or at the mutual request of the parties.

Adopted new subsection (b)(3) provides that the party who requested the BRC, or both parties by mutual request, have the right to an unrestricted cancellation or rescheduling during the 10-day period after receiving the notice of setting. The notice of setting is deemed received on the fifth day after the date of the notice. This adopted subsection carries forward the 10-day unrestricted right to cancel or reschedule that was in previous §141.2(c).

Adopted new subsection (b)(4) sets out the procedure the parties must follow when requesting to cancel or reschedule a BRC after the 10-day unrestricted period. It provides that a request to cancel or reschedule a BRC must be in writing in the form prescribed by the Division, must demonstrate "good cause" as defined in adopted new subsection (b)(1), and must be sent to the Division and opposing party or parties.

Adopted new subsection (b)(5) provides that a cancellation without simultaneous rescheduling constitutes a withdrawal of the dispute on the issue. In addition, this adopted new subsection provides that a request to cancel a BRC subject to §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating) must comply with the provisions of §130.12(b)(3) of this title, which requires agreement of the parties to cancel. This clarification prevents a conflict between §141.2(b)(5) and §130.12(b)(3) and is necessary in order to clarify the status of a disputed issue when the requestor of the BRC cancels the BRC without requesting a new setting.

Adopted new subsection (b)(6) provides that the Division will notify the parties of a cancellation or rescheduling of a BRC in a timely manner. This adopted subsection carries forward provisions that were in previous §141.2(d).

Adopted new subsection (b)(7) provides that, if the benefit review officer denies a request to reschedule a BRC, the benefit review officer will notify the parties in writing and state the reasons for the denial. This is necessary to clarify due process considerations, in response to comments, as more fully discussed below.

*Adopted amendments to §141.3.* The adopted amendments to §141.3 divide the section into a new subsection (a) and (b). Subsection (a) is previous §141.3 renumbered to conform to the new section organization. The adopted amendment provides that subsection (a) will apply to a BRC that is requested before December 1, 2011. An additional amendment is also adopted which would require the benefit review officer to hold a scheduled BRC when a party fails to attend without "good cause." This latter amendment conforms this rule with Labor Code §410.028(a) which requires the benefit review officer to hold the BRC when a party fails to attend without good cause. Adopted new subsection (b) contains adopted new amendments that will govern BRCs and requests to reschedule a BRC in cases where the BRC was requested on or after December 1, 2011.

Adopted new subsection (b)(1) defines "good cause" for rescheduling a BRC when the party failed to attend the scheduled BRC. This adopted amendment is necessary in order to comply with HB 2605 which requires the Division to define "good cause." "Good cause" in these cases will mean objective facts beyond the control of a party, which reasonably prevented the party from attending the BRC and from notifying the Division in advance of the BRC to cancel or reschedule. If the party failed to file the request to reschedule within the third business

day after the BRC as required by adopted §141.3(b)(3)(A), the party in its showing of "good cause" must also justify that failure and any subsequent delay in filing the request to reschedule. This "good cause" definition is different from the "good cause" definition in adopted §141.2(b)(1) in that, in addition to justifying the failure to attend the BRC, the party who failed to attend must also justify the failure to file a request to reschedule or cancel prior to the BRC. Additionally, if the party failed to file the request to reschedule within three business days after the BRC as required by adopted §141.3(b)(3)(A), the party must also justify that delay.

Adopted new subsection (b)(2) provides that the benefit review officer shall hold the BRC as scheduled if a party fails to attend the BRC without good cause as determined by the benefit review officer. This adopted new subsection is consistent with statutory requirements in Labor Code §410.028(a).

Adopted new subsection (b)(3) provides the procedure for rescheduling a BRC when a party fails to attend a scheduled BRC. The request to reschedule must be in writing in the form prescribed by the Division and filed with the Division as soon as practicable, but no later than the close of the third business day after the scheduled BRC. A copy of the request must be provided to the opposing party or parties. In the request, the requestor must show "good cause" as that term is defined in adopted new subsection (b)(1).

Adopted new subsection (b)(4) provides that, except as provided in paragraph (5) of this subsection, a party who fails to attend a BRC without "good cause" forfeits the party's entitlement to attend a subsequent BRC on the issue in dispute and the Division will not reschedule the conference.

Adopted new subsection (b)(5) provides that a party who fails to attend a BRC without "good cause" will not forfeit the party's entitlement to attend a subsequent BRC on the issue in dispute if the benefit review officer is authorized to schedule an additional BRC under Labor Code §410.026(b). Adopted subsection (b)(4) and (5) are consistent with Labor Code §410.028(c) as added by HB 2605.

Adopted new subsection (b)(6) provides that a party who forfeits the party's entitlement to a BRC on the issue in dispute does not forfeit the party's right, as provided by the Texas Workers' Compensation Act (Act) and Division rules, to a contested case hearing on the issue in dispute. This adopted amendment is necessary to clarify that a party's forfeiture of the entitlement to attend a BRC on the issue in dispute does not result in the forfeiture of any right to a contested case hearing on the issue in dispute that is granted by the Act or Division rules. This provision is intended to help streamline the dispute resolution process by eliminating unnecessary delays, while preserving parties' rights to dispute resolution under the Act and Division rules.

Adopted new subsection (b)(7) provides that, notwithstanding a party's entitlement to reschedule a BRC under adopted subsection (b)(3), the Division may refuse to reschedule the BRC and direct the parties to a contested case hearing if authorized under §142.5(b) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes). This adopted new subsection is necessary because there may be cases where, under the circumstances, proceeding directly to a contested case hearing will be more effective than rescheduling the BRC. Section 142.5(b) of this title lists those situations where the Division may direct the parties to proceed directly to a contested case hearing without attending a BRC.

Adopted new subsection (b)(8) provides that any party who fails to attend a BRC without "good cause" commits an administrative violation. Labor Code §415.021(a) states that a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with the Texas Workers' Compensation Act or a rule, order, or decision of the Commissioner.

Adopted new subsection (b)(9) provides that if the benefit review officer denies a request to reschedule a BRC, the benefit review officer will notify the parties in writing and state the reasons for the denial. This is necessary to clarify due process considerations, in response to comments, as more fully discussed below.

SUMMARY OF COMMENTS AND AGENCY RESPONSES.

General: A commenter supports the adoption of these amendments. Other commenters state that the proposed changes are consistent with the legislative directives. However, commenters have concerns over how the Division will apply the adopted rules in the field offices. Another commenter states that there is a need for uniformity in how the rules are applied in the Division's field offices, and states that the Division should train staff on the application of the rules and monitor BRC requests.

Agency Response: The Division appreciates the supportive comments and agrees that the adopted amendments are consistent with the legislative directives. The commenters make several comments regarding the Division's implementation and application of these adopted amendments and the Division notes that these comments are outside the scope of this adoption. The Division notes that determinations of "good cause" under these adopted amendments are fact intensive questions and, as provided by these adopted amendments, will be determined by the benefit review officers on a case-by-case basis.

General: A commenter states that Labor Code §408.123(e) does not require a party to dispute a certification of Maximum Medical Improvement (MMI) and impairment rating (IR) by filing a DWC-45 requesting the setting of a BRC. The commenter states that as a substantive matter, §408.123 does require a party to file a dispute within 90 days after receiving a certification of MMI and IR, but does not require a party to file a DWC-45. The commenter states that it is hard to understand, particularly in the absence of any express statutory requirement, why the Division is imposing an additional burden upon an injured worker to not only file a dispute, but to activate and participate in the dispute resolution process. The commenter urges the Division to modify its current policy to allow injured workers to dispute their impairment rating without placing upon them the additional burden of forcing them to activate and participate in the dispute resolution process.

Agency Response: The Division notes that this comment concerns issues that relate to how a party disputes a certification of MMI and IR. This issue is governed by §130.12 and §141.1 of this title and is outside the scope of these rules.

General: Commenters state that it would improve efficiencies if the Division moved towards an electronic communication and BRC request format. Commenters state that when they submit multiple DWC-45 forms, they must send each form in a separate envelope. Commenters state internet form submission would streamline the request process, enhance timeliness of communication, promote settlements prior to conducting BRCs, and further reflect Division compliance with Labor Code §410.023(c)(2).

Agency Response: The Division notes that these adopted amendments relate to requirements for rescheduling and canceling a BRC, including defining "good cause" for those

purposes and establishing time deadlines for rescheduling a BRC. These comments relate to procedures for requesting an initial BRC and therefore are outside the scope of these rules. However, the Division has noted the commenters' desire for electronic submission of BRC requests for future consideration.

General: A commenter states that, an interpretation of the word "documentation" that includes a weighing of the sufficiency of the evidence by a Division employee who is not necessarily a licensed attorney without a hearing, is unconstitutional, and that a determination of the term "documentation" is limited to attempts to confer with the other side regarding possible resolution similar to a certificate of conference required in the civil litigation system. The commenter states that, any interpretation of the word "documentation" that includes the weighing of the sufficiency of supporting evidence by a Division employee who is not necessarily a licensed attorney, without a hearing, that acts to stop an injured employee from exhausting his/her administrative remedies and proceed to the courthouse because a Division employee is not necessarily a licensed attorney has determined there is not enough supporting evidence in the form of documentation to trigger the dispute resolution process necessary is clearly unconstitutional under both due process and equal protection principles.

Agency Response: The Division notes that this comment relates to the documentation requirements that apply to a person who requests a BRC. These adopted amendments do not address the provisions relating to requesting a BRC. The amendments relate to requirements for rescheduling and canceling a BRC, including defining "good cause" for those purposes, and establishing time deadlines for rescheduling a BRC. These comments are therefore outside of the scope of these rules. The Division notes, however, that Labor Code §410.023 requires the Commissioner to adopt, by rule, guidelines regarding the type of information necessary for a party to document the party's efforts to resolve the disputed issue prior to a BRC request as well as a process through which the Division evaluates the sufficiency of the documentation provided. Labor Code §410.023(b) further clarifies that the Division may deny a BRC request if the party requesting the BRC does not provide sufficient documentation. The Division's rule governing the process for requesting and scheduling an initial BRC is §141.1 of this title (relating to Requesting and Setting a Benefit Review Conference), which is not included in these adopted amendments.

§141.2(a)(3)(C): A commenter states that where there is a true and permanent lack of desire to pursue a BRC, some kind of formal recitation or waiver should be required to safeguard the standard for rescheduling or cancelling a BRC from potential abuse.

Agency Response: The Division declines to make the requested change because the language of §141.2(a)(3)(C) is language in the previous rule and, under this adoption, these provisions will continue to apply to requests for BRCs filed before December 1, 2011 and is meant to maintain the status quo for requests made under the previous rule.

The Division notes that this comment involves issues that impact the application of other Division rules that are not included in the proposed amendments and this adoption, such as issues that relate to disputes involving the first certification of MMI and IR and other Division rules relevant to those types of disputes. To the extent this comment addresses these other issues and Division rules, this comment is outside the scope of this rule.

§141.2(a)(3): A commenter requests a clarification as to how a requesting party will show in §141.2(a)(3) that notice of an unwritten rescheduling or cancellation request was indeed "sent" by one party to an opposing party after the Division waives the requirement that such requests be written.

Agency Response: The Division disagrees that any changes to §141.2(a)(3) are necessary in order to clarify how a requesting party will show that an unwritten request was "sent" to an opposing party. BROs are capable of resolving any issue of fact that arises in any particular case regarding whether a requestor sent an unwritten request to the opposing party. Further, the language in §141.2(a)(3) authorizing the Division to waive the requirement of written notice to the other party is language in the previous rule and, under this adoption, will continue to apply only to requests for a BRC filed before December 1, 2011. This provision therefore has limited continued applicability. Adopted §141.2(b) will apply to a request for a BRC filed on or after December 1, 2011, and §141.2(b)(4) provides that cancellation or rescheduling requests made after the unrestricted cancellation period must be in writing, in the form prescribed by the Division, and be sent to the Division and opposing party or parties. There is no provision in adopted §141.2(b) that authorizes the Division to waive the requirement that requests to cancel or reschedule be in writing.

§141.2(a)(4) and (b)(6): A commenter states that these adopted subsections do not define "timely manner" for the Division to provide notice of cancellation or rescheduling of a BRC, either inside or outside of the 10-day unrestricted period. The commenter suggests that "there be a specific time frame defined in the rule on what is considered timely receipt of notice of a BRC cancellation, i.e., within one business day of the scheduled BRC." The commenter states lack of sufficient notice of cancellation or rescheduling can be especially problematic in cases of settings for expedited proceedings. The commenter suggests that the Division adopt standards for specific methods of giving notice of short-noticed cancellations, i.e., by Division telephone or electronic mail contact with the party representative slated to attend the BRC, as opposed to in person when attending at the canceled hearing or by regular mail.

Agency Response: The Division disagrees that the adopted rule should contain a specific time frame on what is considered a party's timely receipt of notice of a BRC cancellation or rescheduling from the Division or a standard for specific methods of giving notice of short-noticed cancellations by the Division. When a notice of a rescheduled or cancelled BRC is considered timely and what method the Division should use in providing the notice to parties is dependent on the facts and circumstances of each individual case.

§141.2(b)(1): Commenters state that the definition of "good cause" to cancel or reschedule in §141.2(b)(1) is vague and should be clarified to include situations where a party needs additional time to obtain needed evidence. Specifically, the commenters suggest adding additional language to state that "good cause" includes a reasonable showing that additional time is necessary to secure necessary evidence for the dispute. Another commenter states that the current language in this rule is preferable to any attempt to further define and tighten the definition as long as the Division provides training and direction to the benefit review officers and promotes a consistent application of the "good cause" measure.

Agency Response: Although it was the Division's intent for "good cause" under §141.2(b)(1) to include situations where a party needs additional time to obtain needed evidence for the dispute, the Division agrees that clarification is necessary. The Division

therefore has added language to adopted §141.2(b)(1)(A)(ii) that states "good cause" under that subparagraph includes a reasonable showing that additional time is necessary to secure necessary evidence for the dispute.

§141.2(b)(1): A commenter recommends that the Division clarify that the benefit review officer will only make a determination of whether rescheduling or canceling the BRC will unduly prejudice the rights of the other party in those instances where the party objects to the request to reschedule or cancel. The commenter states that if the benefit review officer were to consider and make a determination on such an issue based on his or her own understanding of the potential prejudice imposed by that decision, he or she would be abandoning his or her role as a mediator and would take on the role of an advocate.

Agency Response: The Division disagrees that clarification is necessary. These adopted amendments provide that a determination of "good cause" will be at the discretion of the benefit review officer and will be determined on a case-by-case basis, taking into account prejudice to the other party. Under the definition of "good cause" in adopted §141.2(b)(1), the benefit review officer will make his or her determination of "good cause" on a case-by-case basis, including prejudice to the other party, based on all the evidence provided to the benefit review officer.

§141.2(b)(5): A commenter has "serious concerns about equating cancellation of the BRC without simultaneous rescheduling with withdrawal of the dispute." The commenter states their "concern is exacerbated by the inclusion of the requirement that a request to cancel a BRC subject to §130.12 must comply with the provisions of §130.12(b)(3)." The commenter states that it "appears that the second sentence of §141.2(b)(5) requires the parties to agree that the first certification is final before a BRC concerning a dispute of a first certification of MMI and IR can be canceled." The commenter states that "in most instances, the request to cancel a BRC that is requested to avoid finality under Texas Labor Code §408.123(e) and Rule 130.12 is not being made because the party agrees with the certification." "Rather, the party with the burden of proof in challenging the first certification is requesting a cancellation to have more time to obtain the evidence necessary to pursue the dispute." "Typically, the only reason the BRC was requested is because it was the only mechanism available to prevent finality of the first certification of MMI and IR." The commenter states they are "baffled by the Division's belief that the Legislature has mandated expeditious resolution of a dispute of a first certification of MMI and IR at the expense of correct resolution." The commenter states that the "legislative focus is that the parties be prepared when they pursue dispute resolution, not that they be prematurely pushed into dispute resolution." Finally, the commenter believes that injured employees should be able to avoid finality and protest their right to pursue the dispute of the first certification of MMI and IR without having to request a BRC.

Commenters state that §141.2(b)(5) should be stricken because it prevents a person from preserving a dispute in cases such as 90-day finality of a certification of MMI or an IR where there is a defined timeframe to dispute a determination on those issues. The commenters state that they wish to preserve their dispute and pursue a BRC at some undetermined time in the future.

Agency Response: The Division disagrees. Section 141.2(b)(5) is necessary to prevent a conflict between §141.2(b) and §130.12(b)(3) which states that "A dispute may not be revoked or withdrawn to allow the first valid certification of MMI and/or the first valid assignment of IR to become final except by agreement of the parties." The purpose of requesting a BRC is to resolve a dispute and a party submitting a BRC request should be prepared to move forward with the BRC at the time the request is made. The purpose of these rules is to provide a timely and efficient mechanism to parties who need to resolve disputes regarding certain aspects of a workers' compensation claim, which is consistent with the stated legislative goals for the system under Labor Code §402.021(b)(5) to "minimize the likelihood of disputes and resolve them promptly and fairly when identified." Consequently, if a party wants to dispute the first certification of MMI or IR on a claim, then §130.12 of this title requires a party to either request a BRC or request a designated doctor examination. Accordingly, once a BRC is requested, the Division will proceed with the dispute resolution process and schedule a BRC on the issue. The Division will consider a request to cancel or reschedule a BRC as long as the party submits the request to cancel or reschedule in accordance with the adopted amendments and shows "good cause" if "good cause" is required.

The Division notes that the adopted definition of "good cause" addresses the commenter's concern about situations where a party needs additional time after a BRC request to obtain necessary evidence. The Division intended when defining "good cause" under §141.2(b)(1) to include situations where a party needs additional time to obtain needed evidence for the dispute. In response to other comments, the Division added language to adopted §141.2(b)(1)(A)(ii) that clarifies this issue. This additional language states that "good cause" under that subparagraph will include situations "such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute." Thus, the adopted rules will allow a party who meets this definition of "good cause" to request a rescheduling of the BRC so that the party may obtain the necessary evidence to pursue the dispute.

The Division notes that the commenter's comments that relate how a party is to dispute the first certification of MMI and IR is governed by §130.12 and §141.1 of this title and is outside the scope of these rules.

§141.2: Commenters support the cancellation time restrictions and "good cause" requirements and state that the rule enhancements will increase system efficiencies and produce overall cost savings to all stakeholders.

Agency Response: The Division appreciates the supportive comment.

§141.2(b)(1) and (2): Commenters state that the adopted rules violate due process because benefit review officers may not have a formal legal education or licensure by the state bar, there is no opportunity for a hearing, no opportunity to present witnesses and evidence, and no opportunity to cross-examine, and there is no appeals process. Commenters suggest that the rule should be amended to include notice, structured oversight and a hearing. A commenter also states there must be some form of appeal with procedural due process considerations regarding any determination by a benefit review officer that a party is not entitled to a BRC on a particular issue.

Agency Response: The Division disagrees that the rule violates due process, that it should be amended to include notice, structured oversight and a hearing, or that there needs to be some form of avenue to appeal a benefit review officer's determination of "good cause."

The BRC process is set by statute and the legislature has determined how the BRC process works. Labor Code §410.028 designates the benefit review officer as the person who determines whether there exists "good cause" as that term is used in that section. Labor Code §410.022 sets out the qualifications a benefit review officer must hold and there is no requirement in this section that a benefit review officer must possess a formal legal education or be licensed by the State Bar of Texas. This adopted rule incorporates the statutory requirement that the benefit review officer make the determination of "good cause" under that section.

Further, adopted §141.2(b) already provides for notice to the parties and an opportunity to provide the benefit review officer with evidence relevant to the request to determine whether there exists "good cause" to reschedule or cancel. In addition, the Division has added §141.2(b)(7) and §141.3(b)(9) to require a benefit review officer to issue a written response to a request to cancel or reschedule a BRC, if the request is denied. This adopted rule requires a party seeking to reschedule or cancel a BRC to make the request in writing and to demonstrate "good cause" in that request. The adopted rule also requires the requestor to provide a copy of the written request to each opposing party or parties. Under this adopted rule, all parties are free to submit to the benefit review officer any evidence it may have on the determination of "good cause." The benefit review officer, a neutral party, will then decide whether "good cause" exists to reschedule or cancel the BRC.

Finally, the adopted rule should not contain a process by which a party may appeal a benefit review officer's determination of "good cause." With regard to "good cause" determinations, Labor Code §410.028(a) specifically provides that the benefit review officer has the authority to determine whether "good cause" exists to reschedule a BRC. This statute does not provide a mechanism by which this determination may be appealed. While the Division authorizes a request for an expedited Contested Case Hearing on a denial of an incomplete BRC request in §141.1(g) of this title, that rule does not authorize an appeal of a denial to cancel or reschedule the BRC.

As stated, the Division disagrees with the commenter that the adopted rule violates the due process rights of the parties in a BRC. However, for purposes of ensuring that the parties are notified by the benefit review officer when the officer denies a request to cancel or reschedule a BRC, the Division has added language to adopted §141.2 and §141.3 that states that the benefit review officer will notify the parties in writing when a request is denied and will state the reasons for the denial. Specifically, the Division has added a subsection (b)(7) to adopted §141.2 which states that "If the benefit review officer denies a request to cancel or reschedule a benefit review conference under this section, the benefit review officer will notify the parties in writing and state the reasons for the denial." The Division has added a subsection (b)(9) to adopted §141.3 which states, "If the benefit review officer denies a request to reschedule a benefit review conference under this section, the benefit review officer will notify the parties in writing and state the reasons for the denial."

§141.2(b)(1) and §141.3(b)(1): Commenters state that the definitions of "good cause" and "pattern of abuse" are vague.

Agency Response: The Division disagrees. The "good cause" definition is basically a "reasonable person" standard and includes common elements in other "good cause" definitions, which are commonly used throughout Western jurisprudence. It is not possible to delineate all of the possible examples of "good cause" to cancel or reschedule a BRC or for failure to attend a BRC that would be applicable to every situation. This determination must be made on a case-by-case basis using all of the evidence provided to the benefit review officer at the time the request to cancel or reschedule the BRC is made.

The term "pattern of abuse" came from language in previous §141.2(b). This is not a new term to the system and historically has been commonly understood.

§141.3(b)(1): A commenter supports the addition of §141.3(b)(1).

Agency Response: The Division appreciates the supportive comment.

§141.3(b)(1)(B) and (C), and §141.3(b)(3)(A): A commenter states that "it appears that §141.3(b)(3)(A) permits filing for rescheduling within three days of the BRC in every case, §141.3(b)(1)(B) notwithstanding, and furthermore permits filing after the three day period." The commenter requests clarification that a party is expected to request to reschedule in advance unless good cause for the delay is shown, up to a maximum of three days after the BRC. Otherwise, there is no quantifiably expressed time limit on BRC rescheduling requests in the rule.

Agency Response: The Division clarifies that the three-business-day timeframe to reschedule a BRC in adopted §141.3(b)(3) applies to situations where the party has failed to attend a scheduled BRC and has failed to cancel or reschedule the BRC prior to the date the BRC was scheduled to be held. This timeframe is necessary in order to establish a deadline for requesting to reschedule a BRC as required by HB 2605. A three-business-day deadline is necessary because it both provides the requestor a sufficient amount of time to prepare the request to reschedule the BRC and helps prevent an undue delay in the resolution of the disputed issue. It is important to note that a party who fails to attend a BRC and fails to request to reschedule the BRC within the three-business-day deadline established by this rule may still request to reschedule the BRC. However, a party in this situation will have to meet a higher "good cause" burden to show why the party failed to meet the three-day timeframe in addition to showing why the party failed to attend and failed to previously cancel or reschedule the BRC. Allowing parties to file a request to reschedule a BRC after the three-business-day deadline is necessary because there may be situations, such as cases where the party is incapacitated, where there may be good cause as to why the party failed to attend the BRC and failed to reschedule the BRC within the three-business-day deadline. The Division also notes that there are separate timeframes for canceling or rescheduling a BRC prior to the date the BRC is scheduled to be held and those timeframes are described in §141.2(b)(3).

§141.3(b)(2): A commenter states §141.3(b)(2) only allows the benefit review officer to hold the BRC as scheduled if the benefit review officer has made a determination that a party has failed to attend without good cause. The commenter recommends adding the following text to the proposal: "Evidence that the party was notified of the benefit review conference and failed to timely request that the conference be canceled or rescheduled shall create a rebuttable presumption that there is no good cause for the failure to attend the conference."

Agency Response: The Division disagrees that the suggested language is necessary and declines to make the suggested change. The Division clarifies that if a party does not attend a scheduled BRC and has not established good cause for failure

to attend the BRC, the BRC will proceed accordingly as required by statute. If the party who failed to attend wants to reschedule the BRC, the adopted rule requires the party to submit evidence of "good cause." Therefore, the commenter's recommended language is not necessary.

§141.3(b)(3): Commenters state that a "one business day" deadline to file a request to reschedule after a party misses a BRC is "insufficient," and is "unique and unjustified when considering all other substantive deadlines found in the Texas Workers' Compensation Act and Division rules. Commenters recommend a 10-day deadline, the same amount of time an injured worker has to contest a Division denial of an injured employee's request to change treating doctors or a denial of an insurance carrier's request to dispute an injured employee's entitlement to Supplemental Income Benefits (SIBs). Another commenter also suggests a 15-day deadline, the time to contest a Division order for attorneys' fees, or a 90-day deadline the same amount of time to contest an injured employee's certification of MMI and IR.

Agency Response: The Division clarifies that the proposed amendments and the adopted amendments set a three-business-day deadline to file a request to reschedule when the party has failed to attend the BRC. The Division disagrees with the deadlines suggested by the commenters. Adopted §141.3(b)(3) is necessary in order to establish a deadline for requesting to reschedule a BRC as required by HB 2605. Imposing a three-business-day deadline upon a party who has failed to attend the BRC is necessary because it both provides the requestor a sufficient amount of time to prepare the request to reschedule the BRC and helps prevent an undue delay in the resolution of the disputed issue. It is important to note that a party who fails to attend a BRC and fails to request to reschedule the BRC within the three-business-day deadline established by this rule may still request to reschedule the BRC. However, a party in this situation will have to meet a higher "good cause" burden to show why the party failed to meet the three-day timeframe in addition to showing why the party failed to attend and failed to previously cancel or reschedule the BRC. The provision allowing a party to submit a request to reschedule after the three-business-day deadline was included in the rule because there may be situations, such as incapacitation, where the party may have good cause as to why the party failed to attend the BRC and failed to file the request to reschedule with the three-business-day time period.

§141.3(b)(4): The provisions of §141.3(b)(4), which provide for a forfeiture of any further BRCs on the issues propounded because the injured employee did not come up with a valid excuse is way too harsh. The commenter proposes that this rule be amended to find a less harsh manner to handle BRC cancellations and/or changes than what is being proposed.

Agency Response: The Division disagrees. The adopted rule mirrors a new statutory requirement. Specifically, Labor Code §410.028(c), as amended by HB 2605, provides that "If a party...fails to attend a benefit review conference without good cause as defined by commissioner rule, the party forfeits the party's entitlement to attend a benefit review conference on the issue in dispute, unless a benefit review officer is authorized to schedule an additional benefit review conference under Section 410.026(b)."

§141.3(b)(8): A commenter supports the addition of §141.3(b)(8).

Agency Response: The Division appreciates the supportive comment.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: Concentra, Insurance Council of Texas, Texas Mutual Insurance Company.

For, with changes: Law Offices of Jane A. Clark, J. A. Davis & Associates, LLP, Injured Workers' Pharmacy, Office of Injured Employee Counsel, Property Casualty Insurers Association of America, State Office of Risk Management, and Texas Workers' Advocates.

Against: None.

Neither for or Against: None.

The amendments are adopted under the Labor Code §§410.024, 410.025, 410.026, 410.027, 410.028, 408.123, 408.147, 402.00116, 402.00111, 402.061, 402.00128, 402.021, 410.021, 410.023 and 415.021. Section 410.024 requires the Commissioner by rule to adopt guidelines relating to claims that do not require a BRC and may proceed directly to a contested case hearing. Section 410.025 authorizes the Commissioner to prescribe the scheduling of BRCs and expedited hearings, and the required notice related to the scheduling. Section 410.026 denotes the powers and duties of a benefit review officer. Section 410.027 specifies that the Commissioner shall adopt rules for conducting BRCs. Section 410.028 sets forth consequences for failing to attend a scheduled BRC and provides for procedures to reschedule a BRC. Section 408.123 provides that an employee's first certification of maximum medical improvement or assignment of an impairment rating becomes final if not disputed within 90 days after notice. Section 408.147 states that if an insurance carrier fails to make a request for a BRC within 10 days after the date of the expiration of the impairment income benefit period or within 10 days after receipt of the injured employee's statement, the insurance carrier waives the right to contest entitlement to SIBS and the amount of SIBs for that period of SIBs. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by the Labor Code, Title 5. Section 402.021 sets forth the legislative goals of the workers' compensation system, including minimizing the likelihood of disputes and resolving them promptly and fairly when identified. Section 410.021 sets forth the purpose of the BRC as a nonadversarial and informal proceeding within the dispute resolution process which is designed to explain, discuss, mediate and resolve disputed issues by agreement of the parties. Section 410.023 requires the party requesting a BRC to provide documentation of efforts made to resolve the dispute before the request was submitted. Section 415.021 provides for assessment of administrative penalties if a person violates, fails to comply with, or refuses to comply with a rule or the Texas Workers' Compensation Act.

*§141.2. Canceling or Rescheduling a Benefit Review Conference.*

(a) Applicability. This subsection applies to a benefit review conference that is requested before December 1, 2011.

(1) The division may cancel or reschedule a benefit review conference:

(A) on its own motion;

(B) at the request of the party who requested the conference; or

(C) at the mutual request of the parties.

(2) A request for cancellation or rescheduling under paragraph (1) of this subsection shall be made by notifying the division within 10 days of the date the notice of setting is received. The date the notice of setting is received is deemed to be the fifth day after the date of the notice. Cancellation or rescheduling requests made during this 10-day period are unrestricted unless a pattern of abuse is detected.

(3) Cancellation or rescheduling requests made after the unrestricted cancellation period defined in paragraph (2) of this subsection shall be in writing unless waived by the division and sent to the division and opposing party or parties. The request shall be granted only on a showing of good cause. Good cause may include, but is not limited to, the following:

(A) the parties independently resolved the disputed issue or issues by agreement or settlement, as provided by Chapter 147 of this title (relating to Dispute Resolution--Agreements, Settlements, Commutations);

(B) the conference was scheduled with the wrong insurance carrier;

(C) the party requesting the BRC no longer desires to pursue the issue;

(D) the injured employee has died and no additional benefits appear due; or

(E) illness of a party.

(4) The division will notify the parties of a cancellation or rescheduling of a benefit review conference in a timely manner.

(b) Applicability. This subsection applies to a benefit review conference that is requested on or after December 1, 2011.

(1) In this subsection, "good cause" will be determined at the discretion of the benefit review officer on a case-by-case basis, including consideration of prejudice to parties, and means:

(A) objective facts beyond the control of a party, which reasonably:

*(i)* prevent a party from attending the benefit review conference; or

*(ii)* would prevent the benefit review conference from accomplishing its purpose, such as the need for a reasonable amount of additional time to secure necessary evidence for the dispute; or

(B) objective facts which make the benefit review conference unnecessary.

(2) The division may cancel or reschedule a benefit review conference at any time before the benefit review conference:

(A) on its own motion;

(B) at the request of the party who requested the conference; or

(C) at the mutual request of the parties.

(3) A request for cancellation or rescheduling under paragraph (2)(B) or (C) of this subsection shall be made by notifying the division within 10 days of the date the notice of setting is received. The date the notice of setting is received is deemed to be the fifth day after the date of the notice. Cancellation or rescheduling requests made during this 10-day period are unrestricted unless a pattern of abuse is detected.

(4) Cancellation or rescheduling requests under paragraph (2)(B) or (C) of this subsection made after the unrestricted cancellation period defined in paragraph (3) of this subsection must:

(A) be in writing and in the form prescribed by the division;

(B) demonstrate good cause for canceling or rescheduling, as defined by paragraph (1) of this subsection; and

(C) be sent to the division and opposing party or parties.

(5) A cancellation of a benefit review conference without simultaneous rescheduling constitutes a withdrawal of the dispute on the issue. A request to cancel a benefit review conference subject to §130.12 of this title (relating to Finality of the First Certification of Maximum Medical Improvement and/or First Assignment of Impairment Rating) must comply with the provisions of §130.12(b)(3) of this title.

(6) The division will notify the parties of a cancellation or rescheduling of a benefit review conference in a timely manner.

(7) If the benefit review officer denies a request to cancel or reschedule a benefit review conference under this section, the benefit review officer will notify the parties in writing and state the reasons for the denial.

*§141.3. Failure to Attend a Benefit Review Conference.*

(a) Applicability. This subsection applies to a benefit review conference that is requested before December 1, 2011.

(1) When a party fails to attend a benefit review conference without good cause, as determined by the benefit review officer, the benefit review officer:

(A) shall hold the conference as scheduled; and

(B) may recommend the issuance of an administrative violation.

(2) A representative who fails to attend a benefit review conference without good cause commits an administrative violation.

(b) Applicability. This subsection applies to a benefit review conference that is requested on or after December 1, 2011.

(1) In this subsection, "good cause" will be determined at the discretion of the benefit review officer on a case-by-case basis and means objective facts beyond the control of a party, which reasonably:

(A) prevented the party from attending the benefit review conference;

(B) prevented the party from requesting the division to cancel or reschedule in advance of the benefit review conference; and

(C) if applicable, prevented the party from filing a request to reschedule within the third business day after failing to attend the scheduled benefit review conference and justifies the subsequent delay in filing the request to reschedule.

(2) When a party fails to attend a benefit review conference without good cause, as determined by the benefit review officer, the benefit review officer shall hold the conference as scheduled.

(3) A party who fails to attend a scheduled benefit review conference may request to reschedule the benefit review conference under the provisions of this subsection. The request to reschedule must:

(A) be filed with the division as soon as practicable, but no later than the close of the third business day after the scheduled benefit review conference, unless good cause exists for further delay;

(B) be in writing and in the form prescribed by the division;

(C) establish good cause in accordance with paragraph (1) of this subsection; and

(D) be sent to opposing party or parties.

(4) Except as provided by paragraph (5) of this subsection, if a party fails to attend a benefit review conference without good cause, the party forfeits the party's entitlement to attend a benefit review conference on the issue in dispute. If a party forfeits this entitlement, the division will not reschedule the benefit review conference on the issue in dispute.

(5) A party will not be considered to have forfeited the party's entitlement to attend a benefit review conference on the issue in dispute under paragraph (4) of this subsection if a benefit review officer is authorized to schedule an additional benefit review conference under Labor Code §410.026(b).

(6) A party who forfeits the party's entitlement to attend a benefit review conference on the issue in dispute does not forfeit the party's right, as provided by the Workers' Compensation Act and division rules, to a contested case hearing on the issue in dispute.

(7) Notwithstanding paragraph (3) of this subsection, the division may refuse to reschedule a benefit review conference under this section and may direct the parties to proceed to a contested case hearing, if authorized under §142.5(b) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes).

(8) A party who fails to attend a benefit review conference without good cause commits an administrative violation.

(9) If the benefit review officer denies a request to reschedule a benefit review conference under this section, the benefit review officer will notify the parties in writing and state the reasons for the denial.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 31, 2011.

TRD-201104690
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: November 20, 2011
Proposal publication date: September 2, 2011
For further information, please call: (512) 804-4703

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# CHAPTER 143. DISPUTE RESOLUTION REVIEW BY THE APPEALS PANEL

**28 TAC §143.2**

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts an amendment to §143.2, relating to Description of the Appeal Proceeding, without changes to the proposed text as published in the September 2, 2011, issue of the *Texas Register* (36 TexReg 5628). The section will not be republished.

In accordance with Government Code §2001.033, the Division's reasoned justification for the amendment is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis of the rule, a summary of the comment received from an interested party, the name of the entity that commented and whether it was in support of or in opposition to the adoption of the rule, and the reason why the Division agrees or disagrees with the comment.

The Commissioner conducted a public hearing on the proposed amendment to §143.2 on September 20, 2011. There was no public testimony on this proposed amendment. The public comment period for the proposed amended rule ended on October 3, 2011 and the Division received one written public comment.

The Division also published an informal draft of the adopted amendment on the Division's website from June 27, 2011 until July 18, 2011, and received no informal comments on the amendment.

The rule revision to §143.2 is necessary to implement certain legislative amendments made by House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605) affecting the Division's Appeals Panel. These legislative amendments delineate the types of cases on which the Appeals Panel may affirm and issue written decisions. Specifically, HB 2605 amended Labor Code §410.203(b) and §410.204(a) to authorize the Appeals Panel to affirm the decision of the hearings officer in a case described by Labor Code §410.204(a-1). HB 2605 enacted Labor Code §410.204(a-1) which provides that an Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearings officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the contested case hearing that require correction but do not affect the outcome of the hearing, including findings of fact for which insufficient evidence exists, incorrect conclusions of law, findings of fact or conclusions of law regarding matters that were not properly before the hearings officer, and legal errors not otherwise described. This adopted amendment makes the Appeals Panel rule conform to these legislative amendments.

Section 143.2 lists actions the Appeals Panel may take on a case under review by the panel. The adopted amendment to this section adds to this list the authority to "affirm the decision of the hearings officer in a case as described by Labor Code §410.204(a-1)." This addition conforms this rule to certain legislative amendments made by HB 2605 as stated above.

SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

§143.2(b)(3): A commenter agrees with the proposed addition which allows the Appeals Panel to affirm the decision of a hearing officer pursuant to Texas Labor Code §410.204(a-1).

Agency Response: The Division agrees. The language conforms to legislative amendments enacted under HB 2605 that delineate the types of cases on which the Division's Appeals Panel may affirm and issue written decisions.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: Texas Mutual Insurance Company.

For, with changes: None.

Against: None.

Neither for or Against: None.

The amendment is adopted under the Labor Code §§410.203, 410.204, 402.00116, 402.00111 and 402.061. Section 410.203 authorizes the Appeals Panel to affirm the decision of the hearings officer in a case described by Labor Code §410.204(a-1). Section 410.204(a) states that the Appeals Panel may issue a written decision on an affirmed case as described by subsection (a-1) of that section. Section 410.204(a-1) provides that an appeals panel may only issue a written decision in a case in which the panel affirms the decision of a hearings officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the contested case hearing that require correction but do not affect the outcome of the hearing, including findings of fact for which insufficient evidence exists, incorrect conclusions of law, findings of fact or conclusions of law regarding matters that were not properly before the hearings officer, and legal errors not otherwise described. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation 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.

Filed with the Office of the Secretary of State on October 31, 2011.

TRD-201104691
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: November 20, 2011
Proposal publication date: September 2, 2011
For further information, please call: (512) 804-4703

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# TITLE 40. SOCIAL SERVICES AND ASSISTANCE

## PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

### CHAPTER 8. CLIENT CARE--MENTAL RETARDATION SERVICES

### SUBCHAPTER C. LIFE-SUSTAINING TREATMENT

**40 TAC §§8.51 - 8.63**

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts the repeal of Subchapter C, §§8.51 - 8.63, concerning Life-Sustaining Treatment, in Chapter 8, Client Care--Mental Retardation Services, without changes to the proposal as published in the August 26, 2011, issue of the *Texas Register* (36 TexReg 5308).

The repeal is adopted to remove rules regarding life-sustaining treatment in state supported living centers. The rules were based, in part, on the Natural Death Act, which has been replaced by the Advance Directives Act (Texas Health and Safety Code, Chapter 166). The Advance Directives Act governs directives to physicians, out-of-hospital do-not-resuscitate orders, and medical powers of attorney. The repealed rules conflicted with some requirements of the Act. DADS is not required to have rules regarding the Advance Directives Act; therefore, it will be implemented in state supported living centers through operating procedures.

DADS received no comments regarding adoption of the repeal.

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 3, 2011.

TRD-201104789
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: November 23, 2011
Proposal publication date: August 26, 2011
For further information, please call: (512) 438-3734

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## PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

### CHAPTER 109. OFFICE FOR DEAF AND HARD OF HEARING SERVICES

### SUBCHAPTER A. GENERAL RULES

**40 TAC §109.109**

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Ser-

vices (DARS), adopts the new rule under Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services, Subchapter A, General Rules, §109.109, Examination Accommodations for Persons with Dyslexia. The new rule is adopted without changes to the proposed text as published in the September 9, 2011, issue of the *Texas Register* (36 TexReg 5815) and will not be republished.

DARS adopts new §109.109 to provide rules relating to reasonable examination accommodations for applicants who have been diagnosed as having dyslexia taking any of the DARS interpreter certification examinations; and to establish the eligibility criteria applicants with dyslexia must meet for accommodation.

No comments were received regarding adoption of the rule.

The new rule is adopted pursuant to HHSC's statutory rulemaking authority under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 2, 2011.

TRD-201104748
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Effective date: December 1, 2011
Proposal publication date: September 9, 2011
For further information, please call: (512) 424-4050

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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: 10 TAC §80.93(b)**

# Texas Department of Housing and Community Affairs
## Tax Lien File Layout

| |
|---|
| **MUST be ASCII Fixed Record Layout (Text Format)** |
| **516 bytes total per each record** |
| **All text fields, addresses, names, etc should be left justified.** |

| ITEM | | PICTURE | OFFSET | Additional Information for Accurate Filing |
|---|---|---|---|---|
| **Home Identification** | | | | |
| Label-No | | Alpha 10 | 1-10 | The label number must be exactly 10 characters - anything more or less will be invalid. Also, additional text (*i.e.*, "Lab#" before the label or "A" or "A/B" after the number) will invalidate the field.<br><br>If there is no label number, LEAVE SPACES BLANK – DO NOT enter ZEROS, UNKNOWN, NONE or anything else in this field. |
| Serial-No | | Alpha 26 | 11-36 | Serial numbers must only include the number of the first section - and **not** be prefixed with anything else (*i.e.*, SER#, #, S#, or using both section letters as A/B).<br><br>The chances of recording a lien with only a serial number are very slim. Having a label number is the best chance for a successful recording.<br><br>If there is no serial number, LEAVE SPACES BLANK – DO NOT enter ZEROS, UNKNOWN, NONE or anything else in this field. |
| FILLER (blank spaces) | | Alpha 20 | 37-56 | Model name is no longer required, so leave the 20-spaces originally allocated for this blank. |
| | | | | |
| **Taxpayer Identification** | | | | |
| Taxpayer-Name | Left Justified | Alpha 40 | 57-96 | |
| Taxpayer-Name2 | Left Justified | Alpha 40 | 97-136 | |
| Taxpayer-Addr1 | Left Justified | Alpha 30 | 137-166 | |
| Taxpayer-Addr2 | Left Justified | Alpha 30 | 167-196 | |
| Taxpayer-City | Left Justified | Alpha 20 | 197-216 | |
| Taxpayer-State | Left Justified | Alpha 2 | 217-218 | |
| Taxpayer-Zipcode | | Alpha 10 | 219-228 | |

| ITEM | | PICTURE | OFFSET | Additional Information for Accurate Filing |
|---|---|---|---|---|
| **Collector Identification** | | | | |
| Collector-Tax-Entity-ID or Central Tax Collector Number | | Alpha 10 | 229-238 | The taxing entity id or the Dept. assigned Central Tax Collector number MUST be 10 characters and in the following format XXX-XXX-XX. |
| Collector-Name | Left Justified | Alpha 40 | 239-278 | Enter the name of the taxing jurisdiction. |
| Collector-Name2 | Left Justified | Alpha 40 | 279-318 | Enter the name of the collector. |
| Collector-Addr1 | Left Justified | Alpha 30 | 319-348 | |
| Collector-Addr2 | Left Justified | Alpha 30 | 349-378 | |
| Collector-City | Left Justified | Alpha 20 | 379-398 | |
| Collector-State | Left Justified | Alpha 2 | 399-400 | |
| Collector-Zipcode | | Alpha 10 | 401-410 | |
| | | | | |
| **Lien Information** | | | | |
| Tax-Roll-Account-No | | Alpha 26 | 411-436 | |
| FILLER (blank spaces) | | Alpha 8 | 437-444 | Lien date is the date the lien is received by TDHCA and will be inserted when recorded; so leave the 8-spaces originally allocated for this blank. |
| Tax-Year - YYYY | | Alpha 4 | 445-448 | |
| Tax Amount | | Alpha 8 | 449-456 | The tax amount is required and must be entered without a decimal point (Example: If tax amount is $300.25, please entered as 00030025). |
| Release-Date – YYYYMMDD | | Alpha 8 | 457-464 | The date MUST be formatted as YYYYMMDD and have no slashes or spaces. |
| FILLER (blank spaces) | | Alpha 49 | 465-513 | |
| County Code | | Alpha 3 | 514-516 | A carriage return after entering the 3-digit County Code is needed after each record for proper formatting. |

Figure: 25 TAC §415.108(d)



**DEPARTMENT OF STATE HEALTH SERVICES**
**NEW DRUG APPLICATION**
(for inclusion in the DSHS/DADS Drug Formulary)

**THE NEW DRUG APPLICATION PROCESS IS DESCRIBED ON THE SECOND PAGE OF THIS FORM**

Date: _____

Name of practitioner submitting the application: _____
Name of entity with which the practitioner is associated by employment or contract (i.e., DSHS facility or local authority): _____

Information regarding new drug:

| | |
|---|---|
| **Therapeutic classification** | |
| **Generic name** | |
| **Trade name(s)** | |
| **Manufacturer(s)** | |
| **Dosage form(s)** | |

Explain the pharmacological action or use of this drug:

Explain the advantages of this drug over those listed in the formulary:

State which drugs this new drug would replace or supplement:

☐ application is approved

_____
signature of chairman of DSHS facility pharmacy and therapeutics committee

OR

☐ application is appropriate and complete

_____
signature of non-facility service system component clinical/medical director or designee

Section 415.108(a) - (c) of DSHS rules governing the use and maintenance of the DSHS/DADS Drug Formulary describes the procedures for applying to have a drug added to the formulary.

§415.108. Applying to Have a Drug Added to the Formulary.

(a) Any member of the Executive Formulary Committee, any service system component practitioner, or any contract practitioner may apply to have a drug added to the DSHS/DADS Drug Formulary by completing the New Drug Application form and including:

(1) published articles in biomedical literature that substantiate the efficacy and safety of the proposed drug;

(2) information on the advantages of the proposed drug compared with similar formulary drugs;

(3) a list of formulary drugs that the proposed drug would replace or supplement; and

(4) cost effectiveness data.

(b) Submitting the application.

(1) If the person submitting the application is a DSHS facility practitioner or a DSHS facility contract practitioner, then that practitioner submits the application to the facility's pharmacy and therapeutics committee for approval. If the committee approves the application, then it forwards the application to the Executive Formulary Committee.

(2) If the person submitting the application is a non-facility service system component practitioner or a non-facility service system component contract practitioner, then that practitioner submits the application to the component's clinical/medical director or designee who determines if the application is appropriate and complete, and if so, forwards the application to the Executive Formulary Committee.

(3) If the person completing the application is a member of the Executive Formulary Committee, then that person submits the application directly to the Executive Formulary Committee.

(c) The Executive Formulary Committee considers the drug application and recommends:

(1) approving the proposed drug's inclusion and, if appropriate, approving audit criteria and recommending dosage guidelines;

(2) approving the proposed drug on a trial basis for a specified period of time;

(3) approving the proposed drug as a reserve drug, with guidelines;

(4) postponing the decision until a later meeting; or

(5) denying the proposed drug's inclusion.

* The term "service system component" means DSHS, a DSHS facility, or local authority.

Figure: 40 TAC §743.201(a)

| Serious Incident | (i)To Licensing?<br><br>(ii) If so, when? | (i) To Parents?<br><br>(ii) If so, when? | (i) To Law enforcement?<br><br>(ii) If so, when? |
|---|---|---|---|
| (1) A child dies while in your care. | (A)(i) YES<br><br>(A)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence. | (B)(i) YES<br><br>(B)(ii) Immediately. | (C)(i) YES<br><br>(C)(ii) Immediately. |
| (2) A critical injury or illness that warrants treatment by a medical professional or hospitalization, including dislocated, fractured, or broken bones; concussions; lacerations requiring stitches; second and third degree burns; and damage to internal organs. | (A)(i) YES<br><br>(A)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence. | (B)(i) YES<br><br>(B)(ii) Report as soon as possible, but no later than 24 hours after the incident or occurrence. | (C)(i) NO<br><br>(C)(ii) Not Applicable. |
| (3) Allegations of abuse, neglect, or exploitation of a child; or any incident where there are indications that a child in care may have been abused, neglected, or exploited. | (A)(i) YES<br><br>(A)(ii) As soon as you become aware of it. | (B)(i) YES<br><br>(B)(ii) As soon as you become aware of it. | (C)(i) NO<br><br>(C)(ii) Not applicable. |
| (4) A lost or missing child. | (A)(i) YES<br><br>(A)(ii) As soon as you become aware that the child is lost or missing. | (B)(i) YES<br><br>(B)(ii) As soon as you become aware that the child is lost or missing. | (C)(i) NO<br><br>(C)(ii) Not applicable. |
| (5) A child is indicted, charged, or arrested for a crime, not including being issued a ticket at school by law enforcement or any other citation that does not result in the child being detained. | (A)(i) YES<br><br>(A)(ii) As soon as possible, but no later than 24 hours after you become aware of it. | (B)(i) YES<br><br>(B)(ii) As soon as you become aware of it. | (C)(i) NO<br><br>(C)(ii) Not applicable. |
| (6) A suicide attempt by a child. | (A)(i) YES<br><br>(A)(ii) As soon as you become aware of the incident. | (B)(i) YES<br><br>(B)(ii) As soon as you become aware of the incident. | (C)(i) NO<br><br>(C)(ii) Not applicable. |

Figure: 40 TAC §743.201(b)

| Serious Incident | (i) To Licensing?<br><br>(ii) If so, when? | (i) To Parents?<br><br>(ii) If so, when? |
|---|---|---|
| (1) Any incident that renders all or part of your operation unsafe or unsanitary for a child, such as a fire or a flood. | (A)(i) YES<br><br>(A)(ii) As soon as possible, but no later than 24 hours after the incident. | (B)(i) YES<br><br>(B)(ii) As soon as possible, but no later than 24 hours after the incident. |
| (2) A disaster or emergency that requires your operation to close. | (A)(i) YES<br><br>(A)(ii) As soon as possible, but no later than 24 hours after the incident. | (B)(i) YES<br><br>(B)(ii) As soon as possible, but no later than 24 hours after the incident. |

Figure: 40 TAC §745.37(2)

| Child Day-Care Operations | Description of Operation | Type of Permit |
|---|---|---|
| (A) Listed Family Home | A caregiver at least 18 years old that provides care in her own home for compensation, for three or fewer children unrelated to the caregiver, birth through 13 years, for at least four hours a day, three or more days a week, and more than nine consecutive weeks. The total number of children in care, including children related to the caregiver, may not exceed 12. | Listing (A caregiver who is subject to regulation as a listed family home may instead become a registered family home.) |
| (B) Registered Child-Care Home | The primary caregiver provides regular care in the caregiver's own residence for not more than six children from birth through 13 years, and may provide care after school hours for not more than six additional elementary school children. The total number of children in care at any given time, including the children related to the caregiver, must not exceed 12. | Registration |
| (C) Licensed Child-Care Home | The primary caregiver provides care in the caregiver's own residence for children from birth through 13 years. The total number of children in care varies with the ages of the children, but the total number of children in care at any given time, including the children related to the caregiver, must not exceed 12. | License |
| (D) Child-Care Center | An operation providing care at a location other than the permit holder's home, for seven or more children under 14 years of age, for less than 24 hours per day, but at least two hours a day, three or more days a week. | License |
| (E) Employer-Based Child Care | A small employer providing care for up to 12 of the employees' children that are under 14 years of age, for less than 24 hours per day. The care is located on the employer's premises and in the same building where the parents work. | Compliance Certificate |

| | | |
|---|---|---|
| (F) Shelter Care | A child care program at a temporary shelter, such as a family violence or homeless shelter, providing care for seven or more children under 14 years of age while the resident parent is away from the shelter. The child care program operates for at least four hours a day three days a week. | Compliance Certificate |
| (G) Before or After-School Program | An operation that provides care before, or after, or before and after, the customary school day and during school holidays, for at least two hours a day and three days a week, to children who attend pre-kindergarten through grade six. | License |
| (H) School-age Program | An operation that provides supervision and recreation, skills instruction, or skills training for at least two hours a day and three days a week to children attending pre-kindergarten through grade six. A school-age program operates before or after the customary school day and may also operate during school holidays, the summer period, or any other time when school is not in session. | License |

Figure: 40 TAC §745.115

| Governmental Entity | Description of Exempt Programs |
|---|---|
| (1) Federal | A facility operated on a federal installation, including military bases and Indian reservations. |
| (2) State | (A) A facility operated by the Texas Youth Commission (TYC);<br>(B) A facility providing services solely for TYC;<br>(C) Any other correctional facility for children operated or regulated by another state agency or political subdivision;<br>(D) A treatment facility or structured program for treating chemically dependent persons that is licensed by the Department of State Health Services;<br>(E) A youth camp licensed by the Department of State Health Services; and<br>(F) A youth camp exempt from licensure by the Department of State Health Services under the Health and Safety Code, §141.0021, because it is:<br>(1) Operated by or on "a campus of an institution of higher education" or "a private or independent institution of higher education," as those terms are defined in the Education Code, §61.003; and<br>(2) Regularly inspected by a local governmental entity for compliance with health and safety standards. |
| (3) Municipal | A recreation program for elementary age (5-13 years) children with the following criteria:<br>(A) A municipality operates the program;<br>(B) The governing body of the municipality annually adopts standards of care by ordinance after a public hearing for such programs, although the governing body of a municipality with a population of at least 300,000 that has adopted standards by ordinance after public hearings at least twice may accept public comment through its Internet website for at least 30 days in lieu of having a public hearing;<br>(C) The program provides these standards to the parents of each program participant;<br>(D) The ordinances include child/caregiver ratios, minimum employee qualifications, minimum building, health, and safety standards, and mechanisms for monitoring and enforcing the adopted local standards;<br>(E) The program informs the parents that the state does not license the program; and<br>(F) The program does not advertise itself as a child-care operation. |

Figure: 40 TAC §745.117

| Program of Limited Duration | Criteria for Exemption |
|---|---|
| (1) Parents on the Premises | (A) The program operates in association with a shopping center, business, and other activities such as retreats or classes for religious instruction;<br>(B) The program does not advertise as a child-care facility or day-care center and informs parents that it is not licensed by the state;<br>(C) The parent or person responsible for the child attends or engages in some elective activity nearby, part-time employees or contractors who conduct the elective activity may use the program meeting the limits stated in subparagraph (D) of this part of the chart. A caregiver for the program may use the program for the caregiver's own children as long as the child remains with a caregiver;<br>(D) A child may only be in care for up to four and one half hours per day and:<br>(i) For up to 12 hours per week; or<br>(ii) For up to 15 hours per week if care is provided so a person may attend an educational class provided by a nonprofit entity, and the program is in a county with a population of 800,000 or more and the county is adjacent to an international border; and<br>(E) The program's caregivers must be able to contact the parent or person responsible for the child at all times. |
| (2) Short-Term Program | (A) The program operates for less than three consecutive weeks and less than 40 days in a period of 12 months; and<br>(B) It is not a part of an operation subject to our regulation. |
| (3) Religious Program | (A) It is a program of religious instruction such as Sunday school or weekly catechism; or<br>(B) It is a religious program that lasts two weeks or less. |
| (4) Foreign Exchange/ Sponsorship Program | (A) It is a living arrangement in a caretaker's home where:<br>(i) An unrelated child or sibling group lives in the person's home;<br>(ii) Each child is in the United States on a time-limited visa; and<br>(iii) Each child is under the sponsorship of the person with whom they are living or the sponsorship of some organization. |

Figure: 40 TAC §745.243

| Type of Application | Required Application Materials |
|---|---|
| (1) Application for Listing a Family Home | (A) A completed Listing Request Form;<br>(B) A completed Request for Criminal History and Central Registry Check Form on all applicable persons. See Subchapter F of this chapter (relating to Background Checks);<br>(C) A completed Controlling Person Form as set forth in Subchapter G of this chapter (relating to Controlling Person and Certain Employment Prohibited); and<br>(D) The listing fee, if applicable. |
| (2) Application for Registering a Child-Care Home | (A) A completed Registration Request Form;<br>(B) A completed Request for Criminal History and Central Registry Check Form on all applicable persons. See Subchapter F of this chapter;<br>(C) A completed Controlling Person Form as set forth in Subchapter G of this chapter;<br>(D) A notarized Affidavit for Applicants for Employment with a Child-Care Facility or Registered Child-Care Home Form for any employee of the registered child-care home or any applicant you intend to hire;<br>(E) Proof of current certification in infant/child/adult CPR;<br>(F) Proof of current certification in first aid, which must include rescue breathing and choking;<br>(G) The registration fee;<br>(H) Verification that the applicant completed the required orientation within one year prior to the date of application; and<br>(I) Proof of a high school diploma or high school equivalent. |
| (3) Application for Licensing a Child Day-Care Operation | (A) A completed Child Day-Care Licensing Application Form;<br>(B) A floor plan of the building and surrounding space to be used, including dimensions of the indoor and outdoor space;<br>(C) A completed Governing Body/Director Designation Form. This form is not required if the governing body is a sole proprietorship and the proprietor is also the director;<br>(D) Completed background checks on all applicable persons. See Subchapter F of this chapter;<br>(E) A completed Personal History Statement Form for each applicant that is a sole proprietor or partner, and all persons designated as director or co-director;<br>(F) A completed Controlling Person Form as set forth in Subchapter G of this chapter;<br>(G) If the applicant is a for-profit corporation or limited liability company, proof that the corporation or company is not delinquent in paying the franchise tax. For information on franchise tax, see §745.245 of this title (relating to How do I demonstrate that the governing body is not delinquent in paying the franchise tax?);<br>(H) Except for licensed child-care homes, proof of liability insurance or documentation that the applicant is unable to obtain liability insurance and a copy of the written notice informing the parents that there is no insurance coverage. For further information on liability insurance, see §745.249 and §745.251 of this title (relating to What insurance coverage must I have for my licensed operation? and What are acceptable reasons for not obtaining liability insurance?); |

| | |
|---|---|
| | (I) A completed Plan of Operation for Licensed Facilities Form. The plan of operation must show how you plan to comply with the minimum standards;<br>(J) The application fee; and<br>(K) The initial license fee. |
| (4) Application for a Compliance Certificate for a Shelter Care Operation | (A) A completed Shelter Child Care Application Form. If the law requires that the applicant keep the shelter care location confidential, the applicant must include on the application form a valid correspondence address and telephone number, including a method to immediately contact your operation that allows our staff to obtain your location address within 30 minutes;<br>(B) Completed background checks on all applicable persons;<br>(C) If the applicant is a for-profit corporation or limited liability company, proof that the corporation or company is not delinquent in paying the franchise tax. For information on franchise tax, see §745.245 of this title; and<br>(D) The application fee. |
| (5) Application for a Compliance Certificate for an Employer-Based Child Care Operation | (A) A completed Employer-Based Child Care Application Form;<br>(B) A floor plan of the building and surrounding space to be used, including dimensions of the indoor and outdoor space;<br>(C) Completed background checks on all applicable persons as required for licensed child-care centers. See Subchapter F of this chapter;<br>(D) If the applicant is a for-profit corporation or limited liability company, proof that the corporation or company is not delinquent in paying the franchise tax. For information on franchise tax, see §745.245 of this title; and<br>(E) The application fee. |
| (6) Application for Licensing a Residential Child-Care Operation including a Child-Placing Agency and Maternity Home | (A) A completed Application for a License to Operate a Residential Child-Care Facility, Child-Placing Agency, or Maternity Home;<br>(B) A floor plan of the building and surrounding space to be used, including dimensions of the indoor space;<br>(C) Completed background checks on all applicable persons. See Subchapter F of this chapter;<br>(D) A completed Controlling Person Form as set forth in Subchapter G of this chapter;<br>(E) A completed Personal History Statement Form for each applicant that is a sole proprietor or partner, unless you are a licensed administrator;<br>(F) If the applicant is a for-profit corporation or a limited liability company, proof that the corporation or company is not delinquent in paying the franchise tax. For information on franchise tax, see §745.245 of this title;<br>(G) Proof of liability insurance or documentation that the applicant is unable to obtain liability insurance and a copy of the written notice informing the parents that there is no insurance coverage. For further information on liability insurance, see §745.249 and §745.251 of this title;<br>(H) Policies, procedures, and documentation required by minimum standard rules;<br>(I) The application fee; and<br>(J) The initial license fee, if applicable. |
| (7) Application | (A) A completed Child Day-Care Licensing Application Form; |

| | |
|---|---|
| for Certifying a Child Day-Care Operation | (B) A floor plan of the building and surrounding space to be used, including dimensions of the indoor and outdoor space;<br>(C) A completed Governing Body/Director Designation Form;<br>(D) Completed background checks on all applicable persons. See Subchapter F of this chapter;<br>(E) A completed Personal History Statement Form for all persons designated as director or co-director;<br>(F) A completed Controlling Person Form as set forth in Subchapter G of this chapter; and<br>(G) A completed Plan of Operation for Licensed Facilities Form. The plan of operation must show how you plan to comply with the minimum standards. |
| (8) Application for Certifying a Residential Child-Care Operation including a Child-Placing Agency and Maternity Home | (A) A completed Application for a License to Operate a Residential Child-Care Facility, Maternity Home, or Child-Placing Agency;<br>(B) A floor plan of the building and surrounding space to be used, including dimensions of the indoor space;<br>(C) Completed background checks on all applicable persons. See Subchapter F of this chapter;<br>(D) A completed Controlling Person Form as set forth in Subchapter G of this chapter;<br>(E) A completed Personal History Statement Form for each applicant that is a sole proprietor or partner, unless you are a licensed administrator; and<br>(F) Policies, procedures, and documentation required by minimum standard rules. |

Figure: 40 TAC §745.505(a)

| Type and Amount of Fee | When the Fee is Due | Consequences for Failure to Pay Fee on Time |
|---|---|---|
| (1) Application/request processing fee: $20 | Before we accept your application/request for a listing | We will return your application/request as incomplete. |
| (2) Annual listing fee: $20 | On the anniversary date of your listing | If you do not pay your fee when it is due, your listing is automatically suspended until you pay your fee. If you do not pay your fee within six months of when your suspension begins, your license is automatically revoked. |

Figure: 40 TAC §745.509

| Type and Amount of Fee | When Fee is Due | Consequences for Failure to Pay Fee on Time |
|---|---|---|
| (1) Application processing fee: $35 | Before we accept your application | We will return your application as incomplete. |
| (2) Initial license fee for an operation (other than a child-placing agency or maternity home): $35 | Before we accept your application | We will return your application as incomplete. |
| (3) Initial license fee for a child-placing agency or maternity home: $50 | Before we accept your application | We will return your application as incomplete. |
| (4) Initial renewal fee for an operation (other than a child-placing agency or maternity home): $35 | Before we renew your initial license | We will deny the renewal of your initial license if you do not pay your fee by your renewal date. |
| (5) Initial renewal fee for a child-placing agency or maternity home: $50 | Before we renew your initial license | We will deny the renewal of your initial license if you do not pay your fee by your renewal date. |
| (6) Non-expiring license fee for an operation (other than a child-placing agency or maternity home): $35 + $1 per licensed capacity | Before we issue you a non-expiring license | We will deny your license if you do not pay your fee by your issuance due date. |
| (7) Non-expiring license fee for a child-placing agency: $100 | Before we issue you a non-expiring license | We will deny your license if you do not pay your fee by your issuance due date. |
| (8) Non-expiring license fee for a maternity home: $50 + $2 per licensed capacity | Before we issue you a non-expiring license | We will deny your license if you do not pay your fee by your issuance due date. |
| (9) Annual license fee for an operation (other than a child-placing agency or maternity home): $35 + $1 per licensed capacity | On the anniversary date of your license | If you do not pay your fee when it is due, your license is automatically suspended until you pay your fee. If you do not pay your fee within six months of when your suspension begins, your license is automatically revoked. |
| (10) Annual license fee for a child-placing agency: $100 | On the anniversary date of your license | If you do not pay your fee when it is due, your license is automatically suspended until you pay your fee. If you do not pay your fee within six months of when your suspension begins, your license is automatically revoked. |

| | | |
|---|---|---|
| (11) Annual license fee for a maternity home: $50 + $2 per licensed capacity | On the anniversary date of your license | We will:<br>• Suspend your license if you do not pay your fee within one month after your anniversary date; and<br>• Revoke your license if you do not pay your fee within three months after your anniversary date. |
| (12) Amendment fee for an operation (other than a maternity home) or child-placing agency: $1 for each child that the current licensed capacity is increased | Before we issue your amendment | We will deny your request for an increase in capacity. |
| (13) Amendment fee for a maternity home: $2 for each client that the current licensed capacity is increased | Before we issue your amendment | We will deny your request for an increase in capacity. |
| (14) Background check fee: $2 per person | At the time you request a background check or on a monthly or quarterly basis | We may suspend and/or revoke your license. |

Figure: 40 TAC §745.8407

| Type of Operation | Inspection | Investigation |
|---|---|---|
| (1) Listed Operation | • We do not conduct routine inspections.<br>• We may inspect your operation as part of an investigation.<br>• We may inspect your operation to ensure that you are providing care within the limits of the permit issued to you. | We investigate when we have received a report:<br>• Of abuse or neglect;<br>• Of an immediate risk to the health or safety of a child being cared for in the home;<br>• That the home administered a medication to a child in violation of Human Resources Code, §42.065; or<br>• That the home is caring or receiving compensation for four or more unrelated children. |
| (2) Registered Operation | We inspect:<br>• Prior to the issuance of the registration;<br>• At least once every three years after the issuance of the registration; and<br>• As part of an investigation. | We investigate when we have received a report of:<br>• Alleged abuse or neglect; or<br>• A deficiency in a licensing statute, rule, or minimum standard. |
| (3) Licensed or Certified Operation | We inspect:<br>• Prior to the issuance of the license or certification;<br>• At least once every year; and<br>• As part of an investigation. | We investigate when we have received a report of:<br>• Alleged abuse or neglect; or<br>• A deficiency in a licensing statute, rule, or minimum standard. |
| (4) Agency foster and foster group home | • We will periodically inspect a random sample of agency foster homes and agency group homes. | We investigate when we have received a report of:<br>• Alleged abuse or neglect; or<br>• Pertaining to a child under six years:<br>- A reportable serious incident;<br>- A deficiency in a minimum standard that is weighted high; or<br>- A deficiency in a licensing statute, rule, or minimum standard that is prioritized by DFPS with a high degree of risk.<br>• Other deficiencies in a licensing statute, rule, or minimum standard are investigated by the child-placing agency. |

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|---|---|---|
| (5) Employer-Based Child Care | We inspect:<br>• Prior to the issuance of the compliance certificate; and<br>• As part of the investigation. | We investigate when we have received a report of:<br>• Alleged abuse or neglect; or<br>• A deficiency in a licensing statute or rule. |
| (6) Shelter Care | We inspect:<br>• Prior to the issuance of the compliance certificate; and<br>• As part of an investigation. | We investigate when we have received a report of:<br>• Alleged abuse or neglect; or<br>• A deficiency in a Licensing statute or rule. |

Figure: 40 TAC §749.931(a)

| Who is required to receive the annual training? | How many hours of annual training are needed? |
|---|---|
| (1) Caregivers caring for children receiving only child-care services, programmatic services, and/or treatment services for primary medical needs | (A) For homes with two foster parents, the foster parents must receive a total of 20 hours of annual training, of which four hours must be on training specific to the emergency behavior interventions allowed by your agency.<br>(B) For all other caregivers, each caregiver must receive 20 hours of annual training, of which four hours must be on training specific to the emergency behavior interventions allowed by your agency.<br>(C) For foster group homes only, each person's annual training must include two hours of transportation safety training if the person transports a child in care whose chronological or developmental age is younger than nine years old.<br>(D) Caregivers exclusively caring for children receiving treatment services for primary medical needs are exempt from emergency behavior intervention training requirements. |
| (2) Caregivers caring for children receiving treatment services for emotional disorders, mental retardation, or pervasive developmental disorders | (A) For homes with two foster parents, the foster parents must receive a total of 50 hours of annual training, of which eight hours for each foster parent must be on training specific to the emergency behavior interventions allowed by your agency. These 50 hours must be distributed appropriately, and each foster parent must receive some amount of training.<br>(B) For homes with one foster parent, 30 hours, of which eight hours must be on training specific to the emergency behavior interventions allowed by your agency.<br>(C) All other caregivers, 30 hours, of which eight hours must be on training specific to the emergency behavior interventions allowed by your agency.<br>(D) For foster group homes only, each person's annual training must include two hours of transportation safety training if the person transports a child in care whose chronological or developmental age is younger than nine years old. |
| (3) Child placement staff with less than one year of child-placing experience | (A) 30 hours for the initial year;<br>(B) 20 hours after the initial year; and<br>(C) There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained.<br>(D) Annual training must include two hours of transportation safety training if the person transports a child placed in a foster group home whose chronological or developmental age is younger than nine years old. |
| (4) Child placement staff with at least one year of child-placing experience | 20 hours. Annual training must include two hours of transportation safety training if the person transports a child placed in a foster group home whose chronological or developmental age is younger than nine years old. There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained. |

| | |
|---|---|
| (5) Child placement management staff | 20 hours. Annual training must include two hours of transportation safety training if the person transports a child placed in a foster group home whose chronological or developmental age is younger than nine years old. There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained. |
| (6) Child-placing agency administrators, executive directors, treatment directors, and full-time professional service providers who hold a relevant professional license | (A) 15 hours, however, annual training hours used to maintain a person's relevant professional license may be used to complete these hours.<br>(B) There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained.<br>(C) Annual training must include two hours of transportation safety training if the person transports a child placed in a foster group home whose chronological or developmental age is younger than nine years old. |
| (7) Executive directors, treatment directors, and full-time professional service providers who do not hold a relevant professional license | 20 hours. Annual training must include two hours of transportation safety training if the person transports a child placed in a foster group home whose chronological or developmental age is younger than nine years old. There are no annual training requirements for emergency behavior interventions. However, if there is a substantial change in techniques, types of intervention, or agency policies regarding emergency behavior intervention, then the staff must be re-trained. |
| (8) Child-placing agency administrators, child placement staff, child placement management staff, treatment directors, and full-time professional service providers | At least one hour of annual training must focus on prevention, recognition, and reporting of child abuse and neglect, including:<br>(A) Factors indicating a child is at risk for abuse or neglect;<br>(B) Warning signs indicating a child may be a victim of abuse or neglect;<br>(C) Internal procedures for reporting child abuse or neglect; and<br>(D) Community organizations that have training programs available to child-placing agency staff members, children, and parents. |

# 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.

## Office of the Attorney General

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Agreed Final Judgment

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and Texas Health and Safety Code. Before the State may settle a judicial enforcement action, pursuant to §7.110 of the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of Chapter 7 of the Texas Water Code.

Case Title and Court: *Harris County, Texas, and The State of Texas, acting on behalf of the Texas Commission on Environmental Quality, a Necessary and Indispensable Party, Plaintiffs v. DTX Oil, L.L.C., Defendant*, Cause No. 2010-54708 in the 334th District, Harris County, Texas.

Background: This is a suit for enforcement of the Texas Water Code and Texas Health and Safety Code. On five dates in October 2008, Harris County documented odors coming from the Defendant's facility. Defendant routed plant exhaust vapors to an unpermitted carbon canister emission control device. After passing through the carbon canister, the remaining vapors were emitted without authorization and caused the odors at issue.

Nature of Settlement: Agreed Final Judgment: The Agreed Final Judgment settles all of the State's claims in the suit. The Agreed Final Judgment contains provisions for injunctive relief, civil penalties, and attorney's fees. The Agreed Final Judgment will resolve all existing claims by the State of Texas against DTX Oil, L.L.C. for alleged violations of the Texas Health and Safety Code, and rules and permits promulgated thereunder. The judgment awards (1) $87,500.00 in Civil Penalties which will be split between Harris County and the State of Texas, and (2) State attorney's fees of $4,500.00.

The Office of the Attorney General will accept written comments relating to this proposed judgment for 30 days from the date of the publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment and written comments on the proposed judgment should be directed to Anthony W. Benedict, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911.

*For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.*

TRD-201104837
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 7, 2011

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Texas Water Code and Texas Health and Safety Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Water Code and the Texas Health and Safety Code.

Case Title and Court: *State of Texas v. BP Products North America, Inc.*, Cause No. D-1-GV-09-000921, in the 201st Judicial District Court, Travis County, Texas; and *State of Texas v. BP Products North America, Inc.*, Cause No. D-1-GV-10-001237, in the 261st Judicial District Court, Travis County, Texas.

Nature of Defendant's Operations: Defendant owns and operates a petroleum refinery in Texas City, Galveston County, Texas. The Refinery has a capacity to process 460,000 barrels of crude oil a day and its products include gasoline, diesel, benzene and other carcinogenic and volatile chemicals. Claims settled include allegations that BP emitted air contaminants in excess of its permits and state and federal limits on many occasions. In addition, BP violated an Agreed Order issued by the Texas Commission on Environmental Quality by failing to timely report incidents in which it emitted over 500 lbs. of sulfur dioxide.

Proposed Agreed Judgment: The Agreed Final Judgment orders BP Products North America to pay the State of Texas $49,500,000 in civil penalties and $500,000 in costs of prosecution.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Jane E. Atwood, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

*For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.*

TRD-201104838
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 7, 2011

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## Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 11/14/11 - 11/20/11 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 11/14/11 - 11/20/11 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201104843
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: November 8, 2011

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## Texas Education Agency

### Request for Reading Diagnostic Instruments

Description. The Texas Education Agency (TEA) is notifying publishers that reading diagnostic instruments for Prekindergarten-Grade 8 may be submitted for review for inclusion on the 2012-2013 Commissioner's List of Reading Instruments.

*Kindergarten, Grade 1, and Grade 2*

Reading diagnostic instruments for Kindergarten, Grade 1, and Grade 2 may be submitted for review. Texas Education Code (TEC), §28.006, authorizes the commissioner of education to develop recommendations for school districts to administer reading instruments to diagnose student reading development and comprehension.

In accordance with the TEC, §28.006(b), the commissioner of education shall adopt a list of reading instruments that school districts may use to diagnose student reading development and comprehension. Reading instruments placed on the list must be based on scientific research, evaluate individual student reading progress, and be used to identify students at risk for dyslexia or other reading difficulties. The list of reading instruments adopted under the TEC, §28.006(b), must also provide for diagnosing the reading development and comprehension of students participating in a program under the TEC, Chapter 29, Subchapter B (Bilingual Education and Special Language Programs).

Program Requirements. Since the 1998-1999 school year, school districts have been required to administer early reading instruments. Results from the reading instruments are used to inform instruction and provide additional support assistance for students struggling to achieve literacy success. Results from these reading instruments must be reported to the commissioner of education, the local school board, and the parent and/or guardian of students tested.

Due to continued budgetary limitations, and based on available funding, a cap of $5 per student every four years will remain on each complete Test Option for Kindergarten, Grade 1, and Grade 2 on the 2012-2013 Commissioner's List of Reading Instruments. For the 2012-2013 school year, school districts and open-enrollment charter schools will purchase reading instruments directly from the publisher/vendor and file for reimbursements accordingly. If the cost of the Test Option exceeds the $5 per student limit established, the state will reimburse the school district or open-enrollment charter school at the limit established. The school district or open-enrollment charter school is responsible for the remainder of the cost of the Test Option.

Selection Criteria Specific to Reading Diagnostic Instruments for Kindergarten, Grade 1, and Grade 2. Publishers will be responsible for submitting tests they wish to have considered for inclusion on the 2012-2013 Commissioner's List of Reading Instruments. All tests submitted for review must be based on scientific research and must be submitted with evidence of reliability and validity for assessing key reading domains and identifying children at risk of reading failure, including the identification of children with dyslexia. Submitted evidence must demonstrate that the test meets the state criteria for reliability and validity. Instruments will be evaluated in terms of validity, reliability, and ease of administration/implementation by the classroom teacher. Consideration will also be given to the number of domains covered by the test and the number of additional tests that would need to be purchased by schools in order to cover all required domains. Reading instruments (English and Spanish) submitted for review must address at least one of the following five domains: (1) phonological awareness; (2) graphophonemic knowledge; (3) word reading; (4) oral reading accuracy; and (5) comprehension of text, as appropriate for Kindergarten, Grade 1, and Grade 2. As in previous years, it may be necessary to use a combination of instruments to form a Test Option to assess all required domains.

*Grade 7*

Reading diagnostic instruments for Grade 7 also may be submitted for review. In accordance with the TEC, §28.006(c-1), each school district shall administer at the beginning of Grade 7 a reading instrument adopted by the commissioner to each student whose performance on the assessment instrument in reading administered under the TEC, §39.023(a), in Grade 6 did not demonstrate reading proficiency, as determined by the commissioner. The district shall administer the reading instrument in accordance with the commissioner's recommendations under the TEC, §28.006(a)(1).

Program Requirements. Since the 1998-1999 school year, school districts have been required to administer early reading instruments. Results from the reading instruments are used to inform instruction and provide additional support for students struggling to achieve literacy success. Results from these reading instruments must be reported to the commissioner of education, the local school board, and the parent and/or guardian of students tested.

For the Grade 7 reading diagnostic instrument, school districts and open-enrollment charter schools have the option to use the state-owned Texas Middle School Fluency Assessment (TMSFA). The TMSFA and training on how to administer and interpret results of the instrument are provided through the regional education service centers at no cost to school districts and open-enrollment charter schools. The TMSFA also provides reading instruments for Grades 6 and 8. If school districts or open-enrollment charter schools opt to use a Grade 7 reading instrument other than the TMSFA, they must cover the full cost of the instrument.

For the Grade 7 reading diagnostic instrument, 19 TAC §101.6001, Texas Middle School Diagnostic Reading Assessment, states that an alternate diagnostic reading instrument (an instrument used in place of the TMSFA) must: (1) be based on published scientific research in reading; (2) be age and grade-level appropriate, valid, and reliable; (3) identify specific skill difficulties in word analysis, fluency, and comprehension; and (4) assist the teacher in making individualized instructional decisions based on the assessment results.

Information on how reading instruments will be evaluated can be found in the *Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments* section of this notice.

*Prekindergarten and Grades 3, 4, 5, 6, and 8*

In order to create a comprehensive list of reading diagnostic instruments from Prekindergarten-Grade 8, publishers are also invited to submit early literacy and reading instruments for Prekindergarten and Grades 3, 4, 5, 6, and 8. Information on how early literacy and reading instruments will be evaluated can be found in the *Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments* section of this notice. All instruments found to be conforming to the specified guidelines will be published in the 2012-2013 Commissioner's List of Reading Instruments. While school districts and open-enrollment charter schools will not be reimbursed or provided no-cost copies of instruments in Prekindergarten and Grades 3, 4, 5, 6, and 8, they may refer to the list to ensure that they are selecting instruments that are based on scientific research, are valid and reliable, and measure the appropriate set of reading skills.

2012-2013 Commissioner's List of Reading Instruments. The list of early literacy and reading instruments will be made available late spring/early summer so that school districts and open-enrollment charter schools may order instruments for the 2012-2013 school year. Instruments selected for the Commissioner's List of Reading Instruments will remain on the list for four years unless the approved instrument is no longer available from the publisher or the publisher submits an updated version of the instrument prior to the end of the four-year approval cycle. Reading instruments approved in earlier years do not need to be resubmitted this year if still within the four-year approval cycle but must be resubmitted when the four-year cycle has expired.

Please note: The allocation of $5 per student every four years is only for Kindergarten, Grade 1, and Grade 2. There is no reimbursement for other grades, but the TEA will include approved instruments on the Commissioner's List of Reading Instruments for the 2012-2013 school year.

*Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments*

1. The instrument must be intended for use in Prekindergarten-Grade 8.

2. The length of time needed to administer the instrument, plus other instruments necessary to assess all relevant domains, must be less than 60 minutes per student. That is, total assessment time for evaluation of all relevant skills at each grade level must not exceed 60 minutes.

3. The domains addressed by the instrument must directly assess early literacy skills or reading skills, preferably as they are specified in the Texas Prekindergarten Guidelines and the Texas Essential Knowledge and Skills respectively. Because measurement of early reading skills is desired, instruments that only measure reading-related skills (e.g., book and print awareness) are insufficient as measures of early reading.

4. The instrument should have a scoring structure that yields a separate score for each early literacy skill or reading skill included at each grade level. For this review, an instrument is only considered to "assess" a domain if it provides a score for that domain.

5. The instrument must be individually administered. Although technically group-administered assessments may be individually administered, House Bill (HB) 107, 75th Texas Legislature, 1997, specifically mandated assessments intended for individual administration. Thus, tests primarily intended for group administration were not considered to meet the intent of HB 107.

6. Administration of the instrument by a classroom teacher must be allowable. Specifically, the qualifications for those who administer and interpret the instrument (as specified in publisher's guidelines) should be within the coursework and/or licenses typically completed by teachers with education certification. Administration procedures requiring timing, basals, ceilings, complex judgments, and/or subjective ratings require the special training of a diagnostician and may be inappropriate for teacher administration.

7. If the instrument is norm-referenced, it must have an appropriate national norming sample as evidenced by the size of the sample and groups represented. Norm-referenced tests must be representative of the population of students in Prekindergarten-Grade 8. Criterion-referenced decisions about criterion mastery, non-mastery, risk, and impairment have special requirements for reliability and validity (see Guidelines 8 and 9).

8. The instrument must have, at a minimum, adequate reliability established by independent research as evidenced by internal consistency, alternate form and/or test-retest reliability data, or must provide suitable psychometric data from the test development process for tests based on Item Response Theory, including, but not limited to, the standard error of measurement, indices of item discrimination and difficulty, and total test information. Classifications resulting from criterion-referenced tests must be shown to be reliable. Instruments that depend on examiner ratings must demonstrate appropriate forms of interrater reliability.

9. Decisions based on test results must be supported by validity evidence established by independent research such as evidence of criterion validity (either concurrent or predictive), construct and content validity data, and discriminant and convergent validity. Studies of test dimensionality (e.g., factor analysis), differential item functioning, or predictive utility involving multiple measures should be provided wherever available. Classifications resulting from criterion-referenced tests must be shown to be valid and must demonstrate both sensitivity and specificity.

10. Normative and technical data for the instrument must be no more than 15 years old.

11. While it is desirable to determine risk of dyslexia and other reading-related difficulties, there exists no single reliable and valid measurement method for determining such risks. According to research in measuring reading disabilities, instruments that measure phonological awareness and single-word decoding may be useful in making judgments about dyslexia and other reading disabilities. Therefore, instruments that include measures of phonological awareness and single-word decoding will be identified, but the validity and utility of using such instruments in identifying disabilities must be the subject of specific follow-up research.

Proposals must be submitted to Dr. Gareth P. Morgan; The University of Texas at Austin; 1 University Station D4900; Austin, Texas 78712 by 5:00 p.m. (Central Time), Friday, January 6, 2012, to be considered for inclusion on the 2012-2013 Commissioner's List of Reading Instruments.

Further Information. For clarifying information, contact the TEA Division of Standards and Alignment at (512) 463-9483.

TRD-201104855
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: November 9, 2011

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## Employees Retirement System of Texas

### Contract Award Announcement

This contract award notice is being filed by the Employees Retirement System of Texas in relation to a contract award for Group Term Life Insurance and Accidental Death and Dismemberment Insurance cov-

erages. The contractor is Minnesota Life Insurance Company, 400 Robert Street North, St. Paul, Minnesota 55101. The cost of the contract is estimated to be $12,444,129. The contract was executed on November 2, 2011, and the term of the contract to begin prior to January 1, 2012, and will be for a four-year term, subject to the terms of the contract.

TRD-201104848
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: November 8, 2011

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## Texas Commission on Environmental Quality

### Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is December 19, 2011. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on December 19, 2011. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Alyco, Incorporated dba William Mart; DOCKET NUMBER: 2011-1373-PST-E; IDENTIFIER: RN102007341; LOCATION: Georgetown, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,500; ENFORCEMENT COORDINATOR: Charlie Lockwood, (512) 239-1653; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(2) COMPANY: AMERICAN BIRD, INCORPORATED dba My T Quick; DOCKET NUMBER: 2011-1198-PST-E; IDENTIFIER: RN102262763; LOCATION: Duncanville, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the underground storage tanks; PENALTY: $2,379; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Athens Twin Ventures, Incorporated dba Twin Stop 4; DOCKET NUMBER: 2011-1310-PST-E; IDENTIFIER: RN101763852; LOCATION: Athens, Henderson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the product piping associated with the underground storage tank system; PENALTY: $3,879; ENFORCEMENT COORDINATOR: Marcia Alonso, (512) 239-2616; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: City of Commerce; DOCKET NUMBER: 2011-1032-MWD-E; IDENTIFIER: RN102178233; LOCATION: Commerce, Hunt County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: Texas Pollutant Discharge Elimination System Permit Number WQ0010555001, Operational Requirements Number 1 and Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 4 and 30 TAC §305.125(5), by failing to ensure that the facility and all of its systems of collection, treatment and disposal are properly operated and maintained and by failing to comply with permitted effluent limits; PENALTY: $38,800; Supplemental Environmental Project offset amount of $38,800 applied to Asbestos Abatement Project; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: City of Corrigan; DOCKET NUMBER: 2011-1498-MWD-E; IDENTIFIER: RN101918464; LOCATION: Corrigan, Polk County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010787001, Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 6, by failing to comply with permitted effluent limitations; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0010787001, Sludge Provisions, by failing to timely submit the annual sludge report by September 1, 2010, for the monitoring period ending July 31, 2010; PENALTY: $4,960; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(6) COMPANY: City of Hubbard; DOCKET NUMBER: 2011-1162-MWD-E; IDENTIFIER: RN101918480; LOCATION: Hubbard, Hill County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010534001, Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 6, by failing to comply with the permitted effluent limitations; and 30 TAC §305.125(1) and (17) and §319.7(d) and TPDES Permit Number WQ0010534001, Monitoring and Reporting Requirements Number 1, by failing to submit the discharge monitoring report for the monitoring period ending January 31, 2011, by the 20th day of the following month; PENALTY: $20,400; Supplemental Environmental Project offset amount of $20,400 applied to Austin Parks Foundation, Restoration and Rehabilitation of the Barton Springs Bypass Tunnel; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(7) COMPANY: City of Rochester; DOCKET NUMBER: 2011-1044-PWS-E; IDENTIFIER: RN101192243; LOCATION:

Rochester, Haskell County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of each quarter; PENALTY: $1,145; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(8) COMPANY: City of Teague; DOCKET NUMBER: 2011-1542-MWD-E; IDENTIFIER: RN101607935; LOCATION: Teague, Freestone County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010300003, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $4,040; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(9) COMPANY: City of Victoria; DOCKET NUMBER: 2011-0626-MSW-E; IDENTIFIER: RN100212968; LOCATION: Victoria, Victoria County; TYPE OF FACILITY: Municipal Solid Waste (MSW) Type I landfill; RULE VIOLATED: 30 TAC §330.371(a)(2) and MSW Permit Number 1522A, Site Operating Plan (SOP) Section 4.15 Control of Landfill Gas, by failing to ensure that the concentration of methane gas does not exceed 5% by volume in monitoring points, probes, subsurface soils, or other matrices at the facility boundary; 30 TAC §330.371(c)(1) and MSW Permit Number 1522A, Site Development Plan Attachment 14, Landfill Gas Management Plan, Notification Procedures, by failing to immediately take all necessary steps to ensure protection of human health and notify the executive director, local and county officials, emergency officials, and the public when methane exceedances are detected; and 30 TAC §330.371(c)(3) and MSW Permit Number 1522A, SOP Section 4.15 Control of Landfill Gas, by failing to implement a remediation plan within 60 days of detection of methane gas releases; PENALTY: $48,174; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(10) COMPANY: City of Willow Park; DOCKET NUMBER: 2011-1238-MWD-E; IDENTIFIER: RN101920585; LOCATION: Willow Park, Parker County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: Texas Pollutant Discharge Elimination System Permit Number WQ0013834001, Effluent Limitations and Monitoring Requirements Number 1, 30 TAC §305.125(1) and TWC, §26.121(a), by failing to comply with permitted effluent limits; PENALTY: $8,850; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: CREEDMOOR COUNTRY GROCERY, INCORPORATED; DOCKET NUMBER: 2011-1393-PST-E; IDENTIFIER: RN101433977; LOCATION: Creedmoor, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the suction piping associated with the USTs; PENALTY: $2,629; ENFORCEMENT COORDINATOR: Kimberly Walker, (512) 239-2596; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(12) COMPANY: Custom Crates and Pallets Management, L.L.C.; DOCKET NUMBER: 2011-1521-AIR-E; IDENTIFIER: RN105978712; LOCATION: Canutillo, El Paso County; TYPE OF FACILITY: pallet construction and refurbishment facility; RULE VIOLATED: 30 TAC §101.4 and Texas Health and Safety Code, §382.085(a) and (b), by failing to prevent dust emissions from causing or contributing to nuisance conditions on surrounding properties; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Allison Fischer, (512) 239-2574; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(13) COMPANY: Diamond A, Incorporated dba Crystal Food Mart; DOCKET NUMBER: 2011-1385-PST-E; IDENTIFIER: RN105684534; LOCATION: Leander, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the underground storage tanks; PENALTY: $3,879; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(14) COMPANY: Equistar Chemicals LP; DOCKET NUMBER: 2011-1134-AIR-E; IDENTIFIER: RN100221662; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: industrial organic chemical plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(b)(2)(F), Texas Health and Safety Code, §382.085(b), and New Source Review Permit Numbers 4682B and PSDTX761M1, General Condition Number 8, by failing to prevent unauthorized emissions during an event that occurred on January 6, 2011 (Incident Number 149183); PENALTY: $6,575; Supplemental Environmental Project offset amount of $2,630 applied to Texas A&M University - Corpus Christi, Texas A&M University AutoCheck Program; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(15) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2011-0831-AIR-E; IDENTIFIER: RN102212925; LOCATION: Baytown, Harris County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.715(a), and 122.143(4), Federal Operating Permit Number O1553, Special Terms and Conditions 14, Flexible Permit Numbers 3452 and PSD-TX-302M2, Special Conditions 1, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; Supplemental Environmental Project offset amount of $4,000 applied to Houston Regional Monitoring Corporation (HRMC), HRMC Houston Area Air Monitoring; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: ISP Technologies Incorporated; DOCKET NUMBER: 2011-0841-AIR-E; IDENTIFIER: RN100825272; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: specialty chemical manufacturing plant; RULE VIOLATED: 30 TAC §117.310(c)(1) and Texas Health and Safety Code (THSC), §382.085(b), by failing to comply with the concentration limit for carbon monoxide; and 30 TAC §§117.335(a), 117.9020(2)(C)(i), and 122.143(4), Federal Operating Permit Number O-1592, Special Terms and Conditions Number 18.A.(i)2., and THSC, §382.085(b), by failing to conduct a stack test and submit the test report prior to the March 31, 2007, deadline for the Polyvinyl Polypyrrolidone Spray Dryer Heater Stack (Emission Point Number (EPN) H159/3802) and Polyvinyl Pyrrolidone Spray Dryer 2 (EPN 162/4209SC); PENALTY: $13,520; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Johann Haltermann Ltd.; DOCKET NUMBER: 2011-1443-AIR-E; IDENTIFIER: RN100219237; LOCATION: Houston, Harris County; TYPE OF FACILITY: specialty chemical production plant; RULE VIOLATED: 30 TAC §115.546(a)(1) and §122.143(4), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O1596, Special Terms and Conditions Number 6(A)(vii), by failing to maintain tank degassing records; PENALTY: $6,950; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 899-8785; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: NEEL KAMAL, INCORPORATED dba David's One Stop; DOCKET NUMBER: 2011-1336-PST-E; IDENTIFIER: RN102373560; LOCATION: Cedar Park, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide corrosion protection for the underground storage tank (UST) system; and 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; PENALTY: $5,129; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(19) COMPANY: Northwest Harris County Municipal Utility District Number 32; DOCKET NUMBER: 2011-1212-MWD-E; IDENTIFIER: RN102742731; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant and associated collection system; RULE VIOLATED: 30 TAC §305.125 (1), Texas Pollutant Discharge Elimination System Permit Number WQ0013152001, Permit Conditions Number 2.g., and TWC, §26.121(a), by failing to prevent the unauthorized discharge of wastewater from the collection system and the wastewater treatment plant; PENALTY: $4,400; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Pratap Desai; DOCKET NUMBER: 2011-0721-PWS-E; IDENTIFIER: RN101249498; LOCATION: Channelview, Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to collect routine samples; 30 TAC §290.109(c)(4)(B), by failing to collect at least one raw groundwater sample from the facility's well following a coliform-positive sample result; 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive sample result; and 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay Public Health Service fees; PENALTY: $7,942; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: Princess, Incorporated; DOCKET NUMBER: 2011-1028-PWS-E; IDENTIFIER: RN101225142; LOCATION: Harris County; TYPE OF FACILITY: recreational park with a public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to collect routine samples; PENALTY: $6,854; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: RAHIL, INCORPORATED dba Valero Food Mart 2; DOCKET NUMBER: 2011-1262-PST-E; IDENTIFIER: RN101865830; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the UST; and 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $36,637; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(23) COMPANY: Shell Oil Company; DOCKET NUMBER: 2011-1311-AIR-E; IDENTIFIER: RN100211879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.715(a) and §122.143(4), Texas Health and Safety Code, §382.085(b), Flexible Permit Numbers 21262 and PSDTX928, Special Conditions Number 1, and Federal Operating Permit Numbers O1669, Special Terms and Conditions Number 2.I., by failing to prevent unauthorized emissions during an emissions event that began on March 31, 2011 (Incident Number 152745); PENALTY: $10,000; Supplemental Environmental Project offset amount of $4,000 applied to Houston-Galveston Area Emission Reduction Credit Organization's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: SKSB Corporation dba Hill Town Beverage 2; DOCKET NUMBER: 2011-1079-PST-E; IDENTIFIER: RN101433415; LOCATION: Duncanville, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the underground storage tank (UST) system; and TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $3,850; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: Texas Youth Commission; DOCKET NUMBER: 2011-1194-PST-E; IDENTIFIER: RN101497949; LOCATION: Giddings, Lee County; TYPE OF FACILITY: non-retail fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring) and also by failing to provide proper release detection for the piping associated with the UST system; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3553; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(26) COMPANY: U and N, Incorporated dba Brownie's Market; DOCKET NUMBER: 2011-1414-PST-E; IDENTIFIER: RN102461787; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,500; ENFORCEMENT COORDINA-

TOR: Marcia Alonso, (512) 239-2616; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: UNION FOOD STORE INCORPORATED; DOCKET NUMBER: 2011-1314-PST-E; IDENTIFIER: RN100903632; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,600; ENFORCEMENT COORDINATOR: Theresa Hagood, (512) 239-2540; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: VALLEY FEED MILL INCORPORATED OF PARIS; DOCKET NUMBER: 2011-1170-PST-E; IDENTIFIER: RN101377174; LOCATION: Paris, Lamar County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,500; ENFORCEMENT COORDINATOR: Charles Lockwood, (512) 239-1653; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(29) COMPANY: VASAN, INCORPORATED dba Mr. D's Convenience Store; DOCKET NUMBER: 2011-1272-PST-E; IDENTIFIER: RN101765295; LOCATION: Boerne, Kendall County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide a method of release detection for the piping associated with the underground storage tanks; PENALTY: $2,041; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3423; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(30) COMPANY: Wilbert's Service station, Incorporated; DOCKET NUMBER: 2011-1476-PST-E; IDENTIFIER: RN102776747; LOCATION: Giddings, Lee County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (UST) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and also by failing to provide release detection for the piping associated with the UST system; PENALTY: $2,629; ENFORCEMENT COORDINATOR: Allison Fischer, (512) 239-2574; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

TRD-201104842
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 8, 2011

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## Notice of Availability of the Response to Comments on the Pesticides General Permit Number TXG870000

The executive director of the Texas Commission on Environmental Quality (commission or TCEQ) files this Response to Public Comment (Response) on Texas Pollutant Discharge Elimination System (TPDES) Permit to Authorize Point Source Discharge of Biological Pesticides and Chemical Pesticides that Leave a Residue in Water General Permit Number TXG870000. As required by Texas Water Code (TWC), §26.040(d) and 30 TAC §205.3(c), before a general permit is issued, the executive director must prepare a response to all timely, relevant and material, or significant comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn. Comments received after the end of the comment period on January 18, 2011 are not responded to in this Response. Timely public comments were received from the following persons and entities:

ADAPCO (supports comments of Texas Mosquito Control Association), American Electric Power (AEP), City of Baytown (Baytown), Brazoria County, Burnett Consulting, Caddo Lake Institute, Carol and Blackman, Inc. (CB), Coastal AG Consulting, Cotton and Grain Producers of the Lower Rio Grande Valley (GPLRGV), Sid Chambers, Eastman Chemical Company (ECC), Ray Gomez, Hancock Forest Management (HFM), David Hansen, Harris County, Harris County Flood Control District (HCFCD), Jefferson County Mosquito Control District (JCMCD), Justin Seed Company, Inc. (JSC), The Lake Doctor (Mark Palmer), Lake Pro, Inc. (Lake Pro), Lake Management Services (LSM), Lower Colorado River Authority (LCRA), Lower Neches Valley Authority (LNVA), Lloyd Gosselink Rochelle & Townsend, P.C. (Lloyd Gosselink), Lone Star Chapter of the Sierra Club (Sierra Club) (supports comments of Caddo Lake Institute), Nearly Wild Texas (NWT), Oncor Electric Delivery Company, LLC (ONCOR), Orange County Mosquito Control District (OCMCD), San Jacinto River Authority (SJRA), City of Shoreacres (Shoreacres), Shores Air-Ag, Inc. (Shores Air-Ag), South Texas Cotton and Grain Association (STCGA), Texas Ag Industries Association (TAIA), Texas AgriLife Extension Service (TAES), Texas Aquatic Plant Management Society (TAPMS), Texas Boll Weevil Eradication Foundation, Inc., (TBWEF), Texas Citrus Mutual (TCM), Texas Department of Agriculture (TDA), Texas Farm Bureau (TFB), Texas Forestry Association (TFA), Texas Industry Project, (TIP), Texas Mosquito Control Association (TMCA), Texas Parks & Wildlife Department (TPWD), Texas Pest Control Association (TPCA), Texas Vegetation Management Association (TVMA), West Nueces - Las Moras Soil and Water Conservation District Number 236 (WN Number 236), and Williamson County Grain, Inc. (WCG).

Also comments were received from the following related to golf courses: the Vaquero Club, Gentle Creek Golf Club (GC), TPC Craig Ranch, Pecan Grove GC, Lone Star Golf Course Superintendents Association, Horseshoe Bay Resort, River Ridge GC, Shadow Hawk/Houstonian GC, Stephen F. Austin GC, Redstone GC, and Texas Alliance of Recreational Organizations (Golf Courses).

If you need more information about this permit or the wastewater permitting process, please call the TCEQ Office of Public Assistance at (800) 687-4040. The complete Commissioner's Response to Public Comment may be found at the following website:

*http://www10.tceq.state.tx.us/epic/CCD/*

Additionally, general information about the TCEQ can be found at our website at *www.tceq.texas.gov.*

TRD-201104854
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 9, 2011

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## Notice of Minor Amendment Radioactive Material License Number R04100

APPLICATION. Waste Control Specialists LLC (WCS) has applied to the Texas Commission on Environmental Quality (TCEQ) for minor amendments to Radioactive Material License R04100. Radioactive Material License R04100 authorizes commercial disposal of low-level radioactive waste. WCS conducts waste management services and is the operator of the Compact Waste Disposal Facility (CWF) while the State of Texas is the owner of the CWF. The four proposed amendments request design changes to the CWF Contact Water Secondary Containment Structure, Sedimentation Pond Inlet Structure, Surface Stormwater Conveyances, CWF Red Bed Bench Ditch Drainage System, and CWF Access Ramps. The facility is currently under construction and is located at 9998 State Highway 176 West in Andrews County, Texas. The four applications were submitted to the TCEQ on May 3, 2011 (revised June 14, 2011), June 6, 2011 (revised September 29, 2011), July 14, 2011 (revised September 29, 2011, and October 14, 2011) and July 22, 2011 (revised September 29, 2011, and October 17, 2011). The TCEQ Executive Director has completed the technical review of the application and prepared a draft license. The draft license, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this license, if issued, meets all statutory and regulatory requirements. The license amendment request, the Executive Director's technical summary, and amended draft license are available for viewing and copying at the TCEQ's central office in Austin, Texas and at the Andrews Public Library in Andrews, Texas.

PUBLIC COMMENT/PUBLIC MEETING. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. The TCEQ holds a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments.

EXECUTIVE DIRECTOR ACTION. The application is subject to Commission rules which direct the Executive Director to act on behalf of the Commission and provide authority to the Executive Director to issue final approval of this application for a minor amendment after consideration of all timely comments submitted on the application.

MAILING LIST. If you submit public comments or a request for reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and license or permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html within 10 days from the date of this notice.

AGENCY CONTACTS AND INFORMATION. If you need more information about this license application or the licensing process, please call the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040. Si desea información en español, puede llamar al 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Further information may also be obtained from WCS at the address stated above or by calling Mr. Scott Kirk at (432) 525-8500.

TRD-201104884

Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 9, 2011

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## Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapters 50, 55, and 80

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 50, Action on Applications and Other Authorizations, §50.139; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, §§55.103, 55.201, 55.203, and 55.256; and Chapter 80, Contested Case Hearings, §§80.17, 80.108, 80.109, 80.117, 80.131, 80.151, 80.257, and 80.261 under the requirements of Texas Water Code, §5.103; Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill 2694, Article 10, Contested Case Hearings, 82nd Legislature, 2011, which amends the Texas Water Code by adding new §5.315, amending §5.115(b) and §5.228(c) and (d), and by deleting §5.228(e), and revises the contested case hearings process.

The commission will hold a public hearing on this proposal in Austin on December 12, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

TRD-201104807
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 4, 2011

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## Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 334

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 334, Underground and Aboveground Storage

Tank rules, §334.5 and §334.84. The commission also proposes new §334.19.

The TCEQ Sunset legislation, House Bill (HB) 2694, adopted during the 82nd Legislature, 2011, Regular Session and signed by the Governor on June 17, 2011, included statutory changes addressing petroleum storage tank (PST) regulations. This rulemaking would address those changes: underground storage tank (UST) delivery prohibition; state lead tank removal authorization; and the setting of the PST delivery fee.

The proposed rulemaking would amend Chapter 334, Underground and Aboveground Storage Tanks, Subchapter A (General Prohibitions): §334.5, to reinstate common carrier liability and Subchapter D (Release Reporting and Corrective Action): §334.84, to allow the TCEQ to remove non-compliant USTs and Aboveground Storage Tanks (ASTs) that pose a risk of contamination, and are owned by financially unable persons or entities. A new §334.19 would decrease the fee on delivery of petroleum products beginning July 1, 2012.

The commission will hold a public hearing on this proposal in Austin on December 14, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-011-336-PR. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Jonathan Walling, Remediation Division, (512) 239-2295.

TRD-201104791
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 4, 2011

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## Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 19, 2011.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 19, 2011.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: BIS C-STORE, INC. dba Super Stop 7; DOCKET NUMBER: 2011-1001-PST-E; TCEQ ID NUMBER: RN102278017; LOCATION: 16633 Kuykendahl Road, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide proper corrosion protection for the UST system; and TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $4,600; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Calabrian Corporation; DOCKET NUMBER: 2010-1631-IWD-E; TCEQ ID NUMBER: RN101645018; LOCATION: 5500 State Highway 366, Port Neches, Jefferson County; TYPE OF FACILITY: inorganic chemical plant; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0004731000, Effluent Limitations and Monitoring Requirements Number 1; PENALTY: $38,870; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: COMMUNITY UTILITY COMPANY; DOCKET NUMBER: 2011-0500-UTL-E; TCEQ ID NUMBER: RN101198554 and RN101204303; LOCATION: Beckman Drive off Farm-to-Market Road 2100, Harris County (RN101198554), and the intersection of Berry Thicket Lane and Heathergate Lane, Harris County (RN101204303); TYPE OF FACILITY: public water system (PWS); RULES VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j) and TWC, §13.1395(b)(2), by failing to adopt and submit to the executive director for approval by the extension due date of May 30, 2010, an adoptable emergency preparedness plan (EPP) that demonstrates Forest Manor's ability to provide emergency operations (RN101198554); and 30 TAC §290.39(o)(1) and §291.162(a) and (j) and TWC, §13.1395(b)(2), by failing to adopt and submit to the executive director for approval by the extension due date of May 30, 2010, an adoptable EPP that demonstrates Heathergate Estates' ability to provide emergency operations (RN101204303); PENALTY: $1,080;

STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Four States Recycling, Inc.; DOCKET NUMBER: 2010-1179-MSW-E; TCEQ ID NUMBER: RN103204954; LOCATION: 4110 East Amarillo Boulevard, Amarillo, Potter County; TYPE OF FACILITY: recycling facility; RULES VIOLATED: 30 TAC §330.15(c) and TCEQ Agreed Order Docket Number 2008-0596-MLM-E, Ordering Provision Number 2.c., by failing to prevent the unauthorized disposal of municipal solid waste; 30 TAC §328.5(f) and TCEQ Agreed Order Docket Number 2008-0596-MLM-E, Ordering Provision Number 2.a.ii., by failing to maintain records to document compliance with 30 TAC §328.4; and 30 TAC §37.921, §328.5(d) and (f)(3), and TCEQ Agreed Order Docket Number 2008-0596-MLM-E, Ordering Provision Number 2.b.iii., by failing to demonstrate financial assurance for closure, post closure, and corrective action; PENALTY: $12, 465; STAFF ATTORNEY: Xavier L. Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(5) COMPANY: GEO Enterprises Inc. dba Handi Stop 50; DOCKET NUMBER: 2011-0959-PST-E; TCEQ ID NUMBER: RN101749554; LOCATION: 2230 Wirt Road, Houston, Harris County; TYPE OF FACILITY: UST system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); PENALTY: $3,100; STAFF ATTORNEY: Stephanie Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: James Brook Sloan; DOCKET NUMBER: 2010-1934-PST-E; TCEQ ID NUMBER: RN101755957; LOCATION: 200 North 3rd Street, Grandview, Johnson County; TYPE OF FACILITY: UST system and restaurant; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $2,625; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: NAMINATH INVESTMENT, INC. dba Harborside Food Mart 1; DOCKET NUMBER: 2010-1723-PST-E; TCEQ ID NUMBER: RN101764439; LOCATION: 8220 Harborside Drive, Galveston, Galveston County; TYPE OF FACILITY: UST system and a convenience store with retail sales of gasoline; RULES VIOLATED: Texas Health and Safety Code (THSC), §382.085(b) and 30 TAC §115.246(1) and (3) - (6), by failing to maintain all required Stage II records at the station and make them immediately available for review upon request by agency personnel; THSC, §382.085(b) and 30 TAC §115.245(2), by failing to verify proper operation of the Stage II equipment and vapor space manifolding and dynamic back-pressure at least once every 36 months or upon major system replacement or modification, whichever occurs first; and THSC, §382.085(b) and 30 TAC §115.242(3), by failing to maintain the Stage II vapor recovery system in proper operating condition and free of defects that would impair the effectiveness of the system, including but not limited to absence or disconnection of any component that is a part of the approved system; PENALTY: $4,875; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: SUBURBAN UTILITY COMPANY; DOCKET NUMBER: 2011-0499-UTL-E; TCEQ ID NUMBER: RN101175057, RN101241081, RN101252963 and RN101209922; LOCATION: Flagstaff Lane and Purple Sage Road and 12709 Danvers, (RN101175057), 2700 Balmorhea Avenue, (RN101241081), 12026 Hamblin Road, (RN101252963), and 8119 Jackstone Drive, Harris County (RN101209922); TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j) and TWC, §13.1395(b)(2), by failing to submit to the executive director for approval by the extension due date of May 30, 2010, an adoptable EPP that demonstrates Beaumont Place's ability to provide emergency operations (RN101175057); 30 TAC §290.39(o)(1) and §291.162(a) and (j) and TWC, §13.1395(b)(2), by failing to submit to the executive director for approval by the extension due date of May 30, 2010, an adoptable EPP that demonstrates Castelwood's ability to provide emergency operations (RN101241081); 30 TAC §290.39(o)(1) and §291.162(a) and (j) and TWC, §13.1395(b)(2), by failing to submit to the executive director for approval by the extension due date of May 30, 2010, an adoptable EPP that demonstrates Cypress Bend's ability to provide emergency operations (RN101252963); and 30 TAC §290.39(o)(1) and §291.162(a) and (j) and TWC, §13.1395(b)(2), by failing to submit to the executive director for approval by the extension due date of May 30, 2010, an adoptable EPP that demonstrates Reservoir Acre's ability to provide emergency operations (RN101209922); PENALTY: $5,348; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: White Oak Estates MHC LLC dba Whiye MHC LLC, dba White Oak Estates I and White Oak Estates II; DOCKET NUMBER: 2010-1574-PWS-E; TCEQ ID NUMBER: RN103017620 and RN103017612; LOCATION: 22350 Luke Davis Road, New Caney, Montgomery County; TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and THSC, §341.033(d), by failing to collect routine distribution water samples at Facility 2 for coliform analysis for the months of September - November 2008, April - July 2009, and did not provide public notification for the failure to collect routine samples for the months of September - November 2008, and April - July 2009; 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and THSC, §341.033(d), by failing to collect routine distribution water samples at Facility 1 for coliform analysis for the months of March 2008, September - November 2008, April and May 2009, and did not provide public notification for the failure to collect routine samples for the months of March 2008, September - November 2008, January and April 2009; 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay all annual and late Public Health Service (PHS) fees for TCEQ Financial Administration (FA) Account Number 91700714 (Facility 1) for Fiscal Year 2010; and 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay all annual and late PHS fees for TCEQ FA Account Number 91700715 (Facility 2) for Fiscal Year 2010; PENALTY: $5,532; STAFF ATTORNEY: Stephanie Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201104846
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 8, 2011

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## Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 19, 2011.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 19, 2011.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Ashok K. Sharma dba A-1 Mart and Pokhrel Enterprises Inc. dba A-1 Mart; DOCKET NUMBER: 2011-0968-PST-E; TCEQ ID NUMBER: RN102010097; LOCATION: 6800 Camp Bowie West Boulevard, Fort Worth, Tarrant County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: $2,120; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Charlsie Ann Evans Wilkins; DOCKET NUMBER: 2011-0513-PST-E; TCEQ ID NUMBER: RN105600159; LOCATION: 2027 South Armstrong Avenue, Denison, Grayson County; TYPE OF FACILITY: UST system and a vacant gas station; RULES VIOLATED: 30 TAC §334.7(a)(1), by failing to register with the commission, on authorized agency forms, USTs in existence on or after September 1, 1987; 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.54(b)(1), by failing to keep the UST system vent lines open and functioning; and 30 TAC §334.54(b)(2), by failing to maintain all piping, pumps, manways, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; PENALTY: $5,075; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Christopher W. Duncan dba Lakeside Water Company; DOCKET NUMBER: 2011-0970-PWS-E; TCEQ ID NUMBER: RN103778247; LOCATION: 28654 South United States Highway 69, Zavalla, Angelina County; TYPE OF FACILITY: public water system (PWS); RULES VIOLATED: 30 TAC §290.46(d)(2)(A) and §290.110(b)(4), by failing to operate the disinfection equipment to maintain a free chlorine residual of 0.2 milligrams per liter throughout the distribution system at all times; and TWC, §5.702 and 30 TAC §290.51(b), by failing to pay all annual Public Health Service (PHS) fees for Fiscal Years 2003, 2004, and 2010, including any associated late fees and penalties, for TCEQ Financial Administration Account Number 90030104; PENALTY: $330; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(4) COMPANY: George Santos; DOCKET NUMBER: 2011-1218-LII-E; TCEQ ID NUMBER: RN105797856; LOCATION: 10618 Odyssey Court, Houston, Harris County; TYPE OF FACILITY: landscaping business; RULES VIOLATED: TWC, §37.003, 30 TAC §30.5(b) and TCEQ Default Order Number 2009-1595-LII-E, Ordering Provisions Numbers 2.a.i. and 2.b., by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required when not possessing a current license or registration; PENALTY: $650; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: Hall and Sons Transport Inc.; DOCKET NUMBER: 2011-0698-WQ-E; TCEQ ID NUMBER: RN106031685; LOCATION: 5501 Talley Road, San Antonio, Bexar County; TYPE OF FACILITY: truck maintenance and repair business; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c)(1), by failing to obtain authorization to discharge stormwater associated with industrial activities; and TWC, §26.121(a)(2), by failing to prevent unauthorized discharges into or adjacent to any water in the state; PENALTY: $3,150; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(6) COMPANY: HAMILTON CUSTOM SERVICE, INC.; DOCKET NUMBER: 2011-0216-SLG-E; TCEQ ID NUMBER: RN103155198; LOCATION: 903 380 Bypass, Graham, Young County; TYPE OF FACILITY: sludge transporting business; RULES VIOLATED: TWC, §26.121(a)(1) and 30 TAC §312.143, by failing to deposit wastes at a facility with written authorization by permit or registration; 30 TAC §312.142(d), by failing to renew a sludge transporter registration before continuing to transport waste; TWC, §5.702 and 30 TAC §312.9, by failing to pay the Fiscal Year 2007 TCEQ Waste Management Sludge Haulers fee and associated late fees for Account

Number 0801409H; and 30 TAC §312.147(a), by failing to ensure that waste stored in a mobile closed container is stored for less than four days; PENALTY: $12,064; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(7) COMPANY: JATRA INTERNATIONAL, INC.; DOCKET NUMBER: 2011-0558-MWD-E; TCEQ ID NUMBER: RN101516037; LOCATION: approximately 1,000 feet southeast of the intersection of Interstate Highway 45 and State Highway (SH) 179, Freestone County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(17) and §319.7(d), and Texas Pollutant Discharge Elimination System Permit Number WQ0014770001, Monitoring and Reporting Requirements Number 1, by failing to submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(17) and TPDES Permit Number WQ0014770001, Sludge Provisions, by failing to submit monitoring results at the intervals specified in the permit; PENALTY: $17,680; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: Michael Parma; DOCKET NUMBER: 2011-0534-MSW-E; TCEQ ID NUMBER: RN106078256; LOCATION: 838 SH 72 West, Yorktown, Dewitt County; TYPE OF FACILITY: unauthorized waste disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $3,866; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(9) COMPANY: Richard J. Duda; DOCKET NUMBER: 2011-1126-PWS-E; TCEQ ID NUMBER: RN105362529; LOCATION: Farm-to-Market (FM) Road 986 and Four Post Lane, Kaufman County; TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of the quarter; and 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Customer Confidence Report (CCR) to each bill paying customer by July 1 of each year and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data to the TCEQ by July 1 of each year; PENALTY: $2,904; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Richard Sullivan dba Country View Mobile Home Park and dba Valley Estates; DOCKET NUMBER: 2011-0911-PWS-E; TCEQ ID NUMBER: RN101278190 and RN101278018; LOCATION: 7506 North County Road (CR) 1540, Unit 23, Shallowater (RN101278190) and 7400 North Venita Avenue, Shallowater, Lubbock County (RN101278018); TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §290.271(b), §290.274(a) and (c), and TCEQ Default Order Docket Number 2008-1127-PWS-E, Ordering Provisions Numbers 2.a.1 and 2.b., by failing to mail or directly deliver one copy of the CCR to each bill paying customer by July 1 of each year and by failing to submit to the TCEQ by July 1 of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with the compliance monitoring data (RN101278190); 30 TAC §290.110(e)(4)(A), by failing to submit a DLQOR to the executive director each quarter by the tenth day of the month following the end of each quarter (RN101278190); 30 TAC §290.106(e) and §290.108(e), by failing to report the quarterly results for inorganic and radionuclide contaminant levels to the executive director (RN101278190); 30 TAC §290.113(e) and (f)(2), by failing to report the annual results for Stage-1 disinfectant by-product levels to the executive director (RN101278190); 30 TAC §290.106(e) and §290.107(e), by failing to report the results for triennial sampling to the executive director every three years (RN101278190); 30 TAC §290.271(b), §290.274(a) and (c), and TCEQ Default Order Docket Number 2008-1127-PWS-E, Ordering Provisions Numbers 2.a.1 and 2.b., by failing to mail or directly deliver one copy of the CCR to each bill paying customer by July 1 of each year and by failing to submit to the TCEQ by July 1 of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with the compliance monitoring data (RN101278018); 30 TAC §290.110(e)(4)(A), by failing to submit a DLQOR to the executive director each quarter by the tenth day of the month following the end of each quarter (RN101278018); 30 TAC §290.106(e) and §290.108(e), by failing to report the quarterly results for inorganic and radionuclide contaminant levels to the executive director (RN101278018); 30 TAC §290.113(e) and (f)(2), by failing to report the annual results for Stage-1 disinfectant by-product levels to the executive director (RN101278018); and 30 TAC §290.106(e) and §290.107(e), by failing to report the results for triennial sampling to the executive director every three years (RN101278018); PENALTY: $28,954; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7613.

(11) COMPANY: Teresa Reid dba Laursens Car Care & Keene Auto; DOCKET NUMBER: 2011-0397-PST-E; TCEQ ID NUMBER: RN102225406; LOCATION: 316 South Old Betsy Road, Keene, Johnson County; TYPE OF FACILITY: UST system and an automobile repair facility; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide release detection for the piping associated with the USTs; PENALTY: $2,629; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Terry F. Lee; DOCKET NUMBER: 2011-0533-MSW-E; TCEQ ID NUMBER: RN106078256; LOCATION: 838 SH 72 West, Yorktown, Dewitt County; TYPE OF FACILITY: unauthorized waste disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $3,866; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(13) COMPANY: Terry L. Babb, Sr. dba Twin Oaks Mobile Home Park; DOCKET NUMBER: 2011-1313-PWS-E; TCEQ ID NUMBER: RN101192995; LOCATION: 200 yards west of SH 31 and FM Road 753, between Malakoff and Athens, Henderson County; TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a DLQOR to the executive director each quarter, by the tenth day of the month following the end of the quarter; 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the CCR to each bill paying customer by July 1 of each year, and by failing to submit to the TCEQ, by

July 1 of each year, a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with the compliance monitoring data; and TWC, §5.702 and §7.061(1), 30 TAC §290.51(a)(6), and TCEQ Default Order Docket Number 2003-1328-PWS-E, Ordering Provisions Numbers 1.a. and 1.d.i., and TCEQ Default Order Docket Number 2009-0569-MLM-E, Ordering Provisions Numbers 1 and 2.b.vii., by failing to pay all PHS fees and administrative penalties to the commission in a timely manner; PENALTY: $1,932; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(14) COMPANY: YFZ Land, LLC; DOCKET NUMBER: 2011-0379-MLM-E; TCEQ ID NUMBER: RN104250626; LOCATION: 2420 CR 300, Eldorado, Schleicher County; TYPE OF FACILITY: residential/community development project; RULES VIOLATED: 30 TAC §305.125(1), TCEQ Permit WQ0014722001 and Special Provisions Number 4, by failing to timely submit a copy of the signed daily log book to the TCEQ Regional Office; 30 TAC §305.125(1) and TCEQ Permit Number WQ0014722001, Special Provisions Number 5, by failing to timely submit a record of the facility's daily inspections to the TCEQ Regional Office; 30 TAC §305.125(1) and TCEQ Permit Number WQ0014722001, Special Provisions Number 7, by failing to submit copies of all self-reported effluent monitoring performed by the third party and certified copies of all lab analyses each month to the TCEQ Regional Office; 30 TAC §317.7(e), by failing to maintain a complete fence and lockable gate around the wastewater treatment facility; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TCEQ Permit Number WQ0014722001, Effluent Limitations and Monitoring Requirements A, by failing to meet permitted effluent limitations; 30 TAC §281.25(a)(4) and 40 CFR §122.26, by failing to obtain authorization for discharges of stormwater from construction activities; and TWC, §26.121(a)(1), by failing to obtain authorization for the discharge of concrete washout wastewater and gravel rinse water; PENALTY: $30,782; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

TRD-201104847
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 8, 2011

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## Notice of Public Hearing on a Proposed Revision to 30 TAC Chapter 328

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed new 30 TAC Chapter 328, Waste Minimization and Recycling, §§328.161, 328.163, 328.165, 328.167, 328.169, 328.171, 328.173, 328.175, 328.177, 328.179, 328.181, 328.183, 328.185, 328.187, 328.189, 328.191, 328.193, 328.195, and 328.197, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement Senate Bill 329 from the 82nd Legislature, 2011, relating to a program for the recycling of certain television equipment.

The commission will hold a public hearing on this proposal in Austin on December 13, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-028-328-AD. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Cynthia Carter, Pollution Prevention and Education Section, (512) 239-3143.

TRD-201104796
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 4, 2011

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## Notice of Water Quality Applications

The following notices were issued on October 28, 2011 through November 4, 2011.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

TEXAS ELECTRIC COOPERATIVES INC which operates the Texas Electric Cooperatives, Inc., Treating Division, a utility pole preparation and preservation plant, has applied for a major amendment with renewal to TPDES Permit No. WQ0001766000 to authorize the discharge of non-contact cooling water from the cooling tower tank and non-contact condensate from heated coils and heat exchangers via Outfall 101. The current permit authorizes the discharge of storm water and previously monitored effluents (non-contact cooling water, boiler blowdown, and storm water) on an intermittent and flow variable basis via Outfall 001. The facility is located at 2240 Bevil Loop Road approximately 0.6 mile south of U.S. Highway 190 and southeast of the City of Jasper, Jasper County, Texas 75951.

CITY OF FORT WORTH has applied for a renewal of TPDES Permit No. WQ0010494013, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 166,000,000 gallons per day. The current permit authorizes the surface disposal of sewage sludge on 156 acres and land application of Class A sewage sludge for beneficial use. The facility is located at 4500 Wilma Lane, in Forth Worth in Tarrant County, Texas 76012. The sludge treatment works and sludge surface disposal site are located north of the wastewater treatment facility and the sludge disposal sites are located in six locations in Tarrant County.

SOUTH ATLANTIC SERVICES INC which operates a facility that performs bulk liquid storage, blending, and packaging of vehicle additives, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed TPDES Permit No. WQ0004953000, to authorize the discharge of reverse osmosis concentrate water at a daily average flow not to exceed 10,500 gallons per day via Outfall 001. The facility is located at 16530 Peninsula Street, City of Houston, Harris County, Texas 77015. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF HASKELL has applied for a major amendment to TPDES Permit No. WQ0010728001 to authorize the disposal of treated domestic wastewater via irrigation of 68 acres of non-public access land, and to continue the authorization to discharge treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility is located approximately one mile south and 0.25 mile east of the intersection of U.S. Highway 277 and U.S. Highway 380, in Haskell County, Texas 79521.

OWENS CORNING INSULATING SYSTEMS LLC which operates the Waxahachie Plant, a fiberglass insulation manufacturing plant has applied for a renewal of TPDES permit number WQ0001178000, which authorizes the discharge of storm water runoff commingled with cooling tower blowdown on an intermittent and variable flow basis via Outfall 001. The facility is located 3700 North Interstate 35 East, adjacent to the east side of Interstate Highway 35 East, approximately one (1) mile north of the intersection of Interstate Highway 35 East and U.S. Highway 287, north of the City of Waxahachie, Ellis County, Texas 75165.

CSA LIMITED INC which operates a facility that packages various liquid products for retail distribution, has applied for a renewal of TPDES Permit No. WQ0004084000, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 4,000 gallons per day via Outfall 001; and utility wastewaters, mop water, water from water baths, reverse osmosis reject water, washwater from floor sumps, boiler blowdown, and storm water at a daily average flow not to exceed 8,000 gallons per day via Outfall 002. The facility is located at 16212 State Highway 249, approximately 1.7 miles southeast of the intersection of State Highway 249 and Farm-to-Market Road 1960, Harris County, Texas 77086.

SYNAGRO OF TEXAS CDR INC has applied for a renewal of TCEQ Permit No. WQ0004723000, which authorizes the land application of sewage sludge and water treatment plant sludge for beneficial use on 80.5 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sludge land application site is located approximately 0.75 mile south of the City of Rock Island, east of and fronting Farm-to-Market Road 1693, in Colorado County, Texas 77470.

THE CITY OF BELLS has applied for a renewal of TPDES Permit No. WQ0010126001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 170,000 gallons per day. The facility is located approximately 480 feet northwest of the intersection of U.S. Highway 69 and Farm-to-Market Road 1897, north of the City of Bells in Grayson County, Texas 75414.

CITY OF EVANT has applied for a renewal of TPDES Permit No. WQ0011011001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located at 650 East Live Oak Street, approximately 200 feet south of Live Oak Street near the southeast corner of the City of Evant in Coryell County, Texas 76525.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied for a renewal of TPDES Permit No. WQ0011180001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 850,000 gallons per day. The facility is located approximately 3.5 miles northwest of State Highway 19 and approximately 12 miles northeast of the City of Huntsville in Walker County, Texas 77343.

WEST HARDIN COUNTY CONSOLIDATED INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0011274001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,000 gallons per day. The facility is located immediately south of the intersection of State Highway 105 and Farm-to-Market Road 770 and approximately 1,000 feet east of Pine Island Bayou in Hardin County, Texas 77585.

CITY OF NEWARK has applied for a major amendment to TPDES Permit No. WQ0011626001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 100,000 gallons per day to a daily average flow not to exceed 150,000 gallons per day and the relocation of the outfall. The application also includes a request for a temporary variance from the existing water quality criterion of 5.0 milligrams per liter for dissolved oxygen for the Derrett Creek arm of the Eagle Mountain Reservoir in Segment No. 0809 of the Trinity River Basin. The variance will provide the Applicant with three years period to cease discharging from Outfall 001. The draft permit retains the existing effluent monitoring location. The facility is located on the east bank of Derrett Creek immediately south of the Newark Beach Road Bridge, about 850 feet west of the intersection of Roger Road and Berke Street in Wise County, Texas 76071. The treated effluent is discharged via Outfall 001 to a series of wetland ponds; thence to the Derrett Creek arm of Eagle Mountain Reservoir in Segment No. 0809 of the Trinity River Basin, and via Outfall 002 to a series of wetland ponds; thence to force main pipe; thence to unnamed tributary; thence to Eagle Mountain Reservoir in Segment No. 0809 of the Trinity River Basin.

CITY OF KAUFMAN has applied for a renewal of TPDES Permit No. WQ0012114001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,200,000 gallons per day. The facility is located at 600 Waste Water Treatment Plant Road, on U.S. Highway 175 and State Highway 34 in Kaufman County, Texas 75142.

AQUA UTILITIES INC has applied for a renewal of TPDES Permit No. WQ0012898001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility is located approximately 2,300 feet north of Spring Creek and 5,500 feet east of the Waller-Montgomery County line in Montgomery County, Texas 77447.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied for a renewal of TPDES Permit No. WQ0013717001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 350,000 gallons per day. The facility is located approximately 2 miles southwest of the intersection of Farm-to-Market Road 320 and 645; approximately 5 miles northwest of the intersection of Farm-to-Market Road 645 and U.S. Highway 84 and 79; within the boundaries of the Powledge State Prison Farm in Anderson County, Texas 75803.

TOWN OF ANNETTA has applied to for a renewal of TCEQ Permit No. WQ0013759001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 264,000 gallons per day via surface irrigation of 233 acres of a golf course. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility is located approximately 480 feet northwest of the intersection of Thunderhead Lane and Inglewood Drive in Parker County, Texas 76008. The disposal site is located approximately

1.6 miles due north of the Deer Creek Wastewater Treatment Facility in Parker County.

CITY OF ZAVALLA has applied for a renewal of TPDES Permit No. WQ0013871001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 130,000 gallons per day. The facility is located approximately 0.5 mile west and 1.0 mile south of the intersection of State Highways 69 and 63, and southwest of the City of Zavalla in Angelina County, Texas 75980.

CITY OF PALMER has applied for a renewal of TPDES Permit No. WQ0014795001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 226,000 gallons per day. The facility is located approximately 0.40 mile south and 0.10 mile west of the intersection of Farm-to-Market Road 813 and Interstate Highway 45, in the City of Palmer in Ellis County, Texas 75152.

CITY OF VALLEY VIEW has applied for a renewal of TPDES Permit No. WQ0014892001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 181,000 gallons per day. The facility is located on the east side of Interstate Highway 35, approximately 1.3 miles south of the intersection of Farm-to-Market Road 922 and Interstate Highway 35 in Cooke County, Texas 76272.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201104883
Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 9, 2011

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## Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

**Deadline: Personal Financial Statement due July 1, 2011**

Remelle Farrar, P.O. Box 300, Crowell, Texas 79227

Jeff Sandford, 819 N. State Line Ave., Texarkana, Texas 75501

TRD-201104787
David A. Reisman
Executive Director
Texas Ethics Commission
Filed: November 3, 2011

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## Texas Facilities Commission

Request for Proposal #303-2-20312

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Insurance - Windstorm Inspection Division (TDI), announces the issuance of Request for Proposals (RFP) #303-2-20312. TFC seeks a five (5) year lease of approximately 1,292 square feet of office space in Brazoria County, Texas.

The deadline for questions is November 30, 2011 and the deadline for proposals is December 14, 2011 at 3:00 p.m. The award date is January 20, 2012. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Regional Leasing Assistant, Jana D. Walp, at (512) 463-3160. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=97573.*

TRD-201104790
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 4, 2011

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## Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services 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 TX" 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 | Texas Health Physicians Group dba Arlington Cancer Center | L06434 | Arlington | 00 | 10/27/11 |
| Pasadena | Fairmont Diagnostic and MRI Center, L.L.C. | L06431 | Pasadena | 00 | 10/14/11 |
| Throughout TX | RLN Corporation | L06433 | Hitchcock | 00 | 10/25/11 |
| Throughout TX | Alltech Inspections, Inc. dba TC Inspection, Inc. | L06432 | Oyster Creek | 00 | 10/17/11 |

AMENDMENTS TO EXISTING LICENSES ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Abilene | Frontier Chemical, L.L.C. | L06427 | Abilene | 01 | 10/13/11 |
| Aransas Pass | North Bay General Hospital | L03446 | Aransas Pass | 37 | 10/24/11 |
| Arlington | Columbia Medical Center of Arlington Subsidiary, L.P. dba Medical Center of Arlington | L02228 | Arlington | 72 | 10/19/11 |
| Arlington | Arlington Memorial Hospital dba Texas Health Arlington Memorial Hospital | L02217 | Arlington | 99 | 10/20/11 |
| Austin | Austin Texas Radiation Oncology Group, P.A. dba Austin Cancer Centers | L01761 | Austin | 67 | 10/13/11 |
| Austin | St. David's Healthcare Partnership, L.P., L.L.P. | L00740 | Austin | 111 | 10/19/11 |
| Austin | Austin Radiological Association | L00545 | Austin | 169 | 10/28/11 |
| College Station | BCS Heart, L.L.P. | L04890 | College Station | 20 | 10/12/11 |
| Conroe | CHCA Conroe, L.P. dba Conroe Regional Medical Center | L01769 | Conroe | 84 | 10/25/11 |
| Corpus Christi | Associates in Heart Disease dba Corpus Christi Heart Clinic and Vascular Institute | L05023 | Corpus Christi | 19 | 10/19/11 |
| Corpus Christi | NQS Inspection, Ltd. | L06262 | Corpus Christi | 04 | 10/18/11 |
| Dallas | Southern Methodist University | L00443 | Dallas | 27 | 10/14/11 |
| Dallas | University of Texas Southwestern Medical Center at Dallas | L05947 | Dallas | 21 | 10/18/11 |
| Dallas | Texas Health Presbyterian Hospital Dallas | L01586 | Dallas | 99 | 10/21/11 |
| Dallas | IBA Molecular North America, Inc. dba IBA Molecular | L06174 | Dallas | 11 | 10/26/11 |
| Denton | Tucker Energy Services, Inc. | L06157 | Denton | 05 | 10/24/11 |
| El Paso | The University of Texas at El Paso | L00159 | El Paso | 67 | 10/14/11 |
| El Paso | Cardinal Health | L01999 | El Paso | 116 | 10/12/11 |
| El Paso | El Paso County Hospital District dba University Medical Center of El Paso | L00502 | El Paso | 67 | 10/21/11 |
| El Paso | Michael J. Delucia, M.D., P.A. | L06178 | El Paso | 01 | 10/28/11 |
| Fort Worth | Fort Worth Heart, P.A. | L05480 | Fort Worth | 38 | 10/11/11 |
| Fort Worth | Gorrondona & Associates, Inc. | L06359 | Fort Worth | 02 | 10/17/11 |
| Fort Worth | Oncology Hematology Consultants, P.A. dba The Center for Cancer and Blood Disorders | L05919 | Fort Worth | 19 | 10/21/11 |
| Fort Worth | Cook Children's Medical Center | L04518 | Fort Worth | 19 | 10/28/11 |
| Houston | Halliburton Energy Services, Inc. | L02113 | Houston | 119 | 10/13/11 |
| Houston | AGD Inspections Services | L06368 | Houston | 03 | 10/13/11 |
| Houston | Memorial Hermann Hospital System dba Memorial Hospital Southwest | L00439 | Houston | 167 | 10/12/11 |
| Houston | Cardinal Health | L01911 | Houston | 148 | 10/12/11 |

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Houston | Baker Hughes Oilfield Operations, Inc. dba Baker Atlas Houston | L04452 | Houston | 51 | 10/17/11 |
| Houston | Westhollow Technology Center | L02116 | Houston | 49 | 10/20/11 |
| Houston | Amerapex Corporation | L06417 | Houston | 02 | 10/20/11 |
| Houston | CHCA West Houston, L.P. dba West Houston Medical Center | L05808 | Houston | 15 | 10/24/11 |
| Houston | American Diagnostic Tech, L.L.C. | L05514 | Houston | 69 | 10/21/11 |
| Houston | Radiomedix, Inc. dba Radiomedix | L06044 | Houston | 04 | 10/21/11 |
| Houston | Memorial Hermann Hospital System dba Memorial Hospital Southwest | L00439 | Houston | 68 | 10/26/11 |
| Houston | Valco Instruments Company, Inc. | L01572 | Houston | 27 | 10/25/11 |
| Houston | Triad Isotopes, Inc. | L06327 | Houston | 04 | 10/31/11 |
| Houston | MH/USON Radiation Management Company, L.L.C. | L06408 | Houston | 01 | 10/28/11 |
| Houston | Tops Specialty Hospital, Ltd. dba Tops Surgical Specialty Hospital | L05441 | Houston | 20 | 10/28/11 |
| Irving | Baylor Medical Center at Irving dba Irving Healthcare System | L02444 | Irving | 89 | 10/25/11 |
| Levelland | RNLS, L.L.C. dba Renegade Services | L06307 | Levelland | 08 | 10/13/11 |
| Lewisville | Texas Oncology, P.A. dba Lake Vista Cancer Center | L05526 | Lewisville | 19 | 10/14/11 |
| Lubbock | Rosa of The South Plains, L.L.P. dba Rosa of The South Plains | L05484 | Lubbock | 18 | 10/21/11 |
| Marshall | Harrison County Hospital Association dba Good Shepherd Medical Center-Marshall | L02572 | Marshall | 31 | 10/14/11 |
| Midland | The University of Texas System | L04648 | Midland | 12 | 10/12/11 |
| Midland | Midland Cardiac Clinic | L05571 | Midland | 08 | 10/21/11 |
| New Braunfels | New Braunfels Cardiology | L05463 | New Braunfels | 11 | 10/14/11 |
| Odessa | B & A Laboratories, Inc. dba Environmental Lab of Texas/Xenco Laboratories | L05499 | Odessa | 07 | 10/13/11 |
| Orange | Lanxess Corporation | L00976 | Orange | 58 | 10/24/11 |
| Paris | Advanced Heart Care, P.A. | L05290 | Paris | 31 | 10/17/11 |
| Pasadena | Fairmont Diagnostic Center and Open MRI, Inc. dba Fairmont Diagnostic Center | L05712 | Pasadena | 09 | 10/14/11 |
| Pasadena | CHCA Bayshore, L.P. dba Bayshore Medical Center | L00153 | Pasadena | 94 | 10/25/11 |
| Pittsburg | Southwestern Electric Power Company | L02008 | Pittsburg | 22 | 10/19/11 |
| San Antonio | VHS San Antonio Partners, L.L.C. dba Baptist Health System | L00455 | San Antonio | 212 | 10/14/11 |
| San Antonio | Methodist Healthcare System of San Antonio Ltd., L.L.P. | L00594 | San Antonio | 292 | 10/11/11 |
| San Antonio | Methodist Healthcare System of San Antonio Ltd., L.L.P. | L00594 | San Antonio | 293 | 10/14/11 |
| San Antonio | The University of Texas Health Science Center at San Antonio | L05217 | San Antonio | 17 | 10/19/11 |
| Sherman | Texas Oncology, P.A. dba Texas Cancer Center Sherman | L05019 | Sherman | 24 | 10/14/11 |
| Sherman | Sherman/Grayson Hospital, L.L.C. dba Texas Health Presbyterian Hospital-WNJ | L06354 | Sherman | 04 | 10/28/11 |
| Sugar Land | Schlumberger Technology Corporation | L00764 | Sugar Land | 125 | 10/17/11 |
| Sugar Land | Schlumberger Technology Corporation | L05677 | Sugar Land | 08 | 10/25/11 |
| Texarkana | Alumax Mill Products, Inc. | L04663 | Texarkana | 17 | 10/20/11 |
| Throughout TX | Kleinfelder Central, Inc. | L01351 | Austin | 75 | 10/20/11 |

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Throughout TX | Sanjel USA, Inc. | L06419 | Cibolo | 01 | 10/24/11 |
| Throughout TX | Berry Fabricators | L01575 | Corpus Christi | 58 | 10/25/11 |
| Throughout TX | Alliance Geotechnical Group, Inc. | L05314 | Dallas | 17 | 10/17/11 |
| Throughout TX | Integrity Testing & Inspection, Inc. | L06027 | El Paso | 09 | 10/19/11 |
| Throughout TX | Amec Earth & Environmental, Inc. | L03622 | El Paso | 24 | 10/25/11 |
| Throughout TX | Platinum Energy Solutions, Inc. | L06410 | Houston | 04 | 10/27/11 |
| Throughout TX | Hi-Tech Testing Services, Inc. | L05021 | Longview | 91 | 10/20/11 |
| Throughout TX | Eagle X-Ray, Inc. | L03246 | Mont Belvieu | 103 | 10/26/11 |
| Throughout TX | Apex Geoscience, Inc. | L04929 | Tyler | 36 | 10/17/11 |
| Tyler | Mother Frances Hospital Regional Health Care Center | L01670 | Tyler | 171 | 10/18/11 |
| Weatherford | Weatherford Texas Hospital Company, L.L.C. dba Weatherford Regional Medical Center | L02973 | Weatherford | 26 | 10/12/11 |

RENEWAL OF LICENSES ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Cypress | Houston Interventional Cardiology, P.A. | L05470 | Cypress | 10 | 10/14/11 |
| San Antonio | Salvatore A. Barbaro III., M.D., P.A. | L05680 | San Antonio | 08 | 10/21/11 |
| Victoria | Citizens Medical Center | L00283 | Victoria | 85 | 10/26/11 |

TERMINATIONS OF LICENSES ISSUED:

| Location | Name | License # | City | Amend-ment # | Date of Action |
|---|---|---|---|---|---|
| Bastrop | Bastrop Blackhawk, L.L.C. dba Lakeside Hospital at Bastrop | L06311 | Bastrop | 03 | 10/25/11 |
| Frisco | Frisco Heart & Vascular Institute | L06118 | Frisco | 03 | 10/21/11 |
| San Antonio | Central Cardiovascular Institute of San Antonio | L04892 | San Antonio | 25 | 10/11/11 |
| Throughout TX | Chappell Hill Logging Systems, Inc. | L05374 | Chappell Hill | 09 | 10/20/11 |
| Throughout TX | Syntec Engineering Group, Inc. | L05978 | Dallas | 03 | 10/19/11 |
| Throughout TX | Production Logging, Inc. | L02698 | Snyder | 26 | 10/11/11 |

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289, regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning 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, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-201104841

Lisa Hernandez
General Counsel
Department of State Health Services
Filed: November 8, 2011

♦ ♦ ♦

## Texas Health and Human Services Commission

Public Notice

Notice of Hearing on Proposed Nursing Facility Payment Rates for State Veterans Homes.

**Hearing.** The Health and Human Services Commission (HHSC) will conduct a public hearing on December 7, 2011, at 9:00 a.m., to receive public comment on the proposed payment rate for the state-owned Tyler veterans nursing facility. This nursing facility is in the nursing facility program operated by Department of Aging and Disability Services. This payment rate is proposed to be effective upon the effective date of the facility's Medicaid nursing facility contract.

The public hearing will be held in compliance with Human Resources Code §32.0282 and Title 1 of the Texas Administrative Code (TAC) §355.105(g), which require public notice and hearings on proposed payment rates. The public hearing will be held in the Rate Analysis Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Esther Brown by calling (512) 491-1445, at least 72 hours prior to the hearing so appropriate arrangements can be made.

**Proposal.** HHSC proposes $237.00 as the interim per day payment rate for the state-owned Tyler veterans nursing facility effective upon the effective date of the facility's Medicaid nursing facility contract. The proposed rate for the home is based upon the state veterans home semi-private basic daily rate in effect for this facility on the first day of the rate period in accordance with the rate setting methodologies listed below under Methodology and Justification. This rate will be reconciled retrospectively based on actual costs in accordance with 1 TAC §355.311(j).

**Methodology and justification.** The proposed rate was determined in accordance with the rate reimbursement setting methodology at 1 TAC §355.311(d).

**Briefing package.** A briefing package describing the proposed payment rates will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on November 18, 2011. Interested parties may also obtain a copy of the briefing package prior to the hearing by contacting Esther Brown at (512) 491-1445 by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

**Written and oral comments.** Written comments regarding the payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Esther Brown, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Esther Brown at (512) 491-1998 or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Esther Brown, HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-201104856
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: November 9, 2011

♦ ♦ ♦

## Independent Ombudsman

Notice of Agency Name Change

Senate Bill 653, enacted by the 82nd Texas Legislature, 2011, changed the name of the Office of the Independent Ombudsman of the Texas Youth Commission to the Independent Ombudsman.

The rules of the Independent Ombudsman, located in the Texas Administrative Code at Title 37, Part 14, Chapter 601, are not affected by the name change.

The name change took effect September 1, 2011.

TRD-201104889

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## Texas Department of Insurance

Company Licensing

Application to change the name of SCOR GLOBAL LIFE U.S. RE INSURANCE COMPANY to SCOR GLOBAL LIFE AMERICAS REINSURANCE COMPANY, a life, accident and/or health company. The home office is in Wilmington, Delaware.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201104886
Sara Waitt
Acting General Counsel
Texas Department of Insurance
Filed: November 9, 2011

♦ ♦ ♦

## Texas Lottery Commission

Instant Game Number 1429 "Bonus Break the Bank"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1429 is "BONUS BREAK THE BANK." The play style is "key number match."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1429 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1429.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, MONEY STACK SYMBOL, $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $500, $1,000, $7,500 and $75,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1429 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| 1 | ONE |
| 2 | TWO |
| 3 | THR |
| 4 | FOR |
| 5 | FIV |
| 6 | SIX |
| 7 | SVN |
| 8 | EGT |
| 9 | NIN |
| 10 | TEN |
| 11 | ELV |
| 12 | TLV |
| 13 | TRN |
| 14 | FTN |
| 15 | FFN |
| 16 | SXN |
| 17 | SVT |
| 18 | ETN |
| 19 | NTN |
| 20 | TWY |
| 21 | TWON |
| 22 | TWTO |
| 23 | TWTH |
| 24 | TWFR |
| 25 | TWFV |
| 26 | TWSX |
| 27 | TWSV |
| 28 | TWET |
| 29 | TWNI |
| 30 | TRTY |
| 31 | TRON |
| 32 | TRTO |
| 33 | TRTH |
| 34 | TRFR |
| 35 | TRFV |
| 36 | TRSX |
| 37 | TRSV |
| 38 | TRET |
| 39 | TRNI |
| 40 | FRTY |
| MONEYSTACK SYMBOL | WIN$ |
| $5.00 | FIVE$ |
| $10.00 | TEN$ |
| $15.00 | FIFTN |
| $20.00 | TWENTY |
| $25.00 | TWY FIV |

| | |
|---|---|
| $50.00 | FIFTY |
| $100 | ONE HUND |
| $500 | FIV HUND |
| $1,000 | ONE THOU |
| $7,500 | 75 HUND |
| $75,000 | 75 THOU |

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $7,500 or $75,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1429), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1429-0000001-001.

K. Pack - A pack of "BONUS BREAK THE BANK" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fan-folded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "BONUS BREAK THE BANK" Instant Game No. 1429 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "BONUS BREAK THE BANK" Instant Game is determined once the latex on the ticket is scratched off to expose 38 (thirty-eight) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the LUCKY NUMBERS play symbols within the same game, the player wins prize for that number. If a player reveals a "MONEY STACK" play symbol, the player wins prize instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 38 (thirty-eight) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 38 (thirty-eight) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 38 (thirty-eight) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 38 (thirty-eight) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

C. No duplicate LUCKY NUMBERS play symbols on a ticket.

D. No more than four matching non-winning prize symbols on a ticket.

E. A non-winning prize symbol will never be the same as a winning prize symbol.

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBER play symbol (i.e., 5 and $5).

G. The MONEY STACK (auto win) play symbol will never appear more than once in a game, but may appear once in both games on tickets that win 2 or more times.

H. No YOUR NUMBER play symbol in one game will match a LUCKY NUMBER play symbol in the other game.

I. The top prize will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "BONUS BREAK THE BANK" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "BONUS BREAK THE BANK" Instant Game prize of $1,000, $7,500 or $75,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "BONUS BREAK THE BANK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "BONUS BREAK THE BANK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "BONUS BREAK THE BANK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Government Code, §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing,

distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 15,000,000 tickets in the Instant Game No. 1429. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1429 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $5 | 1,400,000 | 10.71 |
| $10 | 1,600,000 | 9.38 |
| $15 | 550,000 | 27.27 |
| $20 | 150,000 | 100.00 |
| $50 | 195,000 | 76.92 |
| $100 | 37,500 | 400.00 |
| $500 | 2,000 | 7,500.00 |
| $1,000 | 375 | 40,000.00 |
| $7,500 | 40 | 375,000.00 |
| $75,000 | 21 | 714,285.71 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.81. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1429 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the instant ticket game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1429, the State Lottery Act (Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201104840
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 8, 2011

♦ ♦ ♦

Office of the Controller, Lotto Texas® Jackpot Estimation, Procedure OC-JE-002

The Texas Lottery Commission published the attached (Lotto Texas® Jackpot Estimation OC-JE-002) procedure with a Notice of Public Comment Hearing in the July 15, 2011, issue of the *Texas Register* (36 TexReg 4602). A Public Comment Hearing was held on Wednesday, September 7, 2011 at 10:00 a.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. No members of the public were present at the hearing. The Commission received no written comments from individuals, groups, or associations during the public comment period. The Texas Lottery Commission adopted the procedure at the October 19, 2011 Commission Meeting.

# TEXAS LOTTERY COMMISSION

## OFFICE OF THE CONTROLLER

## PROCEDURE

| Number: OC-JE-002 Page: 1 of 5 | Title: *Lotto Texas*® Jackpot Estimation | Approval: Texas Lottery Commission |
|---|---|---|
| Effective Date: October 19, 2011 | Approval Date: October 19, 2011 | Review Date: |

**PROCEDURE NUMBER**
OC-JE-002 [Supersedes OC-JE-002 effective October 2, 2009]

**PURPOSE**
To provide policy guidelines for projecting and estimating sales for future *Lotto Texas* estimated annuitized jackpot prize amounts that will be advertised.

**SCOPE**
This procedure applies to staff of the Texas Lottery Commission.

**RESPONSIBILITY**
The final approval for the estimated annuitized jackpot amount to advertise will be provided by the Texas Lottery Commission Executive Director.

**GENERAL**
The Texas Lottery Commission (TLC) ensures that *Lotto Texas* sales and other information necessary to estimate the jackpot amount to be advertised is utilized in preparation of the jackpot estimation. The Executive Director, or their designee, has the sole authority to approve the final projected estimated annuitized jackpot amount to advertise for *Lotto Texas* Drawings.

The "Lotto Texas" On-Line Game rule is found in the Texas Administrative Code, Title 16, Part 9, Chapter 401, Subchapter D, Rule 401.305. The Lotto Texas Game rule states, "The jackpot prize for a drawing is the greater of 40.47 percent of the proceeds from Lotto Texas ticket sales for all drawings in the roll cycle and any earnings on an investment of all or part of the sales proceeds, paid in 25 annual installments; or the amount advertised in accordance with subsection (e) of the Lotto Texas On-Line Game Rule as the estimated jackpot for the drawing, paid in 25 annual installments."

A roll cycle is a series of drawings that ends when there is a drawing for which one or more tickets are sold that match the six numbers drawn in the drawing. A new roll cycle begins with the next drawing after a drawing for which one or more jackpot tickets are sold that match the six numbers drawn in the drawing.

The advertised amount shall be an amount payable in 25 annual installments. To the extent that the advertised amount is based on projected sales, the projections shall be fair and reasonable. The Executive Director, or designee, may approve an increase in the amount of the jackpot originally advertised for a drawing if the increase is supported by reasonable sales projections.

**PROCEDURE**

**I. Timeline**

1. Distribution of estimated jackpot information as outlined in Section VI shall be completed by close of business, or 5:00 p.m. on Wednesdays and Fridays.
2. The advertised jackpot for the current draw may be increased based on revised sales projections, if the Executive Director, or their designee, determines that sales have grown sufficiently to support an increased advertised jackpot. The Executive Director, or their designee, will be consulted regarding the time frame for increasing the advertised jackpot amount.
3. In the event Wednesday or Friday falls on a holiday and management has agreed that the sales trends and jackpot levels are such that an early estimation may be achieved, or if, due to a large jackpot level, a Friday estimation is delayed until Saturday, the above deadlines may be revised as needed.

**II. Compile Estimate Information:**

1. Determine the Interest Factor: Investment cost information is obtained from the Texas Treasury Safekeeping Trust Company prior to each estimation. Commission staff requests the estimated cost of 25 annual payments to yield the advertised jackpot. The interest factor is calculated by dividing the advertised jackpot by the estimated cost, including the initial payment required, to fund an investment stream that would yield the total advertised jackpot over a 25-year period. Note that the investment information may not be obtainable if the appropriate financial institutions and/or brokers are not open for business such as on business holidays. In those instances either a request for the information is made the day before or the prior estimation interest factor is used.

2. Compile actual *Lotto Texas* draw sales for the current drawing.

**III. Estimate the *Sales and J*ackpot Support for the Current and Future Draws:**

Commission staff will estimate draw sales and jackpot support for the current *Lotto Texas* drawing and project the jackpot to be advertised for the next drawing in the event of a roll. Estimations may be made on a day prior to Wednesday or Friday if Wednesday or Friday fall on a holiday and management has agreed that the sales trends and jackpot levels are such that an early estimation may be achieved.

1. Project the *Lotto Texas* draw sales for the current drawing: Estimations are made each Wednesday and Friday. If the draw day is on a Wednesday, estimate sales for that Wednesday. If the draw day is on a Saturday, estimate sales for Friday and Saturday. However, jackpot estimations may be updated at any time if Commission staff believe that changes in *Lotto Texas* sales or other factors may impact jackpot prize support. Estimate draw sales by using historical sales data and other relevant factors that may impact sales. Combine the actual draw sales to date with the projected draw sales for the remainder of the draw period to calculate the total projected draw sales.

   a) Evaluate historical sales data: Project the current draw day sales by estimating the expected increase/decrease in sales using the hourly sales trend and/or growth pattern for previous like-day drawings.

   b) Other factors to consider in estimating draw sales, along with evaluating historical sales data, include but are not limited to:

      - Wednesday draw sales are generally lower than Saturday draw sales.
      - length of time since a large jackpot was advertised
      - effect of holidays (Holidays generally cause sales to peak early and then fall below average on the holiday.)
      - weather throughout the state, especially in key markets
      - sales trends for like jackpots and/or most recent roll cycles
      - current advertising/promotions schedule
      - relevant media issues
      - on-line terminal connection problems
      - jackpots advertised for games such as Mega Millions and Powerball
      - new on-line game launches or other game enhancements
      - overall trends in sales over similar time periods
      - other - IRS deadlines, spring break, strength of the economy, etc.

      It is not necessary to evaluate all these factor for every estimate. Sound judgment should be used in determining which factors to consider.

2. Evaluate Sales Support for the Current Advertised Jackpot: Determine the projected *Lotto Texas* jackpot sales support given the current advertised jackpot.

   a) If sales proceeds are not sufficient to pay a jackpot prize, the TLC shall use funds from the State Lottery Account as identified in Government Code, Section 466.355.

   b) The advertised jackpot for the current draw may be increased prior to the draw based on revised sales projections, if the Executive Director, or their designee, determines that sales have grown sufficiently to support an increased advertised jackpot.

3. Estimate sales for the next draw in the event of a rollover: To estimate sales for the next draw, use historical sales data and any other relevant information as described in 1.a) and 1.b) above.

4. Project a range of prospective estimated annuitized jackpot prize amounts that may be advertised in the event of a rollover: Use estimated draw sales for the current draw, estimated draw sales for the next draw, and the estimated interest factor to identify a range of prospective estimated annuitized jackpot prize amounts.

   a) The estimated annuitized jackpot prize amount will automatically be set to four million dollars for the first draw following a draw in which at least one jackpot prize ticket is identified.

   b) The range of projected estimated annuitized jackpot amounts to advertise in the event of a rollover should reflect at least one million dollars greater than the current advertised jackpot.

## IV. Approval of Estimated Annuitized Jackpot Amount to Advertise:

1. The recommendation of the jackpot amount to advertise in the event of a rollover should typically be based on the "low end" sales support shown at the time of estimation, however, for marketing related purposes there may be instances when the recommended jackpot could be based on an amount exceeding the "high end" sales support.

2. The range of potential jackpots to advertise in the event of a rollover should be used by management as a tool to understand the amount of additional funds that may be required to fund the jackpot prize. In the event that "low end" sales do not support a roll from the currently advertised jackpot, the TLC will roll the jackpot in $1 million increments.

3. The recommended jackpot amount to advertise is presented to the Executive Director for final approval of the subsequent (annuitized) jackpot prize amount that will be advertised in the event of a *Lotto Texas* jackpot rollover. The *Lotto Texas Jackpot Estimation Worksheet* presented will state the projected current (annuitized) jackpot prize amount for the current draw.

## V. Distribution of Estimated Jackpot Information on the Agency Website:

1. The Commission staff will perform the following:

   a) After the Executive Director has approved an advertised estimated jackpot under subsection (e) of the Lotto Texas On-Line Game Rule, Commission staff will post to the agency website the amount of ticket sales, if any, for previous drawings in the roll cycle, the amount of projected ticket sales for the upcoming drawing,

investment information used to determine the advertised estimated jackpot, and other information used to determine the advertised estimated jackpot.

b) The interest factor calculated by the agency based on investment information obtained from the Texas Treasury Safekeeping Trust Company and used by the TLC to determine the advertised jackpot will be posted to the agency website.

c) The approved estimated jackpot for the next draw in the roll cycle and the approximate cash value of the estimated jackpot will be posted to the agency website and will be published after the draw if no jackpot tickets were sold.

d) In addition, the approximate cash value of the jackpot prize amount for four million dollars is entered on the advertised jackpot screens for posting to the agency website and publishing after the draw if a jackpot prize ticket is sold for a drawing.

**VI. Distribution of information when the current advertised jackpot prize amount is changed:**

If the estimated annuitized jackpot prize amount that is currently advertised is changed prior to the drawing, Commission personnel will communicate the new *Lotto Texas* estimated annuitized jackpot prize amount to advertise to all pertinent TLC and vendor staff. Media Relations will notify the media that there is a new estimated annuitized jackpot prize amount being advertised.

TRD-201104831
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 7, 2011

♦ ♦ ♦

## Texas Board of Nursing

Special Accommodations Forms

The Texas Board of Nursing (Board) is proposing new 22 TAC §217.22, concerning Special Accommodations, in the Proposed Rules section of this issue of the *Texas Register.*

All of the forms required by the proposal, as well as the Board's instructions and requirements for providers completing the Disability Form, are available on the Board's website (http://www.bon.texas.gov/olv/pdfs/SPECACC.pdf) and published in this issue for public comment.

## TEXAS BOARD OF NURSING
## 333 Guadalupe #3-460
## Austin, Texas 78701-3944

## REQUESTING SPECIAL ACCOMMODATIONS

In compliance with the Americans with Disabilities Act (ADA), the Texas Board of Nursing provides reasonable accommodations for candidates with disabilities that may interfere with their performance on the National Council Licensure Examination for Registered Nurses (NCLEX-RN®) or the National Council Licensure Examination for Practical Nurses (NCLEX-PN®). **Disability** is defined in the Americans with Disabilities Act as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." **Major life activities** means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working." (28CFR35.104 - Nondiscrimination on the Basis of Disability in State and Local Government)

### DOCUMENTATION REQUIRED

Candidates requesting special accommodations must submit the following documentation to support the request:

1. A completed **Special Accommodations Request** form.

2. A **Professional Documentation of Disability** form completed by an appropriate professional within the last three years. Please see **Qualifications for Diagnostician.** Complete a **Consent to Release Information** form and together with the **Qualifications for Diagnostician** form give it to the diagnostician who will be completing the **Professional Documentation of Disability**. This will enable the Board and the National Council of State Boards of Nursing, Inc. to obtain additional information or clarification from the diagnostician, if necessary, while processing the request.

3. A **Nursing Program Verification** form completed by the dean or director of the nursing program attended.

### TIME FRAME

Applicants for special accommodations are urged to submit their requests and supporting documentation as early in the application process as possible, preferably before submitting the registration to the testing service, to facilitate the review. If there is a need for further verification of the disability from the applicant or the professional verifying the disability and the need for modification, it is possible that the decision on granting the modification will be delayed and consequently the date when the candidate can take the examination.

Once the request is received together with all the required documentation, the Board will process the request and notify the candidate of the decision. If you have any questions, please contact the Board examination staff at 512/305-7400.

The following are testing centers in the state with capabilities for providing special accommodations:

| | |
|---|---|
| Abilene | 500 Chestnut, Suite 856 |
| Amarillo | 1616 S. Kentucky, Suite C305 |
| Austin (South) | 1701 Directors Blvd., Suite 565 |
| Bellaire (Houston) | 6800 W. Loop South, Prosperity Bank Building Suite 405 |
| Corpus Christi | 4646 Corona Dr., Corona South Building, Suite 175 |
| Dallas | 12801 North Central Expressway, Suite 820 |
| El Paso | 4110 Rio Bravo Drive, Suite 222 |
| Houston (SE) | 8876 Gulf Freeway, Suite 220 |
| Houston (North) | 14425 Torrey Chase, Suite 240 |
| Hurst (Ft. Worth) | 500 Grapevine Hwy., Suite 401 |
| Lubbock | 1500 Broadway Street, Wells Fargo Center, Suite 1113 |
| Midland | 3300 North A Street, Building 4-228 |
| San Antonio (NW) | 6100 Bandera Rd., Suite 407 |
| San Antonio | 10000 San Pedro, Suite 175 |
| Tyler | 909 East Southeast Loop 323, Suite 625 |
| Waco | 1105 Wooded Acres, Suite 406 |

For a listing of sites outside of Texas please visit the NCLEX ® Web Site: http://www.vue.com/nclex or contact NCLEX Candidate services directly at 1-866-496-2539 between Monday-Friday, 7 am to 7 pm, U.S. Central Standard Time.

H:\VeronicaR\Forms\SPECACC.wpd Revised 05/2011

**TEXAS BOARD OF NURSING**
**333 Guadalupe #3-460 - Austin, Texas 78701-3944**

## SPECIAL ACCOMMODATIONS REQUEST

Name: _____
(First) (Middle) (Last)

Address: _____
(Street) (City) (State) (Zip Code)

SSN:_____ Phone #: _____

Name and Type of Nursing Program:_____

Expected Date of Graduation:_____

Test Center Where You Plan to Test: _____(see attached list)

Approximate Test Date Preferred:_____ Exam Type: NCLEX-RN® / NCLEX-PN®
(Circle one)

Describe your type of disability (e.g., physical, mental, or learning) and how this substantially limits one or more of your major life activities:

Explain the nature and extent of your disability ( e.g., hearing impairment, visual impairment, dyslexia, etc.) and how it will affect your ability to take the NCLEX-RN®/NCLEX-PN® :

Describe the specific accommodation you are requesting, e.g., extra time, additional break time, separate room if verbalizing or using a reader, or special equipment:

Describe testing accommodations that you have been provided in the past, if any:

SIGNATURE: _____ DATE: _____

*Return this form to the Texas Board of Nursing at the above address.*

**TEXAS BOARD OF NURSING**
**333 Guadalupe #3-460 - Austin, Texas 78701-3944**

PROFESSIONAL DOCUMENTATION OF DISABILITY

Submit this form to the Diagnostician for completion and return to the Texas Board of Nursing at the above address. The Diagnostician should be a qualified professional with expertise in the area of the diagnosed disability.

Candidate's Name:_____
(First) (Middle) (Last)

SSN: _____ Exam Type: NCLEX-RN® / NCLEX-PN®
(Circle one)

*The examination for which this candidate is requesting special accommodations consists of objective multiple choice questions which are administered by computer in an adaptive format. However, the candidate is not expected to know how to use a computer as only two keys - the space bar and the ENTER key - are used to highlight and record the answer. The number of questions may vary from a minimum of 75 to a maximum of 265. Standard testing time is a maximum of 5 hours in one day. There will be a mandatory 10-minute break at the end of two hours of testing and an optional 10-minute break at the end of 3 ½ hours of testing. The computer selects questions based on responses to previous questions. Thus, depending on candidates' patterns of correct and incorrect responses, different candidates will take varying numbers of questions and use varying amounts of times.*

1. Describe the specific diagnosis of the disability (e.g., physical, mental, learning). Include DSM- IV code, if applicable.

2. Describe the nature, history, and extent of the disability, how it limits one or more of the candidate's major life activities, and if the disability will change in any way over time. In case of a learning disability, include specifics as to the type of disability (e.g., visual or auditory reception or perception, processing, memory, comprehension, verbal or written expression, etc.).

3. When was the disability first diagnosed? Describe the tests used to diagnose the disability, findings, and interpretation of test results obtained. Attach extra sheets as needed. When was the last evaluation done?

Candidate's Name:_____

4. Given the format of the examination, what is the effect of the disability on the candidate's ability to perform under these testing conditions? What are your specific recommendations for accommodations for this candidate? Please include a detailed explanation of why these modifications are required.

5. Please describe your credentials, education, and experience which qualify you to make this diagnosis and recommendations for testing. Please refer to attached Qualifications for Diagnostician.

I certify that I have the necessary specialized training to make the above diagnosis, that I personally examined the candidate named above, and that the diagnosis and assessment of modification requested are based on my professional judgment. I understand that the Texas Board of Nursing may contact me to obtain additional information or obtain an independent assessment by a second professional.

_____ _____
Signature Date

_____ _____
Name of Professional Street Address

_____ _____
Title City, State, Zip Code

_____
Phone Number

_____ _____
Type of Professional License or Certification and No. Expiration Date

**TEXAS BOARD OF NURSING**
**333 Guadalupe #3-460 - Austin, Texas 78701-3944**

## CONSENT TO RELEASE INFORMATION

I authorize _____ to release any and all information regarding my disability(ies) to the Texas Board of Nursing or the National Council of State Boards of Nursing, Inc.

I understand that information obtained by this authorization will be used to determine my eligibility for reasonable accommodations in taking the (**check the appropriate exam type**)

[ ] NCLEX-RN® - National Council Licensure Examination for Registered Nurses ;
[ ] NCLEX-PN® - National Council Licensure Examination for Practical Nurses.

Signature _____ Date _____

**SUBMIT COMPLETED FORM TO YOUR DIAGNOSTICIAN AND FORWARD A COPY TO THE BOARD OFFICE.**

## QUALIFICATIONS FOR DIAGNOSTICIAN

**1. For physical or mental disabilities other than learning disabilities** - a licensed physician or psychologist with expertise in the area of disability.

**2. For learning disabilities**

a). A licensed psychologist or psychiatrist who has experience working with adults with learning disabilities and or another qualified professional with a master's or doctorate degree in special education, education, psychology, educational psychology, or rehabilitation counseling who has the training and experience in all the areas below:

1). Assessing intellectual ability level and interpreting tests of such ability
2). Screening for cultural, emotional, and motivational factors
3). Assessing achievement level
4). Administering tests to measure attention and concentration, memory, language reception and expression, cognition, reading, spelling, writing, and mathematics.

**TEXAS BOARD OF NURSING**
**333 Guadalupe #3-460 - Austin, Texas 78701-3944**

## NURSING PROGRAM VERIFICATION

This form should be completed by the dean or director of the nursing program attended by the candidate.

Candidate's Name:_____
(First) (Middle) (Last)

SSN: _____ Exam Type: NCLEX-RN® / NCLEX-PN®
(Circle one)

Describe the types of examinations (e.g., multiple choice, essay, oral, etc.) administered and the testing modifications provided the above candidate while attending your program.

Name of Dean/Director: _____

Name of School: _____

Address: _____

Telephone No:_____

Signature: _____ Date: _____

*Return this form to the Texas Board of Nursing at the above address.*

TRD-201104758

Jena Abel
Assistant General Counsel
Texas Board of Nursing
Filed: November 2, 2011

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## Texas Board of Professional Geoscientists

Advisory Opinion Request - AOR #7 (2011)

Requestor: Board initiated request.

*Issue: What geoscientific work is exempt from licensure requirements under Texas Occupations Code §1002.252(3)? This section states that: "(3) geoscientific work performed exclusively in exploring for and developing oil, gas, or other energy resources, base metals, or precious or nonprecious minerals, including sand, gravel, or aggregate, if the work is done in and for the benefit of private industry;" are activities that do not require a license under this chapter.*

Discussion: The Board has had questions for many years concerning the intent of the word "exclusively" and the phrase "for the benefit of private industry" that is included in the above cited section of the Texas Geoscience Practice Act (Act). The Board has attempted to determine if this word and this phrase were included in the statute with the intent that some oil and gas activities would not be exempt from the requirements of the Act. For example, is geoscientific interpretation presented for the sole purpose of securing financing from the public exclusively part of the exploration and development process? Could the fact that the benefits of oil and gas exploration are not exclusively for the benefit of private industry since the public also benefits in the form of severance tax paid to the state be a cause to require a license? These are the types of questions that have been posed to the Board in the form of inquiries and complaints over the years.

The Board has had an ad-hoc Legal Interpretation Committee explore the question and this activity did not conclusively resolve the issue. The Board also encouraged the development of an advisory workgroup to involve the oil and gas community to assist with answering the issue. Attempts were made to secure wide participation in the workgroup, and included liaison representatives with involvement in the Houston Geological Society, the American Association of Petroleum Geologists, and the Society of Independent Professional Earth Scientists. Over a period of more than a year, the workgroup met and finally petitioned the Board with a rule proposal that would define that certain activities involving oil and gas exploration and development would not be exempt. All members of the workgroup had ample and equal opportunity to provide input to the rule proposal. The workgroup members felt that the issue should be made available to a broader audience for further review.

The Board finally agreed to publish the rule proposal for the purpose of receiving more widespread public input to help with the determination of exemption applicability but only if certified by legal counsel that the proposal was within the Board's authority to adopt. Based on the subsequent overwhelming public opinion against adoption of the proposal, and legislative intent brought to the attention of the Board, the Board has withdrawn the proposed rulemaking.

Draft Opinion: It is the opinion of the Board that those who engage in the work performed in the exploration for and development of oil, gas, or other energy resources, base metals, or precious, or nonprecious minerals, including sand, gravel, or aggregate, are not required to be licensed under the Texas Geoscience Practice Act.

Comment: Any interested person may submit written comments concerning this Advisory Opinion Request and Draft Opinion to: Charles Horton, Executive Director, P.O. Box 13225, Austin, Texas 78711, or by e-mail to chorton@tbpg.state.tx.us or by fax to (512) 936-4409. Comments must be submitted no later than 30 days from the date of the posting in the *Texas Register.* Please reference Advisory Opinion Request #7.

TRD-201104836
Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Filed: November 7, 2011

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## Texas Public Finance Authority

Request for Applications Concerning Texas Credit Enhancement Program

The Texas Public Finance Authority Charter School Finance Corporation will make applications available for credit enhancement grant awards for eligible Texas open enrollment charter schools on Friday, December 2, 2011. Criteria for eligible entities will be outlined in the application.

Applications will be available in an electronic format to be downloaded from the TPFA CSFC's website: http://www.tpfa.state.tx.us/csfc/.

The Texas Credit Enhancement Program (TCEP) received a $10 million grant from the US Department of Education to establish a credit enhancement program for charter schools facilities funding. TCEP is a consortium formed by the Texas Public Finance Authority Charter School Finance Corporation (TPFA CSFC), the Texas Charter Schools Association and the Texas Education Agency (TEA). Currently, there is approximately $850,000 available for credit enhancement grant awards. The grant funds are to be used to establish reserve funds for charter schools that are issuing municipal bonds to finance the acquisition, construction, repair, or renovation of Texas charter school facilities. Refinancing of facilities debt may be included if it falls within federal program guidelines. The debt service reserve funds will be held in the State treasury solely to provide security for repayment of the bonds. The funds will not be provided directly to the approved charter schools for construction.

Prior to submitting an application charter schools should work with their financial advisors, bond counsel and an underwriter to structure their bond issue and prepare preliminary bond documents. These services will not be provided by TCEP.

The TPFA CSFC is a non-profit corporation created by the Board of Directors of the Texas Public Finance Authority (TPFA), a state agency, pursuant to §53.351 of the Texas Education Code. TPFA provides administrative and staff support for the TPFA CSFC. The TPFA CSFC is the entity responsible for awarding access to TCEP grant funds.

Applications will be due by January 20, 2012, at 5:00 p.m. into the TPFA office at 300 West 15th Street, Suite 411, Austin, Texas, 78701.

Applications will be reviewed by consortium staff and approved by the TPFA CSFC board. Awards will be announced in late February or early March of 2012. Dates are subject to change.

For additional information contact: Susan K. Durso at susan.durso@tpfa.state.tx.us.

TRD-201104849
Susan Durso
Interim Executive Director and General Counsel
Texas Public Finance Authority
Filed: November 8, 2011

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## Public Utility Commission of Texas

### Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 2, 2011, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act.

Project Title and Number: Application of Plateau Telecommunications, Inc. d/b/a Plateau for State-Issued Certificate of Franchise Authority, Project Number 39888.

The requested CFA service area consists of Parmer County, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All inquiries should reference Project Number 39888.

TRD-201104833
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 7, 2011

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### Notice of Application for Waiver from Requirements in Automatic Dial Announcing Devices Application Form

Notice is given to the public of an application filed on November 1, 2011, with the Public Utility Commission of Texas (commission) for waiver from the requirements in the commission prescribed application for a permit to operate automatic dial announcing devices (ADAD).

Docket Style and Number: Request of Five9, Inc. for an Exception to the Federal Registration Number Requirement of the ADAD Application Form, Docket Number 39883.

The Application: Five9, Inc. filed a request for a waiver of the registration number requirement, in the Public Utility Commission of Texas prescribed application for a permit to operate ADAD. Specifically, Question 11(e) of the application requires the Federal Registration Number issued to the ADAD manufacturer or programmer either by the Federal Communications Commission (FCC) or Administrative Council Terminal Attachments.

Five9 stated that it places calls using a Voice over Internet Protocol platform and is exempt from FCC registration requirements under Part 68. Ordinarily, Part 68 of the FCC's rules requires registration of terminal equipment connected to the telephone network.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 39883.

TRD-201104832
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 7, 2011

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## South Texas Development Council

### Notice of Request for Proposals - Peace Officer Academy

The South Texas Development Council (STDC) is requesting proposals for the provision of basic and advance/specialized peace officers training courses within the counties of Jim Hogg, Starr, Webb and Zapata. All basic and specialized training provided must be conducted in conformance with TCLEOSE requirements. Only one contract will be awarded.

Specifications, submittal requirements and other information may be obtained from Jose Conde, Regional Services Planner, STDC, 1002 Dicky Lane, P.O. Box 2187, Laredo, Texas 78044-2187, Tel: (956) 722-3995, Fax: (956) 722-2670, Email: jconde@stdc.cog.tx.us. The STDC reserves the right to reject any and all proposals received and to award a contract only upon availability of funding from the Governor's Office, Criminal Justice Division.

TRD-201104788
Jose Conde
Regional Service Planner
South Texas Development Council
Filed: November 3, 2011

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## Texas Department of Transportation

### Aviation Division - Request for Proposal for Professional Engineering Services

Gaines County, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional services as described below:

Airport Sponsor: Gaines County, Gaines County Airport. TxDOT CSJ No. 1105SEMNL. Scope: Airport layout plan update and development plan. Prepare an Airport Development Plan which includes, but is not limited to information regarding existing and future conditions, proposed facility development to meet existing and future demand, constraints to develop, anticipated capital needs, financial considerations, management structure and options, as well as an updated Airport Layout Plan. The Airport Development Plan should be tailored to the individual needs of the airport.

The DBE goal is set at 0%. TxDOT Project Manager is Scott Gallagher.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal." The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, telephone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one

proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT website as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-551 must be received by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than December 13, 2011, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Kelle Chancey.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating consultants for airport planning projects can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Kelle Chancey, Grant Manager, or Scott Gallagher, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-201104853
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 9, 2011

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## Request for Proposals - Statewide Toll System Integration and Maintenance

Pursuant to Texas Transportation Code, §228.052, the Texas Department of Transportation (department) may enter into an agreement with one or more persons to provide personnel, equipment, systems, facilities, and services necessary to operate a toll project or system, including the operation of toll plazas and lanes and the collection of tolls. The Texas Transportation Commission has promulgated rules located at Texas Administrative Code, Title 43, §27.83 governing the requirements for soliciting proposals to operate a department toll project or system.

**Purpose:** The department is seeking proposals from qualified vendors with the ability to provide high quality statewide toll system integration and maintenance, to include the development, infrastructure design coordination, construction, implementation and system testing of one or more project segments, and the maintenance of new and existing project segments.

**To Obtain a Copy of the Request for Proposals (RFP):** Requests for a copy of the RFP should be submitted to Ms. Linda Sexton, Texas Department of Transportation, Toll Operations Division, 4616 Howard Lane Suite 850, Austin, Texas 78728; telephone: (512) 874-9177; email: Linda.Sexton@txdot.gov. The RFP is also available on the following website: http://www.txdot.gov/business/projects/toll_ops.htm.

**Site Tour of Existing Facilities:** Any prime vendor that did not participate in a site tour during the recent pre-proposal conferences will be allowed to tour the existing facilities. A maximum of four (4) representatives from an interested vendor may participate in a site tour on one of the following dates: November 28, 2011 8:00 a.m. - 12:00 p.m.; or November 29, 2011 8:00 a.m. - 12:00 p.m.; or November 30, 2011 8:00 a.m. - 5:00 p.m. In order to request a site tour, vendors should submit an email indicating a first and second choice date and time to Linda.Sexton@txdot.gov no later than 5:00 p.m. on November 23, 2011. Ms. Sexton will schedule tours in the order requests are received. Participation in a site tour is optional and is not a prerequisite to responding to the RFP.

**Teleconference Regarding Disadvantaged Business Enterprise (DBE) Requirements:** The department will host a teleconference regarding DBE requirements for this procurement on Tuesday, November 22, 2011 at 10:00 a.m. Vendors should submit an email indicating interest in participating in the teleconference to Linda.Sexton@txdot.gov. Ms. Sexton will provide further information regarding the teleconference to interested parties. Participation in the teleconference is optional, but is highly recommended.

**Proposal Submission Deadline: Wednesday, January 4, 2012 at 3:00 p.m.**

**Additional Information:** The department has operated toll roads in Texas since 2006. Additional information regarding facility background and descriptions can be researched at http://www.texastollways.com.

TRD-201104888
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 9, 2011

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## Request for Qualifications

Pursuant to the authority granted under Texas Transportation Code, Chapter 223, (enabling legislation), the Texas Department of Transportation (department) may enter into public-private partnership agreements, also known as comprehensive development agreements, for the design, development, construction, financing, maintenance, or operation of a toll project on the state highway system. The enabling legislation authorizes private involvement in toll projects and provides a process for the department to solicit proposals for such projects. Transportation Code, §223.203 prescribes requirements for a proposal and requires the department to publish a notice in the Texas Register if the department decides to issue a request for qualifications for a project. The Texas Transportation Commission (commission) has promulgated rules located at Texas Administrative Code, Title 43, §§27.1 - 27.10 (the rules), governing the submission and processing of qualification submittals, and providing for publication of notice that the department is requesting qualifications submittals, and setting forth the basic criteria for professional experience, technical competence, and capability to complete a proposed project, and such other information the department considers relevant or necessary in the request for qualifications. The commission has authorized the issuance of a request for qualifications to develop, design, construct, finance, operate, and maintain tolled main lanes and associated facilities along SH 99 in Harris and Montgomery Counties (project), through a public-private partnership agreement (P3A).

On March 31, 2011 in Minute Order 112629, the commission authorized the department to commence the procurement process for the

project under the enabling legislation. This notice represents the next step in the process.

Through this notice, the department is seeking qualifications submittals (QS) from teams interested in entering into a design-build and/or a full toll concession P3A in response to a request for qualifications (RFQ). The department intends to evaluate any QS received and may request submission of detailed proposals, potentially leading to negotiation, award, and execution of a P3A. The department will accept for consideration any QS received in accordance with the rules and the RFQ on or before the deadline in this notice. The department anticipates issuing the RFQ, receiving and analyzing the QSs, developing a shortlist of proposing entities or consortia, and issuing a request for detailed proposals (RFP) to the shortlisted entities. After review and a best value evaluation of the responses to the RFP, the department may negotiate and enter into a P3A for the project.

**RFQ Evaluation Criteria.** QSs for a design-build delivery model will be evaluated by the department for shortlisting purposes using the following general criteria: project experience and statement of technical approach. QSs for a full toll concession delivery model will be evaluated by the department for shortlisting purposes using the following general criteria: technical qualifications and capability, statement of technical approach, project finance qualifications and capability, and conceptual project financing discussion. The specific criteria under the foregoing categories will be identified in the RFQ, as will the relative weighting of the criteria.

**Release of RFQ and Due Date.** The department currently anticipates that the RFQ will be available on November 18, 2011. The RFQ will include a conceptual project concept. Copies of the RFQ will be available at the department's Major Projects Office located at 7721 Washington Ave., Houston, Texas 77007, or on the following website: www.txdot.gov/grandparkway.htm. QSs will be due on January 18, 2012 at the address specified in the RFQ.

TRD-201104887
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 9, 2011

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## Texas Water Development Board

### Requests for Statements of Qualifications for Water Research

Pursuant to 31 Texas Administrative Code §355.3, the Texas Water Development Board (TWDB) requests the submission of Statements of Qualifications leading to the possible award of contracts for geomorphic responses to changes in flow regimes in Texas rivers. Guidelines for Statements of Qualifications, which include an application checklist, will be supplied by the TWDB upon request.

**Description of Research Objectives**

This research study will examine each of the major geomorphic process zones (river styles) previously identified along the lower Brazos River (Phillips 2007) to identify potential thresholds with respect to geomorphic changes in response to changes in flow regimes and sediment supply, and estimate the degree of flow change necessary to result in exceedance of the thresholds. The geomorphic impacts (and associated ecological impacts and engineering and management ramifications) of instream flow changes relative to these thresholds will then be assessed.

Objectives of the research will be to (1) identify potential discharge and sediment supply-related thresholds related to channel widening and incision (or narrowing and aggradation), bed load mobility, channel-floodplain connectivity, inundation of geomorphic units, and channel change (avulsions or cutoffs); (2) estimate changes likely to result in threshold exceedances, relative to contemporary flow and sediment regimes; and (3) synthesize the threshold discharges and the types of instream flow and sediment supply changes most likely to result in exceedances.

Potential thresholds within river zones will be identified based on theoretical analyses (e.g., critical shear stress; bed mobility index), history (observed geomorphic changes in response to past hydrologic events, environmental changes, or river modifications), and empirical sampling (analysis of sample cross-sections within each reach). Potential data for the Brazos River corridor of value to this research will be assembled by the contractor and include topographic information in the form of digital elevation models (DEM), 1:24,000 scale U.S. Geological Survey topographic maps; digital orthophotoquads (DOQQ) from the Texas Natural Resources Information System (TNRIS), and 1:250,000 scale geologic maps *(Geologic Atlas of Texas).* U.S. Geological Survey stream gaging data is also available for six sites along the lower Brazos River. At all of these sites the National Weather Service Advanced Hydrologic Prediction Service has archived information on historic flood crests, effects at various flood stages, and estimated exceedence probabilities for flood flows. In addition, field-based assessments and information are available from a previous project (Phillips 2007). Other historical cross-section data may also be available.

Phillips, J.D. 2007. Field data collection in support of geomorphic classification of the lower Brazos and Navasota rivers. Texas Water Development Board. Contract No. 0604830639. Austin, TX. www.twdb.state.tx.us

The TWDB website site includes (1) guidelines for the Statements of Qualifications, (2) copies of the attachments, (3) a list of Statement of Qualifications Review Criteria, and (4) some supporting material http://www.twdb.state.tx.us/publications

The Statement of Qualifications shall not be more than 15 pages in length, excluding qualifications and experience of project staff. Applicants should be knowledgable in geosciences with a specialty in fluvial geomorphology and should have field experience in fluvial landscape mapping and site sampling. The applicant should also have experience in "river styles" mapping and field validation of map units in Texas.

**Description of Funding Consideration**

Up to $45,000 has been identified for this research study from the TWDB's Research and Planning Fund.

Following the receipt and evaluation of all Statements of Qualifications, oral presentations may be required as part of qualification review. However, invitation for oral presentation is not an indication of probable selection. Up to 100 percent funding may be provided to individual applicants; however, applicants are encouraged to contribute matching funds or services, and funding will not include reimbursement for indirect expenses incurred by political subdivisions of the state or other state and federal agencies. In the event that acceptable Statements of Qualifications are not submitted, the TWDB retains the right to not award funds for the contracts.

**Deadline, Review Criteria, and Contact Person for Additional Information**

Six double-sided copies of a complete Statement of Qualifications, including the required attachments, must be filed with the TWDB prior to 12:00 noon, Monday, November 28, 2011. Statements of Qualifications must be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas; or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231-Capitol Station, Austin,

Texas 78711-3231. Statements of Qualifications will be evaluated according to 31 Texas Administrative Code §355.5 and the Statements of Qualifications Review Criteria rating form included in the TWDB's Guidelines for Water Research Grants. Research shall not duplicate work planned or underway by state agencies. All potential applicants may contact the TWDB to obtain these guidelines or visit the TWDB website at http://www.twdb.state.tx.us/publications

Requests for information, the TWDB's rules covering the Research and Planning Fund, detailed evaluation criteria, more detailed research topic information, and the guidelines may be directed to Mr. David Carter at the preceding address or by calling (512) 936-6079.

TRD-201104786
Ingrid Hansen
Deputy General Counsel
Texas Water Development Board
Filed: November 3, 2011

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## How to Use the Texas Register

**Information Available**: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Secretary of State** - opinions based on the election laws.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rules**- sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

**Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

**Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Texas Department of Banking** - opinions and exempt rules filed by the Texas Department of Banking.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules**- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

**Review of Agency Rules** - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cite**: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 36 (2011) is cited as follows: 36 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 "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 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 at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

## Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cite**: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to update**: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

**TITLE 1. ADMINISTRATION**
***Part 4. Office of the Secretary of State***
**Chapter 91. Texas Register**
40 TAC §3.704.....950 *(P)*