TEXAS REGISTER

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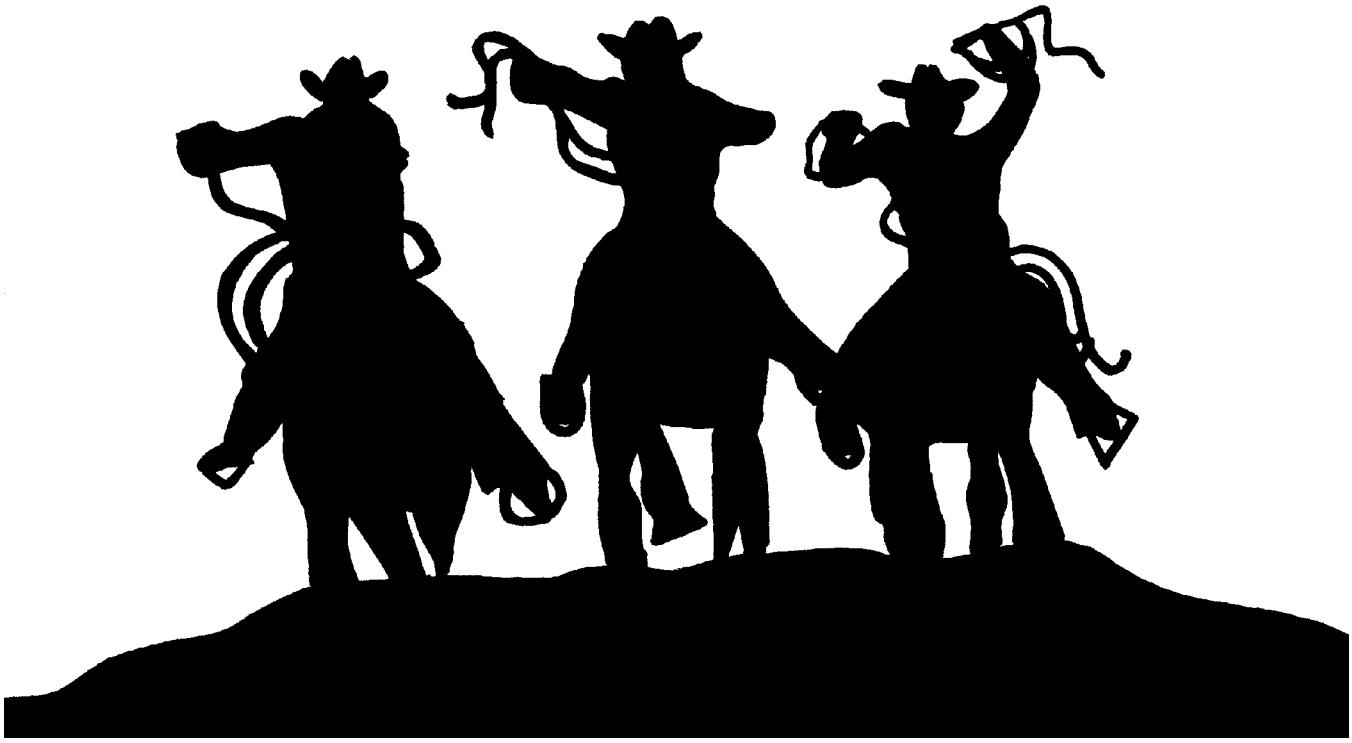
Kayla Dvorak
11th Grade



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

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

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Open Meetings

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

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

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

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

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

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

THE ATTORNEY GENERAL

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

Request for Opinions

RQ-0316-GA

Requestor:

The Honorable William E. Parham

Waller County Criminal District Attorney

836 Austin Street, Suite 103

Hempstead, Texas 77445

Re: Authority of a county to accept a private road, or an easement thereon, into the county road system (Request No. 0316-GA)

Briefs requested by March 19, 2005

RQ-0317-GA

Requestor:

The Honorable Richard J. Miller

Bell County Attorney

Post Office Box 1127

Belton, Texas 76513

Re: Whether a county commissioner may simultaneously hold the position of municipal judge of a city located within his county (Request No. 0317-GA)

Briefs requested by March 19, 2005

RQ-0318-GA

Requestor:

The Honorable Joe R. Smith

Tyler County Criminal District Attorney

Courthouse Annex

Woodville, Texas 75979

Re: Authority of a constable to investigate a criminal offense throughout his county (Request No. 0318-GA)

Briefs requested by March 19, 2005

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

TRD-200500819

Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: February 23, 2005

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Opinions

Opinion No. GA-0304

The Honorable Will Hartnett

Chair, Committee on Judiciary

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a municipality may grant a tax abatement under the Property Redevelopment and Tax Abatement Act for business personal property newly added to a site where previously existing personal property was subject to a ten-year tax abatement agreement (RQ-0261-GA)

S U M M A R Y

Under the Property Redevelopment and Tax Abatement Act, chapter 312 of the Tax Code, a prior tax abatement agreement concerning specific property does not preclude a municipality from agreeing to abate taxes on different business personal property at the same location. A new abatement agreement must fully comply with chapter 312 requirements.

Opinion No. GA-0305

The Honorable Will Hartnett

Chair, Judiciary Committee

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a city may use a Tax Code chapter 311 tax increment fund to reimburse a private developer for certain costs if the expenditures have not been competitively bid (RQ-0262-GA)

S U M M A R Y

A city may use a Tax Code chapter 311 tax increment fund to pay a private developer for environmental remediation, renovation, or facade preservation costs if the costs constitute "project costs" within the scope of section 311.002(1). A tax increment fund is a municipal fund within the meaning of chapter 252 of the Local Government Code, and chapter 252's competitive bidding requirements may apply to expenditures from the tax increment fund. Whether a particular expenditure is subject to competitive bidding will depend upon whether the expenditure falls within the terms of section 252.021 and whether the expenditure is exempt from chapter 252 under section 252.022. If a municipal expenditure is subject to chapter 252, the city would be precluded from reimbursing a person for costs incurred for work not performed pursuant to a competitively bid contract.

Opinion No. GA-0306

The Honorable Bruce Isaacks

Denton County Criminal District Attorney

1450 East McKinney, Suite 3100

Post Office Box 2850

Denton, Texas 76202

Re: Whether sections 85.003 and 86.011 of the Local Government Code provide that a deputy constable's appointment is revoked on the deputy's indictment for a felony (RQ-0268-GA)

S U M M A R Y

Sections 85.003 and 86.011 of the Local Government Code do not provide that a deputy constable's appointment is revoked on the deputy's indictment for a felony.

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

TRD-200500800

Nancy S. Fuller

Assistant Attorney General

Office of the Attorney General

Filed: February 22, 2005

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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 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER H. INVESTMENTS

7 TAC §91.801

The Credit Union Commission proposes amendments to §91.801, concerning investments in CUSOs. The amendments clarify the investment limits for a credit union in CUSOs, require that separate corporate existence between the credit union and the CUSO be clearly maintained, and require that the CUSO be bonded or insured for its operations and obtain an annual opinion audit.

The amendments to the rule are proposed as a result of the Department's observations that some credit unions were trying to operate CUSOs with less than adequate capital and without observing the formalities of separate corporate existence.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be to mitigate potential risk and liability to credit unions and their members. There is no anticipated effect on small businesses as a result of adopting the amended rule. There will be an economic cost anticipated to credit unions for complying with the audit requirement of the amendment if adopted. The audit is justified for safety and soundness reasons based on the potential significant concentration of capital in a CUSO, which makes this a highly at-risk investment in relation to the credit union's net worth. To mitigate the impact of this economic cost, the Commission has established a threshold for the size of investment that triggers the audit requirement.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at Commission's Legislative Advisory Committee meeting on Friday, May 20, 2005 at 9:00 am at 914 East Anderson Lane, Austin, Texas 78752.

The amendment is proposed under the provision of the Texas Finance Code, §124.352 which provides the Credit Union Commission with the authority to adopt rules limiting investments; and under the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the proposed amendment is Texas Finance Code, §124.352.

§91.801. Investments in Credit Union Service Organizations.

(a) Definition. When used in this section, a credit union service organization (CUSO) is an organization whose primary purpose is to strengthen or advance the credit union movement, serve or otherwise assist credit unions or their operations, and [~~or~~] provide products or services authorized by subsection (f) of this section to [~~members of credit unions~~] credit unions and their members.

(b) A credit union by itself, or with other parties, may only organize, invest in or make loans to a CUSO which is structured and operated in a manner that demonstrates to the public that it maintains a legal existence separate from the credit union. A credit union and a CUSO must operate so that:

(1) their respective business transactions, accounts, and records are not intermingled;

(2) each observes the formalities of their separate corporate or other organizational procedures;

(3) each is adequately capitalized [~~financed~~] as a separate unit in light of normal obligations reasonably foreseeable in a business of its size and character;

(4) each is held out to the public as a separate and distinct enterprise; [~~and~~]

(5) all transactions between them are at arms length and consistent with sound business practices as to each of them; and

(6) [~~(5)~~] unless the credit union has guaranteed a loan to the CUSO, all borrowings by the CUSO indicate that the credit union is not liable.

(c) Notice. A credit union shall provide written notice to the commissioner of its intent to make an initial investment in, make an initial loan to a CUSO, make a material change to a CUSO's organizational structure, or perform new activities in an existing CUSO at least 15 days prior to commencing efforts to effect such activity. The written notice must include a complete description of the credit union's investment in or loan to the CUSO, the activity to be conducted, and a representation and undertaking that the activity will be conducted in accordance with applicable law and in a manner that will limit potential exposure of the credit union to no more than the loss of funds invested in, or loaned to, the CUSO. The credit union shall provide any additional information reasonably requested by the commissioner [~~.~~], which may include a written legal opinion that the CUSO has either

been established in a manner that will limit the credit union's potential exposure, or that the new activity or change to its organizational structure will not result in the credit union's potential exposure being more than the loss of funds invested in or loaned to the CUSO.

(d) Limitations. The board of directors of a credit union that organizes, invests in, or lends to any CUSO shall establish, in writing, the maximum amount relative to the credit union's net worth, that will be invested in or loaned to any one CUSO. This maximum amount may not exceed the statutory limit established by Texas Finance Code §124.352(b). Investments and loans described in this section shall not, in the aggregate, exceed the greater of 10% of the total assets or 100% of net capital of the credit union, unless the credit union receives the prior written approval of the commissioner. The amount of loans to CUSOs, cosigned, endorsed, or otherwise guaranteed by the credit union, shall be included in the aggregate for the purpose of determining compliance with the limitations set forth in this section.

(e) Prohibitions. No credit union may invest in or make loans to a CUSO:

(1) if any officer, director, committee member, or employee of such credit union or any member of the immediate family of such persons owns or makes an investment in or has made or makes a loan to the CUSO;

(2) unless the organization is structured as a corporation, limited liability company, registered limited liability partnership, or limited partnership and the credit union has obtained a written legal opinion that the CUSO is established in a manner that will limit the credit union's potential exposure to not more than the loss of funds invested in or loaned to such CUSO;

(3) if the CUSO engages in any revenue producing activity other than the performance of services for credit unions or members of credit unions, and such activity equals or exceeds one half (1/2) of the CUSO's total revenue;

(4) unless prior to investing in or making a loan to a CUSO the credit union obtains a written agreement which requires the CUSO to follow GAAP, render financial statements to the credit union at least quarterly, and provide the department, or its representatives, complete access to the CUSO's books and records at reasonable times without undue interference with the business affairs of the CUSO; [~~or~~]

(5) if the CUSO is not sufficiently bonded or insured for its operations;

(6) if the CUSO does not obtain an annual opinion audit, by a licensed Certified Public Accountant, on its financial statements in accordance with generally accepted auditing standards, unless the investment in the CUSO by any one or more credit unions does not exceed $100,000; or

(7) [~~(5)~~] if any director is an employee of the CUSO, or anticipates becoming an employee of the CUSO upon its formation.

(f) Permissible [~~Permissive~~] activities and services. A credit union may invest in or loan to a CUSO that is [~~shall be~~] engaged in providing products and services that include, but are not limited to:

(1) operational services including credit and debit card services, cash services, wire transfers, audits, ATM and other EFT services, share draft and check processing and related services, shared service center operations, electronic data processing, development, sale, lease, or servicing of computer hardware and software, alternative methods of financing and related services, other lending related services, and [~~any~~] other services or activity, including consulting, related to the routine daily operations of credit unions;

(2) financial services including financial planning and counseling, securities brokerage and dealer activities, estate planning, tax services, insurance services, administering retirement, or deferred compensation and other employee or business benefit plans; [~~, or any other service deemed economically beneficial or attractive to the members of the participating credit union or credit unions;~~]

(3) internet based or related services including sale and delivery of products to credit unions or members of credit unions; or

(4) any other product, service or activity deemed economically beneficial or attractive to credit unions or credit union members if approved, in writing, by the commissioner.

(g) Compensation. A credit union director, senior management employee, or committee member or immediate family member of any such person may not receive any salary, commission, or other income or compensation, either directly or indirectly, from a CUSO affiliated with their credit union, unless received in accordance with a written agreement between the CUSO and the credit union. The agreement shall describe the services to be performed, the rate of compensation (or a description of the method of determining the amount of compensation) and any other provisions deemed desirable by the CUSO and the credit union. The agreement, and any amendments, must be approved by the board of directors of the credit union and the board of directors (or equivalent governing body) of the CUSO prior to any performance of service or payment and annually thereafter. For purposes of this section, senior management employee shall include the chief executive officer, any assistant chief executive officers (e.g. vice presidents and above), and the chief financial officer; and immediate family shall include a person's spouse or any other person living in the same household.

(h) Examination fee. If a CUSO is requested by the commissioner to make its books and records available for inspection and examination, the CUSO shall pay a supplemental examination fee as prescribed in §97.113(d) of this title (relating to Supplemental Examinations). The commissioner may waive the supplemental examination fee or reduce the fee as he deems appropriate.

(i) Exclusion. A credit union which has a net worth ratio greater than six percent (6%) and is deemed adequately capitalized by its insuring organization may invest in or make loans to a CUSO that is not limited by the restriction set forth in subsection (e)(3) of this section; provided the activities of the CUSO are exclusively limited to activities which could be conducted directly by a credit union or are incidental to the conduct of the business of a credit union. Notwithstanding this exclusion, all other provisions of the act and this chapter applicable to a CUSO apply. In the event a credit union's net worth or capital declines below the required thresholds, the credit union may not renew, extend the maturity of, or restructure an existing loan, advance additional funds or increase the investment in the CUSO without the prior written approval of the commissioner.

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

Filed with the Office of the Secretary of State on February 16, 2005.

TRD-200500745
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 837-9236

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 19. TEXAS MAIN STREET PROJECT

13 TAC §§19.1 - 19.8

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

The Texas Historical Commission (hereafter referred to as the Commission) proposes the repeal of §§19.1 - 19.8 of Chapter 19 (Title 13, Part 2 of the Texas Administrative Code) concerning the Texas Main Street Project. New §§19.1 - 9.5 will replace the repealed sections and they are contemporaneously proposed in this issue of the *Texas Register*.

The repeal of these sections are being proposed in an effort to update and modify existing rules associated with the Texas Main Street Project.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Oaks has also determined that the public benefit for the first five year period the repeals will be in effect is the administrative efficiency created by removing obsolete provisions from the Texas Administrative Code. There will be no effect on small businesses or individuals who are required to comply with the repeals as proposed.

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

The repeals are proposed under §442.005(q), Title 4, Chapter 442 of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

These repeals implement §442.014 of the Texas Government Code.

§19.1. Administration of the Project.

§19.2. The Interagency Council.

§19.3. Processing Applications for Designation as Main Street Cities.

§19.4. Qualification as a Self-initiated Main Street City.

§19.5. Assistance To Be Provided Qualifying Self-initiated Main Street Cities.

§19.6. Qualification as an Urban Main Street Program.

§19.7. Assistance To Be Provided to Qualifying Urban Main Street Cities.

§19.8. Assistance To Be Provided to Qualifying Self-initiated Urban Main Street Cities.

This 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 February 14, 2005.

TRD-200500685
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 463-1858

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CHAPTER 19. TEXAS MAIN STREET PROGRAM

13 TAC §§19.1 - 19.5

The Texas Historical Commission (hereafter referred to as the Commission) proposes the creation of new §§19.1 - 19.5 of Chapter 19 (Title 13, Part 2 of the Texas Administrative Code) concerning the Texas Main Street Program.

The creation of these new sections is an effort to thoroughly update and modify existing rules associated with the Texas Main Street Program. The existing rules have been in effect for many years with few revisions and have been augmented over the years as the program has developed. The existing rules contain information that is inaccurate and outdated and were not straightforward and easy to understand. It was apparent that the rules needed to be revisited and rewritten in a comprehensive way so that they better complied with the format of Texas Historical Commission rules. The proposed new rules address the manner in which the program operates in a clear and concise fashion. Section 19.1 provides that the purpose of the Main Street Program is to provide assistance to Texas Main Street cities. Section 19.2 provides that a system exists by which the Commission may designate and provide assistance to Texas Main Street cities. Section 19.3 provides for definitions used in the rules to explain the different types of programs within the Texas Main Street Program as well as other definitions relating to the program. Section 19.4 provides for the application process and review as well as selection of Texas Main Street cities. Section 19.5 provides for the assistance rendered to Texas Main Street cities and any fees that may be associated with this assistance.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new rules.

Mr. Oaks has also determined that for each year of the first five year period the new rules are in effect the public benefit anticipated will be an increased efficiency and effectiveness in the implementation of the Texas Administrative Code. There will be no effect on small businesses or individuals required to comply with the new rules as proposed.

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

The new rules are proposed under §442.005(q), Title 4, Chapter 442 of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§19.1. Object.

(a) The Texas Historical Commission (Commission) is specifically empowered to designate and provide assistance to Texas cities through the Texas Main Street Program.

(b) The mission of the Texas Main Street Center is to assist Texas communities in the preservation and revitalization of historic downtowns and commercial neighborhood districts in accordance with the National Main Street Four Point Approach of organization, economic restructuring, design, and promotion.

§19.2. Scope.

These rules provide a system by which the Commission may designate and provide service to Texas Main Street cities. All applications, designations, and services shall comply with these rules.

§19.3. Definitions.

When used in this chapter, the following words or terms have the following meanings unless the context clearly indicates otherwise:

(1) Texas Main Street Program--A program of the Texas Historical Commission in which designated Texas Main Street cities receive assistance for their historic, commercial buildings.

(2) Texas Main Street City--Any city that has been officially designated by the Texas Historical Commission as a participant in the Texas Main Street Program.

(3) Texas Main Street Small City--Main Street city with population of 50,000 people or fewer.

(4) Texas Main Street Urban City--Main Street city with population greater than 50,000 people.

(5) Texas Main Street Provisional City--A Main Street city of any size that is not accepted upon first application submittal may participate provisionally in the program, upon invitation, while application is resubmitted the following year.

(6) Texas Main Street Recertified City--A city that was formerly in the program that has reapplied and been accepted to be a Main Street City.

(7) Main Street Interagency Council--A council that evaluates and ranks Main Street applications and makes recommendations to the Commission. The composition of the Main Street Interagency Council is determined by the Commission.

§19.4. Application to the Program.

(a) Application to the program. Applications to the program are due annually on the last working day of July or other dates established by the Commission.

(b) Eligibility. Cities with population of 50,000 or fewer may apply to the Main Street Program. Cities with population of 50,001 or greater may apply to the Urban Main Street Program. A city of not more than 65,000 in population that considers that it should qualify as a small city may apply to the Commission to be considered as a small city. If the Commission determines that the city has shown good cause to be considered as a small city, it may allow the city to be designated as a Main Street city under the rules for small cities. Cities of any population that are not accepted upon the first application may be invited by the Commission to participate in the Provisional Main Street Program.

(c) Qualifications. Applications must demonstrate an acceptable amount of historic commercial buildings, public sector support, community and private sector support and meet any other requirements outlined in the application guidelines.

(d) Application guidelines. The Commission shall determine the exact application guidelines and requirements each year and make them available to cities in advance of the application deadline.

(e) Review of Applications. The Main Street Interagency Council shall review applications for designation as official Texas Main Street cities. Recommendations from the Interagency Council and staff are forwarded to the Commission for final selection.

(f) Official selection. The Commission shall select Texas Main Street cities by vote at a meeting of the Commission. Up to five cities per year may be selected, subject to available resources.

(g) Cities not selected. Cities not selected will be so notified in writing by the state coordinator of the Texas Main Street Program. Such cities will be given an evaluation of their application and reasons they were not selected upon request.

§19.5. Assistance Provided.

(a) Training. Each new Main Street City will receive at no charge basic training for their Main Street manager at the beginning of the program. All new Main Street boards will receive at no charge comprehensive board training at the beginning of their city's Main Street Program. Additional training and continuing education is available throughout a city's participation in the Texas Main Street Program.

(b) Technical assistance. Each Texas Main Street City receives technical assistance and training in the areas of design, economic restructuring, promotion and organization.

(c) Main Street network. Each Texas Main Street City is eligible to receive Texas Main Street publications and participate in Texas Main Street networking opportunities.

(d) Fees. Main Street small cities and provisional cities will pay a fee for participation beyond the initial three years. Urban cities will pay a fee for participation in the program. The amount of the fee is determined by the Commission.

(e) Main Street Status. In order to remain a Texas Main Street City, the community must be certified on an annual basis by the Texas Main Street office in Austin to confirm that the community meets all of the requirements for designation.

This 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 February 14, 2005.

TRD-200500686
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 463-1858

CHAPTER 29. MANAGEMENT AND CARE OF ARTIFACTS AND COLLECTIONS

13 TAC §29.6

The Texas Historical Commission (hereafter referred to as the Commission) proposes amendments to §29.6 of Title 13, Part 2, Chapter 29 of the Texas Administrative Code, relating to the management and care of artifacts and collections, gathered under the jurisdiction of Texas Government Code Chapter 442 and the Antiquities Code of Texas (Title 9, Chapter 191, of the Texas Natural Resources Code). The amendment will allow a curatorial facility that has submitted an application for certification to the Commission prior to December 31, 2005 to continue to accept held in trust collections after that date, so long as the application is pending.

These amendments are needed in a continuing effort by the Commission to assist and encourage curatorial facilities to upgrade their care of state associated collections that are gathered under the jurisdiction of the Antiquities Code of Texas.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the rule is in effect, there may be fiscal implications for state and local governments as a result of administering the rule. Curatorial facilities that voluntarily choose to become certified may have additional costs for curating state-associated collections. These costs would likely be passed on to state and local governmental entities required to curate collections at certified facilities. Due to the fact that certification is a voluntary process and any additional costs would be subject to the discretion of the individual curatorial facility, it is not possible to estimate the exact costs.

Mr. Oaks has also determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of the implementation of the rule will be improved inventory and accountability for state-owned collections, better care for artifacts, and increased security for collections. There may be economic effects on small businesses or micro-businesses, and members of the public who are required to comply with the rule as proposed, but these costs cannot be estimated.

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

The amendments are proposed under both §442.005(q), Title 13, Part 2 of the Texas Government Code and §191.052, Title 9, Chapter 191 of the Texas Natural Resources Code, which provides the Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

§29.6. Certification of Curatorial Facilities for State-Associated Held-in-Trust Collections.

(a) Establishment of certification program.

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

(4) Except as provided in paragraph (9) of this subsection, no [~~No~~] collection or any component of a collection as described under the jurisdiction of this subchapter may be placed in a curatorial facility that is not certified through the process established by this section.

(5) - (8) (No change.)

(9) A curatorial facility that has submitted the application for certification provided by subsection (b)(1) of this section by the date provided in subsection (a)(3) of this section may continue to accept held-in-trust collections after that date so long as its application is pending and the application process has not been terminated or its application rejected by the commission.

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

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

Filed with the Office of the Secretary of State on February 14, 2005.

TRD-200500684
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 463-1858

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

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

19 TAC §61.1017

The Texas Education Agency (TEA) proposes new §61.1017, concerning optional flexible year programs for school districts. New §61.1017 would establish specifications for the administration of the Optional Flexible Year Program in accordance with Texas Education Code (TEC), §29.0821, as added by Senate Bill 346, 78th Texas Legislature, 2003.

Senate Bill 346, 78th Texas Legislature, 2003, added TEC, §29.0821, authorizing the Optional Flexible Year Program. The Optional Flexible Year Program provides districts with flexibility in designing the instructional program for students who did not or are not likely to perform successfully on state assessments administered under TEC, §39.023, or who would not otherwise be promoted to the next grade level. The instructional calendar for students who fall into these risk categories must provide for no fewer than 180 days. Districts may request a reduction in the required days of attendance for students who do not fall into these risk categories in order to provide intensive instructional services to those students with greater educational needs. The instructional calendar for students who do not fall into these risk categories may be reduced, but not below 170 days. Districts who wish to use this option are required to seek prior approval from the commissioner to modify the instructional calendar. The commissioner of education may adopt rules for the administration of this program. The proposed 19 TAC §61.1017, Optional Flexible Year Program, would establish general provisions, define eligibility, specify program criteria, describe the approval process, and delineate funding calculations.

Districts will be required to seek prior approval for the modification of their instructional calendar by submitting a written request to the Texas Education Agency State Funding Division. No specific application form will be required. Districts should be prepared to provide evaluations or other evidence regarding the effectiveness of their approach, if requested.

Joe Wisnoski, deputy associate commissioner for school finance and fiscal analysis, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Wisnoski has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the section will be providing districts with the flexibility to reduce instructional days for students who are performing satisfactorily and the opportunity to provide targeted instruction to students who have greater educational needs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new section.

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

The new section is proposed under the Texas Education Code, §29.0821, which authorizes the commissioner of education to adopt rules for the administration of optional flexible year programs.

The new section implements the Texas Education Code, §29.0821.

§61.1017. Optional Flexible Year Program.

(a) General provisions. In accordance with Texas Education Code (TEC), §29.0821, a school district may modify their instructional calendar to provide a flexible year program to meet the educational needs of its students, including providing intensive instructional services. A school district approved by the commissioner of education to implement an Optional Flexible Year Program (OFYP) may reduce the number of instructional days for certain students.

(b) Eligibility. A student is eligible to participate in the OFYP if the student meets one or more of the following criteria.

(1) The student did not or is not likely to achieve a passing score on an assessment instrument administered under TEC, §39.023.

(2) The student is not eligible for promotion to the next grade level.

(c) Program criteria.

(1) A school district may reduce the number of instructional days during the regular school year for students who are not eligible for participation in this program to no fewer than 170 days.

(2) A school district must provide at least 180 days of instruction to those students who meet the eligibility criteria defined in subsection (b) of this section.

(3) A school district may request waivers for no more than five days of staff development or teacher preparation in order to provide additional days of instruction.

(4) A school district that provides transportation services must continue to provide these services during the OFYP.

(5) A school district that participates in the National School Lunch Program or the National School Breakfast Program must continue to provide these services during the OFYP.

(6) A school district may require educational support personnel to provide service as necessary for an OFYP.

(7) Each educator employed under a ten-month contract must provide the minimum days of service required under TEC, §21.401, notwithstanding the reduction in the number of instructional days or in the number of staff development days.

(d) Approval process. To implement an OFYP, a school district must request prior approval from the commissioner of education.

(1) A school district must submit a letter to the Texas Education Agency division responsible for state funding describing the proposed modifications to the instructional calendar, including a description of the OFYP that will be provided under TEC, §29.0821. The letter must be submitted no later than 90 days prior to the first day of the proposed instructional calendar in which the district is requesting to implement the OFYP.

(2) Approval to modify the number of instructional days is limited to one year. Extensions may be approved by submitting subsequent applications.

(3) No approval will be granted that reduces the number of instructional days to fewer than 170 days.

(4) The commissioner may require a school district to provide an evaluation that demonstrates the success of their approach as a condition of approval.

(e) Funding. For a school district that operates an OFYP, the calculation of average daily attendance is modified to reflect the approved instructional calendar. For students placed on a reduced instructional calendar, the reported number of days of instruction used as the divisor in calculating average daily attendance shall reflect the reduced number of days (no fewer than 170). For eligible students served through the OFYP, the reported number of days of instruction used as the divisor in calculating average daily attendance shall reflect the scheduled number of days (180 or more) in which instruction took place.

This agency hereby certifies that the 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 February 17, 2005.

TRD-200500746
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 182. USE OF EXPERTS

22 TAC §182.7

The Texas State Board of Medical Examiners proposes new §182.7, Interim Appointment, regarding the use of Executive Committee members to make interim appointments of expert panelists until the next board meeting.

During the two-month interval between meetings of the Medical Board, expert panelists with specialty qualifications may be needed as part of a case investigation. Interim appointments to the Expert Panel by a member of the Executive Committee and follow-up ratification by the Medical Board will prevent cases from going beyond the statutory investigatory timeline.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the new section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the section as proposed.

Ms. Shackelford also has determined that for each year of the first five years the new section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to prevent cases from going beyond the statutory investigatory timeline. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Colleen Klein, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The new rule is proposed under the authority of the Occupation Code Annotated, §153.001 and §154.056(e), which provide that the Texas State Board of Medical Examiners may adopt rules and bylaws as necessary to perform its duties, regulate the practice of medicine in this state and enforce the Medical Practice Act.

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

§182.7. Interim Appointment.

A member of the Executive Committee may make an interim appointment of an expert panelist to serve the board until the expert panelist can be considered for appointment by the board at the next board meeting.

This 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 February 18, 2005.

TRD-200500775
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 305-7016

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.20

The Texas State Board of Pharmacy proposes amendments to §291.20, concerning Remote Pharmacy Services. The amendments, if adopted, will implement changes to §562.108 of the Texas Pharmacy Act made during the 78th Legislative session which allow Class E (non-resident) pharmacies located not more than 20 miles from an institution in this state that is licensed under Chapter 242 or 252, Health and Safety Code, to maintain controlled substances and dangerous drugs in an emergency medication kit used at an institution licensed under those chapters; and allow a United States Department of Veterans Affairs pharmacy or other federally operated pharmacy to maintain controlled substances and dangerous drugs in an emergency medication kit used at an institution that is licensed under Chapter 242, Health and Safety Code, and is a veterans home, as defined by §164.002, Natural Resources Code. The amendments, if adopted, also clarify inventory requirements for remote pharmacy services using automated pharmacy systems and remote pharmacy services using emergency medication kits; and update citations.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to increase the provision of pharmacy services within certain facilities and will clarify the inventory requirements to be consistent in remote pharmacy services .

There is no fiscal impact for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas, 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., April 30, 2005.

The amendments are proposed under §§551.002, 554.051, 562.108, 562.109, and 562.110 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 Board interprets §562.108 as authorizing the agency to adopt rules regarding emergency medication kits. The Board interprets §562.109 as authorizing the agency to adopt rules regarding automated pharmacy systems. The Board interprets §562.110 as authorizing the agency to adopt rules regarding telepharmacy systems.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.20. Remote Pharmacy Services.

(a) Remote pharmacy services using automated pharmacy systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an automated pharmacy system as outlined

in §562.109 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Occupations Code, as amended).

(2) - (4) (No change.)

(5) Records.

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

(F) Inventory.

(i) A provider pharmacy shall:

(I) (No change.)

(II) keep a perpetual inventory of controlled substances and other drugs required to be inventoried under §291.17 of this title, that are received and dispensed or distributed from each remote site.

(ii) (No change.)

(b) Remote pharmacy services using emergency medication kits.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a facility that is not at the same location as the Class A or Class C pharmacy through an emergency medication kit as outlined in §562.108 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Occupations Code, as amended).

(2) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings defined in §291.31 of this title.

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

(C) Emergency medication kits--controlled substances and dangerous drugs maintained by a community pharmacy (Class A), [~~or~~] an institutional pharmacy (Class C) at an institution licensed under Chapter 242 or 252, Health and Safety Code, a non-resident (Class E) pharmacy located not more than 20 miles from an institution licensed under Chapter 242 or 252, Health and Safety Code, or a United States Department of Veterans Affairs pharmacy or another federally operated pharmacy at an institution that is licensed under Chapter 242, Health and Safety Code, and is a veterans home, as defined by §164.002, Natural Resources Code, to meet the emergency medication needs of a resident at that institution.

(D) Remote site--a facility not located at the same location as a Class A, [~~or~~] Class C, Class E pharmacy or a United States Department of Affairs pharmacy or another federally operated pharmacy, at which remote pharmacy services are provided using an emergency medication kit.

(E) (No change.)

(F) Provider pharmacy--the community pharmacy (Class A), [~~or~~] the institutional pharmacy (Class C), the non-resident (Class E) pharmacy located not more than 20 miles from an institution licensed under Chapter 242 or 252, Health and Safety Code, or the United States Department of Veterans Affairs pharmacy or another federally operated pharmacy providing remote pharmacy services.

(G) (No change.)

(3) General requirements.

(A) - (C) (No change.)

(D) A provider pharmacy which is licensed as an institutional (Class C) or a non-resident (Class E) pharmacy is required to comply with the provisions of §§291.31 - 291.34 of this title and this section.

(E) (No change.)

(4) Operational standards.

(A) Application for permission to provide pharmacy services using an emergency medication kit.

(i) A Class A, [~~or~~] Class C, or Class E Pharmacy shall make application to the board to provide remote pharmacy services using an emergency medication kit. The application shall contain an affidavit with the notarized signatures of the pharmacist-in-charge, and the medical director or the person responsible for the on-site operation of the facility (e.g., administrator, owner, chief executive officer, chief operating officer), and include the following:

(I) - *(II)* (No change.)

(III) a statement indicating that the provider pharmacy and the healthcare facility have entered into a written contract or agreement which outlines the services to be provided and the responsibilities and accountabilities of each party in fulfilling the terms of the contract or agreement in compliance with federal and state laws and regulations; [~~and~~]

(IV) documentation that the emergency medication kit is located in a facility regulated under Chapter 242, or 252, Health and Safety Code; and [~~.~~]

(V) documentation that the emergency kit is located in a facility that is not more than 20 miles from the Class E pharmacy providing the emergency kit.

(ii) - *(iii)* (No change.)

(B) - (G) (No change.)

(5) Records.

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

(E) Inventory.

(i) A provider pharmacy shall:

(I) (No change.)

(II) keep a perpetual inventory of controlled substances and other drugs required to be inventoried under §291.17 of this title, that are received and dispensed or distributed from each remote site.

(ii) (No change.)

(c) Remote pharmacy services using telepharmacy systems.

(1) Purpose. The purpose of this section is to provide standards for the provision of pharmacy services by a Class A or Class C pharmacy in a healthcare facility that is not at the same location as a Class A or Class C pharmacy through a telepharmacy system as outlined in §562.110 of the Texas Pharmacy Act, Chapter 551 - 566 and 568 - 569, Occupations Code.

(2) - (5) (No change.)

(d) (No change.)

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500756
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 305-8028

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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33

The Texas State Board of Pharmacy proposes amendments to §291.33, concerning Operational Standards. The amendments, if adopted, will implement a portion of the recommendations of the Task Force on Patient Counseling requiring a pharmacist to ensure that the patient or patient's agent is offered information about refill prescriptions and requiring pharmacies to post notification in the pharmacy that a pharmacist is available to answer questions about prescription medications. In addition, the amendments, regarding generic substitution if adopted, will make changes to conform with proposed changes in §309.7 published elsewhere in this issue of the *Texas Register*.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there may be financial savings to state and local governments. The LBB report estimates that allowing generic substitution of products not listed in the Orange Book would reduce the state's expenditure for prescription drugs for Medicaid by at least $9.9 million in All Funds for the 2006-2007 biennium. According to the LBB report, approximately $3.9 million of this amount could be saved for the General Revenue Fund.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be requiring pharmacists to ensure that the patient or patient's agent is offered information about refill prescriptions and patient's are made aware of the availability of a pharmacist to answer questions about prescription medications. In addition, the public benefit anticipated as a result of enforcing the rule will be allowing the substitution of products not listed in the Orange Book saving patients and the State of Texas money.

There is no fiscal impact for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas, 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., April 30, 2005.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.33. Operational Standards.

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

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) (No change.)

(B) Such communication:

(i) shall be provided with each new prescription drug order[~~, once yearly on maintenance medications, and if the pharmacist deems appropriate, with prescription drug order refills. (For the purposes of this clause, maintenance medications are defined as any medication the patient has taken for one year or longer)~~];

(ii) - (iv) (No change.)

(C) - (D) (No change.)

(E) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable.

(i) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in subsection (b)(3) [~~(4)~~] of this section or clause (ii) of this subparagraph.

(ii) - (iv) (No change.)

(F) (No change.)

(G) Except as specified in subparagraph (B) of this paragraph, in the best interest of the public health and to optimize drug therapy, upon delivery of a refill prescription, a pharmacist shall ensure that the patient or patient's agent is offered information about the refilled prescription. Either a pharmacist or other pharmacy personnel shall inform the patient or patient's agent that a pharmacist is available to discuss the patient's prescription and provide information.

(H) A pharmacy shall post a sign no smaller than 8.5 inches by 11 inches in clear public view at all locations in the pharmacy where a patient may pick up prescriptions. The sign shall contain the following statement in a font that is easily readable: "Do you have questions about your prescription? Ask the pharmacist." Such notification shall be in both English and Spanish.

(I) [~~(G)~~] The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(2) (No change.)

(3) Generic Substitution.

(A) - (C) (No change.)

(D) Refills.

(i) (No change.)

(ii) Narrow therapeutic index drugs.

(I) The board, in consultation with the Texas State Board of Medical Examiners, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code. [~~The board has specified in §309.7 of this title (relating to dispensing responsibilities) that pharmacist shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication.~~]

(-a-) The board has specified in §309.7 of this title (relating to dispensing responsibilities) that for drugs listed in the

publication, pharmacists shall use as a basis for determining gerenic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication. Pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(-b-) (No change.)

(II) (No change.)

(4) - (7) (No change.)

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

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500757
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 305-8028

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SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.104

The Texas State Board of Pharmacy proposes amendments to §291.104, concerning Generic Substitution. The amendments, if adopted, will make changes to conform with proposed changes in §309.7 published elsewhere in this issue of the *Texas Register*.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there may be financial savings to state and local governments. The LBB report estimates that allowing generic substitution of products not listed in the Orange Book would reduce the state's expenditure for prescription drugs for Medicaid by at least $9.9 million in All Funds for the 2006-2007 biennium. According to the LBB report, approximately $3.9 million of this amount could be saved for the General Revenue Fund.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be allowing the substitution of products not listed in the Orange Book saving patients and the State of Texas money.

There is no fiscal impact for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas, 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., April 30, 2005.

The amendments are proposed 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. Section 554.051(b) which authorizes the agency to make a rule concerning the operation of a licensed pharmacy located in this state applicable to a pharmacy licensed by the board that is located in another state, if the board determines the rule is necessary to protect the health and welfare of the citizens of this state.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.104. Operational Standards.

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

(c) Generic Substitution. Unless compliance would violate the pharmacy or drug laws or rules in the state in which the pharmacy is located:

(1) (No change.)

(2) Pharmacists shall use as a basis for the determination of generic equivalency as defined in the Subchapter A, Chapter 562 of the Act, the following [~~provided the pharmacist uses as a basis for the determination of generic equivalency, the publication, Approved Drug Products With Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration within the limitations stipulated in that publication~~].

(A) For drugs listed in the publication, pharmacists shall use Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book) and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication, to determine generic equivalency. Pharmacists may only substitute products that are rated therapeutically equivalent in the Orange Book and have an "A" rating. "A" rated drug products include but are not limited to, those designated AA, AB, AN, AO, AP, or AT in the Orange Book.

(B) For drugs not listed in the Orange Book, pharmacists shall use their professional judgment to determine generic equivalency.

(d) - (f) (No change.)

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500759
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 305-8028

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CHAPTER 295. PHARMACISTS

22 TAC §295.13

The Texas State Board of Pharmacy proposes amendments to §295.13, concerning Drug Therapy Management by a Pharmacist under Written Protocol of a Physician. The amendments, if

adopted, will delete the requirement for pharmacists participating in drug therapy management under the written protocol of a physician to notify the Board of participation.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to clarify the notification requirements for pharmacists participating in drug therapy management under the written protocol of a physician.

There is no fiscal impact for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas, 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., April 30, 2005.

The amendments are proposed 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 Board interprets §554.051(c) as authorizing the agency to adopt rules regarding records to be maintained by a pharmacist performing a specific act under a written protocol.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§295.13. Drug Therapy Management by a Pharmacist under Written Protocol of a Physician.

(a) (No change.)

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

(1) Act--The Texas Pharmacy Act, Chapter 551 - 566 and 568 - 569, Occupations Code, as amended.

(2) - (6) (No change.)

(c) Pharmacist Training Requirements [~~Notification~~].

(1) Initial requirements. [~~notification. Prior to initially engaging in drug therapy management, a~~] A pharmacist shall maintain and provide to the Board within 24 hours of request [~~provide the board with:~~]

[~~(A) the name, license number, and address of the supervising physician; ~~]

[~~(B) the address where the records of such drug therapy management are maintained; and ~~]

[~~(C)~~] a statement attesting to the fact that the pharmacist has within the last year:

(A) [~~(i)~~] completed at least six hours of continuing education related to drug therapy offered by a provider approved by the Accreditation Council for Pharmacy Education [~~American Council on Pharmaceutical Education~~] (ACPE); or

(B) [~~(ii)~~] engaged in drug therapy management as allowed under previous laws or rules. A statement from the physician supervising the acts shall be sufficient documentation.

(2) Continuing requirements. A pharmacist engaged in drug therapy management shall [~~:~~]

[~~(A)~~] annually complete six hours of continuing education related to drug therapy offered by a provider approved by the Accreditation Council for Pharmacy Education [~~American Council on Pharmaceutical Education~~] (ACPE). (These hours may be applied towards the hours required for renewal of a license to practice pharmacy.)

[~~(B) notify the board of any change in supervising physician or change in the address where the records of drug therapy management are maintained. ~~]

(d) - (g) (No change.)

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500758
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 305-8028

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CHAPTER 309. GENERIC SUBSTITUTION

22 TAC §§309.2, 309.3, 309.7

The Texas State Board of Pharmacy proposes amendments to §309.2, concerning Definitions, §309.3, concerning Generic Substitution and §309.7, concerning Dispensing Responsibilities. The amendments, if adopted, will implement recommendations made by the Legislative Budget Board Staff Performance Report to the 79th Legislature to allow the substitution of products not listed in the U.S. Food and Drug Administration's Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book). In addition, the amendments to §309.2, if adopted, will correct definitions to conform with definitions in Chapter 291.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there may be financial savings to state and local governments as follows:

Figure: 22 TAC Chapter 309--Preamble

The LBB report estimates that allowing generic substitution of products not listed in the Orange Book would reduce the state's expenditure for prescription drugs for Medicaid by at least $9.9 million in All Funds for the 2006-2007 biennium. According to the LBB report, approximately $3.9 million of this amount could be saved for the General Revenue Fund.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will be allowing the substitution of products not listed in the Orange Book saving patients and the State of Texas money.

There is no fiscal impact for small or large businesses or to other entities who are required to comply with the sections.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas, 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., April 30, 2005.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§309.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any term not defined in this section shall have the definition set out in the Act, §551.003 and Chapter 562.

(1) Act--The Texas Pharmacy Act, Occupations Code, Subtitle J, as amended.

(2) Data communication device--An electronic device that receives electronic information from one source and transmits or routes it to another (e.g., bridge, router, switch, or gateway).

(3) Electronic prescription drug order--A prescription drug order which is transmitted by an electronic device to the receiver (pharmacy). [~~Electronic prescription drug order includes computer to computer transmission, but does not include facsimile prescription drug orders.~~]

~~[(4) Facsimile prescription drug order--A prescription drug order which is transmitted by an electronic device which sends an exact image to the receiver (pharmacy).]~~

(4) [~~(5)~~] Generically equivalent--A drug that is pharmaceutically equivalent and therapeutically equivalent to the drug prescribed.

(5) [~~(6)~~] Pharmaceutically equivalent--Drug products that have identical amounts of the same active chemical ingredients in the same dosage form and that meet the identical compendial or other applicable standards of strength, quality, and purity according to the United States Pharmacopoeia or another nationally recognized compendium.

(6) [~~(7)~~] Therapeutically equivalent--Pharmaceutically equivalent drug products that, if administered in the same amounts, will provide the same therapeutic effect, identical in duration and intensity.

(7) [~~(8)~~] Original prescription--The:

(A) original written prescription drug orders; or

(B) original verbal or electronic prescription drug orders reduced to writing either manually or electronically by the pharmacist.

(8) [~~(9)~~] Practitioner--

(A) A person licensed or registered to prescribe, distribute, administer, or dispense a prescription drug or device in the course of professional practice in this state, including a physician, dentist, podiatrist, therapeutic optometrist, or veterinarian but excluding a person licensed under this subtitle;

(B) A person licensed by another state, Canada, or the United Mexican States in a health field in which, under the law of this state, a license holder in this state may legally prescribe a dangerous drug;

(C) A person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration registration number and who may legally prescribe a Schedule II, III, IV, or V controlled substance, as specified under Chapter 481, Health and Safety Code, in that other state; or

(D) An advanced practice nurse or physician assistant to whom a physician has delegated the authority to carry out or sign prescription drug orders under §§157.052, 157.053, 157.054, 157.0541, or 157.0542, Occupations Code.

§309.3. Generic Substitution.

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

(e) Refills.

(1) (No change.)

(2) Narrow therapeutic index drugs.

(A) The board, in consultation with the Texas State Board of Medical Examiners, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code. [~~The board has specified in §309.7 of this title (relating to dispensing responsibilities) that pharmacist shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication.~~]

(i) The board has specified in §309.7 of this title (relating to dispensing responsibilities) that for drugs listed in the publication, pharmacist shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication. For drugs listed in the publications, pharmacists [~~Pharmacists~~] may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(ii) (No change.)

(B) (No change.)

§309.7. Dispensing Responsibilities.

(a) The determination of the drug product to be substituted as authorized by the Subchapter A, Chapter 562 of the Act, is the professional responsibility of the pharmacist, and the pharmacist may not dispense any product that does not meet the requirements of the Subchapter A, Chapter 562 of the Act. As specified in Chapter 562 of the Act and §309.2 of this title (relating to definitions), a generically equivalent product is one that is pharmaceutically equivalent and therapeutically equivalent to the drug prescribed.

(b) Pharmacists shall use [~~utilize~~] as a basis for the determination of generic equivalency as defined in the Subchapter A, Chapter 562 of the Act, the following: [~~Approved Drug Products With Therapeutic Equivalence Evaluations (Orange Book) and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication.~~]

(1) For drugs listed in the publication, pharmacists shall use Approved Drug Products With Therapeutic Equivalence Evaluations (Orange Book) and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication, to determine generic equivalency. Pharmacists may only substitute products that are rated therapeutically equivalent in the Orange Book and have an "A" rating. "A" rated drug products include but are not limited to, those designated AA, AB, AN, AO, AP, or AT in the Orange Book.

(2) For drugs not listed in the Orange Book, pharmacists shall use their professional judgment to determine generic equivalency.

~~[(c) Pharmacists may only substitute products that are rated therapeutically equivalent in the Orange Book and have an "A" rating. "A" rated drug products include but are not limited to, those designated AA, AB, AN, AO, AP, or AT in the Orange Book.]~~

This 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 February 18, 2005.

TRD-200500760
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 305-8028

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

SUBCHAPTER A. LICENSING

22 TAC §851.32

The Texas Board of Professional Geoscientists (TBPG) proposes 22, Texas Administrative Code Chapter 851, §851.32, concerning continuing education. This newly proposed rule establishes both requirements and procedures related to the continuing education of licensed geoscientists in the State of Texas. Legislation enactment in 2001 of Senate Bill 405 required the Texas Board of Professional Geoscientists to adopt and implement a recommended timeline and criteria by which continuing education rules would be established that would enable licensed geoscientists to renew their licenses. The proposed rule provides language clarifying the agency's requirement of number of educational hours as well as acceptable courses applicable to continuing education. The need for this clarification is based on feedback from the geological community in the agency's initial year of operation.

Michael D. Hess, Executive Director of the Texas Board of Professional Geoscientists, has determined that for the first five years that this rule is in effect there will be no fiscal implication for state and local government as a result of enforcement and administration of this section.

Mr. Hess has also determined that for each year of the first five years that this section is in effect, the State of Texas can anticipate public benefit as a result of enforcement and enhancement of the professional practice of geology through the requirement of an increased level of education for the geoscience licensed population. There will not be an effect on small or micro businesses, however it is anticipated that there will be an economic cost to licensees in order to take the required educational courses.

Comments on the proposal may be submitted in writing to Michael D. Hess, Executive Director, P.O. Box 13225, Austin, Texas 78701, (512) 936-4401. Comments may also be submitted electronically to *geoscience@tbpg.state.tx.us* or faxed to (512) 936-4409. All comments must be received 30 days after publication of this rule in the *Texas Register*. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of a proposed new section has been published in the *Texas Register*.

The new section is proposed under the Texas Occupations Code, Chapter 1002, which authorizes the Board to adopt a mandated continuing education process and criteria by which all licensees will participate prior to their annual license renewal.

The proposed section implements the Texas Occupations Code, §1002.302.

§851.32. Continuing Education Program.

(a) Each license holder shall meet the Continuing Education Program (CEP) requirements for professional development as a condition for license renewal.

(b) Terms used in this section are defined as follows:

(1) Professional Development Hour (PDH)--A contact hour (clock hour) of CEP activity. PDH is the basic unit for CEP reporting.

(2) Continuing Education Unit (CEU)--Unit of credit customarily used for continuing education courses. One continuing education unit equals 10 hours of class in an approved continuing education course.

(3) College/Unit Semester/Quarter Hour--Credit for course in a discipline of geoscience or other related technical elective of the discipline.

(4) Course/Activity--Any qualifying course or activity with a clear purpose and objective which will maintain, improve, or expand the skills and knowledge relevant to the license holder's field of practice.

(c) Every license holder is required to obtain 15 PDH units during the renewal period year.

(d) A minimum of 1 PDH per renewal period must be in the area of professional ethics, roles and responsibilities of professional geoscientists, or review on-line of the Texas Geoscientist Practice Act and Board Rules.

(e) If a license holder exceeds the annual requirement in any renewal period, a maximum of 30 PDH units may be carried forward into the subsequent renewal periods.

(f) PDH units may be earned as follows:

(1) Successful completion or auditing of college credit courses.

(2) Successful completion of continuing education courses, either offered by a professional or trade organization, university or college, or offered in-house by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(3) Successful completion of correspondence, on-line, televised, videotaped, and other short courses/tutorials.

(4) Presenting or attending qualifying seminars, in-house courses, workshops, or professional or technical presentations made at meetings, conventions, or conferences sponsored by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(5) Teaching or instructing as listed in paragraphs (1) - (4) of this section.

(6) Authoring published papers, articles, books, or accepted licensing examination items.

(7) Active participation in professional or technical societies, associations, agencies, or organizations, including:

(A) Serving as an elected or appointed official;

(B) Serving on a committee of the organization;

(C) Serving in other official positions.

(8) Patents Issued.

(9) Engaging in self-directed course work.

(10) Software Programs Published.

(g) All activities described in subsection (f) of this section shall be relevant to the practice of a discipline of geoscience and may include technical, ethical, or managerial content.

(h) The conversion of other units of credit to PDH units is as follows and subject to subsection (g) of this section

(1) 1 College or unit semester hour--15 PDH

(2) 1 College or unit quarter hour--10 PDH

(3) 1 Continuing Education Unit--10 PDH

(4) 1 Hour of professional development in course work, seminars, or professional or technical presentations made at meetings, conventions, or conferences--1 PDH

(5) 1 Hour of professional development through self-directed course study (Not to exceed 5 PDH)--1 PDH

(6) Each published paper or article--10 PDH and book--45 PDH

(7) Active participation, as defined in subsection (f)(7) of this section, in professional or technical society, association, agency, or organization (Not to exceed 5 PDH per year)--1 PDH

(8) Each patent issued--15 PDH

(9) Each software program published--15 PDH

(10) Teaching or instructing as described in subsection (f)(5) of this section--3 times the PDH credit earned.

(i) Determination of Credit

(1) The Board shall be the final authority with respect to whether a course or activity meets the requirements of these rules.

(2) The Board shall not pre-approve or endorse any CEP activities during the first two years after the effective date of this rule. It is the responsibility of each license holder to assure that all PDH credits claimed meet CEP requirements. However, a course provider may contact the Board for an opinion for whether or not a course or technical presentation would meet the CEP requirements. Two years after the effective date of this rule, pre-approval will be required.

(3) Credit for college or community college approved courses will be based upon course credit established by the college.

(4) Credit for qualifying seminars and workshops will be based on one PDH unit for each hour of attendance. Attendance at qualifying programs presented at professional and/or technical society meetings will earn PDH units for the actual time of each program.

(5) Credit for self-directed course work will be based on one PDH unit for each hour of study and is not to exceed 5 PDH per renewal period. Credit determination for self-directed course work is the responsibility of the license holder and subject to review as required by the board.

(6) Credit determination for activities described in subsection (h)(6) of this section is the responsibility of the license holder and subject to review as required by the board.

(7) Credit for activity described in subsection (h)(7) of this section requires that a license holder serve as an officer of the organization, actively participate in a committee of the organization, or perform other activities such as making or attending a presentation at a meeting or writing a paper presented at a meeting. PDH credits are not earned until the end of each year of service is completed.

(8) Teaching credit, as defined in subsection (f)(5) of this section, is valid for teaching a course or seminar for the first time only.

(j) The license holder is responsible for maintaining records to be used to support credits claimed. Records required include, but are not limited to:

(1) A log, on a form provided by TBPG, showing the type of activity claimed, sponsoring organization, location, duration, instructor's or speaker's name, and PDH credits earned; and

(2) Attendance verification records in the form of completion certificates, receipts, attendance roster, or other documents supporting evidence of attendance.

(k) The license holder must submit CEP certification on the log form provided by TBPG and a list of each activity, date, and hours claimed that satisfy the CEP requirement for that renewal year when audited. A percentage of the licenses will be randomly audited each year.

Figure: 22 TAC §851.32(k)

(l) CEP records for each license holder must be maintained for a period of three years by the license holder.

(m) CEP records for each license holder are subject to audit by the board or its authorized representative.

(1) Copies must be furnished, if requested, to the Board or its authorized representative for audit verification purposes.

(2) If upon auditing a license holder, the Board finds that the activities cited do not fall within the bounds of educational, technical, ethical, or professional management activities related to the practice of geoscience; the board may require the license holder to acquire additional PDH as needed to fulfill the minimum CEP requirements.

(n) A license holder may be exempt from the professional development educational requirements for one of the following reasons listed in paragraphs (1) - (5) of this subsection:

(1) New license holders by way of examination shall be exempt for their first renewal period.

(2) A license holder serving on active duty and deployed outside the United States, its possessions and territories, in or for the military service of the United States for a period of time exceeding one hundred twenty (120) consecutive days in a year shall be exempt from obtaining the professional development hours required during that year.

(3) A license holder employed outside the United States, its possessions and territories, actively engaged in the practice of geoscience for a period of time exceeding three hundred (300) consecutive days in a year shall be exempt from obtaining the professional development hours required during that year except for five (5) hours of self-directed course work.

(4) License holders who list their status as "Inactive" and who further certify that they are no longer receiving any remuneration from providing professional geoscience services in Texas shall be exempt from the professional development hours required.

(5) License holders experiencing long term physical disability or illness. may be exempt by applying for "inactive" status. Supporting documentation must be furnished to the board.

(o) A license holder may bring an inactive license to active status by obtaining all delinquent PDH units. However, if the total number required to become current exceeds 30 units, then 30 units shall be the maximum number required.

(p) Noncompliance:

(1) If a license holder does not certify that CEP requirements have been met for a renewal period, the license shall be considered expired and subject to late fees and penalties.

(2) A determination by audit that CEP requirements have been falsely reported shall be considered to be misconduct and will subject the license holder to disciplinary action.

This agency hereby certifies that the 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 February 16, 2005.

TRD-200500738
Michael D. Hess
Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 936-4400

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TITLE 28. INSURANCE

PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 112. SCOPE OF LIABILITY FOR COMPENSATION

The Texas Workers' Compensation Commission (the commission) proposes amendments to §112.102 concerning Agreements between Motor Carriers and Owner Operators, §112.200 concerning Definition of Residential Structures, and §112.402 concerning Determination of Equivalent Benefits for Professional Athletes. Recent rule review identified the need for amendments to these rules to reflect current Texas Labor Code citations.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed §112.102(f) corrects the Texas Workers' Compensation Act citation from §3.24 to §406.005.

Proposed §112.200 corrects the Texas Workers' Compensation Act citation from §3.06 to §406.142,

Proposed §112.402 corrects the Texas Workers' Compensation Act citations from Texas Civil Statutes, Article 8308, 3.075 to Texas Labor Code, §406.095.

Brent Hatch, Director of Customer Services, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Hatch has also determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule will be the use of current statutory citations. The amendments are necessary only for the purpose of updating outdated references.

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed.

There will be no costs of compliance for small businesses. There will be no adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., April 4, 2005. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Rules" and then clicking on "Proposed Rules for Comment." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Linda Velasquez, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held at the Austin central office of the commission (7551 Metro Center Drive, Suite 100,

Austin, Texas) on a date to be announced. Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

SUBCHAPTER B. APPLICATION TO GENERAL CONTRACTOR/SUBCONTRACTOR AND MOTOR CARRIER/OWNER OPERATOR

28 TAC §112.102

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.005, which requires employers to notify employees of workers' compensation coverage; the Texas Labor Code, §406.095 which allows certain professional athletes to elect coverage under the Act or under contract agreement; Certain Professional Athletes, Texas Labor Code, §406.121 through §406.127 which address the coverage of certain independent contractors, and Texas Labor Code, §406.141 through §406.146 which address coverage of certain building and construction workers.

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

§112.102. Agreements between Motor Carriers and Owner Operators.

(a) A motor carrier and an owner operator may enter into an agreement which requires the owner operator to assume the responsibilities of an employer for the performance of work.

(b) An agreement made under subsection (a) of this section shall be made at or before the time the contract for the work is made and shall:

(1) be in writing;

(2) state that the owner operator assumes the responsibilities of an employer for the performance of work;

(3) contain the signatures of both parties;

(4) indicate the date the agreement was made, the term the agreement will be effective, the estimated number of workers affected by the agreement, the federal tax identification number of the parties; and

(5) be provided to the insurance carrier of the motor carrier within 10 days of execution.

(c) A motor carrier and an owner operator may enter into an agreement under which the motor carrier provides workers' compensation insurance coverage to the owner operator and the owner operator's employees.

(d) An agreement made under subsection (c) of this section shall be made at or before the time the contract for the work is made and shall:

(1) be in writing;

(2) indicate whether the motor carrier will make a deduction for the premiums;

(3) contain the signatures of both parties;

(4) indicate the date the agreement was made, the term the agreement will be effective, the estimated number of workers affected by the agreement, the federal tax identification number of the parties; and

(5) be filed with the commission in Austin and the insurance carrier of the motor carrier within 10 days of execution.

(e) The workers' compensation insurance coverage provided by the motor carrier under the agreement shall take effect no sooner than the date on which the agreement was executed and deductions for the premiums shall not be made for coverage provided prior to that date.

(f) The motor carrier shall be required to give the owner operator's employees the notice required under the Texas Workers' Compensation Act, §406.005 [~~§3.24(e)~~], when such an agreement is made.

This 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 February 18, 2005.

TRD-200500763
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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SUBCHAPTER C. APPLICATION TO CERTAIN BUILDING AND CONSTRUCTION WORKERS

28 TAC §112.200

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.005, which requires employers to notify employees of workers' compensation coverage; the Texas Labor Code, §406.095 which allows certain professional athletes to elect coverage under the Act or under contract agreement; Certain Professional Athletes, Texas Labor Code, §406.121 through §406.127 which address the coverage of certain independent contractors, and Texas Labor Code, §406.141 through §406.146 which address coverage of certain building and construction workers.

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

§112.200. Definition of Residential Structures.

For purposes of the Texas Workers' Compensation Act (the Act), §406.142 [~~§3.06~~], "residential structures" are buildings used as a family dwelling or multi-family dwelling, limited to a single-family residence, a duplex, a triplex, and a quadraplex. All other types of structures used for living purposes shall be considered commercial structures, and shall only be included within the scope of the Act, §406.142 [~~§3.06~~], if they do not exceed three stories or 20,000 square feet.

This 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 February 18, 2005.

TRD-200500764

Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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SUBCHAPTER E. PROFESSIONAL ATHLETES ELECTION OF COVERAGE

28 TAC §112.402

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.005, which requires employers to notify employees of workers' compensation coverage; the Texas Labor Code, §406.095 which allows certain professional athletes to elect coverage under the Act or under contract agreement; Certain Professional Athletes, Texas Labor Code, §406.121 through §406.127 which address the coverage of certain independent contractors, and Texas Labor Code, §406.141 through §406.146 which address coverage of certain building and construction workers.

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

§112.402. Determination of Equivalent Benefits for Professional Athletes.

(a) Medical care available to a professional athlete subject to the Texas Workers' Compensation Act (the Act), Texas Labor Code, §406.095[~~Texas Civil Statutes, Article 8308-3.075~~], is equal to or greater than medical benefits under the Act if:

(1) the athlete is entitled to all health care reasonably required by the nature of the work-related injury as and when needed, including all health care that:

(A) cures or relieves the effects naturally resulting from the work-related injury;

(B) promotes recovery; or

(C) enhances the ability of the employee to return to or retain employment; and

(2) the employer's liability for health care is not limited or terminated in any way by the contract or collective bargaining agreement.

(b) When the athlete is not eligible for lifetime income benefits or when the athlete's legal beneficiaries are not eligible for death benefits under the Act, weekly benefits available to a professional athlete subject to the Act, §406.095 [~~Article 8308-3.075~~], are equal to or greater than the income benefits provided under the Act if the total amount of the payments provided for in the contract or collective bargaining agreement is equal to or greater than the maximum weekly benefit available under the Act multiplied by 104.

(c) When the athlete is entitled to lifetime income benefits under the Act, weekly benefits available to a professional athlete subject to the Act, §406.095 [~~Article 8308-3.075~~], are equal to or greater than the income benefits provided under the Act if equal to or greater than the maximum weekly benefit available under the Act.

(d) When the athlete's legal beneficiaries are entitled to death benefits under the Act, weekly benefits available to the legal beneficiaries of a professional athlete subject to the Act, §406.095 [~~Article 8308-3.075~~], are equal to or greater than the death benefits provided under the Act if equal to or greater than the maximum weekly benefit available under the Act.

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500765
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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CHAPTER 133. GENERAL MEDICAL PROVISIONS
SUBCHAPTER E. COMPELLING PRODUCTION OF DOCUMENTS

28 TAC §133.401, §133.403

The Texas Workers' Compensation Commission (the commission) proposes amendments to §133.401 and §133.403, concerning Orders for Production of Documents and Noncompliance; Enforcement. The amendments expand the commission staff who can request issuance of an order to produce and update statutory citation.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

The proposed amendments to §133.401(a) and (c), revise the rule to allow all commission employees, rather than only Medical Review employees, to submit a written request to the executive director or designee to issue an order for the production of documents and clarify what documents may be requested.

The proposed amendment to §133.403(a) deletes an outdated citation and replaces it with a citation to the current codified version of the Texas Workers' Compensation Act.

Mr. Allen McDonald, Medical Review Director, has determined that for the first five-year period the proposed rules are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

There will be no fiscal implication for local governments with respect to enforcing or administering the proposed amendments to the rules, as local government has no regulatory role in the rule amendments as proposed.

Local government and state government as covered regulated entities will be impacted in the same manner as described later in this preamble for persons required to comply with the rules as proposed.

Mr. McDonald has also determined that for each year of the first five years the rules as proposed are in effect the public benefits anticipated as a result of enforcing the rules will be additional clarity and updated citations which make the rules easier to understand.

There will be no anticipated economic costs to persons who are required to comply with the rules as proposed.

There will be no costs of compliance for small businesses. There will be no adverse economic impact on small businesses or micro-businesses.

Comments on the proposed rule amendments must be received by 5:00 p.m., April 4, 2005. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and clicking on "Rules" then clicking on "Proposed Rules for Comment." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Linda Velasquez at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, TX 78744.

Commenters are requested to clearly identify by number the specific rule (e.g., 133.401 and 133.403) commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part.

A public hearing on this proposal will be held at the Austin central office of the commission (7551 Metro Center Drive, Suite 100, Austin, Texas) on a date to be announced. Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communications at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

The amendments are proposed under the Texas Labor Code §402.61, which authorizes the commission to adopt rules necessary for the implementation and enforcement of the Texas Workers' Compensation Act; Texas Labor Code §413.052, which requires the commission to adopt rules to establish procedures enabling the commission to compel the production of documents; and Texas Labor Code §415.021, which allows the commission to establish an administrative penalty against a person who commits an administrative violation.

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

§133.401. Orders for Production of Documents.

(a) The executive director or designee may issue an order for the production of documents upon the written request of an employee of the commission, [~~medical review division~~] which establishes good cause for issuance.

(b) The request for issuance of an order for the production of documents shall be sufficient to establish good cause if it contains:

(1) a description of the documents sought with adequate particularity;

(2) the name of the person believed to be in possession of the documents and the address or location where the documents are believed to be; and

(3) a statement that such documents are needed in an identified matter.

(c) An order for the production of documents may be issued at any time to obtain documents relating to a matter within the authority of the commission [~~division of medical review~~].

§133.403. Noncompliance; Enforcement.

(a) Noncompliance with an order for the production of documents is punishable as an administrative violation under Texas Labor Code §415.021(b)(3) [~~Texas Civil Statutes, Article 8308-10.21(b)(3)~~], with a penalty not to exceed $10,000.

(b) In addition to initiation of administrative violation proceedings, compliance with an order for the production of documents may be enforced by means of a civil proceeding filed in a district court in Travis County.

This 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 February 18, 2005.

TRD-200500767
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER C. MEDICAL FEE GUIDELINES

28 TAC §134.303

The Texas Workers' Compensation Commission (the commission) proposes a new rule, §134.303, concerning the 2005 Dental Fee Guideline.

This new rule is proposed to update reimbursement guidelines for dental services provided in the Texas workers' compensation system. The proposed rule establishes new reimbursement guidelines for dental services by applying a multiplier of 200% to the fees listed in the most current Texas Medicaid Dental Fee Schedule. The increase in the multiplier from the current 125% to 200% is intended to strike the proper balance between establishing fair and reasonable guidelines for medical services fees that ensure continuing quality of medical care and achieving effective medical cost control. The proposed new rule severs the dental component of the Medical Fee Guideline, contained within §134.202 of this title, concerning Medical Fee Guideline (MFG) for dental services provided on or after June 1, 2005, and creates a standalone Dental Fee Guideline responsive to current economic indicators in this segment of the medical services market.

Dental fees, as a subset of medical fees, must satisfy the standards for medical fees established in Texas Labor Code §413.011. Subsection (d) of that section requires guidelines for medical services fees to be fair and reasonable and designed

to ensure the quality of medical care and to achieve effective medical cost control. The guidelines may not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf. The commission must consider the increased security of payment afforded by the Texas Workers' Compensation Act in establishing the fee guidelines.

More recent statutory requirements added to §413.011 of the Texas Labor Code also require that the commission use health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. In order to achieve standardization, the statute additionally requires the commission to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Health Care Financing Administration (HCFA), (now known as the Centers for Medicare and Medicaid Services (CMS)), including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet the requirements of Texas Labor Code §413.053 (relating to Standards of Reporting and Billing). The commission is required to develop conversion factors or other payment adjustment factors in determining appropriate fees, taking into account economic indicators in health care. However, the commission may not adopt conversion factors or other payment adjustment factors based solely on those factors as developed by the HCFA.

The current reimbursements for professional dental services are established by §134.202(c)(4) of this title, concerning Medical Fee Guideline (MFG). The MFG provides maximum allowable reimbursement (MAR) amounts for health care providers (HCPs) treating injured workers in Texas. For dental treatments and services, the established MAR amount in the MFG is the Texas Medicaid Dental Fee Schedule multiplied by 125%, as the national Medicare system does not provide for reimbursement to professional dental health care providers. The proposed rule increases the multiplier to 200% to ensure continued access to quality dental services.

The proposed rule will be applicable to professional dental services provided on or after June 1, 2005. The proposed rule additionally clarifies that for professional dental services provided August 1, 2003 through May 31, 2005, §134.202 of this title (relating to Medical Fee Guideline) shall be applicable. Professional dental services provided December 1, 1996 through July 31, 2003 shall be reimbursed in accordance with §134.302 of this title, concerning the commission's previous Dental Fee Guideline.

Commission staff met with dental providers to discuss the current reimbursement methodology contained in §134.202 of this title (relating to Medical Fee Guideline). That reimbursement is currently set at 125% of the Texas Medicaid Dental Fee Schedule. The dental representative member of the commission's Medical Advisory Committee offered a sampling of 16 dental procedure codes as representative dental services that might be provided in workers' compensation cases. This sampling information contained preferred provider organization reimbursement amounts and the dental representative's usual, customary, and reasonable (UCR) charges. This data was compared to published dental reimbursement amounts for workers' compensation systems in three other states (Kansas, North Carolina, and Florida). The data reflected that total average reimbursement for the 16 codes ranged from 105% (Florida) to 261% (UCR) of the Texas Medicaid Dental Fee Schedule.

The commission also met with carrier representatives and held a stakeholders meeting. A preproposal rule draft was shared with interested parties prior to the stakeholder meeting. As a result of the October 14, 2004 meeting, the commission requested system participants, providers and carriers, to submit their charge and reimbursement information relating to their 20 most frequently utilized dental codes for the 12-month period prior to the implementation of the current Medical Fee Guideline. The commission received additional significant information from three carriers, the Texas Dental Association, and Medata, a health care information data collection service. The commission also received information from a limited number of providers and payers. This data reflected that total average reimbursement for a larger sampling of 33 dental procedure codes ranged from 206% (TMIC) to 293% (Travis County) of Texas Medicaid Dental Fee Schedule.

Texas Labor Code §413.011 requires the commission to adopt necessary conversion factors or payment adjustment factors to establish fair and reasonable reimbursement in the Texas workers' compensation system. Additionally, the commission must take into account economic indicators in health care and the requirements found in subsection (d) of §413.011. The statute also states that the commission shall not adopt a conversion or payment adjustment factor based solely on those factors developed by the Centers for Medicare and Medicaid Services (formerly HCFA). Consistent with the information received from the system stakeholders, the commission is proposing a new multiplier of 200% to be applied to the most current Texas Medicaid Dental Fee Schedule reimbursement rates for professional dental treatments and services.

In considering subsection (d) of §413.011, the proposed multiplier establishes fair and reasonable reimbursement that is designed to ensure continued access to quality care, along with appropriate medical cost control.

Dental treatments and services are infrequently provided in the workers' compensation system and, as such, are unlikely to be a significant contributor to Texas' high medical costs per claim. The proposed multiplier for dental treatment and services is higher than that of the current Medical Fee Guideline because the multiplier of 125%, as now applied to the Texas Medicaid Dental Fee Schedule, has been determined to be at the lower end of the average reimbursements for the dental procedure codes analyzed by commission staff. The recommended multiplier of 200% has been chosen to ensure continued access to quality dental care for injured workers, and is responsive to the cited economic indicators in this segment of the medical services market.

Proposed new §134.303 establishes reimbursements for professional dental treatments and services. The proposed new rule provides standardized reimbursement methods and billing procedures by aligning the workers' compensation reimbursement structure with the structures used by CMS and the Texas Medicaid Program.

Proposed subsection (a) of the rule establishes the applicability of this guideline to reimbursements for professional dental services provided on or after June 1, 2005. The proposed rule additionally clarifies that for professional dental services provided

August 1, 2003 through May 31, 2005, §134.202 of this title (relating to Medical Fee Guideline) shall be applicable. Professional dental services provided December 1, 1996 through July 31, 2003 shall be reimbursed in accordance with §134.302 of this title, concerning the commission's previous Dental Fee Guideline. Specific provisions contained in the Texas Workers' Compensation Act and commission rules shall take precedence over any provision adopted or utilized by Texas Medicaid in administering the Texas Medicaid Dental Fee Schedule. Proposed subsection (a) establishes that Independent Review Organization (IRO) decisions regarding medical necessity are made on a case-by-case basis. The commission will monitor IRO decisions to determine whether commission rulemaking action would be appropriate. Proposed subsection (a) additionally provides that whenever a component of the Texas Medicaid Dental Fee Schedule is revised and effective, use of the revised component shall be required for compliance with commission rules, decisions and orders for services rendered on or after the effective date of the revised component. This will prevent the proposed rule from falling out of synchronization with the Texas Medicaid Dental Fee Schedule and will achieve the standardization goals established in Texas Labor Code §413.011.

Proposed subsection (b) of the rule requires system participants to utilize the Texas Medicaid Dental Fee Schedule, including its coding, billing, reporting, and reimbursement of dental treatments and services, in effect on the date a service is provided, with further application of any additions or exceptions in this section. This allows for the basic reimbursements of the Texas Medicaid Dental Fee Schedule to be applied to the Texas workers' compensation system.

Proposed subsection (c) establishes the method to be used for determining the maximum allowable reimbursement (MAR) for dental treatments and services in the Texas workers' compensation system. In establishing the multiplier of 200% to be applied to the current Texas Medicaid Dental Fee Schedule for the rule, the commission considered the statutory requirements and objectives and utilized current commission reimbursement levels, available dental provider payer information, and other states' workers' compensation reimbursements for comparable dental treatment and services.

Proposed subsection (c) also provides that for products and services for which the Texas Medicaid Dental Fee Schedule does not establish a value, the carrier shall assign a relative value, which may be based on nationally recognized published relative value studies, published commission medical dispute decisions, and values assigned for services involving similar work and resource commitments.

If multiple procedures are performed during the same operative session, proposed subsection (d) provides for reimbursement of the procedure with the highest MAR value at 100% of its MAR, and reimbursement for each subsequent procedure at 50% of its MAR value.

Proposed subsection (e) provides that reimbursement for dental laboratory procedures is bundled with the maximum fees for the associated dental procedures. No additional reimbursement shall be due.

Proposed subsection (f) provides that in all cases as established by this rule, reimbursement for dental treatment and services is the lesser of the MAR amount; the healthcare provider's usual and customary charge; or workers' compensation negotiated and/or contracted amount that applies to the billed service(s).

Allen McDonald, Director of the Medical Review Division, has determined that for the first five-year period the proposed rule is in effect, there will be minimal fiscal implications for state or local governments as a result of enforcing or administering the rule.

Local government and state government, as covered regulated entities, will be impacted in the same manner as for persons required to comply with the rule as proposed.

Mr. McDonald has also determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule will be to ensure access to dental treatments and services for injured workers as a result of raising reimbursements.

Health care providers will benefit from this rule by receiving increased reimbursement for the infrequent provision of dental services in the workers' compensation system.

Employers will benefit from the injured workers' prompt return to work and the potential for decreased premiums.

Carriers will benefit from the injured workers' prompt return to work and decreased indemnity payments.

The increase in the multiplier to be applied to the Texas Medicaid Dental Fee Schedule, from 125% to 200%, will result in a slight increase in total reimbursements for system participants required to comply with the rule. As an example, a major state agency reported the use of only eight dental codes, used a total of nine times, for the 12-month period of August 1, 2002 through July 31, 2003. Based on this reported activity, it is estimated that this major state agency's reimbursement for dental services would increase less than $1,000.

Dental treatments and services are infrequently required in the workers' compensation system. Although the commission has not collected dental billing and reimbursement information, based on information provided by carriers, the commission estimates that total dental reimbursement is less than $5 million per year. Comparatively, this represents less than 0.3% of the greater than $1.6 billion total system medical costs in 2003. Additionally, the commission clarifies that the proposed multiplier of 200% to be applied to the Texas Medicaid Dental Fee Schedule is comparable to the estimated average fair and reasonable reimbursement made under the application of §134.302 of this title (related to Dental Fee Guideline) in effect December 1, 1996 through July 31, 2003.

Consequently, there will be minimal anticipated economic costs to persons who are required to comply with the rule as proposed. It is also anticipated that there will be minimal costs of compliance for small businesses. Accordingly, there will be no adverse economic impact on small businesses or micro-businesses. The minimal costs of compliance for small businesses and micro-businesses as compared to large businesses will be proportionately the same.

Comments on the proposed rule must be received by 5:00 p.m., April 4, 2005. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us*, clicking on "Rules," and then on "Proposed Rules For Comment." This medium for commenting will help you organize your comments. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Linda Velasquez, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite #100, Austin, Texas 78744-1609.

Commenters are requested to clearly identify by number the specific rule and paragraph (e.g., 134.303 (a)(1), 134.303(b)(2), etc.) commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

Persons in support or opposition of the rule as proposed, in whole or in part, are encouraged to comment to that effect. The failure to comment accordingly is not indicative of support or opposition.

A public hearing on this proposal will be held at the Austin central office of the commission (7551 Metro Center Drive, Suite #100, Austin, Texas 78744-1609) on a date to be announced. Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

The new rule is proposed under Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; Texas Labor Code §408.021, which entitles injured employees to all health care reasonably required by the nature of the injury as and when needed; Texas Labor Code §413.002, which requires the commission's Medical Review Division monitor health care providers, insurance carriers and claimants to ensure compliance with commission rules; Texas Labor Code §413.007, which sets out information to be maintained by the commission's Medical Review Division; Texas Labor Code §413.011, which mandates that the commission by rule establish medical policies and guidelines; Texas Labor Code §413.012, which requires review and revision of the medical policies and fee guidelines at least every two years; Texas Labor Code §413.013, which requires the commission by rule to establish programs related to health care treatments and services for dispute resolution, monitoring, and review; Texas Labor Code §413.014, which requires express preauthorization by the insurance carrier for health care treatments and services; Texas Labor Code §413.015, which requires insurance carriers to pay charges for medical services as provided in the statute and requires that the commission ensure compliance with the medical policies and fee guidelines through audit and review; Texas Labor Code §413.016, which provides for refund of payments made in violation of the medical policies and fee guidelines; Texas Labor Code §413.017, which provides a presumption of reasonableness for medical services fees that are consistent with the medical policies and fee guidelines; Texas Labor Code, §413.019, which provides for payment of interest on delayed payments refunds or overpayments; and Texas Labor Code §413.031, which provides a procedure for medical dispute resolution.

The new rule is proposed under the Texas Labor Code §§402.061, 408.021, 413.002, 413.007, 413.011, 413.012, 413.013, 413.014, 413.015, 413.016, 413.017, 413.019, and 413.031.

The previously cited sections of the Texas Labor Code are affected by this proposed rule action. No other code, statute, or article is affected by this proposal.

§134.303. 2005 Dental Fee Guideline.

(a) Applicability of this rule is as follows:

(1) This section applies to professional dental services provided in the Texas Workers' Compensation system.

(2) This section shall be applicable to professional dental services provided on or after June 1, 2005. For professional dental services provided August 1, 2003 through May 31, 2005, §134.202 of this title (relating to Medical Fee Guideline) shall be applicable. For professional dental services provided December 1, 1996 through July 31, 2003, §134.302 of this title (relating to Dental Fee Guideline) shall be applicable.

(3) Specific provisions contained in the Texas Workers' Compensation Act (the Act), or Texas Workers' Compensation Commission (commission) rules, including this rule, shall take precedence over any provision adopted by or utilized by Texas Medicaid in administering the Texas Medicaid Dental Fee Schedule. Independent Review Organization (IRO) decisions regarding medical necessity are made on a case-by-case basis. The commission will monitor IRO decisions to determine whether commission rulemaking action would be appropriate.

(4) Whenever a component of the Texas Medicaid Dental Fee Schedule is revised and effective, use of the revised component shall be required for compliance with commission rules, decisions and orders for services rendered on or after the effective date of the revised component.

(b) For coding, billing, reporting, and reimbursement of dental treatments and services, Texas Workers' Compensation system participants shall apply the Texas Medicaid Dental Fee Schedule in effect on the date a service is provided with any additions or exceptions in this section.

(c) To determine the maximum allowable reimbursements (MARs), the following apply:

(1) The fees listed for the procedure codes in the Texas Medicaid Dental Fee Schedule shall be multiplied by 200%.

(2) For products and services for which the Texas Medicaid Dental Fee Schedule does not establish a value, the carrier shall assign a relative value, which may be based on nationally recognized published relative value studies, published commission medical dispute decisions, and values assigned for services involving similar work and resource commitments.

(d) If multiple procedures are performed during the same operative session, the following multiple procedures rule shall be utilized:

(1) reimbursement of the procedure with the highest MAR value is 100% of its MAR; and

(2) reimbursement for each subsequent procedure is 50% of its MAR value.

(e) Reimbursement for dental laboratory procedures is bundled with the maximum fees for the associated dental procedures. No additional reimbursement shall be due.

(f) In all cases, reimbursement shall be the lesser of the:

(1) MAR amount;

(2) health care provider's usual and customary charge; or

(3) workers' compensation negotiated and/or contracted amount that applies to the billed service(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.

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500768
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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CHAPTER 140. DISPUTE RESOLUTION--GENERAL PROVISIONS

28 TAC §140.1, §140.4

The Texas Workers' Compensation Commission (the commission) proposes amendments to §140.1 and §140.4, concerning Definitions and Conduct and Decorum. The amendments are proposed to correct the wording regarding referrals for administrative violations and to correct cites to the codified version of the Texas Workers' Compensation Act.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed amendments to §140.1, relating to Definitions, change statutory citations to the current codified version of the Act.

In proposed §140.4, relating to Conduct and Decorum, current rule language in subsection (c) is amended to more accurately reflect that the presiding officer has the authority to enforce proper conduct and decorum by referring an action to the commission's division of Compliance and Practices for consideration as a possible administrative violation or taking other appropriate action.

Dorian Ramirez, Director of Hearings, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Ms. Ramirez has also determined that for each year of the first five years the rules are in effect the public benefit will be additional clarity and updated citations which make the rules easier to understand. There will be no costs of compliance for small businesses. There will be no adverse economic impact on small businesses or micro-businesses.

System participants will benefit by additional clarity and updated citations which make the rule easier to understand.

Comments on the proposal must be received by 5:00 p.m., April 4, 2005. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Rules" and then clicking on "Proposed Rules for Comment." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Linda Velasquez, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held at the Austin central office of the commission (7551 Metro Center Drive, Suite 100, Austin, Texas) on a date to be announced. Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

The amendments are proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; Texas Labor Code, §410.025, which authorizes the commission to prescribe the time within which a benefit review conference shall be scheduled; Texas Labor Code, §410.027, which authorizes the commission to adopt rules governing the procedures under which benefit review conferences are conducted; Texas Labor Code, §410.111, which authorizes the commission to provide rules governing the procedures under which arbitration is conducted; Texas Labor Code, §410.157, which authorizes the commission to adopt rules governing the procedures under which contested case hearings are conducted.

The previously cited sections of the Texas Labor Code are affected by this rule action. No other code, statute, or article is affected by this rule action.

§140.1. Definitions.

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

(1) Benefit dispute--A disputed issue arising under the Texas Workers' Compensation Act (the Act) in a workers' compensation claim regarding compensability or eligibility for, or the amount of, income or death benefits.

(2) Benefit proceeding--A proceeding pursuant to the Act, Chapter 410 [~~Article 6~~], conducted by a presiding officer to resolve one or more benefit disputes. Benefit proceedings include benefit review conferences, benefit contested case hearings, appeals, and, after January 1, 1992, arbitration.

(3) Director of the hearings division--The director of the Division of Hearings and Review, or his delegatee.

(4) Party to a proceeding--A person entitled to take part in a proceeding because of a direct legal interest in the outcome.

(5) Presiding officer--The commission employee, or independent arbitrator, assigned to conduct a proceeding. Presiding officers include benefit review officers, hearing officers, and appeals panel members, and, after January 1, 1992, arbitrators.

(6) Special accommodations--Individuals and equipment necessary to allow an individual who does not speak English or who has a physical, mental, or developmental handicap to participate in a proceeding. The term includes spoken language translators and sign language translators.

(7) Stipulation--A voluntary accord between parties to a benefit contested case hearing regarding any matter relating to the hearing that does not constitute an agreement, as defined by the Act, §401.011(3) [~~§1.02(3)~~], or a settlement, as defined by the Act, §401.011(40) [~~§1.02(43)~~].

§140.4. Conduct and Decorum.

(a) The presiding officer may at the beginning of any proceeding and during the course of that proceeding establish rules of decorum to be followed during the proceeding. The presiding officer may also establish times for beginning the proceeding, for recesses, and for ending the proceeding.

(b) Parties and participants in a proceeding shall conduct themselves with dignity, shall show courtesy and respect for one another and for the presiding officer, shall follow the decorum prescribed by the presiding officer at the proceeding, and shall adhere to the beginning times of the proceeding, and to the times established for each recess and for ending the proceeding.

(c) To maintain and enforce proper conduct and decorum at a proceeding, and to enforce promptness at a proceeding, the presiding officer may take appropriate action, including, but not limited to:

(1) issuing a warning;

(2) excluding any person from the proceeding;

(3) recessing the proceeding; and

(4) referring an action for possible enforcement as [~~writing~~] an administrative violation.

This 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 February 18, 2005.

TRD-200500770
Susan Cory
General Counsel
Texas Workers' Compensation Commission
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CHAPTER 145. DISPUTE RESOLUTION--HEARINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT

28 TAC §§145.1 - 145.28

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

The Texas Workers' Compensation Commission (the commission) proposes the repeal of §§145.1 - 145.28, concerning Dispute Resolution--Hearings Under the Administrative Procedure Act. The repeal is proposed to remove rules addressing procedures for hearings that are now governed by the State Office of Administrative Hearings (SOAH) procedural rules in Title 1, Chapter 155 of the Texas Administrative Code (arising under the Texas Workers' Compensation Act). There are no dispute resolution hearings pending under the rules proposed to be repealed; therefore, the rules are no longer needed.

Heidi Jackson, Director of Claims Services, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications to state or local governments.

Local government and state government as a covered regulated entity will be impacted in the same manner as described for persons required to comply with the proposed repeal.

Ms. Jackson has also determined that for each year of the first five years the repeals are in effect the public benefits anticipated as a result of the proposed repeals will be that unnecessary and unused rules will no longer be in the commission's rules. This prevents confusion regarding what rules should be used.

There will be no anticipated economic costs to persons who are required to comply with the repeal of these rules. There will be no costs of compliance for small businesses. There will be no adverse economic impact on small businesses or micro-businesses. The cost of compliance for small businesses as compared to large businesses will be zero because the repeals do not affect cost.

Comments on the proposal must be received by 5:00 p.m., April 4, 2005. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Rules" and then clicking on "Proposed Rules for Comment." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Linda Velasquez, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rules as proposed for repeal, may be repealed or may be repealed only in part. Persons in support of the rules repeal, as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held at the Austin central office of the commission (7551 Metro Center Drive, Suite 100,

Austin, Texas) on a date to be announced. Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

The repeal is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, Texas Labor Code, §402.073, which authorizes the commission and SOAH to adopt a memorandum of understanding governing administrative procedure law hearings conducted by SOAH for the commission and authorizes SOAH to conduct certain hearings; Texas Labor Code, §413.031(k) that provides for a SOAH hearing after certain medical disputes; Texas Labor Code, §413.055(c) that provides for a SOAH hearing to contest an interlocutory medical order of the commission; Texas Labor Code, §411.049 that provides a hearing for an employer to contest findings of the commission under the Hazardous Employer Program; Texas Labor Code, §408.0231(e) that provides for a hearing on certain sanctions by the commission against a doctor or insurance carrier; Texas Labor Code, §415.034 that provides for a hearing to contest administrative violation sanctions initiated by the commission; and Texas Government Code, §2003.050 concerning procedural rules by SOAH.

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

This proposed repeal affects the following statutes: Texas Labor Code, §§402.061, 402.073, 413.031(k), 413.055(c), 411.049, 408.0231(e), 415.034 and Texas Government Code §2003.050.

§145.1. Scope and Applicability.

§145.2. Definitions.

§145.3. Requesting a Hearing.

§145.4. Notice of Hearing.

§145.5. Statement of Matters Asserted.

§145.6. Venue.

§145.7. Appearance.

§145.8. Withdrawal of Hearing Request.

§145.9. Informal Disposition.

§145.10. Filing Instruments; Furnishing Copies.

§145.11. Administrative Procedure and Texas Register Act Prehearing Conference.

§145.12. Request for Alternative Dispute Resolution.

§145.13. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

§145.14. Subpoenas; Depositions.

§145.15. Ex Parte Communications.

§145.16. Conduct and Decorum.

§145.17. Hearing Officer's Authority.

§145.18. Parties' Rights in Hearings.

§145.19. Failure To Appear.

§145.20. Recording the Hearing.

§145.21. Evidence.

§145.22. Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents.

§145.23. Decision of the Hearing Officer.

§145.24. Special Provisions for Imposing Sanctions Pursuant to the Texas Workers' Compensation Act, §2.09(f).

§145.25. Special Provisions for Administrative Penalties.

§145.26. Record of the Hearing.

§145.27. Transcript or Duplicate of the Hearing Audiotape.

§145.28. Expenses To Be Paid by Petitioner.

This 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 February 18, 2005.

TRD-200500771
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
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CHAPTER 148. HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

The Texas Workers' Compensation Commission proposes new §§148.1 - 148.23 concerning procedures governing certain hearings, conducted by the State Office of Administrative Hearings, to adjudicate disputes arising under the Texas Workers' Compensation Act (the Act). The commission also proposes simultaneous repeal of current §§148.1 - 148.28. These procedures are not applicable to benefit disputes, governed by Chapters 140, 142, and 143 of this title (related to Dispute Resolution-General Provisions; Benefit Contested Case Hearing; and Review by the Appeals Panel, respectively). These new procedural rules are proposed in order to reflect changes in other commission rules and practices, to coordinate commission rules with changes to the procedural rules of the State Office of Administrative Hearings, to clarify the requirements for the commission's processing of requests for subpoenas and for the issuance of commissions requiring depositions, and to provide related policies of the commission as, for example, the party who has the burden of proof in the contested case hearing.

Proposed new §148.1 incorporates the existing definitions of terms in current §148.2(1)-(4) and (6)-(9) with revisions. In addition, newly defined terms or acronyms are included in subsections (2), (6), (7), (9) and (13). In subsection (1), the definition of "Act" eliminates surplus verbiage "as specified in the Act." Subsection (2) adds a new definition for "Administrative Law Judge or ALJ" to be consistent with terminology used by the State Office of Administrative Hearings (SOAH) in its procedural rules in Chapter 155, Title 1 (relating to Rules of Procedure). Proposed new subsection (5) defines "Commission Representative" to reflect the practice of the commission to designate a commission representative only for some contested cases. The term "hearing officer" in existing subsection (5) has not been included because SOAH utilizes the terms "Administrative Law Judge" or "ALJ" instead. New subsection (6) defines "contested case" utilizing the basic definition in the Texas Government Code, §2001.003(1) and also includes references to sections of the Texas Labor Code that address contested cases handled by SOAH involving the Texas Workers' Compensation Act (Act). New subsection (7) defines the acronym "IRO" because Independent Review Organizations, established in accordance

with Insurance Code article 21.58C, perform certain reviews of health care under the Act and their decisions may be reviewed *de novo* in SOAH contested cases. Subsection (8) revises the definition of "Party" to specifically include a state agency named or admitted as a party because the commission and certain other state agencies (for example, the State Office of Risk Management) can be parties to SOAH contested cases. New subsection (9) defines a "person" utilizing the basic definition in the Texas Government Code, §2001.003(5). New subsection (13) defines "TWCC Chief Clerk" because the TWCC Chief Clerk is the person designated by the commission to receive important forms, notifications, and other documents from SOAH and persons and parties to SOAH contested cases.

Proposed new §148.2 includes the "Scope and Applicability" provisions currently contained in §148.1 with clarifying changes.

New subsection (a) adds the term "contested case," as defined in proposed new §148.1 (relating to Definitions), to specify the type of hearings and to add the words "before the SOAH" to limit the applicability of these rules to contested cases where the Act provides for SOAH hearings. Other changes clarify and update the subsection.

New subsection (b) summarizes the cases that the commission's Chapter 148 rules will govern and specifies certain, related policies of the commission applicable to such cases (for example, the burden of proof policies contained in proposed new §148.14 (relating to Burden of Proof)).

Proposed new subsection (c) incorporates the provisions of existing §148.1(b) except that the reference to Texas Labor Code, §408.023 is replaced with a reference to Texas Labor Code, §408.0231 because the latter section is the section that includes a right to a hearing. Also, the phrase "and in other cases not subject to §402.073(b) is added to clarify that the TWCC Commissioners render the final decision in cases not subject to Act, §402.073(b).

Proposed new §148.3: (1) clarifies how a person or state agency, including the staff of the commission, may send the commission a request for a contested case hearing before SOAH; (2) specifies how the "deemed" date of receipt for a request will be determined by the commission; (3) specifies how the commission will handle requests for contested case hearings after initial decisions are made in certain medical dispute cases; (4) specifies that late filings will be dismissed; and (5) specifies how requests for correction of clerical errors will be handled when made with a request for a hearing. Existing §148.3(a) has been deleted and replaced with new proposed subsection (a) to clarify the date, under the various provisions of the Act, when the 20-day rule limitations period for filing a request for a hearing begins.

New subsection (b) establishes the date when a request for a hearing, other than a request made pursuant to Texas Labor Code §413.031 for certain medical disputes, will be deemed as filed with TWCC.

New subsection (c) specifies requirements for a request for a SOAH contested case hearing after an initial medical dispute decision has been rendered either by the commission's Medical Review division for a medical fee dispute or an IRO for an applicable medical necessity dispute. This subsection does not apply to requests for SOAH hearings after an IRO decision with respect to prospective medical necessity of spinal surgery (where such requests must be filed in accordance with §133.308(v) of this title (relating to Medical Dispute Resolution by Independent Review Organization). In addition, this rule does not apply to case reviews completed pursuant to the commission's alternate medical dispute process in accordance with §133.309 of this title (relating to Alternate Medical Necessity Dispute Resolution by Case Review Doctor) because under that rule the decision of the case review doctor constitutes the final administrative decision.

New subsection (d) clarifies that a request for a SOAH hearing will be dismissed if filed later than twenty days after receipt of the original medical dispute decision.

New subsection (e) specifies how a request for a SOAH hearing will be handled by the commission if that request also contains a request for correction of a clerical error in the original decision.

New subsection (f) addresses correction of clerical errors discovered by the commission.

New subsection (g) specifies that the commission will send the request for hearing to SOAH within 20 working days of receipt unless a decision is withdrawn in accordance with proposed new §148.8 of this title (relating to Withdrawal of Hearing Request) or unless the parties have been notified of the commission's intent to revise the order or decision pursuant to subsections (e) or (f). While decisions will be forwarded as soon as practical, the maximum period of time should allow the parties time to informally resolve disputed matters and to then withdraw the request for hearing or should allow the commission adequate time to initiate a clerical correction process based upon information provided to it or based upon its review of the prior decision.

New subsections (h) and (i) contain the provisions of existing §148.3(c) and (d) but the term "adverse action" has been deleted as unnecessary.

Proposed new §148.4 provides that the commission may revise an order or decision of the Medical Review Division to correct a clerical error either at the request of one or more parties to such an order or decision or by decision of the commission's Executive Director or his designee. This is a companion section to proposed new §148.3 and, in contrast, only addresses correction of a clerical error not associated with a request for a hearing. The procedures are similar to the procedures in proposed new §148.3 except that the commission's actions will be taken not later than 30 days after a request for clerical correction is received from a party and the commission's action in any particular request, shall either be to: (1) issue and deliver to the parties a corrected order or decision, (2) advise the parties in writing that the order or decision was correct as originally entered, or (3) advise the parties in writing that the order or decision cannot be corrected pursuant to this section (for example, if the requested clerical correction is not determined to be a clerical error issue). If a clerical correction is made by decision of the commission's executive director or his designee, the correction may be made either without notice to the parties (for example, concerning an obvious error or errors requiring immediate correction) or by a procedure that includes notice of the intended correction, a period for receiving response, and action of the commission's executive director or designee under the three options summarized previously.

Proposed new §148.5 includes provisions of existing §148.4 except that existing subsections (a) and (d) have been deleted because related commission policies are addressed elsewhere (in proposed new Chapter 149 and in the SOAH procedural rules).

New subsection (a) contains provisions of existing §148.4(b) except for: (1) revisions in accordance with the definitions in proposed new §148.1 of this title (relating to Definitions); (2) additional language "and upon receipt of the docket number, location and setting date from SOAH" to recognize information that must be received from SOAH before a notice of hearing can be sent in accordance with Texas Government Code, §2001.052; (3) additional language "a notice regarding failure to appear and default judgments" to emphasize possible actions in a case pursuant to SOAH's procedure rule at §155.55 of title 1 (relating to Failure to Attend Hearing and Default); and (4) additional language "...and any rules involved, nature of the hearing..." to clarify that rules will be specified only when any rules are involved and that the nature of the hearing will be specified in compliance with Texas Government Code, §2001.052(a)(1).

New subsection (b) contains provisions of existing §148.4(c) except to use terms defined in proposed new §148.1 of this title (relating to Definitions) and to clarify some of the notice information requirements may be provided by the commission's representative and, if so, would not be provided by the TWCC Chief Clerk.

Proposed new §148.6 includes the addition of "Texas" to the "Austin, Travis County" location for SOAH contested case hearings and deletes the provisions concerning appearing at the hearing or participating by telephone conference call because those procedures are specified in SOAH's rule in §155.45 of title 1 (relating to Participation by Telephone).

Proposed new §148.7 does not include the language contained in current §148.7 because the SOAH rules of procedure in Chapter 155 of Title 1 (relating to Rules of Procedure) preempt TWCC procedural rules and because the SOAH rules address appearance and representation generally. However, because the Act contains specific requirements on representation of injured employees and insurance carriers and because the commission has interpreted those requirements in its rules in Chapter 150 of this title (relating to Representation Of Parties Before The Agency Qualifications of Representatives), new §148.7 addresses the additional qualification requirements for representatives of injured employees and insurance carriers.

Proposed new §148.8 clarifies that a request for withdrawal of hearing request should be sent to the TWCC Chief Clerk if the written request for withdrawal is submitted before a case is received by SOAH or after a proposal for decision is received from SOAH. Otherwise, the request should be submitted to SOAH in accordance with its procedure rules in Title 1, Chapter 155 (relating to Rules of Procedures). The last sentence of existing subsection (a) is deleted because a SOAH ALJ will make a legal determination of whether any subsequent requests for hearing constitute or include the same subject matters as a previous request for hearing and, if so, whether and how the subsequent hearing should proceed. Subsection (b), addresses the commission's withdrawal of a medical dispute decision and should result in reduced expenses for all parties. The decision-maker will be able to withdraw or amend the small percentage of decisions containing an obvious error, omission, or procedural defect when identified in requests for hearing, without necessitating formal hearings.

Proposed new §148.9 is the same as current §148.9 except for substitution of the acronym "ALJ" for "Hearing Officer" in accordance with the revised definitions in §148.1 of this title (relating to Definitions).

Existing §148.10 (relating to Filing Instruments; Furnishing Copies) has been deleted because such procedures are addressed in SOAH's rules in Chapter 155 of Title 1 (relating to Rules of Procedure). Proposed new §148.10 provides that a request for issuance of a subpoena shall be directed to the TWCC Chief Clerk in the commission's central office. SOAH has noted in the adoption of its rule §155.31(e) in Title 1 (relating to Discovery) that "... requests for issuance of subpoenas or commissions (requiring depositions) shall be directed to the referring agency. The absence of any reference to subpoenas for witnesses at hearing means the referring agency's subpoena rules apply." (27 TexReg 3336). A request for a subpoena shall include the following six requirements: (1) the actual subpoena, attached to the request, for TWCC to execute, (2) the name and address of the sheriff or constable to whom the subpoena should be addressed on the actual subpoena, (3) a good faith, itemized estimate of the anticipated, reimbursable costs that the requestor will pay to the person being subpoenaed calculated in accordance with §2001.089 of the Texas Government Code and a deposit for the same amount in the form of a negotiable instrument satisfactory to the commission, (4) as placed on the actual subpoena: the name, address and title, if any, of the witness, the date, time, and place where the witness is to appear and give testimony, the docket number of the SOAH proceeding, and a statement showing date of execution and return of the subpoena to the TWCC Chief Clerk (to be completed by the constable or sheriff upon service of the subpoena to the witness), (5) if the subpoena is for the production of books, records, writing, or other tangible items, a specific, detailed description of the items sought to be produced along with the information in number (4) above, and (6) a description of the reasonable steps to avoid imposing undue burden or expense on the person served.

The information specified is necessary for the commission to issue the subpoena under Texas Government Code §2001.089 and to provide the witness with specific instructions on where to appear and, if applicable, what to bring. The deposit is required under the authority of Texas Government Code §§2001.089 and 2001.103. However, the party or agency requesting the subpoena is responsible for paying the applicable witness expenses under Texas Government Code §2001.103(b). The requirement for information showing "good cause" for the issuance of a subpoena is found in Texas Government Code §2001.089. One of the elements of "good cause" is a showing that the information sought from the witness is not available to the requestor from other sources. *Lueg v. Tewell*, 572 S.W.2d 97, 102 (Tex. App. - Corpus Christi 1978, no writ) citing *Ex Parte Shepperd*, 513 S.W.2d 813, 816 (Tex. 1974). Such case law interpreted "good cause" when that showing was required under the Texas Rules of Civil Procedure. While the "good cause" requirement subsequently was deleted in the Texas Rules of Civil Procedure, those Rules do require a party requesting a subpoena to take reasonable steps to avoid imposing undue burden or expense on the person served. The requestor, as part of the information showing good cause for the issuance of the subpoena, must provide a description of the reasonable steps to avoid imposing undue burden or expense on the person to be served with the subpoena. Finally, if a person fails to comply with a subpoena, enforcement actions provided in the rule are based upon authority provided in Texas Government Code, §2001.201 or Texas Labor Code §402.042(b)(3) and (9).

The commission solicits comments on possible alternatives that would satisfy the APA requirement of a deposit to the commission for the amount of anticipated costs to be incurred by the witness

and the APA requirement upon the requesting party to pay the witness for those costs.

Existing §148.11 (relating to APA Prehearing Conference) has been deleted because its procedures have been preempted by SOAH in accordance with §2003.050(b), Government Code and SOAH's adoption of its procedural rules in Chapter 155 of Title 1 (relating to Rules of Procedure). Proposed new §148.11 provides that a request for the issuance of a commission requiring deposition shall be directed to the TWCC Chief Clerk in the commission's central office. SOAH has noted in the adoption of its rule §155.31(e) in Title 1 (relating to Discovery) that "...requests for issuance of subpoenas or commissions (requiring depositions) shall be directed to the referring agency." (27 TexReg 3336). The proposed rule requires that a request for issuance of a commission requiring deposition include: (1) the actual commission requiring deposition, attached to the request, for the TWCC Chief Clerk to execute; (2) the name and address of the applicable officer to take the deposition; the date, time, and place where either the witness is to appear and give testimony or where the written responses are to be sent; a detailed description of any items the witness will be required to produce; and a statement showing date of execution and return of the commission to the TWCC Chief Clerk (to be completed by the officer designated to take the deposition upon service of the commission requiring deposition to that officer); (3) a good faith, itemized estimate of the anticipated, reimbursable costs that the requestor will pay to the person being deposed calculated in accordance with §2001.094 and a deposit for the same amount in the form of a negotiable instrument satisfactory to the commission; and (4) coordination by the requestor with the other party or parties and with the witness to determine a mutually agreeable location and time for the attendance of the witness and a statement whether such coordination has been made and whether the proposed location and time is by mutual agreement with the parties and witness.

The information specified is necessary for the TWCC to issue the commission requiring deposition, to provide the witness with specific instructions on where to appear or send the written responses and, if applicable, what to bring, and to reduce the expense to the commission and to other parties of having to reissue one or more commissions requiring deposition because the requestor had not attempted to coordinate an agreed time, date, and, if applicable, place with the other party or parties and with the witness. The deposit is required under the authority of Texas Government Code §§2001.094 and 2001.103. However, a party or agency requesting the commission requiring deposition is responsible for paying the applicable witness expenses under Texas Government Code §2001.103(b).

Proposed subsection (b) provides that the issuance of a commission for an oral deposition is not required if the witness is a party or is retained by, employed by, or otherwise subject to the control of a party. This provision allows the parties to agree to such depositions in accordance with SOAH's rule at §155.31(n) of Title 1 (relating to Discovery).

Proposed subsection (c) prohibits the taking of a deposition of a member of an agency, board or commission after a hearing date for the contested case has been set in accordance with Texas Government Code §2001.095. Proposed subsection (e) refers to special provisions of the APA concerning depositions, for example, Texas Government Code §§2001.096, 2001.097, 2001.098, 2001.099, 2001.100, 2001.101, and 2001.102. Finally, if a person fails to comply with a deposition, enforcement actions provided in the rule are based upon authority provided in Texas Government Code §2001.201 or Texas Labor Code §402.042(b)(9).

The commission solicits comments on possible alternatives that would satisfy the APA requirement of a deposit to the commission for the amount of anticipated costs to be incurred by the witness and the APA requirement upon the requesting party to pay the witness for those costs.

Existing §148.12 (relating to Request for Alternative Dispute Resolution) has been deleted because such procedures are addressed in SOAH's rules in Title 1, §155.33(d) (relating to Orders) and §155.37 (relating to Settlement Conferences). Proposed new §148.12 contains the provisions in existing §148.15 (relating to Ex Parte Communications).

Existing §148.13 (relating to Discovery and Production of Documents and Tangible Things for Inspection Copying or Photographing) has been deleted because such procedures are addressed in SOAH's rules in Title 1, §155.31 (relating to Discovery). Proposed new §148.13 contains provisions in existing §148.20 (relating to Recording the Hearing) with revisions. Subsection (a) has been revised to delete provisions now more fully addressed in SOAH's rule in §155.43 of Title 1 (relating to Making a Record of Contested Case) and clarify that the petitioner in a contested case is responsible for all costs associated with making a record of the hearing, including the costs of the court reporter at the hearing and the costs of the preparation of a verbatim record if one is required. Where more than one party is seeking affirmative relief, such costs will be assessed equally. The parties can agree to their own arrangements for a court reporter or allocation of associated costs among the parties. The commission finds the petitioner as the proper party to pay such costs since the petitioner has requested the hearing, e.g. disputing a previous decision in a medical dispute or an action taken by the commission after preliminary notices and opportunity for input have been received and considered.

Subsection (b) provides that a party, electing to use a means of making a record that is in addition to the means specified in SOAH's rules (currently §155.43 of Title 1 relating to Making a Record of Contested Case), is responsible for all associated costs of making that record and, if a verbatim transcript is made, shall provide SOAH and the commission with a copy of the audiotape or videotape free of charge. If a transcript is made, the party shall provide the commission with the original of the transcript free of charge. The responsibility for such costs has been made in accordance with Texas Government Code §2001.059(b) and Texas Labor Code §402.064. The party requesting the additional services should pay for those services. In addition, the commission often has a need to review the record of the hearing, for example, the videotape or other type of transcript. In an appropriate case, the commission staff may confirm, in writing, that the copy is either not needed or that the delivery of the copy can be delayed for a specified period of time or until a specified event occurs.

Existing §148.14 (relating to Subpoenas; Depositions) has been deleted because both discovery devices are now covered in proposed new §§148.10 (relating to Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum) and 148.11 (relating to Commissions to Compel Attendance for Deposition). Proposed new §148.14 specifies the particular sections of the Act where the commission will have the burden of proof in hearings.

These include hearings on sanctions under §402.072, sanctions on a doctor or an insurance carrier under §408.0231, identification of a hazardous employer based, at least in part, upon a fatality under §411.0415, findings by the commission relating to hazardous employers under §411.049, and administrative penalty assessments and other sanctions under §§415.021, 415.023, 415.032, and 415.034.

The burden of proof will be upon the party seeking relief in hearings conducted pursuant to §408.024 (when an insurance carrier seeks to be relieved of liability for health care that otherwise would be payable), §413.031 (when a party seeks to change the result of an initial medical dispute decision rendered by the commission's Medical Review division or an Independent Review Organization), and §413.055 (when a party disputes an interlocutory medical order issued by the commission pursuant to the rigorous requirements of §133.306 of this title (relating to Interlocutory Orders for Medical Benefits)). In each of these situations the party requesting the hearing is either seeking: (1) to overturn a previous decision of the commission after a previous proceeding has been held in which the party has had the opportunity to present its position and support its position or (2) is seeking to overturn liability normally established for a medical benefit under other provisions of the Act and the commission's rules. Setting the burden of proof upon the party contesting an earlier decision is in accordance with general judicial practices and encourages finality (and resulting reduction in dispute costs to system participants) of the original decision.

The burden of proof will be upon the Certified Self-Insurer in hearings conducted under §407.046 (concerning revocation of a certificate of authority to self-insure) because §407.046(d) of the Act impliedly places that burden by stating: "If the certified self-insurer fails to show cause why the certificate should not be revoked, the commission immediately shall revoke the certificate." In addition, the burden of proof will be upon the Certified Self-Insurer in hearings conducted under §407.133 (for failure to pay an assessment to the Texas Certified Self-Insurer Guaranty Association (TCSIGA) under Texas Labor Code §§407.124 and 407.125) because the Certified Self-Insurer will be attempting to overturn an assessment, determined in part by TCSIGA under criteria specified in those sections of the Texas Labor Code and the provisions in Chapter 407 of the Texas Labor Code that assign to TCSIGA vital roles to fulfill (for example, §407.042 requiring the approval of TCSIGA before the commission votes to issue a certificate of authority and §407.130 specifying TCSIGA as a party in interest in a proceeding involving a workers' compensation claim against an impaired employer whose compensation obligations have been paid or assumed by TCSIGA. The burden of proof shall be upon the party challenging the decision of the Director of the commission's Self-Insurance division in hearings conducted under §407.066 because that decision was made after input from various parties, who can present their various positions and support those positions prior to the rendering of the Director's decision.

The burden of showing a timely filing or good cause when an allegation of untimely filing has been made rests with the employer under §120.2 of this title (relating to Employer's First Report of Injury) because §120.2 establishes that burden of proof.

Subsection (b) specifies an exception to proof by preponderance of the evidence for IRO appeals. Section 133.308(w) of this title (relating to Medical Dispute Resolution by Independent Review Organizations) provides: "In all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has presumptive weight."

Existing §148.15 (relating to Ex Parte Communications) has been deleted because the same provisions are contained in proposed new §148.12. Proposed new §148.15 contains the provisions of existing §148.22 with revisions.

Subsection (a) lists the types of hearings where the SOAH ALJs render final decisions in accordance with §402.073(b) of the Act (relating to Cooperation With State Office of Administrative Hearings).

The provisions of existing §148.22(b) thru (d) have not been included in proposed new §148.15 because of the preemption by SOAH in accordance with §2003.050(b), Government Code and SOAH's adoption of its procedural rules in Chapter 155 of Title 1 (relating to Rules of Procedure) and because Texas Labor Code §401.021(1)(A) specifically excludes Subchapter F of the APA as a subchapter that governs a proceeding or hearing under the Act. Subchapter F of the APA includes §2001.141 that specifies the requirements for findings of fact and conclusions of law, separately stated, among other requirements of a final order. Texas Labor Code §401.021(1)(D) does include §2001.141(c) that provides: "Findings of fact may be based only on the evidence and on matters that are officially noticed."

New subsection (b) includes the compliance provisions in existing §148.22(e) with revisions: (1) to change the term "hearing officer" to "ALJ" consistent with proposed section 148.1 (relating to Definitions); (2) to add language that will notify the recipient of the order in a compliance action of the date the compliance action must be completed, to determine the date of receipt of the order according to §102.5 of this title (relating to General Rules for Written Communications to and from the Commission), and to ensure that any administrative penalty is specified as a certain dollar amount and that the order will specify a period of time for payment of any administrative penalty not to exceed 30 days from the date that the order is received; and (3) to delete the last, existing sentence as unnecessary. Compliance orders must have language necessary to ensure that the recipient of such orders knows exactly what is required and when such action needs to be taken. In addition, if timely action does not occur as ordered, the Commission will be able to take proper enforcement actions.

New subsection (c) specifies the manner of service of SOAH decisions to allow such service to be accomplished by a verifiable means that must be documented in the hearing file. This change recognizes existing and future changes in technology as well as the need for documentation of the service so that TWCC can take any necessary further actions (for example, actions that may be needed to enforce orders) after it receives the hearing file from SOAH. For the same reasons, additional language has been added to ensure that service by personal delivery is documented to contain the date of delivery and the person, any business title, and the person's business address that received the delivery.

New subsection (d) contains the provisions in current §148.22(h), with revisions. This subsection specifies the date when a SOAH decision becomes final. Current provisions are revised: (1) to change the term "hearing officer" to "ALJ" consistent with proposed section 148.1 (relating to Definitions); (2) to specify the date as the date of receipt determined in accordance with §102.5 of this title (relating to General Rules

for Written Communications to and from the Commission); and (3) to delete the last, existing sentence as unnecessary. The added provisions should ensure that the date a SOAH decision becomes final is determined consistently.

New subsection (e) contains the provisions of existing §148.22 (i) that the SOAH decision constitutes the exhaustion of administrative remedies with two revisions: (1) the term "hearing officer" is changed to "ALJ" consistent with proposed section 148.1 (relating to Definitions), and (2) a clarification that no motion for rehearing is required pursuant to the APA or otherwise.

New subsection (f) contains the provisions for judicial review under the authority of the Act and the APA.

Proposed new §148.16 contains the provisions of existing §148.23.

Subsection (a) has been revised to replace the reference to §408.023 of the Act with §408.0231 of the Act because the latter is the section that includes a right to a hearing. Additional language has been added to reference other possible cases under §402.073(b) of the Act that require a proposal for decision. The last sentence of existing §148.23(a) has been deleted because the procedures have been preempted by SOAH in accordance with §2003.050(b), Government Code and SOAH's adoption of its procedural rules in Chapter 155 of Title 1 (relating to Rules of Procedure) and specifically §155.59 (relating to Proposal for Decision).

Subsection (b) describes the basis for the proposal for decision, requires it be in writing and contain information cited in proposed new §149.9 of this title (relating to Proposals for Decision in accordance with the Act, §§402.072, 407.046, and 408.0231).

New subsection (c) requires that SOAH furnish the proposal for decision to the TWCC Chief Clerk and that SOAH shall furnish the proposal for decision, by verifiable means, to the parties to the hearing and retain information on the date, address, person or entity served and the means of service to the parties to the hearing. These revisions will allow TWCC to determine the date of service of the proposal for decision so that the due dates for any exceptions by the parties can be determined.

New subsection (d) addresses the filing of briefs and exceptions to the proposal for decision and requires that the parties furnish their briefs and exceptions both to the SOAH ALJ and to the TWCC Chief Clerk so that commission staff may monitor the case and expeditiously make preparations for presentation of the case to the Commissioners.

New subsection (e) contains the provisions of existing §148.23(g) revised to require that the parties furnish their briefs and replies both to the SOAH ALJ and to the TWCC Chief Clerk so that commission staff may monitor the case and expeditiously make preparations for presentation of the case to the Commissioners. In addition, the ten-day time limit would be changed to 15 days in accordance with SOAH's rule at §155.59 of Title 1 (relating to Proposal for Decision).

New subsection (f) contains the provisions of existing §148.23(h) revised to provide that the TWCC commissioners shall consider a case no later than 120 days either from the date the SOAH ALJ provides a proposal for decision or, if any exceptions or replies are filed by the parties, then the date of the ALJ's comments or response to such exceptions or replies. If the ALJ communicates to the commission that no ALJ response will be made to the exceptions or replies of the parties, the date of that ALJ communication to the commission will be the date when the 120 days commences. If the ALJ does not respond after exceptions or replies are filed, the 120-day period commences upon expiration of the 15-day period allowed for the ALJ response in SOAH's rules at §155.59(c)(4) of Title 1 (relating to Proposal for Decision). In addition, notification of the final decision of the Commissions will be made by verifiable means to reflect past and future changes in technology. The last sentence of existing §148.23(h) is not included and is no longer necessary because the applicable provisions are contained in §102.5 of this title (relating to General Rules for Written Communications to and from the Commission).

New subsections (g) and (h) contain the provisions of existing §148.23(i) revised to clarify that no motion for rehearing will be considered. No motion for rehearing will be considered because §401.021(1)(A), Labor Code specifically excludes Subchapter F of the APA as a subchapter that governs a proceeding or hearing under the Act. Subchapter F of the APA includes §§2001.145, 2001.146, and 2001.147 concerning motions for rehearing. Judicial review is in accordance with the Act and the APA §§2001.171, 2001.172, and 2001.174.

Proposed new §148.17 contains the provisions of existing §148.24 revised to : (1) change the term "hearing officer" to "ALJ" consistent with §148.1 of this title (relating to Definitions), (2) correct a reference to proposed §148.15(c) of this title, and (3) to note that the charged party shall file with the TWCC Chief Clerk rather than the commission's executive director.

Proposed new §148.18 contains the provisions of existing §148.25, revised to change the term "hearing officer" to "ALJ" consistent with §148.1 of this title (relating to Definitions).

Proposed new §148.19 contains the provisions of existing §148.26 revised to include videotape, if that method was used in the SOAH hearing.

Proposed new §148.20 revises and clarifies the provisions in existing §148.27.

Subsection (a) specifies the amounts determined under the APA §2001.103 as the maximum amounts of reimbursement for a non-party witness who is subpoenaed or required to participate in a deposition.

Subsection (b) places the responsibility upon the party who is requesting the subpoena, the commission requiring deposition, or otherwise compelling the attendance of a witness, to pay the reasonable and necessary expenses of such witness in accordance with the APA, §2001.103(b).

Subsection (c) specifies that a party's failure to pay required witness expenses shall be deemed a violation of a commission rule.

Subsection (d) contains the documentation and information required by the commission from the party requesting the subpoena or commission requiring deposition, prior to refund of the deposit made under proposed §148.10(b)(3) or §148.11(d)(3). Such documentation and information is needed because: (1) the commission has previously issued the subpoena or commission requiring deposition that commands the witness to appear, (2) the party requesting the subpoena or commission requiring deposition is required to pay the reasonable and necessary costs of the witness, (3) any failure by the party to pay the required witness expenses may result in the witness seeking assistance from the commission for the unpaid but incurred expenses, (4) the commission has not been appropriated funds for payment of

such expenses, and (5) the required deposit from the requesting party may be needed to resolve any failure of the party to pay the expenses of a non-party witness.

Proposed new §148.21 contains the provisions in existing §148.28 revised to include the authority in the APA §2001.177 for the commission to require the party requesting judicial review to pay the expenses of preparing a certified copy of the entire record of the case.

Proposed new §148.22 specifies that a person commits an administrative violation by violating a commission rule if that person fails to comply with an order of the ALJ. Persons and parties, either participating in SOAH hearing or required to be witnesses in such hearings, must comply with ALJ orders. If noncompliance occurs, then TWCC may take administrative sanction actions as authorized under the Act.

Proposed new §148.23 specifies that any final order of SOAH is a final order of the commission and may be enforced by the commission under the Act, the APA, or commission rules. In addition, if an interim SOAH order survives the entry of a final order, the sending of a proposal for decision to the commission, or the dismissal or withdrawal of a case, such interim order will be considered an order of the commission and may be enforced by the commission in a manner permitted by the Act, the APA, or the rules of the commission. Examples of such orders are specified as orders to reimburse, orders to pay reasonable and necessary medical costs, orders to pay administrative fines, orders to refund, orders assessing attorney fees, orders assessing costs, and orders imposing discovery sanctions. This new section should provide additional support to ensure compliance with SOAH orders.

Allen McDonald, director of the commission's Medical Review division, has determined that for the first five-year period the proposed sections are in effect there will be fiscal implications for state or local governments as a result of enforcing or administering the new sections. While the dollar amounts of the fiscal implications cannot be determined because of the uncertainty of the number of hearings to be held in the future, costs for the hearings held by the State Office of Administrative Hearings will be reimbursed by the commission as required by law.

Allen McDonald, director of the commission's Medical Review division, has also determined that for each year of the first five years the new sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide fair and efficient procedures for the conduct of those commission contested case hearings which will be conducted by State Office of Administrative Hearings administrative law judges.

The anticipated economic costs to persons who are required to comply with the rule as proposed cannot be accurately estimated. There may be economic costs to persons who are required to comply with the sections as proposed due to filings of contested case documents being made at SOAH as well as with the TWCC Chief Clerk. There also may be economic costs to persons who request the commission to issue subpoenas or commissions requiring depositions due to the requirements to make a deposit of costs with the commission and the requirement to pay witness expenses. The amount of any additional costs to persons due to the filing requirements cannot be accurately estimated because the number of filings in a case varies depending on many factors. The amount of any economic costs due to the commission's process and requirements for issuing subpoenas and commissions requiring depositions cannot be accurately estimated because the number of such requests and the costs that may be incurred by the witnesses could vary substantially. In addition, the cost of mailing a filing is generally dependent on the weight of the mailed documents. There may, also, be reduced costs in hearings for many parties in hearings involving issues of medical fees and services because of the procedures allowing for the commission to correct clerical errors in medical dispute decisions. There will be no adverse economic impact on small or micro-businesses. There will be no difference in anticipated costs of compliance for small businesses as compared to large businesses.

Comments on the proposal must be received by 5:00 p.m., April 4, 2005. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Rules" and then clicking on "Proposed Rules for Comment." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Linda Velasquez, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rules as proposed for repeal, may be repealed or may be repealed only in part. Persons in support of the rules repeal, as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held at the Austin central office of the commission (7551 Metro Center Drive, Suite 100, Austin, Texas) on a date to be announced. Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

28 TAC §§148.1 - 148.28

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

The repealed rules are proposed under the Texas Labor Code, §401.021(1), which specifies the provisions of the Administrative Procedure Act that are applicable to the commission; §402.061, which authorizes the commission to adopt rules necessary to administer the Texas Workers' Compensation Act; §402.071, which specifies that the commission shall establish qualifications for "representatives" as defined by §401.011(37), Texas Labor Code; §402.072, which specifies that only the commission may impose certain types of sanctions; §402.073, which authorizes SOAH to conduct certain hearings; §407.046(b) and (c), which authorizes a hearing when the commission proposes to revoke a certificate of authority granted to a certified self-insurer;

§407.066, which provides for a hearing after the director of the commission's division of self-insurance regulation resolves a dispute concerning the deposit, renewal, termination, release, or return of all or part of the security, liability arising out of the submission or failure to submit security, or the adequacy of the security or reasonableness of the administrative costs, including legal fees, that arise among: a surety, an insurer of an agreement of assumption and guarantee of workers' compensation liabilities, an issuer of a letter of credit, a custodian of the security deposit, a certified self-insurer, or the Texas Certified Self-Insurer Guaranty Association; §407.133, which authorizes the commission, after a hearing, to suspend or revoke the certificate of authority to self-insure of a certified self-insurer who fails to pay an assessment required under §407.124, Texas Labor Code; §407.023, which authorizes the commission to establish criteria for deleting doctors from the commission's list of approved doctors; §408.0231(e), which provides for a hearing on certain sanctions by the commission against a doctor or insurance carrier; §408.024, which authorizes a hearing if the commission intends to relieve an insurance carrier of liability for health care that is furnished by a health care provider or another person selected in a manner inconsistent with the requirements of Subchapter B, Chapter 408, Texas Labor Code; §411.0415, which provides that the commission may request a hearing if the commission determines that the case history of an employee's fatality indicates that the employer or the work environment was a proximate cause of the fatality, §411.042, which providers for the notification process by the commission to identify an employer as a hazardous employer; §411.049(b), which provides for a hearing for an employer to contest findings of the commission under the Hazardous Employer Program; §413.014, which authorizes the commission to adopt rules that provide that preauthorization and concurrent review are required for specified health care treatments and services; §413.031(k), which provides for a SOAH hearing after the original decision in certain medical disputes; §413.055 that provides a hearing to a party that disputes an interlocutory order of the commission for the payment of all of part of medical benefits; §415.021, which authorizes the commission to assess administrative penalties against a person who commits an administrative violation and to enter a cease and desist order against a person who engages in certain types of conduct; §415.032, which provides the commission's notification process for a possible administrative violation and the request for hearing process by the charged party; §415.034(a), which provides for a hearing to contest administrative violation sanctions by the commission; and Texas Government Code, §2001.003, which provides definitions of terms used in the Administrative Procedure Act; §2001.061, which prohibits certain types of *ex parte* communications in hearings; §2001.062, which provides the process for a decision by the state agency after SOAH has issued a proposal for decision; §2001.089, which provides for the process for a state agency to issue a subpoena; §2001.090 which provides for official notice of certain evidence and for use of the special skills or knowledge of the state agency and its staff in evaluating evidence; §2001.094, which provides the process for a state agency to issue a commission requiring deposition; §§2001.171, 2001.174, 2001.176, and 2001.177, which provide a process for judicial review after a final administrative decision has been rendered in a contested case hearing and which authorize a state agency, by rule, to require a party who appeals such a decision to pay all or a part of the cost of preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court; and §2003.050 concerning procedural rules by SOAH.

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

§148.1. Scope and Applicability.
§148.2. Definitions.
§148.3. Requesting a Hearing.
§148.4. Notice of Hearing.
§148.5. Statement of Matters Asserted.
§148.6. Venue.
§148.7. Appearance and Representation.
§148.8. Withdrawal of Hearing Request.
§148.9. Informal Disposition.
§148.10. Filing Instruments; Furnishing Copies.
§148.11. APA Prehearing Conference.
§148.12. Request for Alternative Dispute Resolution.
§148.13. Discovery and Production of Documents and Tangible Things for Inspection, Copying or Photographing.
§148.14. Subpoenas; Depositions.
§148.15. Ex Parte Communications.
§148.16. Conduct and Decorum.
§148.17. Hearing Officer's Authority.
§148.18. Parties' Rights in Hearings.
§148.19. Failure To Appear.
§148.20. Recording the Hearing.
§148.21. Evidence.
§148.22. Decision of the Hearing Officer.
§148.23. Proposal for Decision by the Hearing Officer.
§148.24. Special Provisions for Administrative Penalties.
§148.25. Record of the Hearing.
§148.26. Transcript or Duplicate of the Hearing Audiotape.
§148.27. Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents.
§148.28. Expenses To Be Paid by Party Seeking Judicial 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.

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500773
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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28 TAC §§148.1 - 148.23

The new rules are proposed under the Texas Labor Code, §401.021(1), which specifies the provisions of the Administrative Procedure Act that are applicable to the commission; §402.061, which authorizes the commission to adopt rules necessary to administer the Texas Workers' Compensation Act; §402.071, which specifies that the commission shall establish qualifications for "representatives" as defined by §401.011(37), Texas Labor Code; §402.072, which specifies that only the commission may impose certain types of sanctions; §402.073, which authorizes SOAH to conduct certain hearings; §407.046(b) and (c), which authorizes a hearing when the commission proposes to revoke a certificate of authority granted to a certified self-insurer; §407.066, which provides for a hearing after the

director of the commission's division of self-insurance regulation resolves a dispute concerning the deposit, renewal, termination, release, or return of all or part of the security, liability arising out of the submission or failure to submit security, or the adequacy of the security or reasonableness of the administrative costs, including legal fees, that arise among: a surety, an insurer of an agreement of assumption and guarantee of workers' compensation liabilities, an issuer of a letter of credit, a custodian of the security deposit, a certified self-insurer, or the Texas Certified Self-Insurer Guaranty Association; §407.133, which authorizes the commission, after a hearing, to suspend or revoke the certificate of authority to self-insure of a certified self-insurer who fails to pay an assessment required under §407.124, Texas Labor Code; §407.023, which authorizes the commission to establish criteria for deleting doctors from the commission's list of approved doctors; §408.0231(e), which provides for a hearing on certain sanctions by the commission against a doctor or insurance carrier; §408.024, which authorizes a hearing if the commission intends to relieve an insurance carrier of liability for health care that is furnished by a health care provider or another person selected in a manner inconsistent with the requirements of Subchapter B, Chapter 408, Texas Labor Code; §411.0415, which provides that the commission may request a hearing if the commission determines that the case history of an employee's fatality indicates that the employer or the work environment was a proximate cause of the fatality, §411.042, which providers for the notification process by the commission to identify an employer as a hazardous employer; §411.049(b), which provides for a hearing for an employer to contest findings of the commission under the Hazardous Employer Program; §413.014, which authorizes the commission to adopt rules that provide that preauthorization and concurrent review are required for specified health care treatments and services; §413.031(k), which provides for a SOAH hearing after the original decision in certain medical disputes; §413.055 that provides a hearing to a party that disputes an interlocutory order of the commission for the payment of all of part of medical benefits; §415.021, which authorizes the commission to assess administrative penalties against a person who commits an administrative violation and to enter a cease and desist order against a person who engages in certain types of conduct; §415.032, which provides the commission's notification process for a possible administrative violation and the request for hearing process by the charged party; §415.034(a), which provides for a hearing to contest administrative violation sanctions by the commission; and Texas Government Code, §2001.003, which provides definitions of terms used in the Administrative Procedure Act; §2001.061, which prohibits certain types of *ex parte* communications in hearings; §2001.062, which provides the process for a decision by the state agency after SOAH has issued a proposal for decision; §2001.089, which provides for the process for a state agency to issue a subpoena; §2001.090 which provides for official notice of certain evidence and for use of the special skills or knowledge of the state agency and its staff in evaluating evidence; §2001.094, which provides the process for a state agency to issue a commission requiring deposition; §§2001.171, 2001.174, 2001.176, and 2001.177, which provide a process for judicial review after a final administrative decision has been rendered in a contested case hearing and which authorize a state agency, by rule, to require a party who appeals such a decision to pay all or a part of the cost of preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court; and §2003.050 concerning procedural rules by SOAH.

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

§148.1. Definitions.

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

(1) *Act*--The Texas Workers' Compensation Act, Texas Labor Code, §§401.001 et. seq.

(2) *Administrative Law Judge or ALJ*--The administrative law judge (ALJ) designated by the State Office of Administrative Hearings (SOAH) to preside over the hearing.

(3) *APA*--The Administrative Procedure Act, as specified in the Government Code, Chapter 2001.

(4) *Commission*--The Texas Workers' Compensation Commission.

(5) *Commission Representative*--The attorney or representative that may be designated by the executive director of the commission to represent the commission.

(6) *Contested Case*--A proceeding held by the State Office of Administrative Hearings in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing as defined in the Texas Government Code, §2001.003, subject, however, to the provisions of the Act as codified in the Texas Labor Code, Title 5, Subtitle A, including §§401.021(1), 411.049, 413.031, 413.055, 415.034, 402.073, 407.046, and 408.0231, 408.023, 408.024 and the rules adopted by the commission, in particular this chapter.

(7) *IRO*--An Independent Review Organization, established in accordance with Insurance Code article 21.58C, performing reviews of health care under the Act.

(8) *Party*--A person or state agency named or admitted as a party.

(9) *Person*--An individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency as defined in the APA.

(10) *Petitioner*--The person who has filed a written request for a hearing in accordance with these procedures.

(11) *Respondent*--The person responding to the petitioner's request for a hearing.

(12) *SOAH*--The State Office of Administrative Hearings.

(13) *TWCC Chief Clerk*--The Chief Clerk of Proceedings within the Hearings Division in the central office of the commission.

§148.2. Scope and Applicability.

(a) *Scope of these rules*. Except for benefit disputes, governed by chapters 140, 142, and 143 of this title (relating to Dispute Resolution-General Provisions; Dispute Resolution-Benefit Contested Case Hearing; and Dispute Resolution-Review by the Appeals Panel), these rules govern all contested case hearings to adjudicate disputes before the SOAH arising under the Act.

(b) *Coordination with SOAH's Procedural Rules*. The procedural rules of the commission govern the following procedural matters and also provide related policies of the commission:

(1) matters arising before a case is transferred by the commission to SOAH;

(2) matters arising after a proposal for decision or after the entire case is received from SOAH;

(3) requests for the issuance of a subpoena and related matters; and

(4) requests for issuance of a commission requiring deposition and related matters.

(c) *Applicability of the Administrative Procedure Act*. The sections of the APA enumerated in the Texas Labor Code, §401.021(1), apply to the hearings governed by this chapter. In hearings involving those sanctions defined by the Act, §§402.072, 407.046, 408.0231, and in other cases not subject to §402.073(b), the commissioners render the final decision and the provisions of the APA, §2001.062 will be followed.

§148.3. Requesting a Hearing.

(a) *When requests are due*. The person requesting a hearing shall file a written request addressed to the TWCC Chief Clerk, in accordance with the instructions provided in the TWCC notice letter regarding submission of an appeal, not later than 20 days after:

(1) receipt of a findings and decision from the medical review division on a review of a medical service or a medical fee under the Act, §413.031(a), (b), (c), and (k), or;

(2) receipt of an IRO decision under the Act, §413.031, except with respect to a prospective necessity dispute regarding spinal surgery in which case the request shall be filed in accordance with §133.308 of this title (relating to Medical Dispute Resolution by Independent Review Organization), or;

(3) receipt of a commission refund order issued pursuant to a commission audit or review;

(4) receipt of an interlocutory order for payment under the Act, §413.055, or;

(5) receipt of a notice of administrative violation under the Act, §415.032; or

(6) receipt of a notice of identification as a hazardous employer under the Act, §411.042; or

(7) receipt of a notice of sanction under the Act, §408.0231; or

(8) receipt of a notice of the intent of the commission to determine the legal rights, duties, or privileges of a party within the scope of §148.2 of this title (relating to Scope and Applicability).

(b) *Date deemed filed or received*. When a request for a hearing is addressed to the TWCC Chief Clerk but is sent to an office other than the TWCC Chief Clerk, the date filed or received shall be the date the request is received in the central office. When a request for a hearing is not addressed to the TWCC Chief Clerk, it will not be considered as received by the Commission unless it is actually received by the TWCC Chief Clerk. Otherwise, a request for a hearing is deemed filed as of the date of the TWCC date stamp placed on the document or other evidence of receipt.

(c) *Requests under §413.031 of the Act*. If the request for a hearing is based on a receipt of a findings and decision from the medical review division on a review of a medical service or a medical fee under the Act, §413.031, or receipt of an IRO decision under the Act, §413.031, (except with respect to a prospective necessity dispute regarding spinal surgery in which case the request shall be filed in accordance with §133.308 of this title (relating to Medical Dispute Resolution by Independent Review Organization and except with respect to disputes handled in accordance with §133.309 of this title (relating to Alternate Medical Necessity Dispute Resolution by Case Review Doctor)), to be deemed a request for hearing the request shall:

(1) contain a statement indicating that it is a request for a hearing;

(2) include a copy of the findings and decision on which a hearing is being requested; and

(3) be signed by a requestor or respondent as defined by §133.305 of this title (relating to Medical Dispute Resolution - General), or its representative.

(4) include a certificate of service demonstrating that the request has been sent to the other party in accordance with the requirements of §133.307 of this title (relating to Medical Dispute Resolution of a Medical Fee Dispute), or §133.308 of this title (relating to Medical Dispute Resolution by Independent Review Organization) in substance as follows: "I hereby certify that I have on this _____ day of _____, 20__, served a copy of the attached instrument on (state the name of the other parties on whom a copy was served) by (state the manner of service.)"

(d) *Late filings*. A written request for hearing filed with the TWCC Chief Clerk later than 20 days after receipt of a notice of a matter set forth in subsection (a) of this section shall be dismissed.

(e) *Request for correction of clerical error*. If the request for hearing is a request to correct a clerical error, the executive director, or the director's designee, may at any time prior to delivery of the request for a hearing to SOAH, revise the order or decision to correct the clerical error.

(1) When a party requests a correction of clerical error and intends that request to constitute a request for hearing pursuant to this section, the request shall:

(A) meet all of the requirements of subsection (c) (1) - (4) of this section;

(B) include markings on a copy of the findings and decision indicating the alleged error; and

(C) state the requested correction, and the reasons for making it.

(2) A party affected by the proposed correction to the order or decision may file a response to the request with the TWCC Chief Clerk no later than 10 days after receipt of a party's request for correction of clerical error.

(3) After notice and opportunity to respond under paragraph (2) of this subsection, the commission shall either:

(A) issue and deliver to the parties a corrected order or decision; or

(B) deliver the request for hearing to SOAH.

(f) *Correction of clerical error discovered by commission.* Upon receipt of a request for hearing, the executive director, or the director's designee, may at any time prior to delivery of the request for a hearing to SOAH, advise the parties in writing by verifiable means of the commission's intent to revise the order or decision to correct the clerical error.

(1) Any party affected by the proposed correction to the order or decision may file a response to the notice with the TWCC Chief Clerk no later than 10 days after receipt of the notice of the commission's intent to revise the order or decision.

(2) Following notice of the commission's intent to revise the order or decision, and after notice and opportunity to respond under paragraph (1) of this subsection, the commission shall either:

(A) issue and send to the parties a corrected order or decision; or

(B) send the request for hearing to SOAH.

(g) *Delivery of request*. The commission shall send the request for a hearing to SOAH within twenty working days of receipt, if the decision has not been withdrawn under the provisions contained in §148.8 of this title (relating to Withdrawal of Hearing Request), unless the parties have been notified of the commission's intent to revise the order or decision pursuant to subsections (e) or (f) of this section.

(h) *Notice of alleged violation*. If the notice is a notice of alleged violation, the person charged must file an answer not later than the 20th day after the date of receipt of the notice. The answer must either consent to the proposed sanction, and remit the amount of the penalty, if any, or request a hearing.

(i) *Commission request for hearing*. Notwithstanding the provisions of subsection (a) of this section, the commission may request a hearing as permitted by the Act and the implementing rules to the Act, including, but not limited to the Act, §407.046(b) and §411.0415(c).

§148.4. Correction of Clerical Error in Medical Review Division Decisions or Orders Absent a Request For Hearing.

(a) *Correction of clerical error at request of party*. Notwithstanding the provisions of §148.3 of this title (relating to Requesting a Hearing), the executive director or the director's designee may at any time revise an order or decision of the medical review division to correct clerical error:

(1) at the request of a party or parties affected by the order or decision; or

(2) on the executive director or the director's designee's decision.

(b) *Contents of request*. When a party requests correction of clerical error, the request must:

(1) include a copy of the order or decision marked to indicate the alleged error;

(2) state the requested correction, and the reasons for making it;

(3) be filed with the medical review division; and

(4) include a certificate of service demonstrating that the request has been sent to all other parties affected by the order or decision in substance as follows: "I hereby certify that I have on this _____ day of _____, 20__ served a copy of the attached instrument on (state the name of the other parties on whom a copy was served) by (state the manner of service.)"

(c) *Time to file response*. A party affected by the proposed correction to the order or decision may file a response to the request no later than 10 days after receipt of the request.

(d) *Notice of action.* No later than 30 days after the request was filed under subsection (b) of this section, the medical review division shall either:

(1) issue and deliver to the parties a corrected order or decision;

(2) advise the parties in writing that the order or decision was correct as originally entered; or

(3) advise the parties in writing that the order or decision cannot be corrected pursuant to this section.

(e) *Correction of clerical error on the motion of the executive director or the executive director's designee*. When a clerical error is corrected on the decision of the executive director or the executive director's designee, a copy of the corrected order or decision will be delivered to all affected parties. A clerical error may be corrected on the decision of the executive director or the executive director's designee without prior notice to the parties.

(f) *Notice of intent to revise decision or order at discretion of executive director or director's designee*. Notwithstanding the provisions of subsection (e) of this section, when the executive director or the director's designee intends to correct a clerical error, at the discretion of the executive director or the director's designee, a notice may be sent advising the parties in writing by verifiable means of the intent to revise the order or decision to correct the clerical error.

(1) Any party affected by the order or decision may file a response to the notice with the medical review division no later than 10 days after receipt of the notice of the commission's intent to revise the order or decision.

(2) No later than 30 days after notice of the commission's intent to revise the order or decision, and after notice and opportunity to respond under paragraph (1) of this subsection, the commission shall either:

(A) issue and deliver to the parties a corrected order or decision;

(B) advise the parties in writing that the order or decision was correct as originally entered; or

(C) advise the parties in writing that the order or decision cannot be corrected pursuant to this section.

(g) *Request for correction of clerical error versus request for hearing*. A request to correct clerical error shall not be deemed a request for hearing unless it complies with the requirements specified in §148.3(e) of this title (relating to Requesting a Hearing).

§148.5. Notice of Hearing.

(a) *Notice of hearing.* Except as provided in subsection (b) of this section, and upon receipt of the docket number, location and setting date from SOAH, and no later than ten days before the hearings date, the TWCC Chief Clerk shall notify the parties in writing, by a verifiable means, of the date, time, place and nature of the hearing; the docket number; the legal authority and jurisdiction under which the hearing will be held; a reference to the particular sections of the statutes and any rules involved; a notice regarding failure to appear and default judgments, and a short, plain statement of the matters asserted. The reference to the statutes and any rules involved, nature of the hearing, and the short, plain statement may be provided by the commission's representative, and, if so, would not be provided by the TWCC Chief Clerk.

(b) *Notice of hearing under the Act, §407.046(b)*. No later than 30 days before the hearing date, SOAH shall notify, in writing, a certified self-insurer and the TWCC Chief Clerk of the date, time, place, and nature of a hearing concerning the intent of the commission to revoke a certificate of self-insurance under the Act, §407.046. The notice shall contain a reference to the particular sections of the statute and any rules involved; and a short, plain statement of the matters asserted, including the grounds for the proposed revocation action. The reference to the statutes and rules involved, nature of the hearing, and the short, plain statement may be provided by the commission's representative, and, if so, would not be provided by the TWCC Chief Clerk.

§148.6. Venue.

Hearings are held in Austin, Travis County, Texas.

§148.7. Representation.

(a) *Representation of injured employees or insurance carriers*. Pursuant to §402.071 of the Act (relating to Representatives) and §150.03 of this title (relating to Representatives: Written Authorization Required), a person representing an injured employee or insurance carrier in a contested case hearing shall not receive a fee for providing representation under this subtitle unless the person is an adjuster representing an insurance carrier or licensed to practice law.

(b) *Fee defined*. For the purposes of this section, "fee" means any remuneration received directly or indirectly, in cash or in kind. It includes voluntary contributions. The provision of representation before SOAH as an extension of, or in addition to, other services for which a fee was paid shall be considered receipt of a fee for providing representation as specified in sections 401.011(37) and 402.071 of the Act and section 150.03 of this title (relating to Representatives: Written Authorization Required).

(c) *Representation by employee*. The prohibitions in subsections (a) and (b) of this section do not preclude representation by a person who receives a salary as an employee of the person represented to perform services in the usual course and scope of the employer's business.

(1) For the purposes of this subsection, "employee" means a person in the service of another under a contract of hire, whether express or implied, or oral or written.

(2) The term "employee" does not include:

(A) an independent contractor or the employee of an independent contractor; or

(B) a person whose employment is not in the usual course and scope of the employer's business.

(d) *Ombudsman Program*. This section does not apply to persons performing duties pursuant to the Act, Chapter 409, Subchapter C.

(e) *Administrative violation*. A person commits an administrative violation if that person receives a fee for providing representation under circumstances prohibited by this section. A violation of this section shall be deemed a violation of a commission rule.

§148.8. Withdrawal of Hearing Request.

(a) The petitioner may, at any time before the decision and order is signed, submit a written request to withdraw the request for a hearing. If the written request is made before the case is received by SOAH or after a proposal for decision is received from SOAH, the request should be sent to the TWCC Chief Clerk. Otherwise, the request should be submitted to SOAH in accordance with its procedure rules in Title 1 Chapter 155 (relating to Rules Of Procedures).

(b) Notwithstanding the provisions of subsection (a) of this section, a findings and decision of the commission's medical review division in a review of a medical service or medical fee under the Act, §413.031, or receipt of an IRO decision from the medical review division on a review of a medical service or a medical fee under the Act, §413.031, except with respect to a prospective necessity dispute regarding spinal surgery in which case the request shall be filed in accordance with §133.308 of this title (relating to Medical Dispute Resolution by Independent Review Organization), may be withdrawn by the commission within fifteen working days after the commission receives the request for hearing before SOAH.

§148.9. Informal Disposition.

At any time prior to the signing of the decision by the ALJ or the commission, informal disposition of any case may be made by a written stipulation, an agreed settlement or consent order, or default.

§148.10. Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum.

(a) *Issuance of subpoena*. A request for issuance of a subpoena shall be directed to the TWCC Chief Clerk in the commission's central office. On the written request of any party in compliance with the requirements set forth below, and a showing of good cause, the commission shall issue a subpoena addressed to the sheriff or any constable to require the attendance of a witness and production of books, records, paper or other objects that may be necessary and proper for the purpose of the proceedings. The determination of good cause under this section shall include consideration of whether the issuance of the subpoena would cause undue burden or expense to the person served.

(b) *Request for subpoena*. A request for issuance of a subpoena shall be in writing addressed to the TWCC Chief Clerk, contain a showing of good cause, and shall comply with the following:

(1) The request shall include the subpoena sought to be issued prepared for the signature of the TWCC Chief Clerk.

(2) The subpoena shall be addressed to a sheriff or constable for service in accordance with the APA, §2001.089. The request shall contain the name and address of the applicable sheriff or constable.

(3) The request shall include a good faith, itemized estimate of the amount likely to accrue under §148.20 of this title (relating to Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents) and include a deposit of the same amount as required by Texas Government Code §2001.089(2) (relating to Issuance of Subpoena). The deposit shall be a certified check, money order, or other negotiable instrument satisfactory to the commission.

(4) If the subpoena is for the attendance of a witness, the written request and accompanying subpoena shall contain the name, address, and title, if any, of the witness, the date, time and place where the person is to appear and give testimony, the docket number of the SOAH proceeding, and a statement showing date of execution and return of the subpoena to the TWCC Chief Clerk.

(5) If the subpoena is for the production of books, records, writings, or other tangible items, the written request and accompanying subpoena sought shall contain a specific, detailed description of the items sought to be produced, the date, time, and place where the person is to appear and give testimony and produce the requested items, the docket number of the proceeding, and a statement showing date of execution and return of the subpoena duces tecum to the TWCC Chief Clerk.

(6) A description of the reasonable steps to avoid imposing undue burden or expense on the person served.

(c) *Failure to comply with subpoena*. If a person fails to comply with a subpoena, the commission, acting through the attorney general, or the party requesting the subpoena, may bring suit to enforce the subpoena in a district court in Travis County. This remedy is not exclusive. The commission may enforce the subpoena in any manner permitted by the Act, the APA, or the rules of the commission.

§148.11. Commissions to Compel Attendance for Deposition.

(a) *Issuance of commissions*. A request for issuance of a commission requiring deposition shall be directed to the TWCC Chief Clerk in the commission's central office. On the written request of any party in compliance with the requirements set forth below the commission shall issue a commission addressed to the several officers authorized by statute to take depositions in accordance with the APA, §2001.094. On the written request of any party in compliance with the requirements set forth below the TWCC Chief Clerk shall issue a commission to require that the witness appear and produce, at the time the deposition is

taken, books, records, papers, or other objects that may be necessary and proper for the purpose of the proceeding.

(b) *Commission not required for party*. The issuance of a commission requiring deposition is not required if the witness is a party or is retained by, employed by, or otherwise subject to the control of a party. Service of the notice of oral deposition upon the party or the party's representative shall be sufficient.

(c) *Deposition of a member of an agency, board or commission*. The deposition of a member of an agency, board or commission shall not be taken after a hearing date has been set.

(d) *Requests for commissions requiring deposition*. A request for a commission requiring deposition shall be in writing addressed to the TWCC Chief Clerk and shall comply with the following:

(1) The request shall include the commission requiring deposition sought to be issued prepared for the signature of the TWCC Chief Clerk.

(2) The commission requiring deposition shall be addressed to an officer authorized by statute to take a deposition in accordance with the APA, §2001.094. The request shall contain the name and address of the applicable officer authorized to take the deposition, the date, time and place where either the witness is to appear and give testimony or where the written deposition responses are to be sent, a detailed description of any items the witness will be required to produce, and a statement showing date of execution and return of the commission requiring deposition to the TWCC Chief Clerk.

(3) The request shall include a good faith itemized estimate of the amount likely to accrue under §148.20 of this title (relating to Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents) and include a deposit of the same amount as required by Texas Government Code §2001.094(a) (related to Issuance of Commission Requiring Deposition). The deposit shall be certified check, money order, or other negotiable instrument satisfactory to the commission.

(4) The party seeking the commission requiring deposition should coordinate with the other party or parties and with the witness to determine a mutually agreeable location and time for the attendance of the witness. The request for commission requiring deposition shall state whether such coordination has been made and whether the proposed location and time is by mutual agreement with the parties and witness.

(5) The party seeking the commission requiring deposition which includes a requirement for production should coordinate with the other party or parties, and with the person from whom production is sought, to determine a mutually agreeable location and time for the requested production. The request for the commission requiring deposition shall state whether such coordination has been made and whether the proposed location and time is by mutual agreement with the parties and the person from whom production is sought.

(e) *Application of the APA*. Matters related to deposition conduct, use, opening, and any other matters relating to depositions not covered by these rules shall be in accordance with the requirements of the APA, Chapter 2001.

(f) *Failure to comply with commission requiring deposition*. If a person fails to comply with a commission requiring deposition, the commission, acting through the attorney general, or the party requesting the subpoena or commission, may bring suit to enforce the subpoena or commission in a district court in Travis County. This remedy is not exclusive. The commission may enforce the subpoena or commission requiring deposition in any manner permitted by the Act, the APA, or the rules of the commission.

§148.12. Ex Parte Communications.

The APA, §2001.061 applies to commissioners and employees of the commission and to the hearings officers of SOAH. It provides that:

(1) unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person, party, or their representatives, except on notice and opportunity for all parties to participate; and

(2) under the APA, §2001.090, a member of an agency or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case, including SOAH, may communicate ex parte with employees of the commission, who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of the commission and its staff in evaluating the evidence.

§148.13. Recording the Hearing.

(a) *Arrangement for court reporter and costs*. In cases in which a court reporter is required, on the commission's own initiative or at the request of a party or when required by SOAH rules or the ALJ of a case, the commission will arrange for a court reporter. The Petitioner is responsible for all associated costs including the costs of the court reporter at the hearing and the costs associated with preparation of a verbatim record if one is required. In cases in which more than one party is seeking affirmative relief, the costs will be assessed equally. Nothing in this section precludes the parties from entering into their own agreement regarding arrangements for a court reporter or allocation of associated costs.

(b) *Recording by a party*. A party electing to use a means of making a record that is in addition to the means specified in SOAH's rules or by the ALJ is responsible for all associated costs. If a verbatim record is made, the party shall provide the commission and SOAH with a copy of the audiotape or videotape free of charge. If a transcript is made, the party shall provide the commission with the original of the transcript free of charge.

§148.14. Burden of Proof.

(a) *Burden of proof*. The Commission has the burden of proof in hearings pursuant to the Act §§402.072, 408.0231, 411.0415, 411.049, 415.021, 415.023, 415.032 and 415.034, (except issues under §§120.2(g) and (h) of this title (relating to Employer's First Report of Injury). The burden of proof rests with the party seeking relief in hearings conducted pursuant to the Act, §§408.024, 413.031, and 413.055. The burden of proof rests with the certified self-insurer in hearings conducted pursuant to the Act, §407.046 and §407.133. The burden of proof rests with the party(ies) requesting the hearing challenging the position of the staff of the Self-Insurance Division in hearings conducted pursuant to the Act, §407.066. The burden of proof of showing timely filing or good cause when an allegation of untimely filing has been made rests with the employer in issues under §120.2 of this title (relating to Employer's First Report of Injury).

(b) *Proof*. Proof required to prevail at a contested case hearing shall be by a preponderance of the evidence, except in cases of appeals pursuant to §133.308 of this title (relating to Medical Dispute Resolution by Independent Review Organization) in which case the decision of the IRO shall be given presumptive weight.

§148.15. Final Decision by the ALJ.

(a) *Decision*. In contested cases held under the Act, §§411.049, 413.031, 413.055, and 415.034, and after all evidence has been heard, the ALJ shall adjourn the hearing.

(b) *Entry of orders*. The ALJ shall enter orders that are necessary to implement the decision and when the order requires any action or compliance, it shall contain a period of time, normally not to exceed 30 days from the date the order is received, for such action or compliance to be completed. Receipt of an order will be determined by §102.5 of this title (relating to General Rules for Written Communication to and from the Commission). If it is determined an administrative penalty violation has occurred, the decision shall set forth the amount of the penalty assessed and shall order payment within a period of time not to exceed 30 days from the date that the order is received. Any penalty assessed by the ALJ for an administrative violation shall be in accordance with the Act, §415.021(c).

(c) *Furnishing decision.* The decision shall be sent immediately to the parties or their representatives by verifiable means that shall be documented in the hearing file. If the decision is furnished by personal delivery, a receipt verifying personal delivery and containing the date of delivery and the person, any business title, and person's business address that received the delivery shall be made by the person who makes the personal delivery, and shall be date-stamped and placed in the hearing file.

(d) *Finality of decision*. The ALJ's decision is final on the date it is received as determined by §102.5 of this title (relating to General Rules for Written Communications to and from the Commission).

(e) *Exhaustion of administrative remedies*. The notification to a party of the ALJ's final decision constitutes exhaustion of all administrative remedies. No motion for rehearing pursuant to the APA or otherwise will be entertained.

(f) *Judicial Review*. A party dissatisfied with a decision of the ALJ may seek judicial review as provided by the Act and in accordance with the APA, §§2001.171, 2001.172, 2001.174, and 2001.176.

§148.16. Proposal for Decision by the ALJ.

(a) *Proposal For Decision*. In contested cases held under the Act, §§402.072, 407.046, and 408.0231, and in other cases not subject to §402.073(b) of the Act (relating to Cooperation with SOAH), and after all evidence has been heard, the ALJ shall adjourn the hearing.

(b) *Description of Proposal Decision*. The proposal for decision shall be based solely upon the record of the individual case. It shall be in writing and include information specified in §149.9 of this title (relating to Proposals for Decision in accordance with the Act, §§402.072, 407.046, and 408.0231).

(c) *Furnishing decision*. SOAH shall furnish the proposal for decision to the TWCC Chief Clerk and shall furnish the proposal for decision by verifiable means and retain information on the date, address, person or entity served, and the means of service to the parties to the hearing. The TWCC Chief Clerk shall notify the Chief of Staff and the General Counsel of the receipt of a proposal for decision from SOAH.

(d) *Filing of briefs and exceptions.* Any party may file briefs and exceptions to the proposal for decision, with SOAH and the TWCC Chief Clerk, for consideration by the ALJ and the commission no later than 15 days after receiving the proposal for decision. Any brief and exceptions filed by any party shall be served by that party on all other parties in the manner provided by §§155.23 (relating to Filing Documents or Serving Documents on the Judge) and 155.25 (relating to Serving a Document to Parties) except that an additional copy shall be served upon the TWCC Chief Clerk in accordance with §102.5 of this title (relating to General Rules for Written Communications to and from the Commission).

(e) *Filing replies*. Any party may file a reply to a brief and exceptions filed under subsection (f) of this section, with SOAH and the TWCC Chief Clerk, for consideration by the ALJ and the commission no later than ten days after the filing of the brief and exceptions. Any reply filed by any party shall be served by that party on all other parties in the manner provided by §§155.23 (relating to Filing Documents or Serving Documents on the Judge) and 155.25 (relating to Serving a Document to Parties) except that an additional copy shall be served upon the TWCC Chief Clerk in accordance with §102.5 of this title (relating to General Rules for Written Communications to and from the Commission).

(f) *Decision by the commission.* The commission shall consider the case at a posted meeting of the commission, no later than 120 days after SOAH provides the commission with the proposal for decision, or the date of the ALJ's comments or response to any exceptions or briefs and any replies to such exceptions or briefs or the expiration of the ALJ's deadline for such response in accordance with §155.59 of this title (relating to Proposal for Decision). Parties to a contested case will be notified of the final decision of the commissioners by verifiable means.

(g) *Exhaustion of administrative remedies.* The notification to a party of the commission's final decision constitutes exhaustion of all administrative remedies. No motion for rehearing will be considered.

(h) *Judicial Review*. A party dissatisfied with a decision of the commission may seek judicial review as provided in the Act in accordance with the APA. Judicial review will be in accordance with the Act and the APA §§2001.171, 2001.172, and 2001.174.

§148.17. Special Provisions for Administrative Penalties.

Required response to assessment of administrative penalty. Not later than the 30th day after a party receives notification of the ALJ's decision assessing an administrative penalty, under §148.15(c) of this title (relating to Final Decisions of the ALJ), the charged party shall file with the TWCC Chief Clerk:

(1) the full amount of the penalty, in the form of a cashier's check, a certified check, or a certified draft; or

(2) a bond for the full amount of the penalty. The bond must be:

(A) executed by a licensed surety company authorized to do business in Texas;

(B) approved by the commission;

(C) made payable to the Texas Workers' Compensation Commission; and

(D) must be effective until all judicial review is final.

§148.18. Record of the Hearing.

The record of the hearing includes:

(1) all pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings on them;

(5) proposed findings and exceptions;

(6) any decision, opinion, report or proposal for decision by the officer presiding at the hearing and any decision by the commission; and

(7) all staff memoranda or data submitted to or considered by the ALJ or members of the agency who are involved in making the decision.

§148.19. Transcript or Duplicate of the Hearing Audiotape or Videotape.

(a) A party may submit a request to the commission for a transcript of the hearing audiotape or videotape. The requestor shall pay the cost of the transcript, as established by the commission.

(b) A party may submit a request to the commission for a duplicate of the hearing audiotape or videotape. The requestor shall pay the cost of the duplication, as established by the commission.

§148.20. Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents.

(a) *Reimbursement of witness or deponent*. A witness or deponent who is not a party and who is served with a subpoena or otherwise compelled to attend any hearing or proceeding to give a deposition or to produce books, records, papers, or other objects that are necessary for the proceeding is entitled to receive reimbursement for travel, meals, lodging, and other amounts as specified and limited in the APA, §2001.103 (relating to Expenses of Witness or Deponent):

(b) *Reasonable and necessary expenses and service*. The party requesting the subpoena or commission or otherwise compelling the attendance of a witness at any hearing or proceeding to give a deposition or produce books, records, papers, or other objects shall be responsible for the payment, of any expense, incurred in serving the subpoena, as well as reasonable and necessary expenses incurred by a nonparty witness who appears in response to the subpoena.

(c) *Failure to pay expenses*. The party requesting the subpoena or commission or otherwise compelling the attendance of a witness at any hearing or proceeding to give a deposition or produce books, records, papers, or other objects shall pay the witness the amount accrued under this section. Failure to pay the witness the amount accrued when sought shall be deemed a violation of a commission rule.

(d) *Return of deposit*. After the Commission's Chief Clerk has received, from the party requesting the subpoena or commission to take deposition, sufficient documentation of all requests by the witness for payment of witness expenses and sufficient proof of payment of all amounts due to the non-party witness or deponent, the commission will return the amount of any deposit required under §§148.10(b)(3) and 148.11(d)(3) of this title (relating respectively to Hearings Subpoenas To Compel Attendance and Subpoenas Duces Tecum and Commissions To Compel Attendance For Depositions).

§148.21. Expenses To Be Paid By Party Seeking Judicial Review.

(a) Upon receiving a copy of a petition filed in district court which seeks judicial review of a final decision in a contested case decided under this chapter, the commission shall prepare a certified copy of the entire record of the proceeding under review, including a transcript of the hearing audiotape, and transmit it to the reviewing court.

(b) The commission shall assess to the party seeking judicial review, expenses incurred by the commission in preparing this copy, including transcription costs, in accordance with the APA §2001.177 (relating to Costs of Preparing Agency Record). Upon request, the commission shall consider the financial ability of the party to pay the costs or any other factor that is relevant to a just and reasonable assessment of costs. If the party seeking judicial review is an injured employee, the commission shall not charge for duplicating the record.

§148.22. Failure to Appear or Comply with Order or Decision, Administrative Violation.

A person commits an administrative violation if that person in the status of a party, or otherwise within the jurisdiction of SOAH (for example, a witness), in a contested case hearing or proceeding before SOAH, fails to comply with an order of the ALJ to include any final decisions issued. Failure to comply with such order or decision shall be deemed a violation of a commission rule.

§148.23. Commission Enforcement of Orders.

Any final order of SOAH is a final order of the commission and may be enforced by the commission in any manner permitted by the Act, the APA, or the rules of the commission. After conclusion of the administrative process, any SOAH order which survives the entry of a final order, the sending of a proposal for decision to the commission, or the dismissal or withdrawal of the case from the SOAH docket, regardless of upon whose motion the dismissal or withdrawal was granted, is an order of the commission and may be enforced by the commission in any manner permitted by the Act, the APA, or the rules of the commission. Examples of enforceable orders include, but are not limited to, orders to reimburse, orders to pay reasonable and necessary medical costs, orders to pay administrative fines, orders to refund, orders assessing attorney fees, orders assessing costs, and orders imposing discovery sanctions.

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500772
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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CHAPTER 149. MEMORANDUM OF UNDERSTANDING WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

The Texas Workers' Compensation Commission (the commission) proposes new §§149.1 - 149.10 concerning an interagency agreement between the commission and the State Office of Administrative Hearings (SOAH) for administrative law judges of SOAH to conduct certain contested case hearings under the Workers' Compensation Act (the Act). The commission also proposes simultaneous repeal of current §§149.1-149.10. New commission procedural rules for such hearings have simultaneously been proposed in Chapter 148 of this title (relating to Hearings Conducted by the State Office of Administrative Hearings). The interagency agreement between the commission and SOAH is required by §402.073(a) of the Texas Labor Code.

The proposed new rules include elimination of provisions of existing Chapter 149 rules that have been preempted by SOAH in accordance with §2003.050(b), Texas Government Code and SOAH's adoption of its procedural rules in Chapter 155 of Title 1 (relating to Rules of Procedures). SOAH declined to adopt any specific procedural rules of the commission. (22 TexReg 12721). SOAH has stated that its procedural rules are not intended to affect agency rules that pertain to events that occur before SOAH

takes jurisdiction or after SOAH loses jurisdiction over a case and that agencies may have their own procedural rules in areas not covered by SOAH procedural rules. (22 TexReg 12720). SOAH has stated that its procedural rules were established "...to continue with the general, established practice at SOAH that the referring agencies initially issue subpoenas and commissions. ...The general procedure has worked efficiently for SOAH, and referring agencies have been able to handle the task as a ministerial matter without confusion. ...the SOAH ALJ will rule on motions to quash the subpoena or commission based on lack of a showing of good cause or for other alleged deficiencies." (22 TexReg 12728).

Proposed new §149.1 includes definitions of terms contained in current §149.2, with revisions to the definition of "contested case" to include additional references to hearings in the Act, and would add new definitions for the acronyms "APA" (the Administrative Procedure Act) and "IRO" (an Independent Review Organization).

Proposed new §149.2 includes the "General Statement" in existing §149.1, with clarifying changes. The general statement sets out the purpose of the Memorandum of Understanding between the commission and SOAH.

Proposed new §149.3 contains the provisions in current §149.3, updates reference to forms used by system participants to request SOAH hearings, and contains guidelines for the length of time for hearings to be set. Subsection (c) has been added to provide commission policy relating to the need for prompt hearings depending on the type of contested case referred to SOAH.

Proposed new §149.4 sets out and clarifies the contents of a notice of hearing in a SOAH case and the time period for providing such notice.

Proposed new §149.5 references the statutes and rules governing SOAH hearings. The rule does not include the "Filing Requirements" currently contained in §149.6 because these provisions are preempted by SOAH's procedural rules.

Proposed new §149.6 contains updated and clarifying provisions concerning statutory confidentiality requirements.

Proposed new §149.7 allows withdrawal of a findings and decision of the commission's medical review division or an IRO decision within 15 working days of the date the request for hearing is received by the Commission. Procedures for accomplishing this withdrawal and subsequent dismissal are also addressed in this section.

Proposed new §§149.8, 149.9, and 149.10 contain the provisions of existing §§149.7, 149.8 and 149.9 with minor modifications. The current requirement to utilize the *Texas Rules of Form* is deleted to allow use of other citation formats. Language is included to allow for changes that have occurred and will occur in technology for verifiable means of transmittal, and to allow amendment of a proposal for decision by an ALJ or comments by an ALJ. A requirement has been added that SOAH find in a proposal for decision whether the commission is authorized by the Act or commission rules to take disciplinary or sanction action against the Petitioner in the SOAH hearing.

Existing provisions in current §149.10 are deleted because those provisions concern the 1995-1996 transfer of hearings to SOAH and are no longer needed.

Allen McDonald, director of the commission's Medical Review division, has determined that for the first five-year period the proposed sections are in effect there will not be fiscal implications for state or local governments as a result of enforcing or administering the new proposed amendments. The procedures currently utilized by parties to SOAH contested case hearings are those contained in the existing rules of the commission and SOAH and those procedures have not been revised to cause any significant fiscal implications.

Allen McDonald, director of the commission's Medical Review division, has also determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide fair and efficient procedures for both the commission and SOAH to handle requests for certain contested case hearings under the Texas Workers' Compensation Act. While the anticipated economic costs to individuals, who are required to comply with the new proposed amendments, cannot be accurately estimated, because the complexity, duration and number of future hearings is unknown, the new proposed amendments are not anticipated to increase the average, procedural costs of a contested case hearing. There may be economic costs to persons who are required to comply with the proposed new amendments due to filings of contested case documents being made at SOAH as well as with the TWCC Chief Clerk especially after a proposal for decision is made by an ALJ at SOAH. There will be no difference in anticipated costs of compliance for small businesses as compared to large businesses.

The commission staff posted a pre-proposal draft rule for informal public input on the commission's website from January 11, 2005 through January 21, 2005. The commission reviewed the input and other available information, sought clarification, and now proposes these rule amendments.

Comments on the proposal must be received by 5:00 p.m., April 4, 2005. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Rules" and then clicking on "Proposed Rules for Comment." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@ twcc.state.tx.us* or by mailing or delivering your comments to Linda Velasquez, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rules as proposed for repeal, may be repealed or may be repealed only in part. Persons in support of the rules repeal, as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held at the Austin central office of the commission (7551 Metro Center Drive, Suite 100, Austin, Texas) on a date to be announced. Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430

to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us*.

28 TAC §§149.1 - 149.10

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

The repealed rules are proposed under the Texas Labor Code, §401.021(1), which specifies the provisions of the Administrative Procedure Act that are applicable to the commission; §402.061, which authorizes the commission to adopt rules necessary to administer the Texas Workers' Compensation Act; §402.071, which specifies that the commission shall establish qualifications for "representatives" as defined by §401.011(37), Texas Labor Code; §402.072, which specifies that only the commission may impose certain types of sanctions; §402.073, which authorizes SOAH to conduct certain hearings; §§402.082 thru 402.092, which require that information in or derived from a commission claim file regarding an injured employee and information maintained in an investigation file of the commission be kept confidential; §407.046(b) and (c), which authorizes a hearing when the commission proposes to revoke a certificate of authority granted to a certified self-insurer; §407.066, which provides for a hearing after the director of the commission's division of self-insurance regulation resolves a dispute concerning the deposit, renewal, termination, release, or return of all or part of the security, liability arising out of the submission or failure to submit security, or the adequacy of the security or reasonableness of the administrative costs, including legal fees, that arise among: a surety, an insurer of an agreement of assumption and guarantee of workers' compensation liabilities, an issuer of a letter of credit, a custodian of the security deposit, a certified self-insurer, or the Texas Certified Self-Insurer Guaranty Association; §407.133, which authorizes the commission, after a hearing, to suspend or revoke the certificate of authority to self-insure of a certified self-insurer who fails to pay an assessment required under §407.124, Texas Labor Code; §407.023, which authorizes the commission to establish criteria for deleting doctors from the commission's list of approved doctors; §408.0231(e), which provides for a hearing on certain sanctions by the commission against a doctor or insurance carrier; §408.024, which authorizes a hearing if the commission intends to relieve an insurance carrier of liability for health care that is furnished by a health care provider or another person selected in a manner inconsistent with the requirements of Subchapter B, Chapter 408, Texas Labor Code; §411.0415, which provides that the commission may request a hearing if the commission determines that the case history of an employee's fatality indicates that the employer or the work environment was a proximate cause of the fatality, §411.042, which providers for the notification process by the commission to identify an employer as a hazardous employer; §411.049(b), which provides for a hearing for an employer to contest findings of the commission under the Hazardous Employer Program; §413.014, which authorizes the commission to adopt rules that provide that preauthorization and concurrent review are required for specified health care treatments and services; §413.031(k), which provides for a SOAH hearing after the original decision in certain medical disputes; §§413.0511 thru 413.0514, which provide that certain information collected, assembled, or maintained by or on behalf of the commission under §§413.0511 or 413.0512 constitutes an investigation file for purposes of §402.092, Texas Labor Code and must be kept confidential except as otherwise specified in those sections; §413.055 that provides a hearing to a party that disputes an interlocutory order of the commission for the payment of all of part of medical benefits; §415.021, which authorizes the commission to assess administrative penalties against a person who commits an administrative violation and to enter a cease and desist order against a person who engages in certain types of conduct; §415.032, which provides the commission's notification process for a possible administrative violation and the request for hearing process by the charged party; §415.034(a), which provides for a hearing to contest administrative violation sanctions by the commission; Texas Government Code, §2001.003, which provides definitions of terms used in the Administrative Procedure Act; §2001.051, which provides an opportunity for a contested case hearing under the Administrative Procedure Act, §2001.052, which provides for the required contents of a notice of hearing in a contested case hearing; §2001.058, which provides for consideration by SOAH of agency rules and limitations upon a state agency making changes to a finding of fact or conclusion of law made by SOAH; §2001.061, which prohibits certain types of *ex parte* communications in hearings; §2001.062, which provides the process for a decision by the state agency after SOAH has issued a proposal for decision; §2001.089, which provides for the process for a state agency to issue a subpoena; §2001.090 which provides for official notice of certain evidence and for use of the special skills or knowledge of the state agency and its staff in evaluating evidence; §2001.094, which provides the process for a state agency to issue a commission requiring deposition; §§2001.171, 2001.171, 2001.174, 2001.176, and 2001.177, which provide a process for judicial review after a final administrative decision has been rendered in a contested case hearing and which authorize a state agency, by rule, to require a party who appeals such a decision to pay all or a part of the cost of preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court; and §2003.050 concerning procedural rules by SOAH.

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

§149.1. General Statement.

§149.2. Definitions.

§149.3. Referral of Contested Case to SOAH.

§149.4. Notice of Hearing.

§149.5. Filing Requirements.

§149.6. Hearings.

§149.7. Final Orders in Accordance with the Act, §§411.049, 413.031 and 415.034.

§149.8. Proposals for Decision in Accordance with the Act, §§402.072, 407.046, and 408.023.

§149.9. Custody of the Hearing Record.

§149.10. Transition of Hearings from the Commission to SOAH.

This 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 February 18, 2005.

TRD-200500774
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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28 TAC §§149.1 - 149.10

The new rules are proposed under the Texas Labor Code, §401.021(1), which specifies the provisions of the Administrative Procedure Act that are applicable to the commission; §402.061, which authorizes the commission to adopt rules necessary to administer the Texas Workers' Compensation Act; §402.071, which specifies that the commission shall establish qualifications for "representatives" as defined by §401.011(37), Texas Labor Code; §402.072, which specifies that only the commission may impose certain types of sanctions; §402.073, which authorizes SOAH to conduct certain hearings; §§402.082 thru 402.092, which require that information in or derived from a commission claim file regarding an injured employee and information maintained in an investigation file of the commission be kept confidential; §407.046(b) and (c), which authorizes a hearing when the commission proposes to revoke a certificate of authority granted to a certified self-insurer; §407.066, which provides for a hearing after the director of the commission's division of self-insurance regulation resolves a dispute concerning the deposit, renewal, termination, release, or return of all or part of the security, liability arising out of the submission or failure to submit security, or the adequacy of the security or reasonableness of the administrative costs, including legal fees, that arise among: a surety, an insurer of an agreement of assumption and guarantee of workers' compensation liabilities, an issuer of a letter of credit, a custodian of the security deposit, a certified self-insurer, or the Texas Certified Self-Insurer Guaranty Association; §407.133, which authorizes the commission, after a hearing, to suspend or revoke the certificate of authority to self-insure of a certified self-insurer who fails to pay an assessment required under §407.124, Texas Labor Code; §407.023, which authorizes the commission to establish criteria for deleting doctors from the commission's list of approved doctors; §408.0231(e), which provides for a hearing on certain sanctions by the commission against a doctor or insurance carrier; §408.024, which authorizes a hearing if the commission intends to relieve an insurance carrier of liability for health care that is furnished by a health care provider or another person selected in a manner inconsistent with the requirements of Subchapter B, Chapter 408, Texas Labor Code; §411.0415, which provides that the commission may request a hearing if the commission determines that the case history of an employee's fatality indicates that the employer or the work environment was a proximate cause of the fatality, §411.042, which providers for the notification process by the commission to identify an employer as a hazardous employer; §411.049(b), which provides for a hearing for an employer to contest findings of the commission under the Hazardous Employer Program; §413.014, which authorizes the commission to adopt rules that provide that preauthorization and concurrent review are required for specified health care treatments and services; §413.031(k), which provides for a SOAH hearing after the original decision in certain medical disputes; §§413.0511 thru 413.0514, which provide that certain information collected, assembled, or maintained by or on behalf of the commission under §§413.0511 or 413.0512 constitutes an investigation file for purposes of §402.092, Texas Labor Code and must be kept confidential except as otherwise specified in those sections; §413.055 that provides a hearing to a party that disputes an interlocutory order of the commission for the payment of all of part of medical benefits; §415.021, which authorizes the commission to assess administrative penalties against a person who commits an administrative violation and to enter a cease and desist order against a person who engages in certain types of conduct; §415.032, which provides the commission's notification process for a possible administrative violation and the request for hearing process by the charged party; §415.034(a), which provides for a hearing to contest administrative violation sanctions by the commission; Texas Government Code, §2001.003, which provides definitions of terms used in the Administrative Procedure Act; §2001.051, which provides an opportunity for a contested case hearing under the Administrative Procedure Act, §2001.052, which provides for the required contents of a notice of hearing in a contested case hearing; §2001.058, which provides for consideration by SOAH of agency rules and limitations upon a state agency making changes to a finding of fact or conclusion of law made by SOAH; §2001.061, which prohibits certain types of *ex parte* communications in hearings; §2001.062, which provides the process for a decision by the state agency after SOAH has issued a proposal for decision; §2001.089, which provides for the process for a state agency to issue a subpoena; §2001.090 which provides for official notice of certain evidence and for use of the special skills or knowledge of the state agency and its staff in evaluating evidence; §2001.094, which provides the process for a state agency to issue a commission requiring deposition; §§2001.171, 2001.171, 2001.174, 2001.176, and 2001.177, which provide a process for judicial review after a final administrative decision has been rendered in a contested case hearing and which authorize a state agency, by rule, to require a party who appeals such a decision to pay all or a part of the cost of preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court; and §2003.050 concerning procedural rules by SOAH.

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

§149.1. Definitions.

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

(1) *Act* -- The Texas Workers' Compensation Act, Texas Labor Code, §§401.001 et. seq.

(2) *ALJ* -- The Administrative Law Judge assigned by the State Office of Administrative Hearings.

(3) *APA* -- The Administrative Procedure Act, as specified in the Government Code, Chapter 2001.

(4) *Commission* -- The Texas Workers' Compensation Commission.

(5) *Contested Case* -- A proceeding in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing as defined in the Government Code, §2001.003, subject, however, to the provisions of the Act as codified in the Texas Labor Code, Title 5, Subtitle A, including §§401.021(1), 411.049, 413.031, 413.055, 415.034, 402.073, 407.046, and 408.0231; and the rules adopted by the commission, in particular Chapter 148 of this title (relating to Hearings Conducted by the State Office of Administrative Hearings).

(6) *IRO* -- An Independent Review Organization, established in accordance with Insurance Code article 21.58C, performing reviews of health care under the Act.

(7) *MOU* -- The Memorandum of Understanding executed by the commission in accordance with this chapter.

(8) *SOAH* -- The State Office of Administrative Hearings.

(9) *TWCC Chief Clerk* -- The Chief Clerk of Proceedings within the Hearings Division of the commission.

§149.2. General Statement.

(a) The Act, §402.073, mandates the commission and the chief administrative law judge of SOAH to adopt by rule an MOU governing contested case hearings held by SOAH under the Act.

(b) The MOU is necessary to accomplish the efficient and expeditious hearing of matters to be heard by SOAH under the Act, §402.073 by establishing the procedures to be used by each agency and clearly delineating each agency's responsibilities. Additionally, the MOU is necessary to inform the public of each agency's responsibilities and the procedures for the institution, conduct and determination of proceedings before SOAH on behalf of the commission.

(c) Chapter 149 rules constitute the MOU between the Commission and SOAH. The MOU provides procedures for referring a case to SOAH, the notice of hearing, proposals for decision, final orders, and custody of the hearing record, and related matters.

§149.3. Referral of Contested Case to SOAH.

(a) Referral of a contested case to SOAH may be made only by the commission. The referral is initiated by filing with SOAH a Request to Docket Case form. The TWCC Chief Clerk will ensure that the appropriate areas are marked on the SOAH form to provide additional notification of the confidentiality provisions as specified in §149.6 of this title (relating to Confidentiality of Records). In addition to filing the appropriate form, a referral also consists of the following items:

(1) all pleadings in the case, including but not limited to, the agency's findings and decision, requests for hearing, complaints, petitions, applications, motions, or such other documents produced by the commission describing agency action relating to the contested case;

(2) a current service list; and

(3) notification of any statutory deadlines imposed by statute or rule involving the contested case.

(b) Not later than ten days after receiving the Request to Docket Case form, SOAH shall assign the case a docket number and provide the docket number and a confirmation of the date, time, and place of hearing to the commission within the limitations specified in §148.5 of this title (relating to Notice of Hearing). The SOAH docket clerk will coordinate the assignment of hearing dates with the TWCC Chief Clerk so that hearings are scheduled both for the efficient use of ALJs and commission representatives in such cases. Following receipt of a request for an assignment of judge, SOAH shall assign an ALJ and shall notify all parties and the commission in writing of the ALJ assigned to the case.

(c) SOAH shall utilize its best efforts to set hearings involving issues of preauthorization under the Act, §§413.014 and 413.055, for a date no more than 30 days after SOAH has received the Request to Docket Case form. SOAH shall utilize its best efforts to set a hearing to consider a proposed penalty under the Act, Chapter 415, Subchapter B, no earlier than 60 days after SOAH has received the Request to Docket Case form. In all other cases under the Act, SOAH shall set such cases for a date within a 90-day period after receiving the Request to Docket Case form.

§149.4. Notice of Hearing.

(a) Except as provided in subsection (b) of this section and upon receipt of the docket number, location and setting date from SOAH and no later than ten days before the hearing date, the TWCC Chief Clerk shall notify the parties in writing, by a verifiable means, of the date, time, place, and nature of the hearing; the docket number; the legal authority and jurisdiction under which the hearing will be held; a reference to the particular sections of the statutes and any rules involved; a notice regarding failure to appear and default judgment, and a short, plain statement of the matters asserted. The reference to the statutes and any rules involved, nature of the hearing, and the short, plain statement may be provided by the commission's representative, and, if so, would not be provided by the TWCC Chief Clerk. After the initial notice is sent by the commission, the ALJ may issue additional notices of the time, date, and place of the hearing as needed.

(b) No later than 30 days before the scheduled hearing date for a hearing conducted under the Act, §407.046(b), SOAH will issue a notice of hearing to the certified self-insurer and to the TWCC Chief Clerk according to the procedures specified in §148.5(b) of this title (relating to Notice of Hearing).

§149.5. Hearings.

(a) Hearings, including prehearing proceedings, on contested cases shall be conducted in accordance with the APA, subject to the provisions of the Act, the commission's rules, SOAH's rules of procedure and any other applicable law and accompanying regulations.

(b) SOAH shall notify the TWCC Chief Clerk of the date, time, and location of the hearing utilizing its best efforts to make such notification within ten days after receiving from the TWCC Chief Clerk a Request to Docket Case form.

§149.6. Confidentiality of Records.

(a) SOAH shall ensure that the confidentiality provisions of the Act, §§402.082 through 402.091, 402.092, 411.034, 413.0513, and 413.0514 and the Code of Federal Regulations, Title 20, §§603.6 and 603.7 (for information obtained from the Texas Workforce Commission or its successor agencies), will be followed, including requests for release of documents or information made confidential under the Act or other applicable law.

(b) Unless authorized by law, SOAH will not identify the name of a claimant for workers' compensation coverage under the Act or other information contained in or derived from the commission's claim file for such a claimant in listings of docketed cases or in other documents distributed to persons other than to the commission and the parties to a contested case involving that claimant.

(c) If a party or a member of the public files a written request with the TWCC Chief Clerk and with SOAH that a hearing be conducted as a hearing open to the public, the ALJ shall consider that request and issue a ruling prior to the opening of the hearing to the public.

(d) Any request for a hearing open to the public shall be filed with the TWCC Chief Clerk and with SOAH at least seven days prior to the first day of the hearing unless the ALJ allows a shorter filing period upon a showing of good cause.

(e) When considering a request that a hearing be open to the public, the ALJ's considerations shall include, but are not limited to, whether the hearing would contain information made confidential under the Act or other applicable laws. If confidential information would be included, then the ALJ may consider whether any procedure could be devised and utilized which would allow a hearing to be open to the

public without violating the confidentiality provisions of the Act, other applicable laws, other applicable regulations, and agreements required by those laws or regulations or without causing an undue burden on the commission or the parties to the hearing.

(f) While SOAH will have temporary custody of the hearing records, the Executive Director of the commission retains statutory authority as custodian of records and is ultimately responsible, as the originating agency, for the release or non-release of the information. Therefore, should any information, which may be confidential under the Act, commission rules, or other law, be requested from SOAH by any person or entity, SOAH shall follow all legal requirements necessary to ensure that the confidential information or document is not released, unless specifically required by law, and shall provide such request to the commission's executive communication division immediately upon receipt.

(g) Pursuant to §413.031(c) of the Act, the commission shall be responsible for publishing any SOAH decisions required to be published by that section on its Internet website. SOAH shall as soon as practicable deliver to the commission a version of the decision in an electronic format.

(h) SOAH and the commission have responsibilities for compliance with the Texas Public Information Act, Chapter 552, Government Code. Each agency maintains information that may be considered confidential or exempt from disclosure under laws administered by that agency. To the extent required by law, each agency is responsible for replying to all public information requests for information maintained by that agency. Each agency will promptly notify the other agency of the receipt of a Texas Public Information Act request relating to confidential or exempt records obtained from the other agency and will coordinate responses as necessary.

§149.7. Action Upon Withdrawal of Decision.

If a findings and decision of the commission's medical review division in a review of a medical service or medical fee under the Act, §413.031, or an IRO decision under the Act, §413.031, is withdrawn by the commission within fifteen working days after the commission receives the request for hearing before SOAH the commission shall file a request to withdraw the case from the SOAH docket. SOAH shall then issue an order dismissing the case without prejudice from the SOAH docket. This provision does not apply to a prospective medical necessity dispute regarding spinal surgery, in which case the request shall be filed in accordance with §133.308 of this title (relating to Medical Dispute Resolution by Independent Review Organization).

§149.8. Final Orders in Accordance with the Act, §§411.049, 413.031, 413.055 and 415.034.

(a) The ALJ shall prepare and issue the decision and order for contested cases under the Act, §§411.049, 413.031, 413.055, and 415.034. The decision shall include findings of fact, conclusions of law, and the order(s) of the ALJ. The Government Code, §2001.058(d) does not permit the commission to attempt to influence the ALJ's findings of fact, conclusions of law, or the ALJ's application of the law to the facts in any proceedings except by proper evidence and legal argument. Unless otherwise provided by statute or rule, the ALJ shall issue a decision and order no later than the 60th day after the date the record is finally closed. In cases involving issues of preauthorization under the Act, §413.014, the ALJ shall make a good faith effort to expedite the issuance of the final order and to issue the final order no later than 30 days after the record in the case is closed.

(b) SOAH shall serve true and correct copies of the transmittal letter and the decision and order by verifiable means upon the parties and shall provide a copy of such documents to the TWCC Chief Clerk.

(c) SOAH shall place a confidentiality stamp on each page of the final order.

§149.9. Proposals for Decision in Accordance with the Act, §§402.072, 407.046, and 408.0231.

(a) After holding a hearing pursuant to the Act, §§402.072, 407.046, and 408.0231, and in other cases not subject to §149.8 of this title (relating to Final Orders in Accordance with the Act, §§411.049, 413.031, 413.055 and 415.034), the ALJ shall prepare a proposal for decision not later than 60 days after the date of the hearing.

(b) The proposal for decision shall contain:

(1) a statement of the reasons upon which the decision is based;

(2) findings of fact based on the evidence presented and matters officially noticed;

(3) conclusions of law based upon the findings of fact and other legal requirements of the law; and

(4) the sanction or order recommended by the ALJ; and

(5) a conclusion of whether the commission is authorized by the Act or commission rules to take disciplinary or sanction action against the Petitioner.

(c) The proposal for decision may also contain:

(1) a summary of the evidence presented by each party; and

(2) a list of all mitigating circumstances and a list of all aggravating circumstances, separately stated, which are necessary for the commissioners to have a complete understanding of the case.

(d) SOAH shall serve a copy of the transmittal letter and the proposal for decision by verifiable means on each party or attorney of record and the TWCC Chief Clerk.

(e) Although filed with SOAH, exceptions and replies are the primary methods by which a party may communicate with the agency's decision maker. Notwithstanding, upon review of any exceptions and replies filed pursuant to §148.16(d) and (e) of this title (relating to Proposal for Decision by the Administrative Law Judge) the ALJ may amend the proposal for decision if the ALJ deems it is appropriate to do so. If the ALJ believes comments other than an amendment are necessary, the administrative law judge may issue a letter to the commission with service of copies to all parties by verifiable means. Any amendments or comments by the ALJ under this subsection shall be due to the TWCC Chief Clerk not later than fifteen working days after receipt of any briefs and exceptions and replies thereto. If such amendments or comments are not received within the twenty working days, the Commission will proceed under the assumption that the ALJ does not intend to make any changes to the existing proposal for decision.

(f) SOAH shall forward the completed record in a case, including the proposal for decision, any amended proposal for decision, and any proposed order to the TWCC Chief Clerk utilizing its best efforts to ensure that such record is forwarded no later than ten days after the later of the deadline for the filing of any exceptions or replies has passed or the issuance of an amended proposal for decision.

(g) SOAH shall place a confidentiality stamp on each page of the proposal for decision.

§149.10. Custody of the Hearing Record.

(a) SOAH shall maintain the official record in a contested case from the time the commission refers the case to SOAH until the conclusion of the administrative hearing process. The commission may also maintain a copy of the record. The conclusion of the administrative hearing process occurs when:

(1) there is the entry of a final order by an ALJ;

(2) the ALJ enters an order to withdraw or dismiss a case from the SOAH docket either by the granting of a party's motion or on the ALJ's own motion; or

(3) the ALJ sends the proposal for decision to the commission.

(b) Prior to the conclusion of the administrative hearing process, any request for a copy of the record may be directed either to SOAH or the commission. Requests for official copies shall be directed to SOAH as the official custodian authorized to certify as to the completeness of the record before the conclusion of the administrative hearing process. SOAH shall consider the confidentiality provisions of the Act, §§402.081 - 402.091 and other applicable laws before denying release or releasing the requested information within the procedures specified in §149.6 of this title (relating to Confidentiality of Records).

(c) After the conclusion of the administrative hearing process, the official custodian of the record shall be the commission. SOAH shall deliver the official record, including the hearing audiotape, to the TWCC Chief Clerk along with a certified statement that the documents delivered constitute the complete record in the case. Any request for a copy or transcript of the record shall then be directed to the commission. The commission shall have the authority to certify as to the completeness of the record.

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500766
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 804-4287

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 367. AGRICULTURAL WATER CONSERVATION PROGRAM

31 TAC §§367.2, 367.17, 367.18, 367.21 - 367.26

The Texas Water Development Board (the board) proposes amendments to 31 TAC §§367.2, 367.17 and 367.18 and new §367.21 - 367.26 under the Agricultural Water Conservation Program.

The rules are proposed as the board's policy on collateral under the nonpoint source pollution control linked deposit program. Under that program, lending institutions agree to make loans to individuals for nonpoint source pollution control projects in exchange for the board's deposit of funds with the institution. These rules provide the requirements on how the deposit of board funds will be collateralized, or secured, as required by the Public Funds Collateralization Act (PFCA).

The board proposes amendments to §367.2 to amend the definition of eligible lending institution. The change will clarify that a state depository is an institution designated by the Texas comptroller of public accounts as a state depository. The section is also amended to add a new definition of pledged security. The term is used throughout the proposed rules, and refers to the securities authorized by the board's rules and the linked deposit agreement to secure the board's deposit of funds with the eligible lending institution.

The board proposes an amendment to §367.17 to clarify that when the executive administrator withdraws funds under the linked deposit agreement or because the institutions cease to be eligible to hold the board's funds, such withdrawal shall be without penalty and shall include withdrawal of accrued interest.

The board proposes an amendment to §367.18 to clarify that the amount of funds required to be deposited as collateral is governed by the newly proposed §367.21 rather than the amount of funds deposited with the lending institution. The difference is that the new provision specifies that the total amount of securities must include accrued interest, and may be reduced by the amount of federal insurance (i.e. FDIC) on the funds.

The board proposes new §367.21 to describe the collateral requirements. Proposed new subsection (a) establishes that the funds the board deposits must be secured in an amount not less than the amount on deposit under the linked deposit agreement increased by the amount of any accrued interest and reduced to the extent the deposit is insured by the United States or its instrumentality. This provision reflects the requirements in the PFCA, and assures the board's deposits are fully secured. Proposed new subsection (b) establishes the value of the securities as the market value from a nationally recognized financial information service based upon the previous day's closing market quotations. This establishes a neutral method for valuation based upon an industry standard, and establishes a specific time for the valuation. This also is the method used to value securities under the board's rules on investments in 31 TAC Chapter 365, thereby providing consistency between board programs in similar situations. Proposed new subsection (c) requires additional collateral to be pledged if the market value falls below the funds on deposit by the board, in order to assure full collateralization of the board's deposit, and also allows a reduction in collateral if the market value exceeds the board's funds on deposit, and if allowed in the linked deposit agreement. Proposed new subsection (d) lists the securities that will be accepted to secure board deposits, and proposed new subsection (e) lists those securities that will not be accepted. The list is taken from the Public Funds Investment Act, §2256.009, and provides a conservative approach to collateralization that will limit the board's risk in the deposit of its funds. Proposed new subsection (f) allows a lending institution to substitute one group of eligible securities with other eligible securities, thereby providing flexibility for the lending institutions while at the same time assuring adequate protection of the board's deposits. Proposed new subsection (g) allows the executive administrator to further limit the selection of securities in the linked deposit agreement, thereby allowing for situation-specific evaluation.

Proposed new §367.22 through §367.26 include specific provisions of the PFCA into board rules in order to put lending institutions and custodians on notice of these requirements. Specifically, proposed new §367.22 establishes the requirements for

the lending institutions to maintain records and the ability of the comptroller or executive administrator to examine such records and securities. Proposed new §367.23 requires the lending institution to deposit the securities issued with a custodian, which must execute a written agreement with the executive administrator regarding the terms and conditions of how the funds will be secured. Still tracking the requirements of the PFCA, the section further provides which entities are eligible to be a custodian, and that the custodian holds the pledged securities in trust, and acts as a bailee or agent of the board. It establishes the requirements of a custodian to record the receipt of a pledged security and issue a trust receipt to the executive administrator. It further establishes that the eligible lending institution shall pay any charges of the custodian bank for accepting and holding the securities.

Proposed new §367.24 allows the custodian to deposit a pledged security with a specified list of institutions, and establishes the duties of the institution into which the pledged security is deposited, in a manner that reiterates the requirements of the PFCA. Proposed new §367.25 requires the custodian to maintain records regarding the pledged securities and transactions relating to them, allows the executive administrator and comptroller to examine the securities or records of the custodian, and requires custodians to file a collateral report with the comptroller. Proposed new §367.26 establishes, as required by the PFCA, that an audit or regulatory examination of lending institutions and custodians must include an examination and verification of pledged securities and records relating to such, and that significant or material noncompliance with the requirements of board rule and the PFCA shall be reported to the comptroller and board.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period the amendments and new sections are in effect there will not be fiscal implications on state and local government as a result of enforcement and administration of the amendments and new sections.

Ms. Callahan has also determined that for the first five years the amendments and new sections, as proposed, are in effect the public benefit anticipated as a result of enforcing the amendments and new sections will be to assure the funds of the board deposited with lending institutions as part of the linked deposit programs will be protected. Ms. Callahan has determined there will not be economic costs to small businesses or individuals required to comply with the amendments and new sections as proposed.

Comments on the proposal will be accepted for 30 days following publication and may be submitted to Jonathan Steinberg, Deputy Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to jonathan.steinberg@twdb.state.tx.us or by fax at (512) 475-2051.

The amendments and new sections are proposed under the authority of the Texas Water Code §6.101 and §17.905, which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State and for the linked deposit program.

The statutory provisions affected by the proposed amendments and new sections are Texas Water Code, Chapter 17, Subchapter J.

§367.2. Definitions.

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

(1) - (5) (No change.)

(6) Eligible lending institution--a financial institution that makes commercial loans, is either a designated depository of state funds by the Texas comptroller of public accounts, herein referred to as a state depository, or an institution of the Farm Credit System headquartered in this state, and agrees to participate in a linked deposit program established under Water Code §17.905 and is willing to agree to provide collateral equal to the amount of linked deposits placed with it.

(7) - (11) (No change.)

(12) Pledged security--Means the securities authorized by these rules and the linked deposit agreement to secure the board's deposit of funds with the eligible lending institution.

(13) [~~(12)~~] Political subdivision--Includes a municipality, county, district or authority created under the Texas Constitution Article III, Section 52, or Article XVI, Section 59, an institution of higher education as defined by §61.003, Education Code, any interstate compact commission to which the state is a party, and any nonprofit water supply corporation created and operating under Texas Water Code Chapter 67.

§367.17. Board Obligations in Linked Deposit Agreements.

(a) (No change.)

(b) The board or the executive administrator may withdraw linked deposits and accrued interest from the lending institution without penalty according to the terms of the linked deposit agreement or if the institution ceases to be either a state depository as designated by the Texas comptroller of public accounts or a Farm Credit System institution headquartered in Texas.

§367.18. Lending Institution Obligations in Linked Deposit Agreements.

(a) Upon execution of a linked deposit agreement and receipt of money from the board, the lending institution shall:

(1) provide collateral as required in §367.21 of this title (relating to Collateral for Linked Deposits) [~~equal to the amount of the money from the fund placed on deposit with it~~];

(2) - (6) (No change.)

(b) (No change.)

§367.21. Collateral for Linked Deposits.

(a) Eligible lending institutions shall secure funds which the board deposits pursuant to a linked deposit agreement in an amount not less than the amount of the deposit under the linked deposit agreement:

(1) increased by the amount of any accrued interest; and

(2) reduced to the extent that the United States or an instrumentality of the United States insures the deposit.

(b) For the purposes of this chapter, the value of securities shall be the market value obtained from a nationally recognized financial information service based upon the previous day's closing market quotations.

(c) If the market value of the securities pledged by the eligible lending institution becomes less than the amount of funds on deposit in the depository by the board, the executive administrator shall require that additional collateral be pledged immediately, or that the amounts of board funds on deposit be reduced. If the collateral pledged by an

eligible lending institution is in excess of that required by the market value of funds on deposit by the board, the executive administrator may allow the release of the excess collateral.

(d) Eligible lending institutions shall secure funds that the board deposits pursuant to a linked deposit agreement using only the following as pledged securities except as further limited by subsection (e) of this section:

(1) obligations, including letters of credit, of the United States or its agencies and instrumentalities;

(2) direct obligations of this state or its agencies and instrumentalities;

(3) collateralized mortgage obligations directly issued by a federal agency or instrumentality of the United States, the underlying security for which is guaranteed by an agency or instrumentality of the United States;

(4) other obligations, the principal and interest of which are unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies and instrumentalities;

(5) obligations of states, agencies, counties, cities, and other political subdivisions of any state rated as to investment quality by a nationally recognized investment rating firm not less than A or its equivalent; and

(6) bonds issued, assumed, or guaranteed by the State of Israel.

(e) The following may not be used to secure funds that the board deposits pursuant to a linked deposit agreement:

(1) obligations whose payment represents the coupon payments on the outstanding principal balance of the underlying mortgage-backed security collateral and pays no principal;

(2) obligations whose payment represents the principal stream of cash flow from the underlying mortgage-backed security collateral and bears no interest;

(3) collateralized mortgage obligations that have a stated final maturity date of greater than 10 years; and

(4) collateralized mortgage obligations the interest rate of which is determined by an index that adjusts opposite to the changes in a market index.

(f) An eligible lending institution may substitute one group of securities eligible under this section and the linked deposit agreement for another group of securities eligible under this section and the linked deposit agreement.

(g) Within the limits of this section, the executive administrator may limit the selection of eligible investment securities for linked deposits in the linked deposit agreement.

§367.22. Records of Depository.

(a) Eligible lending institutions shall maintain a separate, accurate, and complete record relating to the pledged securities, the deposit of the board's funds, and all transactions related to the pledged securities.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time the pledged securities or a record an eligible lending institution maintains under this section.

§367.23. Deposit of Pledged Securities with Custodian.

(a) An eligible lending institution shall deposit with a custodian a pledged security. The custodian and the executive administrator shall agree in writing on the terms and conditions for securing a linked deposit.

(b) A custodian must be approved by the executive administrator, either in the linked deposit agreement or separately, and be:

(1) a state or national bank that:

(A) is designated by the comptroller as a state depository;

(B) has its main office or a branch office in this state; and

(C) has a capital stock and permanent surplus of $5 million or more;

(2) the Texas Treasury Safekeeping Trust Company;

(3) a Federal Reserve Bank or a branch of a Federal Reserve Bank; or

(4) a federal home loan bank.

(c) A custodian holds in trust the pledged securities used to secure the board's deposit in the eligible lending institution.

(d) A custodian, whether acting alone or through a permitted institution under §367.24 of this title (relating to Custodian's Deposit of Pledged Security with Another Institution), is for all purposes the bailee or agent of the board.

(e) On receipt of a pledged security, a custodian shall:

(1) immediately identify on its books and records, by book entry or another method, the pledge of the security to the board; and

(2) promptly issue and deliver to the executive administrator a trust receipt for the pledged security. If the custodian deposits the pledged security pursuant to §367.24 of this title, the trust receipt shall so indicate.

(f) An eligible lending institution may not itself be the custodian of securities it pledges for the linked deposit, nor may it deposit the securities with an entity of which the eligible lending institution is a branch.

(g) The eligible lending institution shall pay any charges of the custodian bank for accepting and holding the securities.

§367.24. Custodian's Deposit of Pledged Security with Another Institution.

(a) The custodian may deposit a pledged security with one of the following institutions:

(1) a Federal Reserve Bank;

(2) a clearing corporation as defined by §8.102, Texas Business and Commerce Code;

(3) a bank eligible to be a custodian under §367.23 of this title (relating to Deposit of Pledged Securities with Custodian); or

(4) a state or nationally chartered bank that is controlled by a bank holding company that controls a bank eligible to be a custodian under §367.23 of this title.

(b) The custodian may not deposit a pledged security with an eligible lending institution or an entity of which the eligible lending institution is a branch.

(c) If a deposit is made under subsection (a) of this section, the institution to which the deposit is made shall:

(1) hold the pledged security to secure funds the board deposits with the eligible lending institution; and

(2) on receipt of deposit, immediately issue to the custodian an advice of transaction or other document that is evidence of the deposit of the pledged security.

(d) An institution may apply book entry procedures when an investment security held by a custodian is deposited under this section. The records must at all times state the name of the custodian that deposits an investment security in the institution.

§367.25. Records of Custodian.

(a) The custodian shall maintain a separate, accurate, and complete record relating to each pledged security and each transaction relating to a pledged security.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time a pledged security or a record a custodian maintains under this section. The board or its agent may inspect at any time a pledged security evidenced by a trust receipt.

(c) The custodian shall file a collateral report with the comptroller in the manner and on the dates prescribed by the comptroller.

§367.26. Audits and Examinations.

As part of an audit or regulatory examination of an eligible lending institution or custodian, the auditor or examiner shall examine and verify pledged securities and records maintained under this chapter, and shall report any significant or material noncompliance with this chapter to the comptroller and the board.

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

Filed with the Office of the Secretary of State on February 15, 2005.

TRD-200500725
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: April 19, 2005
For further information, please call: (512) 475-2052

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND
SUBCHAPTER C. NONPOINT SOURCE POLLUTION CONTROL PROJECT AND ESTUARY MANAGEMENT FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board (the board) proposes amendments to 31 TAC §§375.302, 375.354 and 375.355 and new §375.358 - 375.363 under Clean Water State Revolving Fund.

The rules are proposed as the board's policy on collateral under the nonpoint source pollution control linked deposit program. Under that program, lending institutions agree to make loans to individuals for nonpoint source pollution control projects in exchange for the board's deposit of funds with the institution. These rules provide the requirements on how the deposit of board funds will be collateralized, or secured, as required by the Public Funds Collateralization Act (PFCA).

The board proposes an amendment to §375.302 to add a definition of pledged security. The term is used throughout the proposed rules, and refers to the securities authorized by the board's rules and the linked deposit agreement to secure the board's deposit of funds with the eligible lending institution.

The board proposes an amendment to §375.354 to clarify that when the executive administrator withdraws funds under the linked deposit agreement or because the institutions cease to be eligible to hold the board's funds, such withdrawal shall be without penalty and shall include withdrawal of accrued interest.

The board proposes an amendment to §375.355 to clarify that the amount of funds required to be deposited as collateral is governed by the newly proposed §375.358 rather than the amount of funds deposited with the lending institution. The difference is that the new provision specifies that the total amount of securities must include accrued interest, and may be reduced by the amount of federal insurance (i.e. FDIC) on the funds.

The board proposes new §375.358 to describe the collateral requirements. Proposed new subsection (a) establishes that the funds the board deposits must be secured in an amount not less than the amount on deposit under the linked deposit agreement increased by the amount of any accrued interest and reduced to the extent the deposit is insured by the United States or its instrumentality. This provision reflects the requirements in the PFCA, and assures the board's deposits are fully secured. Proposed new subsection (b) establishes the value of the securities as the market value from a nationally recognized financial information service based upon the previous day's closing market quotations. This establishes a neutral method for valuation based upon an industry standard, and establishes a specific time for the valuation. This also is the method used to value securities under the board's rules on investments in 31 TAC Chapter 365, thereby providing consistency between board programs in similar situations. Proposed new subsection (c) requires additional collateral to be pledged if the market value falls below the funds on deposit by the board, in order to assure full collateralization of the board's deposit, and also allows a reduction in collateral if the market value exceeds the board's funds on deposit, and if allowed in the linked deposit agreement. Proposed new subsection (d) lists the securities that will be accepted to secure board deposits, and proposed new subsection (e) lists those securities that will not be accepted. The list is taken from the Public Funds Investment Act, §2256.009, and provides a conservative approach to collateralization that will limit the board's risk in the deposit of its funds. Proposed new subsection (f) allows a lending institution to substitute one group of eligible securities with other eligible securities, thereby providing flexibility for the lending institutions while at the same time assuring adequate protection of the board's deposits. Proposed new subsection (g) allows the executive administrator to further limit the selection of securities in the linked deposit agreement, thereby allowing for situation-specific evaluation.

Proposed new §375.359 through §375.363 include specific provisions of the PFCA into board rules in order to put lending institutions and custodians on notice of these requirements. Specifically, proposed new §375.359 establishes the requirements for the lending institutions to maintain records and the ability of the comptroller or executive administrator to examine such records and securities. Proposed new §375.360 requires the lending institution to deposit the securities issued with a custodian, which must execute a written agreement with the executive administrator regarding the terms and conditions of how the funds will be

secured. Still tracking the requirements of the PFCA, the section further provides which entities are eligible to be a custodian, and that the custodian holds the pledged securities in trust, and acts as a bailee or agent of the board. It establishes the requirements of a custodian to record the receipt of a pledged security and issue a trust receipt to the executive administrator. It further establishes that the eligible lending institution shall pay any charges of the custodian bank for accepting and holding the securities.

Proposed new §375.361 allows the custodian to deposit a pledged security with a specified list of institutions, and establishes the duties of the institution into which the pledged security is deposited, in a manner that reiterates the requirements of the PFCA. Proposed new §375.362 requires the custodian to maintain records regarding the pledged securities and transactions relating to them, allows the executive administrator and comptroller to examine the securities or records of the custodian, and requires custodians to file a collateral report with the comptroller. Proposed new §375.363 establishes, as required by the PFCA, that an audit or regulatory examination of lending institutions and custodians must include an examination and verification of pledged securities and records relating to such, and that significant or material noncompliance with the requirements of board rule and the PFCA shall be reported to the comptroller and board.

Ms. Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period the amendments and new sections are in effect there will not be fiscal implications on state and local government as a result of enforcement and administration of the amendments and new sections.

Ms. Callahan has also determined that for the first five years the amendments and new sections, as proposed, are in effect the public benefit anticipated as a result of enforcing the amendments and new sections will be to assure the funds of the board deposited with lending institutions as part of the linked deposit programs will be protected. Ms. Callahan has determined there will not be economic costs to small businesses or individuals required to comply with the amendments and new sections as proposed.

Comments on the proposal will be accepted for 30 days following publication and may be submitted to Jonathan Steinberg, Deputy Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to jonathan.steinberg@twdb.state.tx.us or by fax at (512) 475-2051.

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §375.302

The amendments are proposed under the authority of the Texas Water Code §6.101 and §15.611, which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State and for the linked deposit program.

The statutory provisions affected by the proposed amendments are Texas Water Code, Chapter 15, Subchapter J.

§375.302. Definitions of Terms.

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

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

(10) Pledged security--Means the securities authorized by these rules and the linked deposit agreement to secure the board's deposit of funds with the eligible lending institution.

This 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 February 15, 2005.

TRD-200500723
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: April 19, 2005
For further information, please call: (512) 475-2052

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DIVISION 3. NONPOINT SOURCE POLLUTION LINK DEPOSIT PROGRAM

31 TAC §§375.354, 375.355, 375.358 - 375.363

The amendments and new sections are proposed under the authority of the Texas Water Code §6.101 and §15.611, which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State and for the linked deposit program.

The statutory provisions affected by the proposed amendments and new sections are Texas Water Code, Chapter 15, Subchapter J.

§375.354. Board Obligations in Linked Deposit Agreements.

(a) (No change.)

(b) The board or the executive administrator may withdraw linked deposits and accrued interest from the lending institution without penalty according to the terms of the linked deposit agreement or if the institution ceases to be either a state depository or a Farm Credit System institution headquartered in Texas.

§375.355. Lending Institution Obligations in Linked Deposit Agreements.

(a) Upon execution of a linked deposit agreement and receipt of funds from the board, the lending institution shall:

(1) provide collateral as required in §375.358 of this title (relating to Collateral for Linked Deposits) [~~equal to the amount of the funds from the CWSRF program account placed on deposit with it~~];

(2) - (6) (No change.)

(b) (No change.)

§375.358. Collateral for Linked Deposits.

(a) Eligible lending institutions shall secure funds which the board deposits pursuant to a linked deposit agreement in an amount not less than the amount of the deposit under the linked deposit agreement:

(1) increased by the amount of any accrued interest; and

(2) reduced to the extent that the United States or an instrumentality of the United States insures the deposit.

(b) For the purposes of this subchapter, the value of securities shall be the market value obtained from a nationally recognized financial information service based upon the previous day's closing market quotations.

(c) If the market value of the securities pledged by the eligible lending institution becomes less than the amount of funds on deposit in the depository by the board, the executive administrator shall require that additional collateral be pledged immediately, or that the amounts of board funds on deposit be reduced. If the collateral pledged by an eligible lending institution is in excess of that required by the market value of funds on deposit by the board, the executive administrator may allow the release of the excess collateral.

(d) Eligible lending institutions shall secure funds that the board deposits pursuant to a linked deposit agreement using only the following as pledged securities except as further limited by subsection (e) of this section:

(1) obligations, including letters of credit, of the United States or its agencies and instrumentalities;

(2) direct obligations of this state or its agencies and instrumentalities;

(3) collateralized mortgage obligations directly issued by a federal agency or instrumentality of the United States, the underlying security for which is guaranteed by an agency or instrumentality of the United States;

(4) other obligations, the principal and interest of which are unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies and instrumentalities;

(5) obligations of states, agencies, counties, cities, and other political subdivisions of any state rated as to investment quality by a nationally recognized investment rating firm not less than A or its equivalent; and

(6) bonds issued, assumed, or guaranteed by the State of Israel.

(e) The following may not be used to secure funds that the board deposits pursuant to a linked deposit agreement:

(1) obligations whose payment represents the coupon payments on the outstanding principal balance of the underlying mortgage-backed security collateral and pays no principal;

(2) obligations whose payment represents the principal stream of cash flow from the underlying mortgage-backed security collateral and bears no interest;

(3) collateralized mortgage obligations that have a stated final maturity date of greater than 10 years; and

(4) collateralized mortgage obligations the interest rate of which is determined by an index that adjusts opposite to the changes in a market index.

(f) An eligible lending institution may substitute one group of securities eligible under this section and the linked deposit agreement for another group of securities eligible under this section and the linked deposit agreement.

(g) Within the limits of this section, the executive administrator may limit the selection of eligible investment securities for linked deposits in the linked deposit agreement.

§375.359. Records of Depository.

(a) Eligible lending institutions shall maintain a separate, accurate, and complete record relating to the pledged securities, the deposit of the board's funds, and all transactions related to the pledged securities.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time the pledged securities or a record an eligible lending institution maintains under this section.

§375.360. Deposit of Pledged Securities with Custodian.

(a) An eligible lending institution shall deposit with a custodian a pledged security. The custodian and the executive administrator shall agree in writing on the terms and conditions for securing a linked deposit.

(b) A custodian must be approved by the executive administrator, either in the linked deposit agreement or separately, and be:

(1) a state or national bank that:

(A) is designated by the comptroller as a state depository;

(B) has its main office or a branch office in this state; and

(C) has a capital stock and permanent surplus of $5 million or more;

(2) the Texas Treasury Safekeeping Trust Company;

(3) a Federal Reserve Bank or a branch of a Federal Reserve Bank; or

(4) a federal home loan bank.

(c) A custodian holds in trust the pledged securities used to secure the board's deposit in the eligible lending institution.

(d) A custodian, whether acting alone or through a permitted institution under §375.361 of this title (relating to Custodian's Deposit of Pledged Security with Another Institution), is for all purposes the bailee or agent of the board.

(e) On receipt of a pledged security, a custodian shall:

(1) immediately identify on its books and records, by book entry or another method, the pledge of the security to the board; and

(2) promptly issue and deliver to the executive administrator a trust receipt for the pledged security. If the custodian deposits the pledged security pursuant to §375.361 of this title, the trust receipt shall so indicate.

(f) An eligible lending institution may not itself be the custodian of securities it pledges for the linked deposit, nor may it deposit the securities with an entity of which the eligible lending institution is a branch.

(g) The eligible lending institution shall pay any charges of the custodian bank for accepting and holding the securities.

§375.361. Custodian's Deposit of Pledged Security with Another Institution.

(a) The custodian may deposit a pledged security with one of the following institutions:

(1) a Federal Reserve Bank;

(2) a clearing corporation as defined by §8.102, Texas Business and Commerce Code;

(3) a bank eligible to be a custodian under §375.360 of this title (relating to Deposit of Pledged Securities with Custodian); or

(4) a state or nationally chartered bank that is controlled by a bank holding company that controls a bank eligible to be a custodian under §375.360 of this title.

(b) The custodian may not deposit a pledged security with an eligible lending institution or an entity of which the eligible lending institution is a branch.

(c) If a deposit is made under subsection (a) of this section, the institution to which the deposit is made shall:

(1) hold the pledged security to secure funds the board deposits with the eligible lending institution; and

(2) on receipt of deposit, immediately issue to the custodian an advice of transaction or other document that is evidence of the deposit of the pledged security.

(d) An institution may apply book entry procedures when an investment security held by a custodian is deposited under this section. The records must at all times state the name of the custodian that deposits an investment security in the institution.

§375.362. Records of Custodian.

(a) The custodian shall maintain a separate, accurate, and complete record relating to each pledged security and each transaction relating to a pledged security.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time a pledged security or a record a custodian maintains under this section. The board or its agent may inspect at any time a pledged security evidenced by a trust receipt.

(c) The custodian shall file a collateral report with the comptroller in the manner and on the dates prescribed by the comptroller.

§375.363. Audits and Examinations.

As part of an audit or regulatory examination of an eligible lending institution or custodian, the auditor or examiner shall examine and verify pledged securities and records maintained under this subchapter, and shall report any significant or material noncompliance with this subchapter to the comptroller and the board.

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

Filed with the Office of the Secretary of State on February 15, 2005.

TRD-200500724
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: April 19, 2005
For further information, please call: (512) 475-2052

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.17

The Texas Board of Pardons and Paroles proposes an amendment to 37 TAC §145.17, concerning action upon special review of information not previously available--release denied. The amendment is proposed for the purpose of clarifying the procedures regarding subsequent reviews of parole panel votes to deny release to parole or mandatory supervision.

Rissie Owens, Chair of the Board, has determined, that for the first five-year period the proposed amendment is in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the amended rule as proposed is in effect, the public benefit anticipated as a result of the amendment to this section will be to bring the rules into compliance with current board practice. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed.

Comments should be directed to Laura McElroy, General Counsel, Texas Board of Pardons and Paroles, 211 W. 14th Street, Suite 500, Austin, Texas 78701. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rule is proposed under §§508.0441, 508.045, 508.141, and 508.147 Government Code. Sections 508.0441, 508.045, 508.141, and 508.147 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to parole or mandatory supervision; to act on matters of release to parole or mandatory supervision; to consider and order release on parole; and release to mandatory supervision.

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

§145.17. Action upon Special Review of Information Not Previously Available--Release Denied.

(a) This rule provides a forum for receipt and consideration of information not previously available to the parole panel where the decision of the panel was to deny release to parole or mandatory supervision. While affording a remedy for consideration of such information, the Board also intends by this rule to reduce frivolous and duplicate requests for special consideration.

(b) Requests for special review shall apply only to cases reviewed for release to parole or mandatory supervision where the decision of the parole panel was to deny release to parole or mandatory supervision.

(c) All requests for special review shall be in writing.

(d) All requests for special review shall be filed with The Texas Board of Pardons and Paroles, Board Administrator, P.O. Box 13401, Austin, Texas 78711.

(e) The board administrator shall refer to the special review parole panel only those requests for special review which meet the criteria set forth herein.

(f) [~~(d)~~] Requests for special review shall be considered in the following circumstances:

(1) a parole panel denied release to parole or mandatory supervision and a parole panel member who voted with the majority on that panel desires to have the decision reconsidered prior to the next review date; or

(2) a written request [petition] on behalf of an offender cites information not previously available to the parole panel. Information not previously available shall mean only:

(A) responses from trial officials and victims;

(B) a change in an offender's sentence and judgment; or

(C) an allegation that the parole panel has committed an error of law or board rule.

(3) [If] both parole panel members who voted with the majority are no longer active board members or parole commissioners, and the presiding officer (chair) or designated board member may places the decision in the special review process to be reconsidered prior to the next review date.

[(e) Information not previously available shall mean only:]

[(1) responses from trial officials and victims;]

[(2) a change in an offender's sentence and judgment; or]

[(3) an allegation that the parole panel commits an error of law or board rule.]

[(f) All requests for special review shall be filed with The Texas Board of Pardons and Paroles, Board Administrator, P.O. Box 13401, Austin, Texas 78711.]

[(g) The board administrator shall refer to the special review parole panel only those requests for special review which meet the criteria set forth herein.]

(g) [(h)] A special review parole panel, other than the current voting panel, shall decide and exercise final action on such requests for special review.

(h) [(i)] Upon considering a case for special review, the special review parole panel may take the following action:

(1) defer for request and receipt of further information;

(2) grant special review, and either [deny special review; or]

(A) vote remain set, or

(B) revote the case in accordance with applicable provisions of Chapter 145 of this title (relating to Parole Process).

[(3) grant special review and revote the case in accordance with applicable provisions of Chapter 145 of this title (relating to Parole Process).]

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

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500776
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 406-5388

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER L. PERMANENCY PLANNING

40 TAC §700.1208

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), new §700.1208, concerning the specific goal as to the percentage of children who remain in care for over 24 months, in its Child Protective Services chapter. Under the federal Social Security Act, Title IV-E, §471(a), and federal rules 45 Code of Federal Regulations §1356.21(n) implementing the Adoption and Safe Families Act, states are required to provide specific goals by state law as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care) who, at any time during such year, will remain in foster care after having been in such care for more than 24 months. DFPS currently fulfills this requirement by attaching a performance measure as a rider to the DFPS section of the state Appropriations Act. The purpose of the new section is to put the required information in rules, instead of relying on the Appropriations Act. In addition, the rule reduces from 45% to 35% the percentage of children who may remain in foster care for more than 24 months.

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 length of children's stay in substitute care will continue to be monitored closely. 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.

Questions about the content of the proposal may be directed to Larry Burgess at (512) 438-5320 in DFPS's Child Protective Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-312, 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*.

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

The new section is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes FPS to propose and adopt rules to facilitate implementation of Department programs.

The new section implements the Social Security Act, Title IV-E, §471(a).

§700.1208. What is the specific goal as to percentage of children in care over 24 months?

To comply with Title IV of the Social Security Act, §471(a)(14) and federal rules 45 Code of Federal Regulations §1356.21(n), the Department of Family and Protective Services (DFPS) seeks to limit the number of children under DFPS's responsibility who remain in substitute care for a period longer than 24 months to no more than 35% of the 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.

Filed with the Office of the Secretary of State on February 15, 2005.

TRD-200500698
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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CHAPTER 745. LICENSING
SUBCHAPTER M. ADMINISTRATIVE REVIEWS AND DUE PROCESS HEARINGS
DIVISION 2. DUE PROCESS HEARINGS

40 TAC §745.8843

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), an amendment to §745.8843, concerning procedures after an individual requests a due process hearing, in its Licensing chapter. The State Office of Administrative Hearings (SOAH) procedural rules will allow DFPS to obtain a default judgment based on notice of hearing sent to the party's last known address if the DFPS rules authorize it. The current DFPS rules are not specific enough to satisfy SOAH's procedural rules. The Licensing Division is recommending the rule be revised to satisfy the SOAH requirement. The proposed amendment will also clarify that the person requesting a hearing must inform DFPS of a change in address.

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 person requesting the hearing will be more aware of their responsibilities when requesting a due process hearing. 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.

Questions about the content of the proposal may be directed to Michele Adams at (512) 438-3262 in DFPS's Child-Care Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-318, 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*.

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

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes FPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements HRC, §40.029.

§745.8843. What happens after I make a request for a due process hearing?

(a) After you request a due process hearing, we will ask the State Office of Administrative Hearings to appoint an administrative law judge to conduct proceedings necessary for him to make a final decision in the case.

(b) After the State Office of Administrative Hearings assigns a docket number to your case, we will send you notice of the hearing, by regular and certified mail, to your last known address as shown by our records.

(c) You are responsible for providing the Docket Clerk with written notification of any change in your address that occurs after you have requested 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
General Counsel
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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 §§746.615, 746.617, 746.619, 746.621, 746.623, 746.629, 746.1325, 746.3309, 746.3401, 746.3503, 746.3505, 746.4003, and 746.5403, concerning immunizations, vision and hearing screening, self-instructional training, meals and/or snacks, annual sanitation inspection, diaper changing, first-aid kits, and annual inspection for gas leaks; the repeal of §746.4005, concerning syrup of ipecac; and new §746.5017, concerning children swimming in a body of water other than a swimming pool, in its Minimum Standards for Child-Care Centers chapter.

The amendments to §§746.615, 746.617, 746.619, 746.621, and 746.623 change the name of the Texas Department of Health to the Texas Department of State Health Services (DSHS). In addition, current DFPS rules conflict with new rules recently adopted by the DSHS, so DFPS is cross-referencing DSHS rules to ensure the DFPS minimum standards do not conflict with DSHS rules. The purpose of the amendment to §746.629 is to cross-reference the Department of State Health Services rules for Vision and Hearing requirements in the Texas Administrative Code. This will eliminate any conflicts in interpretation and will ensure that the child-care community and Licensing staff utilize the most current rules regarding vision and hearing screening requirements.

The amendment to §746.1325 clarifies the definition of self-instructional and instructor-led training. Typically, caregivers derive greater benefit from instructor-led training, due to the interaction with the trainer and others in the group, thus the current rules limit the amount of annual training that can be obtained through self-instructional methods. However, changes in technology have expanded the training resources available to the child-care community, including computer-based training modules, which may be either self-instructional or instructor-led. The revised rule will help centers, as well as DFPS Licensing staff, correctly classify training formats.

The purpose of the amendment to §746.3309 is to clarify that baked goods provided by parents for celebrations can be shared with other children. This change is the result of a concern raised by parents and permit holders that the current rule limits a parent's opportunity to provide baked goods prepared outside of the child-care operation for not only their child, but all children in a group for birthdays or other type celebrations.

The amendment to §746.3401 clarifies that a sanitation inspection must be completed before a provisional permit can be issued and at least once every 12 months.

The amendments to §746.3503 and §746.3505 are the result of concerns that have been expressed regarding the length of time required for the diaper-changing surface to air dry between diaper changes as a part of the sanitizing process specified in §746.3409. When diapers are changed on consecutive children in an infant care room, waiting 10 minutes between each diaper change is not feasible. The proposed rule change provides an option to use a non-absorbent paper liner on the changing surface or wipe the surface dry after approximately two minutes when changing children consecutively. Additionally, the directions for sanitizing the changing surface are moved to §746.3505, which is a more appropriate location for the topic.

The amendment to §746.4003 and the repeal of §746.4005 update the rules to be consistent with recent recommendations concerning syrup of ipecac. The American Academy of Pediatrics recently reported on the adverse effects of administering syrup of ipecac in the event of poisoning. Research has shown that the syrup can cause serious harm if not administered correctly. In many communities, syrup of ipecac is no longer available for purchase over the counter.

New §746.5017 addresses children swimming in a body of water other than a swimming pool. The current rules do not clearly prohibit swimming in bodies of water other than swimming or wading pools, such as rivers, lakes or ponds. The new rule clearly states this. Unlike properly maintained swimming pools and wading pools, caregivers cannot clearly see the bottom of a lake, river, pond, or creek to know when a child may be in distress in the water, a child is missing, or has drowned. In addition, bodies of water such as rivers, creeks, and coastal waters lack physical boundaries, which limit the area a child may swim in, may have an undercurrent that can quickly carry a child outside of a designated swimming area, and the water has not been treated chemically to protect children's health.

The title of §746.5403 is amended to make the rule consistent with §746.5401, which allows a gas leak inspection to be conducted once every two years, rather than annually.

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 the health, safety, and well being of children will be protected. 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.

Questions about the content of the proposal may be directed to Michele Adams at (512) 438-3262 in DFPS's Child Care Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-317, 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*.

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

SUBCHAPTER C. RECORD KEEPING

DIVISION 1. RECORDS OF CHILDREN

40 TAC §§746.615, 746.617, 746.619, 746.621, 746.623, 746.629

The amendments are proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendments implement the Human Resources Code, §40.029 and §42.042.

§746.615. Are there exemptions for immunization requirements?

Yes; however, exemptions for immunization requirements must meet criteria specified by the Texas Department of State Health Services rules in 25 TAC §97.62 (relating to Exclusions from Compliance).

§746.617. Where can I find more information on immunizations?

You can find more information in the Texas Department of State Health Services [~~Health's~~] rules at 25 TAC Chapter 97, Subchapter B (relating to Immunization Requirements in Texas Elementary and Secondary Schools and Institutions of Higher Education). You can access it on the Texas Department of State Health Services Internet website at: www.dshs.state.tx.us/immunize [~~www.tdh.state.tx.us/immunize~~], or you may obtain a copy from Licensing or your local or state health department.

§746.619. When must I have the child's immunization record on file?

(a) (No change.)

(b) If you provide only an alternate-care program, you must have the immunization record for each child who has attended your child-care center two [~~five~~] or more times within a 30-day [~~three-month~~] period.

§746.621. May I admit a child who is not current on immunizations?

Yes; however, you must comply with the rules for provisional admittance established by the Texas Department of State Health Services rules in 25 TAC §97.66 (relating to Provisional Enrollment). [~~You may enroll a child provisionally and allow the child to attend for up to 30 days if the parent can provide written documentation from a health-care professional that the child has received at least one immunization in each series required for that age child, and a statement of when the remaining required immunizations will be completed.~~]

§746.623. What documentation is acceptable for immunization records?

(a) Documentation on file at the child-care center may be the original immunization record or a photocopy of the record. An official immunization record generated from a state or local health authority, such as a registry, or a record received from school officials including a record from another state, is also acceptable.

(b) [~~(a)~~] The immunization record must include: [~~Documentation acceptable for immunization records must have been validated by a physician or other health-care professional with a signature or rubber stamp and include:~~]

(1) The child's name and birth date;

(2) The number of doses and vaccine type; [~~and~~]

(3) The month, day, and year the child received each vaccination; and[~~.~~]

(4) The signature or stamp of the physician or other health care professional who administered the vaccine.

[~~(b) Documentation on file at the child-care center may be the original record, a photocopy, or a handwritten copy that the child-care center director has signed.~~]

§746.629. Must children in my care have vision and hearing screening?

(a) The Special Senses and Communication Disorders Act, Texas Health and Safety Code, Chapter 36, requires a screening or a professional examination for possible vision and hearing problems for children of certain ages. [~~the following children who are enrolled in a child-care center:~~]

[~~(1) First-time enrollees who are four years of age or older and all children enrolled in programs who are four years of age by September 1 of each year will be screened for possible vision and hearing problems prior to completion of the first semester of enrollment or within 120 calendar days of enrollment, whichever is longest, or present evidence of screening conducted one year prior to enrollment; and~~]

[~~(2) Each child who is in the first, third, fifth, or seventh-grade must complete a screening or examination within the school year.~~]

[~~(b) A licensed or certified screener or a health-care professional must conduct the screening. Refer to Texas Health and Safety Code, §36.011,~~] Refer to 25 TAC Chapter 37, Subchapter C, (relating to Vision and Hearing Screening), for specifics on vision and hearing screening. This information may be accessed on the Internet at: www.dshs.state.tx.us/vhs [~~www.tdh.state.tx.us/vhs/~~].

(b) [~~(c)~~] You must keep one of the following at the child-care center for each child required to be screened:

(1) The individual vision and hearing screening; or

(2) A signed statement from the child's parent that the child's screening records are current and on file at the pre-kindergarten program or school the child attends away from the center. The statement must be dated and include the name, address, and telephone number of the pre-kindergarten program or school.

This 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 D. PERSONNEL
DIVISION 4. PROFESSIONAL DEVELOPMENT

40 TAC §746.1325

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§746.1325. What is self-instructional and instructor-led training?

(a) Self-instructional training [~~material, such as on-line training, written, or video-based material,~~] is designed to be used by one individual working alone and at their own pace to complete the lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. Examples include, but are not limited to, computer-based training (CBT), written materials, or a combination of video-based and written materials. [~~and must include:~~]

[~~(1) Specifically stated 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 or the director.~~]

(b) Instructor-led training is characterized by the communication and interaction that takes place between the learner and the instructor and must include an opportunity for the learner to interact with the instructor to obtain information beyond the scope of the training materials. The instructor must be able to communicate with the learner in a timely and organized fashion, including but not limited to the instructor answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively contacting learners. Examples include, but are not limited to, classroom training, on-line distance learning, video-conferencing, or other group learning experiences.

(c) Both self-instructional and instructor-led training must also include the components listed in §746.1317(b) of this title (relating to Must the training for my caregivers and the director meet certain criteria?).

This 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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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

40 TAC §746.3309

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§746.3309. May parents provide meals and/or snacks for their children instead of my child-care center providing these?

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

(d) Meals and snacks provided by a parent must not be shared with other children, unless a parent is providing baked goods for a celebration or party being held at the operation. [~~You must ensure meals and snacks provided by the parent are not shared with other children.~~]

This 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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For further information, please call: (512) 438-3437

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SUBCHAPTER R. HEALTH PRACTICES
DIVISION 1. ENVIRONMENTAL HEALTH

40 TAC §746.3401

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§746.3401. Must my child-care center have an annual sanitation inspection?

(a) Your child-care center must have a sanitation inspection before we issue a provisional permit and at least once every 12 months,

unless your child-care center is in a public school building that a local or state sanitation official has approved for public school use.

(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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Gerry Williams
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DIVISION 2. DIAPER CHANGING

40 TAC §746.3503, §746.3505

The amendments are proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendments implement the Human Resources Code, §40.029 and §42.042.

§746.3503. What equipment must I have for diaper changing?

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

[~~(c) You must sanitize the diaper-changing surface after each use. Refer to §746.3409 of this title (relating to What does Licensing mean when it refers to "sanitizing"?). You may also use a clean, disposable covering on the diaper-changing surface that must be changed after each use.~~]

(c) [~~(d)~~] A diaper-changing surface that is above the floor level must have a safety mechanism that prevents the child from falling from the surface and that is used at all times when a child is on the surface.

(d) [~~(e)~~] You must have a hand-washing sink in the diaper-changing area. Refer to §746.4403 of this title (relating to Must I have a hand-washing sink in the diaper-changing area?).

§746.3505. What must I do to prevent the spread of germs when diapering children?

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

(e) You must sanitize the diaper-changing surface after each use. Refer to §746.3409 of this title (relating to What does Licensing mean when it refers to "sanitizing"?). However, if you are changing diapers on a number of children consecutively, you may cover the surface with a non-absorbent paper liner that is disposed of between each diaper change or wipe the surface dry after approximately 2 minutes of contact with the sanitizing solution. When the diaper changing session is completed, follow the procedures outlined in §746.3409 of this title.

(f) [~~(e)~~] You must cover containers used for soiled diapers or keep them in a sanitary manner, such as placing soiled diapers in individual sealed bags.

This 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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SUBCHAPTER S. SAFETY PRACTICES
DIVISION 4. FIRST-AID KITS

40 TAC §746.4003

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§746.4003. What items must each first-aid kit contain?

(a) Each first-aid kit must contain the following supplies:

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

[~~(8) Syrup of ipecac;~~]

(8) [~~(9)~~] Thermometer;

(9) [~~(10)~~] Tweezers; and

(10) [~~(11)~~] Waterproof, disposable gloves.

(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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Gerry Williams
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For further information, please call: (512) 438-3437

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40 TAC §746.4005

(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.)

The repeal is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The repeal implements the Human Resources Code, §40.029 and §42.042.

§746.4005. When may I use the syrup of ipecac?

This 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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For further information, please call: (512) 438-3437

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SUBCHAPTER V. SWIMMING POOLS AND WADING/SPLASHING POOLS

40 TAC §746.5017

The new section is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The new section implements the Human Resources Code, §40.029 and §42.042.

§746.5017. Can children in my care swim in a body of water other than a swimming pool, such as a lake, pond, or river?

No, you must not allow children to swim in a lake, pond, river, or a body of water other than a swimming pool or wading pool that complies with the rules specified in this subchapter.

This 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: April 3, 2005
For further information, please call: (512) 438-3437

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SUBCHAPTER W. FIRE SAFETY AND EMERGENCY PRACTICES
DIVISION 4. GAS AND PROPANE TANKS

40 TAC §746.5403

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§746.5403. Who must conduct the [~~annual~~] inspection for gas leaks?

(a)-(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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Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
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 proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§747.107, 747.111, 747.113, 747.201, 747.207, 747.613, 747.615, 747.617, 747.621, 747.623, 747.633, 747.1323, 747.3109, and 747.3803, concerning purpose and definitions, immunizations, self-instructional training, meals and/or snacks, and first-aid kits; the repeal of §747.3805, concerning syrup of ipecac; and new §747.4817, concerning children swimming in a body of water other than a swimming pool, in its Minimum Standards for Child-Care Homes chapter.

The purpose of the amendments to §§747.107, 747.111, 747.113, and 747.201 concerns the one-time opportunity to choose to operate as a licensed child-care home or licensed child-care center. The minimum standard rules do not currently support this choice in all cases. A variety of group day care homes, choosing to operate as a licensed child-care home, did not fit neatly into the minimum standard rules that became effective September 1, 2003. These include but are not limited to a corporation owning a group day care home, a group day care home operating in a public school, and a governing body owning more than one group day care home. The proposed changes to the existing rules will clarity the oversight and essentially grandfather these operations as licensed child-care homes. These proposed changes also eliminate the need to process a variance for each of these rules, thus reducing the associated paperwork for both the permit holder, as well as DFPS Licensing staff.

The proposed amendment to §747.207 cross-references Chapter 745, Licensing, and eliminates conflicting requirements.

The amendments to §§747.613, 747.615, 747.617, 747.621, and 747.623 change the name of the Texas Department of Health to the Texas Department of State Health Services (DSHS). In addition, current DFPS rules conflict with new rules recently adopted by the DSHS, so DFPS is cross-referencing DSHS rules to ensure the DFPS minimum standards do not conflict with DSHS rules. The purpose of the amendment to §747.633 is to cross-reference the Department of State Health Services rules for Vision and Hearing requirements in the Texas Administrative Code. This will eliminate any conflicts in interpretation and will ensure that the child-care community and Licensing staff utilize the most current rules regarding vision and hearing screening requirements.

The amendment to §747.1323 clarifies the difference between self-instructional and instructor-led training. Typically, caregivers derive greater benefit from instructor-led training, due to the interaction with the trainer and others in the group, thus the current rules limit the amount of annual training that can be obtained through self-instructional methods. However, changes in technology have expanded the training resources available to the child-care community, including computer-based training modules, which may be either self-instructional or instructor-led. The revised rule will help centers, as well as DFPS Licensing staff, correctly classify training formats. The purpose of the amendment to §747.3109 is to clarify that baked goods provided by parents for celebrations can be shared with other children. This is the result of a concern raised by parents and permit holders that the current rule limits a parent's opportunity to provide baked goods prepared outside of the child-care operation for not only their child, but all children in a group for birthdays or other type celebrations.

The amendment to §747.3803 and the repeal of §747.3805 update the rules to be consistent with recent recommendations concerning syrup of ipecac. The American Academy of Pediatrics recently reported on the adverse effects of administering syrup of ipecac in the event of poisoning. Research has shown that the syrup can cause serious harm if not administered correctly. In many communities, syrup of ipecac is no longer available for purchase over the counter.

New §747.4817 addresses children swimming in a body of water other than a swimming pool. The current rules do not clearly prohibit swimming in bodies of water other than swimming or wading pools, such as rivers, lakes or ponds. The new rule clearly states this. Unlike properly maintained swimming pools and wading pools, caregivers cannot clearly see the bottom of a lake, river, pond, or creek to know when a child may be in distress in the water, a child is missing, or has drowned. In addition, bodies of water such as rivers, creeks, and coastal waters lack physical boundaries, which limit the area a child may swim in, may have an undercurrent that can quickly carry a child outside of a designated swimming area, and the water has not been treated chemically to protect children's health.

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 the health, safety, and well being of children will be protected. There will be no effect on large, small, or micro-businesses because the proposed changes do 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 sections.

Questions about the content of the proposal may be directed to Luis Palacois at (512) 438-2946 in DFPS's Child Care Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-317, 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*.

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

SUBCHAPTER A. PURPOSE AND DEFINITIONS

40 TAC §§747.107, 747.111, 747.113

The amendments are proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendments implement the Human Resources Code, §40.029 and §42.042.

§747.107. What types of operations do these minimum standards apply to?

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

(c) To be considered operating in one's own home, the location where care is being provided must be at the same address as the permit holder's residence, unless the exception in §747.111(b) of this title (relating to What is a licensed child-care home?) is met.

§747.111. What is a licensed child-care home?

(a) In a licensed child-care home, the licensed primary caregiver provides care in the caregiver's own residence for children from birth through 13 years, unless the operation was licensed as a group day care home prior to September 1, 2003.

(b) A child-care home licensed as a group day care home prior to September 1, 2003, may provide care at a location other than the primary caregiver's own residence, until the permit is no longer valid. A location, other than the primary caregiver's own residence, is subject to the minimum standards in this chapter and, if applicable, the conditions specified in §745.373 of this title (relating to May I have more than one licensed child-care home?)

(c) The total number of children in care varies with the ages of the children, but the total number of children in care in a licensed child-care home at any given time, including the children related to the caregiver, must not exceed 12.

§747.113. Who is responsible for complying with the minimum standards?

(a) If the child-care home is registered, the permit holder [~~A registered primary caregiver~~] must ensure compliance with all minimum standards in this chapter, with the exception of any minimum standard requirements specified for licensed child-care homes.

(b) If the child-care home is licensed, the permit holder [~~A licensed primary caregiver~~] must ensure compliance with all minimum standards in this chapter, with the exception of any minimum standard requirements specified only for registered child-care homes.

(c) The permit holder [~~A registered or licensed primary caregiver~~] is not required to comply with minimum standards identified for specific types of child-care programs or activities the child-care home does not offer, such as transportation or swimming activities.

This 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 February 15, 2005.

TRD-200500708
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION
DIVISION 1. PRIMARY CAREGIVER

40 TAC §747.201, §747.207

The amendments are proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendments implement the Human Resources Code, §40.029 and §42.042.

§747.201. Who is a primary caregiver?

(a) The [~~A licensed or registered~~] primary caregiver is the person with ultimate authority and responsibility for the child-care home's overall operation and compliance with these minimum standards and the licensing laws. The primary caregiver must be the permit holder for the licensed or registered child-care home, and must live in the home where care is provided, unless the home was licensed as a group day care home prior to September 1, 2003. Refer to §747.111 of this title (relating to What is a licensed child-care home?).

(b) A permit holder licensed to operate one or more group day care homes prior to September 1, 2003, must designate, on a DFPS form, a person who meets the qualifications in §747.1101 of this title (relating to Who is required to meet the qualifications specified in this division?) to act as the primary caregiver for each licensed child-care home. This exception will not apply to an operation when the permit issued prior to September 1, 2003, is no longer valid.

§747.207. What are my responsibilities as the primary caregiver?

You are responsible for the following:

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

(7) Initiating background checks [~~within two days of obtaining a new assistant or substitute caregiver, the addition of a household member, or a household member turning 14 years, who will regularly or frequently be present at your operation while children are in care~~] as specified in Subchapter F of Chapter 745 of this title (relating to Background Checks);

(8) (No change.)

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

Filed with the Office of the Secretary of State on February 15, 2005.

TRD-200500709

Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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SUBCHAPTER C. RECORD KEEPING
DIVISION 1. RECORDS OF CHILDREN

40 TAC §§747.613, 747.615, 747.617, 747.621, 747.623, 747.633

The amendments are proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendments implement the Human Resources Code, §40.029 and §42.042.

§747.613. What immunizations are children in my care required to have?

Each child enrolled or admitted to a child-care home must meet applicable immunization requirements specified by the Texas Department of State Health Services (DSHS) [~~Health~~] Immunization Requirements in Texas Elementary and Secondary Schools and Institutions of Higher Education. This requirement applies to all children in the child-care home from birth through 17 years.

§747.615. Are there exemptions for these immunization requirements?

Yes; however, exemptions for immunization must meet criteria specified by the Texas Department of State Health Services [~~Health~~] rules in 25 TAC §97.62 (relating to Exclusions from Compliance).

§747.617. Where can I find more information on immunizations?

You can find this information in the Texas Department of State Health Services [~~Health's~~] rules at 25 TAC Chapter 97, Subchapter B (relating to Immunization Requirements in Texas Elementary and Secondary Schools and Institutions of Higher Education). You can access it on the Texas Department of State Health Services [~~Health~~] Internet website at: www.dshs.state.tx.us/immunize [~~www.tdh.state.tx.us/immunize~~], or you may obtain a copy from Licensing or your local or state health department.

§747.621. May I admit a child who is not current on immunizations?

Yes; however, you must comply with the rules for provisional admittance established by the Texas Department of State Health Services' rules in 25 TAC §97.66 (relating to Provisional Enrollment). [~~You may enroll a child provisionally and allow the child to attend the child-care home for up to 30 days if the parent can provide written documentation from a health-care professional that the child has received at least one immunization in each series, required for that age child, and a statement of when the remaining required immunizations will be completed.~~]

§747.623. What documentation is acceptable for immunization records?

(a) Documentation may be the original immunization record or a photocopy. An official immunization record generated from a state or local health authority, such as a registry, or a record received from school officials including a record from another state, is also acceptable.

(b) [~~(a)~~] The immunization record must include: [~~Documentation acceptable for immunization records must have been validated by a physician or other health-care professional with a signature or rubber stamp and include:~~]

(1) The child's name and birth date;

(2) The number of doses and vaccine type; [~~and~~]

(3) The month, day, and year the child received each vaccination; and [~~.~~]

(4) The signature or stamp of the physician or other health care professional who administered the vaccine.

[~~(b) Documentation may be the original record, a photocopy, or a handwritten copy that you have signed and dated.~~]

§747.633. Must children in my licensed child-care home have vision and hearing screening?

(a) The Special Senses and Communication Disorders Act, Texas Health and Safety Code, Chapter 36, requires a screening or a professional examination for possible vision and hearing problems for children of certain ages. [~~the following children who are enrolled in a licensed child-care home:~~]

[~~(1) First time enrollees who are four years of age and older and all children enrolled in programs who are four years of age by September 1 of each year will be screened for possible vision and hearing problems prior to completion of the first semester of enrollment or within 120 calendar days of enrollment, whichever is longest, or present evidence of screening conducted one year prior to enrollment; and~~]

[~~(2) Each child who is in the first, third, fifth, or seventh-grade must complete a screening or examination within the school year.~~]

[~~(b) A licensed or certified screener or a health-care professional must conduct the screening. Refer to Texas Health and Safety Code, §36.011,~~] Refer to 25 TAC, Chapter 37, Subchapter C, (relating to Vision and Hearing Screening), for specifics on vision and hearing screening. This information may be accessed on the Internet at: www.dshs.state.tx.us/vhs/ [~~www.tdh.state.tx.us/vhs/~~].

(b) [~~(c)~~] You must keep one of the following at the child-care home for each child required to be screened:

(1) The individual vision and hearing screening; or

(2) A signed statement from the child's parent that the child's screening records are current and on file at the pre-kindergarten program or school the child attends away from the child-care home. The statement must be dated and include the name, address, and telephone number of the pre-kindergarten program or school.

This 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 February 15, 2005.

TRD-200500710

Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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SUBCHAPTER D. PERSONNEL
DIVISION 4. PROFESSIONAL DEVELOPMENT

40 TAC §747.1323

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§747.1323. What is self-instructional and instructor-led training?

(a) Self-instructional training [~~material, such as on-line training, written, or video-based material~~] is designed to be used by one individual working alone and at their own pace to complete the lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. Examples include, but are not limited to, computer-based training (CBT), written materials, or a combination of video-based and written materials. [~~and must include:~~]

[~~(1) Specifically stated objectives;~~]

[~~(2) A curriculum that 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, as specified in this subchapter.~~]

(b) Instructor-led training is characterized by the communication and interaction that takes place between the learner and the instructor and must include an opportunity for the learner to interact with the instructor to obtain information beyond the scope of the training materials. The instructor must be able to communicate with the learner in a timely and organized fashion, including but not limited to the instructor answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively contacting learners. Examples include, but are not limited to, classroom training, on-line distance learning, video-conferencing, or other group learning experiences.

(c) Both self-instructional and instructor-led training must also include the components listed in §747.1315(b) of this title (relating to Must child-care training meet certain criteria?).

This 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 February 15, 2005.

TRD-200500711
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

40 TAC §747.3109

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§747.3109. May parents provide meals and/or snacks for their children instead of my child-care home providing them?

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

(d) Meals and snacks provided by a parent must not be shared with other children, unless a parent is providing baked goods for a celebration or party being held at the operation. [~~You must ensure meals and snacks provided by the parent are not shared with other children.~~]

This 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 February 15, 2005.

TRD-200500712
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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SUBCHAPTER S. SAFETY PRACTICES
DIVISION 4. FIRST-AID KITS

40 TAC §747.3803

The amendment is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The amendment implements the Human Resources Code, §40.029 and §42.042.

§747.3803. What items must each first-aid kit contain?

(a) Each first-aid kit must contain the following supplies:

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

~~[(8) Syrup of ipecac;]~~

(8) [~~(9)~~] Thermometer;

(9) [~~(10)~~] Tweezers; and

(10) [~~(11)~~] Waterproof, disposable gloves.

(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.

Filed with the Office of the Secretary of State on February 15, 2005.

TRD-200500713
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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40 TAC §747.3805

(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.)

The repeal is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The repeal implements the Human Resources Code, §40.029 and §42.042.

§747.3805. When may I use the syrup of ipecac?

This 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 February 15, 2005.

TRD-200500714
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
For further information, please call: (512) 438-3437

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SUBCHAPTER V. SWIMMING POOLS AND WADING/SPLASHING POOLS

40 TAC §747.4817

The new section is proposed under Government Code §531.0055, which provides 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; Human Resources Code (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; and HRC, §40.029, which authorizes DFPS to propose and adopt rules to facilitate implementation of Department programs.

The new section implements the Human Resources Code, §40.029 and §42.042.

§747.4817. Can children in my care swim in a body of water other than a swimming pool, such as a lake, pond, or river?

No, you must not allow children to swim in a lake, pond, river, or a body of water other than a swimming pool or wading pool that complies with the rules specified in this subchapter.

This 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 February 15, 2005.

TRD-200500715
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: April 3, 2005
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 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION

7 TAC §109.3

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amended section, submitted by the State Securities Board has been automatically withdrawn. The amended section as proposed appeared in the August 13, 2004 issue of the *Texas Register* (29 TexReg 7826).

Filed with the Office of the Secretary of State on February 22, 2005.

TRD-200500791

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7 TAC §§109.4 - 109.6

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed new section's, submitted by the State Securities Board have been automatically withdrawn. The new section's as proposed appeared in the August 13, 2004 issue of the *Texas Register* (29 TexReg 7827).

Filed with the Office of the Secretary of State on February 22, 2005.

TRD-200500792

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER B. GENERAL PROCEDURES IN A CONTESTED CASE

22 TAC §281.25

The Texas State Board of Pharmacy (TSBP) adopts amendments to §281.25 concerning Notice and Service. The amendments are adopted without changes to the proposed text published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11876).

The adopted amendments update the font size requirement for disclosure statements regarding notices for contested cases to be consistent with the State Office of Administrative Hearings Rules of Procedure.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551-566 and 568-569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551-566 and 568-569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500749
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: March 10, 2005
Proposal publication date: December 24, 2004
For further information, please call: (512) 305-8028

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22 TAC §281.42

The Texas State Board of Pharmacy (TSBP) adopts amendments to §281.42 concerning Failure to Attend Hearing and Default. The amendments are adopted without changes to the proposed text published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11877).

The adopted amendments update the font size requirement for disclosure statements regarding notices for default hearings to be consistent with the State Office of Administrative Hearings Rules of Procedure.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551-566 and 568-569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551-566 and 568-569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500750
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: March 10, 2005
Proposal publication date: December 24, 2004
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 (TSBP) adopts amendments to §291.34 concerning Records. The amendments are adopted with changes to the proposed text published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11878) based on comments received.

The adopted amendments clarify the requirements for prescriptions electronically transferred between pharmacies and correct citations.

One comment was received from the Texas Pharmacy Association recommending that §291.34(e)(4)(C) be clarified to allow verbal and faxed transfers. The Board agreed with the recommendation and clarified the rule to allow verbal and faxed transfers between pharmacists and pharmacist interns.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551-566 and 568-569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551-566 and 568-569, Texas Occupations Code.

§291.34. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Requirements), contained in Community Pharmacy (Class A) shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.

(2) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(3) Records of controlled substances, other than prescription drug orders, listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(4) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(A) the records maintained in the alternative system contain all of the information required on the manual record; and

(B) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(b) Prescriptions.

(1) Professional responsibility.

(A) Pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(B) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that the prescription is a valid prescription. A pharmacist may not dispense a prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship.

(C) Subparagraph (B) of this paragraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g. a practitioner taking calls for the patient's regular practitioner).

(2) Written prescription drug orders.

(A) Practitioner's signature.

(i) Except as noted in clause (ii) of this subparagraph, written prescription drug orders shall be:

(I) manually signed by the practitioner; or

(II) electronically signed by the practitioner using a system which electronically replicates the practitioner's manual signature on the written prescription, provided:

(-a-) that security features of the system require the practitioner to authorize each use; and

(-b-) the prescription is printed on paper that is designed to prevent unauthorized copying of a completed prescription and to prevent the erasure or modification of information written on the prescription by the prescribing practitioner. (For example, the paper contains security provisions against copying that results in some indication on the copy that it is a copy and therefore render the prescription null and void.)

(ii) Prescription drug orders for Schedule II controlled substances shall be issued on an official prescription form as required by the Texas Controlled Substances Act, §481.075, and be manually signed by the practitioner.

(iii) A practitioner may sign a prescription drug order in the same manner as he would sign a check or legal document, e.g. J.H. Smith or John H. Smith.

(iv) Rubber stamped or otherwise reproduced signatures may not be used except as authorized in clause (i) of this subparagraph.

(v) The prescription drug order may not be signed by a practitioner's agent but may be prepared by an agent for the signature of a practitioner. However, the prescribing practitioner is responsible in case the prescription drug order does not conform in all essential respects to the law and regulations.

(B) Prescription drug orders written by practitioners in another state.

(i) Dangerous drug prescription orders. A pharmacist may dispense a prescription drug order for dangerous drugs issued by practitioners in a state other than Texas in the same manner as prescription drug orders for dangerous drugs issued by practitioners in Texas are dispensed.

(ii) Controlled substance prescription drug orders.

(I) A pharmacist may dispense prescription drug order for controlled substances in Schedule II issued by a practitioner in another state provided:

(-a-) the prescription is filled in compliance with a written plan approved by the Director of the Texas Department of Public Safety in consultation with the Board, which provides the

manner in which the dispensing pharmacy may fill a prescription for a Schedule II controlled substance;

(-b-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule II controlled substances in such other state; and

(-c-) the prescription drug order is not dispensed after the end of the seventh day after the date on which the prescription is issued.

(II) A pharmacist may dispense prescription drug orders for controlled substances in Schedule III, IV, or V issued by a practitioner in another state provided:

(-a-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule III, IV, or V controlled substances in such other state;

(-b-) the prescription drug order is not dispensed or refilled more than six months from the initial date of issuance and may not be refilled more than five times; and

(-c-) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order is obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(C) Prescription drug orders written by practitioners in the United Mexican States or the Dominion of Canada.

(i) Controlled substance prescription drug orders. A pharmacist may not dispense a prescription drug order for a Schedule II, III, IV, or V controlled substance issued by a practitioner in the Dominion of Canada or the United Mexican States.

(ii) Dangerous drug prescription drug orders. A pharmacist may dispense a dangerous drug prescription issued by a person licensed in the Dominion of Canada or the United Mexican States as a physician, dentist, veterinarian, or podiatrist provided:

(I) the prescription drug order is an original written prescription; and

(II) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of dangerous drugs.

(D) Prescription drug orders carried out or signed by an advanced practice nurse or physician assistant.

(i) A pharmacist may dispense a prescription drug order which is carried out or signed by an advanced practice nurse or physician assistant provided the advanced practice nurse or physician assistant is practicing in accordance with Subtitle B, Chapter 157, Occupations Code.

(ii) Each practitioner shall designate in writing the name of each advanced practice nurse or physician assistant authorized to carry out or sign a prescription drug order pursuant to Subtitle B, Chapter 157, Occupations Code. A list of the advanced practice nurses or physician assistants designated by the practitioner must be maintained in the practitioner's usual place of business. On request by a pharmacist, a practitioner shall furnish the pharmacist with a copy of the written authorization for a specific advanced practice nurse or physician assistant.

(E) Prescription drug orders for Schedule II controlled substances. No Schedule II controlled substance may be dispensed without a written prescription drug order of a practitioner on an official prescription form as required by the Texas Controlled Substances Act, §481.075.

(3) Verbal prescription drug orders.

(A) A verbal prescription drug order from a practitioner or a practitioner's designated agent may only be received by a pharmacist or a pharmacist-intern under the direct supervision of a pharmacist.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to communicate prescriptions verbally for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense a verbal prescription drug order for a Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act.

(D) A pharmacist may not dispense a verbal prescription drug order for a dangerous drug or a controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(4) Electronic prescription drug orders. For the purpose of this subsection, prescription drug orders shall be considered the same as verbal prescription drug orders.

(A) An electronic prescription drug order may be transmitted by a practitioner or a practitioner's designated agent:

(i) directly to a pharmacy; or

(ii) through the use of a data communication device provided:

(I) the confidential prescription information is not altered during transmission; and

(II) confidential patient information is not accessed or maintained by the operator of the data communication device other than for legal purposes under federal and state law.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to electronically transmit prescriptions for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense an electronic prescription drug order for a:

(i) Schedule II controlled substance, except as authorized for faxed prescriptions in §481.074, Health and Safety Code;

(ii) Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act; or

(iii) dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(5) Original prescription drug order records.

(A) Original prescriptions shall be maintained by the pharmacy in numerical order and remain legible for a period of two years from the date of filling or the date of the last refill dispensed.

(B) If an original prescription drug order is changed, such prescription order shall be invalid and of no further force and effect; if additional drugs are to be dispensed, a new prescription drug order with a new and separate number is required.

(C) Original prescriptions shall be maintained in three separate files as follows:

(i) prescriptions for controlled substances listed in Schedule II;

(ii) prescriptions for controlled substances listed in Schedules III - V; and

(iii) prescriptions for dangerous drugs and nonprescription drugs.

(D) Original prescription records other than prescriptions for Schedule II controlled substances may be stored on microfilm, microfiche, or other system which is capable of producing a direct image of the original prescription record, e.g., digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable:

(i) the record of refills recorded on the original prescription must also be stored in this system;

(ii) the original prescription records must be maintained in numerical order and separated in three files as specified in subparagraph (C) of this paragraph; and

(iii) the pharmacy must provide immediate access to equipment necessary to render the records easily readable.

(6) Prescription drug order information.

(A) All original prescriptions shall bear:

(i) name of the patient, or if such drug is for an animal, the species of such animal and the name of the owner;

(ii) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name and strength of the drug prescribed;

(v) quantity prescribed;

(vi) directions for use;

(vii) intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient; and

(viii) date of issuance.

(B) All original electronic prescription drug orders shall bear:

(i) name of the patient, if such drug is for an animal, the species of such animal, and the name of the owner;

(ii) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name and strength of the drug prescribed;

(v) quantity prescribed;

(vi) directions for use;

(vii) indications for use, unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(viii) date of issuance;

(ix) a statement which indicates that the prescription has been electronically transmitted, (e.g., Faxed to or electronically transmitted to:);

(x) name, address, and electronic access number of the pharmacy to which the prescription was transmitted;

(xi) telephone number of the prescribing practitioner;

(xii) date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription; and

(xiii) if transmitted by a designated agent, the full name of the designated agent.

(C) All original written prescriptions carried out or signed by an advanced practice nurse or physician assistant in accordance with Subtitle B, Chapter 157, Occupations Code, shall bear:

(i) name and address of the patient;

(ii) name, address, telephone number, and if the prescription is for a controlled substance, the DEA number of the supervising practitioner;

(iii) name, identification number, original signature and if the prescription is for a controlled substance, the DEA number of the advanced practice nurse or physician assistant;

(iv) address and telephone number of the clinic at which the prescription drug order was carried out or signed;

(v) name, strength, and quantity of the drug;

(vi) directions for use;

(vii) indications for use, if appropriate;

(viii) date of issuance; and

(ix) number of refills authorized.

(D) At the time of dispensing, a pharmacist is responsible for the addition of the following information to the original prescription:

(i) unique identification number of the prescription drug order;

(ii) initials or identification code of the dispensing pharmacist;

(iii) quantity dispensed, if different from the quantity prescribed;

(iv) date of dispensing, if different from the date of issuance; and

(v) brand name or manufacturer of the drug product actually dispensed, if the drug was prescribed by generic name or if a drug product other than the one prescribed was dispensed pursuant to the provisions of the Act, Chapters 562 and 563.

(7) Refills.

(A) Refills may be dispensed only in accordance with the prescriber's authorization as indicated on the original prescription drug order.

(B) If there are no refill instructions on the original prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original prescription drug order have been dispensed, authorization from the prescribing practitioner shall be obtained prior to dispensing any refills.

(C) Refills of prescription drug orders for dangerous drugs or nonprescription drugs.

(i) Prescription drug orders for dangerous drugs or nonprescription drugs may not be refilled after one year from the date of issuance of the original prescription drug order.

(ii) If one year has expired from the date of issuance of an original prescription drug order for a dangerous drug or nonprescription drug, authorization shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of the drug.

(D) Refills of prescription drug orders for Schedules III - V controlled substances.

(i) Prescription drug orders for Schedules III - V controlled substances may not be refilled more than five times or after six months from the date of issuance of the original prescription drug order, whichever occurs first.

(ii) If a prescription drug order for a Schedule III, IV, or V controlled substance has been refilled a total of five times or if six months have expired from the date of issuance of the original prescription drug order, whichever occurs first, a new and separate prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(E) A pharmacist may exercise his professional judgment in refilling a prescription drug order for a drug, other than a controlled substance listed in Schedule II, without the authorization of the prescribing practitioner, provided:

(i) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;

(ii) either:

(I) a natural or manmade disaster has occurred which prohibits the pharmacist from being able to contact the practitioner; or

(II) the pharmacist is unable to contact the practitioner after a reasonable effort;

(iii) the quantity of prescription drug dispensed does not exceed a 72-hour supply;

(iv) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills;

(v) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time;

(vi) the pharmacist maintains a record of the emergency refill containing the information required to be maintained on a prescription as specified in this subsection;

(vii) the pharmacist affixes a label to the dispensing container as specified in §291.33(c)(6) of this title; and

(viii) if the prescription was initially filled at another pharmacy, the pharmacist may exercise his professional judgment in refilling the prescription provided:

(I) the patient has the prescription container, label, receipt or other documentation from the other pharmacy which contains the essential information;

(II) after a reasonable effort, the pharmacist is unable to contact the other pharmacy to transfer the remaining prescription refills or there are no refills remaining on the prescription;

(III) the pharmacist, in his professional judgment, determines that such a request for an emergency refill is appropriate and meets the requirements of clauses (i) and (ii) of this subparagraph; and

(IV) the pharmacist complies with the requirements of clauses (iii) - (v) of this subparagraph.

(c) Patient medication records.

(1) A patient medication record system shall be maintained by the pharmacy for patients to whom prescription drug orders are dispensed.

(2) The patient medication record system shall provide for the immediate retrieval of information for the previous 12 months which is necessary for the dispensing pharmacist to conduct a prospective drug regimen review at the time a prescription drug order is presented for dispensing.

(3) The pharmacist-in-charge shall assure that a reasonable effort is made to obtain and record in the patient medication record at least the following information:

(A) full name of the patient for whom the drug is prescribed;

(B) address and telephone number of the patient;

(C) patient's age or date of birth;

(D) patient's gender;

(E) any known allergies, drug reactions, idiosyncrasies, and chronic conditions or disease states of the patient and the identity of any other drugs currently being used by the patient which may relate to prospective drug regimen review;

(F) pharmacist's comments relevant to the individual's drug therapy, including any other information unique to the specific patient or drug; and

(G) a list of all prescription drug orders dispensed (new and refill) to the patient by the pharmacy during the last two years. Such list shall contain the following information:

(i) date dispensed;

(ii) name, strength, and quantity of the drug dispensed;

(iii) prescribing practitioner's name;

(iv) unique identification number of the prescription; and

(v) name or initials of the dispensing pharmacists.

(4) A patient medication record shall be maintained in the pharmacy for two years. If patient medication records are maintained in a data processing system, all of the information specified in this subsection shall be maintained in a retrievable form for two years and information for the previous 12 months shall be maintained on-line.

(5) Nothing in this paragraph shall be construed as requiring a pharmacist to obtain, record, and maintain patient information other than prescription drug order information when a patient or patient's agent refuses to provide the necessary information for such patient medication records.

(d) Prescription drug order records maintained in a manual system.

(1) Original prescriptions shall be maintained in three files as specified in subsection (b)(5)(C) of this section.

(2) Refills.

(A) Each time a prescription drug order is refilled, a record of such refill shall be made:

(i) on the back of the prescription by recording the date of dispensing, the written initials or identification code of the dispensing pharmacist, and the amount dispensed. (If the pharmacist merely initials and dates the back of the prescription drug order, he or she shall be deemed to have dispensed a refill for the full face amount of the prescription drug order); or

(ii) on another appropriate, uniformly maintained, readily retrievable record, such as medication records, which indicates by patient name the following information:

(I) unique identification number of the prescription;

(II) name and strength of the drug dispensed;

(III) date of each dispensing;

(IV) quantity dispensed at each dispensing;

(V) initials or identification code of the dispensing pharmacist; and

(VI) total number of refills for the prescription.

(B) If refill records are maintained in accordance with subparagraph (A)(ii) of this paragraph, refill records for controlled substances in Schedules III - V shall be maintained separately from refill records of dangerous drugs and nonprescription drugs.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted on the original prescription, in addition to the documentation of dispensing the refill.

(4) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements:

(A) the transfer of original prescription drug order information for controlled substances listed in Schedule III, IV, or V is permissible between pharmacies on a one-time basis;

(B) the transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills;

(C) the transfer is communicated directly between pharmacists and/or pharmacist interns;

(D) both the original and the transferred prescription drug order are maintained for a period of two years from the date of last refill;

(E) the pharmacist or pharmacist intern transferring the prescription drug order information shall:

(i) write the word "void" on the face of the invalidated prescription drug order; and

(ii) record on the reverse of the invalidated prescription drug order the following information:

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription drug order is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(III) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(IV) the date of the transfer;

(F) the pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(i) write the word "transfer" on the face of the transferred prescription drug order; and

(ii) record on the transferred prescription drug order the following information:

(I) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(II) original prescription number and the number of refills authorized on the original prescription drug order;

(III) number of valid refills remaining and the date of last refill, if applicable;

(IV) name, address, and if a controlled substance, the DEA registration number of the pharmacy from which such prescription information is transferred; and

(V) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(5) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in paragraph (4) of this subsection.

(e) Prescription drug order records maintained in a data processing system.

(1) General requirements for records maintained in a data processing system.

(A) Compliance with data processing system requirements. If a Class A (community) pharmacy's data processing system is not in compliance with this subsection, the pharmacy must maintain a manual recordkeeping system as specified in subsection (c) of this section.

(B) Original prescriptions. Original prescriptions shall be maintained in three files as specified in subsection (b)(5)(C) of this section.

(C) Requirements for backup systems.

(i) The pharmacy shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis, at least monthly, to assure that data is not lost due to system failure.

(ii) Data processing systems shall have a workable (electronic) data retention system which can produce an audit trail of drug usage for the preceding two years as specified in paragraph (2)(G) of this subsection.

(D) Change or discontinuance of a data processing system.

(i) Records of dispensing. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records of dispensing to the new data processing system; or

(II) purge the records of dispensing to a printout which contains the same information required on the daily printout as specified in paragraph (2)(B) of this subsection. The information on this hard-copy printout shall be sorted and printed by prescription number and list each dispensing for this prescription chronologically.

(ii) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records to the new data processing system; or

(II) purge the records to a printout which contains all of the information required on the original document.

(iii) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(E) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(2) Records of dispensing.

(A) Each time a prescription drug order is filled or refilled, a record of such dispensing shall be entered into the data processing system.

(B) The data processing system shall have the capacity to produce a daily hard-copy printout of all original prescriptions dispensed and refilled. This hard-copy printout shall contain the following information:

(i) unique identification number of the prescription;

(ii) date of dispensing;

(iii) patient name;

(iv) prescribing practitioner's name;

(v) name and strength of the drug product actually dispensed; if generic name, the brand name or manufacturer of drug dispensed;

(vi) quantity dispensed;

(vii) initials or an identification code of the dispensing pharmacist; and

(viii) if not immediately retrievable via CRT display, the following shall also be included on the hard-copy printout:

(I) patient's address;

(II) prescribing practitioner's address;

(III) practitioner's DEA registration number, if the prescription drug order is for a controlled substance;

(IV) quantity prescribed, if different from the quantity dispensed;

(V) date of issuance of the prescription drug order, if different from the date of dispensing; and

(VI) total number of refills dispensed to date for that prescription drug order.

(C) The daily hard-copy printout shall be produced within 72 hours of the date on which the prescription drug orders were dispensed and shall be maintained in a separate file at the pharmacy. Records of controlled substances shall be readily retrievable from records of noncontrolled substances.

(D) Each individual pharmacist who dispenses or refills a prescription drug order shall verify that the data indicated on the daily hard-copy printout is correct, by dating and signing such document in the same manner as signing a check or legal document (e.g., J.H. Smith, or John H. Smith) within seven days from the date of dispensing.

(E) In lieu of the printout described in subparagraph (B) of this paragraph, the pharmacy shall maintain a log book in which each individual pharmacist using the data processing system shall sign a statement each day, attesting to the fact that the information entered into the data processing system that day has been reviewed by him or her and is correct as entered. Such log book shall be maintained at the pharmacy employing such a system for a period of two years after the date of dispensing; provided, however, that the data processing system can produce the hard-copy printout on demand by an authorized agent of the Texas State Board of Pharmacy, the Texas Department of Public Safety, or the Drug Enforcement Administration. If no printer is available on site, the hard-copy printout shall be available within 48 hours with a certification by the individual providing the printout, which states that the printout is true and correct as of the date of entry and such information has not been altered, amended, or modified.

(F) The pharmacist-in-charge is responsible for the proper maintenance of such records and responsible that such data processing system can produce the records outlined in this section and that such system is in compliance with this subsection.

(G) The data processing system shall be capable of producing a hard-copy printout of an audit trail for all dispensings (original and refill) of any specified strength and dosage form of a drug (by either brand or generic name or both) during a specified time period.

(i) Such audit trail shall contain all of the information required on the daily printout as set out in subparagraph (B) of this paragraph.

(ii) The audit trail required in this subparagraph shall be supplied by the pharmacy within 48 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, Department of Public Safety, or Drug Enforcement Administration.

(H) Failure to provide the records set out in this subsection, either on site or within 48 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(I) The data processing system shall provide on-line retrieval (via CRT display or hard-copy printout) of the information set out in subparagraph (B) of this paragraph of:

(i) the original controlled substance prescription drug orders currently authorized for refilling; and

(ii) the current refill history for Schedules III, IV, and V controlled substances for the immediately preceding six-month period.

(J) In the event that a pharmacy which uses a data processing system experiences system downtime, the following is applicable:

(i) an auxiliary procedure shall ensure that refills are authorized by the original prescription drug order and that the maximum number of refills has not been exceeded or authorization from the prescribing practitioner shall be obtained prior to dispensing a refill; and

(ii) all of the appropriate data shall be retained for on-line data entry as soon as the system is available for use again.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted as follows:

(A) on the hard-copy prescription drug order;

(B) on the daily hard-copy printout; or

(C) via the CRT display.

(4) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(A) The transfer of original prescription drug order information for controlled substances listed in Schedule III, IV, or V is permissible between pharmacies on a one-time basis only. However, pharmacies electronically sharing a real-time, on-line database may transfer up to the maximum refills permitted by law and the prescriber's authorization.

(B) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(C) The transfer is communicated directly between pharmacists and/or pharmacist interns orally by telephone or via facsimile or as authorized in paragraph (5) of this subsection. A transfer completed as authorized in paragraph (5) of this subsection may be initiated by a pharmacy technician acting under the direct supervision of a pharmacist.

(D) Both the original and the transferred prescription drug orders are maintained for a period of two years from the date of last refill.

(E) The pharmacist or pharmacist intern transferring the prescription drug order information shall:

(i) write the word "void" on the face of the invalidated prescription drug order; and

(ii) record on the reverse of the invalidated prescription drug order the following information:

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(III) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(IV) the date of the transfer.

(F) The pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(i) write the word "transfer" on the face of the transferred prescription drug order; and

(ii) record on the transferred prescription drug order the following information:

(I) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(II) original prescription number and the number of refills authorized on the original prescription drug order;

(III) number of valid refills remaining and the date of last refill, if applicable;

(IV) name, address, and if a controlled substance, the DEA registration number of the pharmacy from which such prescription drug order information is transferred; and

(V) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(G) Prescription drug orders may not be transferred by non-electronic means during periods of downtime except on consultation with and authorization by a prescribing practitioner; provided however, during downtime, a hard copy of a prescription drug order may be made available for informational purposes only, to the patient, a pharmacist or pharmacist intern, and the prescription may be read to a pharmacist or pharmacist intern by telephone.

(H) The original prescription drug order shall be invalidated in the data processing system for purposes of filling or refilling, but shall be maintained in the data processing system for refill history purposes.

(I) If the data processing system has the capacity to store all the information required in subparagraphs (E) and (F) of this paragraph, the pharmacist is not required to record this information on the original or transferred prescription drug order.

(J) The data processing system shall have a mechanism to prohibit the transfer or refilling of controlled substance prescription drug orders which have been previously transferred.

(5) Electronic transfer of prescription drug order information between pharmacies. Pharmacies electronically accessing the same prescription drug order records may electronically transfer prescription information if the following requirements are met.

(A) The original prescription is voided and the following information is documented in the records of the transferring pharmacy:

(i) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(ii) the name of the pharmacist or pharmacist intern receiving the prescription drug order information; and

(iii) the date of the transfer.

(B) Pharmacies not owned by the same person may electronically access the same prescription drug order records, provided the owner or chief executive officer of each pharmacy signs an agreement allowing access to such prescription drug order records.

(C) An electronic transfer between pharmacies may be initiated by a pharmacy technician acting under the direct supervision of a pharmacist.

(6) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in paragraphs (4) and (5) of this subsection.

(f) Limitation to one type of recordkeeping system. When filing prescription drug order information a pharmacy may use only one of the two systems described in subsection (d) or (e) of this section.

(g) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(1) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(2) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed and distributed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(3) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(A) the actual date of distribution;

(B) the name, strength, and quantity of controlled substances distributed;

(C) the name, address, and DEA registration number of the distributing pharmacy; and

(D) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(4) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(A) The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222C) to the distributing pharmacy.

(B) The distributing pharmacy shall:

(i) complete the area on the DEA order form (DEA 222C) titled "To Be Filled in by Supplier";

(ii) maintain Copy 1 of the DEA order form (DEA 222C) at the pharmacy for two years; and

(iii) forward Copy 2 of the DEA order form (DEA 222C) to the Divisional Office of the Drug Enforcement Administration.

(h) Other records. Other records to be maintained by a pharmacy:

(1) a permanent log of the initials or identification codes which will identify each dispensing pharmacist by name (the initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes shall not be used);

(2) Copy 3 of DEA order form (DEA 222C) which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(3) a hard copy of the power of attorney to sign DEA 222C order forms (if applicable);

(4) suppliers' invoices of dangerous drugs and controlled substances; a pharmacist shall verify that the controlled drugs listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances;

(5) suppliers' credit memos for controlled substances and dangerous drugs;

(6) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements);

(7) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(8) a hard copy of the Schedule V nonprescription register book;

(9) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(10) a hard copy of any notification required by the Texas Pharmacy Act or the sections in this chapter, including, but not limited to, the following:

(A) reports of theft or significant loss of controlled substances to DEA, Department of Public Safety, and the board;

(B) notifications of a change in pharmacist-in-charge of a pharmacy; and

(C) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(i) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(1) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(A) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by Title 21, Code of Federal Regulations, §1304.04(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(B) The pharmacy maintains a copy of the notification required in subparagraph (A) of this paragraph.

(C) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(2) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(3) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(4) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(j) Ownership of pharmacy records. For the purposes of these sections, a pharmacy licensed under the Act is the only entity which may legally own and maintain prescription drug records.

(k) Confidentiality.

(1) A pharmacist shall provide adequate security of prescription drug orders, and patient medication records to prevent indiscriminate or unauthorized access to confidential health information. If prescription drug orders, requests for refill authorization, or other confidential health information are not transmitted directly between a pharmacy and a physician but are transmitted through a data communication device, confidential health information may not be accessed or maintained by the operator of the data communication device unless specifically authorized to obtain the confidential information by this subsection.

(2) Confidential records are privileged and may be released only to:

(A) the patient or the patient's agent;

(B) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(C) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(D) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(E) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(F) an insurance carrier or other third party payor authorized by a patient to receive such information.

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 February 18, 2005.

TRD-200500751
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: March 10, 2005
Proposal publication date: December 24, 2004
For further information, please call: (512) 305-8028

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CHAPTER 295. PHARMACISTS

22 TAC §295.8

The Texas State Board of Pharmacy (TSBP) adopts amendments to §295.8 concerning Continuing Education Requirements. The amendments are adopted with changes to the proposed text published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11879) based on comments received.

The adopted amendments permit a pharmacist to acquire 12 hours of continuing education credit for Advanced Cardiovascular Life Support certification during a licensure period, 4 hours of continuing education credit for Advanced Cardiovascular Life Support recertification during a licensure period, and three hours of continuing education credit for participating in a Board appointed Task Force. The adopted amendments also correct citations, update definitions, and delete language no longer needed.

Comments were received from two individuals. One individual recommended that pharmacists receive 12 hours of continuing education credit for Advanced Cardiovascular Life Support certification. A second individual recommended that pharmacists receive 17 hours of continuing education credit for Advanced Cardiovascular Life Support (ACLS) certification and 5 hours of continuing education credit for ACLS recertification. The Board agreed with increasing the number of continuing education hours for ACLS as reflected above.

The amendments are adopted under §§551.002, 554.051, and 559.052 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 Board interprets §559.052 as authorizing the agency to adopt rules for the approval of pharmacy continuing education programs.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551-566 and 568-569, Texas Occupations Code.

§295.8. Continuing Education Requirements.

(a) Authority and purpose.

(1) Authority. In accordance with §559.003 of the Texas Pharmacy Act, (Chapters 551 - 566, and 568 - 569, Occupations Code), all pharmacists must complete and report 30 contact hours (3.0 CEUs) of approved continuing education obtained during the previous license period in order to renew their license to practice pharmacy.

(2) Purpose. The board recognizes that the fundamental purpose of continuing education is to maintain and enhance the professional competency of pharmacists licensed to practice in Texas, for the protection of the health and welfare of the citizens of Texas.

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

(1) ACPE--Accreditation Council for Pharmacy Education.

(2) Act--The Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Occupations Code.

(3) Approved programs--Live programs, home study, and other mediated instruction delivered by an approved provider or a program specified by the board and listed as an approved program in subsection (e) of this section.

(4) Approved provider--An individual, institution, organization, association, corporation, or agency that is approved by the board and recognized by ACPE in accordance with its policy and procedures, as having met criteria indicative of the ability to provide quality continuing education programs.

(5) Board--The Texas State Board of Pharmacy.

(6) Certificate of completion--A certificate or other official document presented to a participant upon the successful completion of a continuing education program. Certificates presented by an ACPE approved provider must contain the following information:

(A) name of the participant;

(B) title and date of the program;

(C) name of the approved provider sponsoring or cosponsoring the program;

(D) number of contact hours and/or CEUs awarded;

(E) the assigned ACPE universal program number;

(F) a dated certifying signature of the approved provider; and

(G) the official ACPE logo.

(7) Contact hour--A unit of measure of educational credit which is equivalent to approximately 50 to 60 minutes of participation in an organized learning experience.

(8) Continuing education unit (CEU)--A unit of measure of education credit which is equivalent to 10 contact hours (i.e., one CEU = 10 contact hours).

(9) Credit hour--A unit of measurement for continuing education equal to 15 contact hours.

(10) Home-study and other mediated instruction--Continuing education activities that are not conducted as live programs, including audiotapes, videotapes, cable television, computer assisted instruction, journal articles, or monographs.

(11) Initial license period--The time period between the date of issuance of a pharmacist's license and the next expiration date.

(12) License period--The time period between consecutive expiration dates of a license.

(13) Live programs--On-site continuing education activities including lectures, symposia, live teleconferences, or workshops.

(14) Standardized pharmacy examination--The North American Pharmacy Licensing Examination (NAPLEX).

(c) Methods for obtaining continuing education. A pharmacist may satisfy the continuing education requirements by either:

(1) successfully completing the number of continuing education hours necessary to renew a license as specified in subsection (a)(1) of this section;

(2) successfully completing during the preceding license period, one credit hour for each year of their license period, which is a part of the professional degree program in a college of pharmacy the professional degree program of which has been accredited by ACPE; or

(3) taking and passing the standardized pharmacy examination (NAPLEX) during the preceding license period, which shall be equivalent to the number of continuing education hours necessary to renew a license as specified in subsection (a)(1) of this section.

(d) Reporting Requirements.

(1) Renewal of a pharmacist license. To renew a license to practice pharmacy, a pharmacist must report on the renewal application completion of the required number of contact hours of continuing education. The following is applicable to the reporting of continuing education contact hours.

(A) The renewal application issued by the board shall state the number of contact hours the pharmacist must complete in order to be eligible to renew the license.

(B) Any continuing education requirements which are imposed upon a pharmacist as a part of a board order or agreed board order shall be in addition to the requirements of this section.

(2) Failure to report completion of required continuing education. The license of a pharmacist who fails to report completion of the required number of continuing education contact hours shall not be renewed and the pharmacist shall not be issued a renewal certificate for the license period. A pharmacist who practices pharmacy without a current renewal certificate is subject to all penalties of practicing pharmacy without a license. The following is also applicable if a pharmacist fails to report completion of the required continuing education.

(A) The pharmacist's license shall not be renewed until such time as the pharmacist successfully completes the required continuing education and reports the completion to the board.

(B) The pharmacist shall be subject to the delinquent fees specified in the Act, §559.003.

(3) Extension of time for reporting. The board may grant an extension of time for a pharmacist to comply with the continuing education requirements. Such extension may be granted for good cause as follows:

(A) A pharmacist who has had a physical disability, illness, or other extenuating circumstances which prohibits the pharmacist from obtaining continuing education credit during the preceding license period may be granted an extension of time to complete the continued education requirement. The following is applicable for this extension.

(i) The pharmacist shall submit a petition to the board with his/her license renewal application which contains:

(I) the name, address, and license number of the pharmacist;

(II) statement of the reason for the request for extension which includes the dates the pharmacist was incapacitated; and

(III) if the reason for the request for extension is health related, a statement from the attending physician(s) treating the pharmacist which includes the nature of the physical disability or illness and the dates the pharmacist was incapacitated.

(ii) After review and approval of the petition, a pharmacist may be granted an extension of time to comply with the continuing education requirement which shall not exceed one license renewal period.

(iii) An extension of time to complete continuing education credit does not relieve a pharmacist from the continuing education requirement during the current license period.

(iv) If a petition for extension to the reporting period for continuing education is denied, the pharmacist shall:

(I) have 60 days to complete and report completion of the required continuing education requirements; and

(II) be subject to the requirements of paragraph (2) of this subsection relating to failure to report completion of the required continuing education if the required continuing education is not completed and reported within the required 60-day time period.

(B) Pharmacists who have been licensed for 50 years are subject to the following.

(i) Pharmacists who are actively practicing pharmacy shall complete the continuing education requirements in order to renew their license.

(ii) Pharmacists who are not actively practicing pharmacy shall be granted an indefinite extension to the reporting requirement for continuing education provided the pharmacists submit a completed renewal application for each license period which states that they are not practicing pharmacy. Upon submission of the completed renewal application, the pharmacist shall be issued a renewal certificate which states that pharmacist is inactive.

(iii) Pharmacists who wish to return to the practice after being granted an extension to the continuing education requirements as specified in clause (ii) of this subparagraph must:

(I) notify the board of their intent to actively practice pharmacy;

(II) pay the licensing fee as specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees); and

(III) submit documentation of completion of the required number of continuing education hours for each license period they have been granted an extension up to a maximum of 45 contact hours (4.5 CEUs).

(C) During a granted extension period, a pharmacist license shall be renewed and the pharmacist may practice pharmacy.

(4) Exemptions from requirements. All pharmacists licensed in Texas shall be exempt from the continuing education requirements during their initial license period.

(e) Approved Programs.

(1) Any program presented by an ACPE approved provider subject to the following conditions.

(A) Pharmacists may receive credit for the completion of the same course only once during each year of a license period.

(B) Pharmacists who present approved continuing education programs may receive credit for the time expended during the actual presentation of the program. Pharmacists may receive credit for the same presentation only once during each year of a license period.

(2) Courses which are part of a professional degree program or an advanced pharmacy degree program offered by a college of pharmacy which has a professional degree program accredited by ACPE.

(A) Pharmacists may receive credit for the completion of the same course only once during each year of a license period.

(B) Pharmacists who teach these courses may receive credit towards their continuing education, but such credit may be received only once for teaching the same course during each year of a license period.

(3) Basic cardiopulmonary resuscitation (CPR) courses which lead to CPR certification by the American Red Cross or the American Heart Association shall be recognized as approved programs. Pharmacists may receive credit for one contact hour (0.1 CEU) towards their continuing education requirement for completion of a CPR course only once during each year of a license period. Proof of completion of a CPR course shall be the certificate issued by the American Red Cross or the American Heart Association.

(4) Advanced cardiovascular life support courses (ACLS) which lead to initial ACLS certification by the American Heart Association shall be recognized as approved programs. Pharmacists may receive credit for twelve contact hours (1.2 CEUs) towards their continuing education requirement for completion of an ACLS course only once during a license period. Proof of completion of an ACLS course shall be the certificate issued by the American Heart Association.

(5) Advanced cardiovascular life support courses (ACLS) which lead to ACLS recertification by the American Heart Association shall be recognized as approved programs. Pharmacists may receive credit for four contact hours (0.4 CEUs) towards their continuing education requirement for completion of an ACLS recertification course only once during a license period. Proof of completion of an ACLS recertification course shall be the certificate issued by the American Heart Association.

(6) Attendance at Texas State Board of Pharmacy Board Meetings shall be recognized for continuing education credit as follows.

(A) Pharmacists shall receive credit for three contact hours (0.3 CEUs) towards their continuing education requirement for attending a full, public board business meeting in its entirety.

(B) A maximum of six contact hours (0.6 CEUs) are allowed for attendance at a board meeting within a pharmacist's biennial license period.

(C) Proof of attendance for a complete board meeting shall be a certificate issued by the Texas State Board of Pharmacy.

(7) Participation in a Texas State Board of Pharmacy appointed Task Force shall be recognized for continuing education credit as follows.

(A) Pharmacists shall receive credit for three contact hours (0.3 CEUs) towards their continuing education requirement for participating in a Texas State Board of Pharmacy appointed Task Force.

(B) Proof of participation for a Task Force shall be a certificate issued by the Texas State Board of Pharmacy.

(8) Completion of an Institute for Safe Medication Practices' (ISMP) Medication Safety Self Assessment for hospital pharmacies or for community/ambulatory pharmacies shall be recognized for continuing education credit as follows.

(A) Pharmacists shall receive credit for three contact hours (0.3 CEUs) towards their continuing education requirement for completion of an ISMP Medication Safety Self Assessment.

(B) Proof of completion of an ISMP Medication Safety Self Assessment shall be:

(i) a continuing education certificate provided by an ACPE approved provider for completion of an assessment; or

(ii) a document from ISMP showing completion of an assessment.

(9) Upon demonstrated need the board may establish criteria to approve programs presented by non-ACPE approved providers.

(f) Retention of continuing education records and audit of records by the board.

(1) Retention of records. Pharmacists are required to maintain certificates of completion of approved continuing education for

three years from the date of reporting the contact hours on a license renewal application.

(2) Audit of records by the board. The board shall audit the records of pharmacists for verification of reported continuing education credit. The following is applicable for such audits.

(A) Upon written request, a pharmacist shall provide to the board copies of certificates of completion for all continuing education contact hours reported during a specified license period(s). Failure to provide all requested records during the specified time period constitutes prima facie evidence of failure to keep and maintain records and shall subject the pharmacist to disciplinary action by the board.

(B) Credit for continuing education contact hours shall only be allowed for approved programs for which the pharmacist submits copies of certificates of completion reflecting that the hours were completed during the specified license period(s). Any other reported hours shall be disallowed. A pharmacist who has received credit for continuing education contact hours disallowed during an audit shall be subject to disciplinary action.

(C) A pharmacist who submits false or fraudulent records to the board shall be subject to disciplinary action by the board.

(g) Reinstatement of pharmacist's license.

(1) Any person seeking reinstatement of a license which has been revoked or canceled by the board shall submit documentation of completion of the required number of continuing education contact hours for all years the license has been revoked or canceled prior to reinstatement of the license.

(2) Persons who seek reinstatement of a pharmacist license which has expired shall meet the requirements of §283.10 of this title (relating to Requirements for Application for a Pharmacist License Which Has Expired).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 267. PESTICIDE APPLICATORS

25 TAC §§267.2, 267.3, 267.9

The Health and Human Services Executive Commissioner on behalf of the Department of State Health Services (department) adopts amendments to §§267.2, 267.3, and 267.9, concerning fees and two-year licensing for non-commercial health-related pesticide applicators. These amendments are adopted without changes to the proposed text as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11253) and, therefore, will not be republished.

The amendments are required as a result of Senate Bill 1152, 78th Legislature, Regular Session, 2003, and amend Government Code, Chapter 2054, to authorize the department to collect subscription and convenience fees to recover costs associated with processing licenses through Texas Online, and House Bill 2292, 78th Legislature, Regular Session, 2003, which revised Health and Safety Code, §12.0111, that requires full cost recovery and §12.0112, that requires two-year licenses effective January 1, 2005, with a provision for staggering the renewal of licenses.

The amendments change definitions to include the new name of the department, and define the increase in fees imposed to implement full recovery of costs.

No comments were received on the proposed rule changes.

The amendments are adopted under the Government Code, Chapter 2054; the Health and Safety Code, §12.0111 and §12.0112; the Government Code, §531.055; and Health and Safety Code, §1001.075, which authorize the executive commissioner of the Health and Human Services Commission to adopt rules necessary for the department to administer its regulatory and administrative functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy Campbell
Director, Legal Services
Department of State Health Services
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.18

The Commissioner of Insurance adopts amendments to §7.18, concerning the adoption by reference of the National Association of Insurance Commissioners Accounting Practices and Procedures Manual (Manual). The amended section is adopted with changes to the proposed text as published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11896).

The amendments are necessary to update the version of the Manual previously adopted by the department. The section adopts the Manual by reference with deference to Texas statutes, regulations, and to exceptions enumerated in the section. The amendments to §7.18, concerning Statements of Statutory Accounting Principles (SSAP) provide guidance to independent accountants, industry accountants, and the department's analysts and examiners as how to properly record business transactions for the purpose of accurate statutory reporting. SSAP provides a nationwide standard method of accounting, which most insurers, including health maintenance organizations, are required to use for statutory financial reporting guidance. Although SSAP creates a more consistent regulatory environment, they do not preempt individual state legislative or regulatory authority. The Manual is a comprehensive guide to statutory accounting principles and includes the SSAP that have been adopted by the National Association of Insurance Commissioners (NAIC). Editorial clarifications were made throughout the section to avoid potential confusion. These clarifications did not result in any substantive change to the meaning or effect of the section.

The adopted section provides for more consistent and efficient regulation of insurance. The adoption of the March 2004 version of the Manual provides for a more consistent regulatory environment and provides a single source for accounting guidance. The amendments adopt by reference the March 2004 version of the Manual with the exceptions noted in subsections (c) and (d). The amendments include new SSAP Nos. 88, 89, 91, and subsection (e). SSAP No. 88 supersedes SSAP No. 46, paragraphs 2 and 3 of SSAP No. 32, and paragraphs 4 - 6 of SSAP No. 68. SSAP No. 88 is a new SSAP on the valuation of subsidiary, controlled, and affiliated entities. SSAP No. 89 supersedes SSAP No. 8 and provides statutory accounting guidance for accounting for employers' pensions. SSAP No. 91 supersedes SSAP Nos. 18, 33, and 45 and provides for accounting for transfers and servicing of financial assets including securitizations and various repurchase agreements. New subsection (e) provides for an insurer to request a permitted accounting practice from the department at least 30 days before filing a financial statement that reflects the deviated accounting practice.

No comments were received.

The amendments are adopted under the Texas Insurance Code Articles 1.15, 1.32, 3.33, 5.61, 21.28-A, 21.39 and §§32.041, 36.001, 802.001, 823.012, 841.004, 843.151, 861.255, 862.001. Article 1.15 mandates that the department examine the financial condition of each carrier organized under the laws of Texas or authorized to transact the business of insurance in Texas and adopt by rule procedures for the filing and adoption of examination reports. Article 1.32 authorizes the Commissioner to establish standards for evaluating the financial condition of an insurer. Article 3.33 provides standards for the development and administration of plans for the investment of the assets of insurers. Article 5.61 provides that reserves for workers' compensation insurers transacting business in this state shall be computed in accordance with rules adopted by the Commissioner for the purpose of adequately protecting insureds, securing the solvency of the insurer, and preventing unreasonably large reserves. Article 21.28-A authorizes the Commissioner to adopt rules necessary to remedy the financial condition and the management of certain insurers. Article 21.39 authorizes the Commissioner to adopt rules for establishing reserves applicable to each line of insurance recommended by the NAIC. Section 32.041 and §802.001 authorize the Commissioner to provide required financial statement forms. Section 823.012 authorizes the Commissioner to issue rules and orders necessary to implement the provisions of Chapter 823 (Insurance Holding Company Systems). Section 843.151 authorizes the Commissioner to promulgate rules as are necessary to carry out the provisions of Chapter 843. Sections 841.004, 861.255 and 862.001 authorize the Commissioner to adopt rules defining electronic machines and systems, office equipment, furniture, machines and labor saving devices, and the maximum period for which each such class may be amortized. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

§7.18. National Association of Insurance Commissioners Accounting Practices and Procedures Manual.

(a) The purpose of this section is to adopt statutory accounting principles, which will provide independent accountants, industry accountants, and the department's analysts and examiners guidance as how to properly record business transactions for the purpose of accurate statutory reporting. The March 2004 version of the Accounting Practices and Procedures Manual (Manual) published by the National Association of Insurance Commissioners (NAIC) will be utilized as the guideline for statutory accounting principles in Texas to the extent the Manual does not conflict with provisions of the Insurance Code or rules of the department. The Commissioner reserves all authority and discretion to resolve any accounting issues in Texas. When making a determination on the proper accounting treatment for an insurance or health plan transaction, the Commissioner shall refer to the sources in paragraphs (1) - (6) of this subsection in the respective order of priority listed. Furthermore, §§3.1501 - 3.1505, 3.1605, 3.1606, 3.7004, 7.7, 7.85 and 11.803 of this title (relating to Annuity Mortality Tables, General Requirements, Required Opinions, Contract Reserves, Subordinated Indebtedness, Audited Financial Reports and Investments, Loans and Other Assets), preempt any contrary provisions in the Manual:

(1) Texas statutes;

(2) department rules;

(3) directives, instructions, and orders of the Commissioner;

(4) the Manual;

(5) other NAIC handbooks, manuals, and instructions, adopted by the department; and

(6) Generally Accepted Accounting Practices.

(b) The Commissioner adopts by reference the March 2004 version of the Manual, with the exceptions and additions set forth in subsections (c) and (d) of this section, as the source of accounting principles for the department when examining financial reports and for conducting statutory examinations and rehabilitations of insurers and health maintenance organizations licensed in Texas, except where otherwise provided by law. This adoption by reference shall be applied to examinations conducted as of January 1, 2005 and thereafter, and also shall be used to prepare all financial statements filed with the department for periods after January 1, 2005.

(c) The Commissioner adopts the following exceptions and additions to the Manual:

(1) In addition to the statements of statutory accounting principles in the Manual, Statement of Statutory Accounting Principles (SSAP) No. 88 regarding valuation of subsidiary, controlled, and

affiliated entities and SSAP No. 91 regarding accounting for transfers and servicing of financial assets including securitizations and various repurchase agreements adopted by the NAIC on September 12, 2004 and effective January 1, 2005, are adopted by reference and shall be used to prepare all financial statements filed with the department for periods after January 1, 2005. This adoption of SSAP Nos. 88 and 91 effectively replaces SSAP Nos. 18, 33, 45, 46, paragraphs 2 and 3 of SSAP No. 32, and paragraphs 4 - 6 of SSAP No. 68.

(2) Retrospective premiums must be billed within 60 days of computation and audit premiums must be billed within 60 days of the completion of the audit in determining the beginning date from which the 90 day period is calculated to determine admissibility of uncollected premium balances under SSAP No. 6.

(3) Electronic machines, constituting a data processing system or systems and operating systems software used in connection with the business of an insurance company acquired after December 31, 2000, may be an admitted asset as permitted by Insurance Code §§841.004, 861.255, 862.001, and any other applicable law and shall be amortized as provided by the Manual. All such property acquired prior to January 1, 2001, may be an admitted asset as permitted by Insurance Code §§841.004, 861.255, 862.001, and any other applicable law, and shall be amortized in full over a period not to exceed ten years.

(4) Furniture, labor-saving devices, machines, and all other office equipment may be admitted as an asset as permitted by Insurance Code §§841.004, 861.255, 862.001, and any other applicable law and, for such property acquired after December 31, 2000, depreciated in full over a period not to exceed five years. All such property acquired prior to January 1, 2001, may be an admitted asset as permitted by Insurance Code §§841.004, 861.255, 862.001, and any other applicable law, and shall be depreciated in full over a period not to exceed ten years.

(5) Goodwill, as reported on a regulated entity's statutory financial statements as of December 31, 2000, and any additional goodwill acquired thereafter, beginning January 1, 2001, shall be admitted as an asset and accounted for as permitted by SSAP Nos. 61 and 68. All other amounts of goodwill, including, but not limited to, such amounts that may have been previously expensed, shall not be allowed as an admitted asset. However, notwithstanding the provisions of SSAP Nos. 61 and 68, all methods of non-insurer subsidiary and affiliate valuation permitted by Insurance Code §§823.301 - 823.307 may be used for the purposes of goodwill calculation.

(6) All certificates of deposit, of any maturity, may be classified as cash and are subject to the accounting treatment contained in SSAP No. 2, notwithstanding the provisions of SSAP No. 26.

(d) A farm mutual insurance company, statewide mutual assessment company, local mutual aid association, or mutual burial association that has less than $5 million in annual direct written premiums need not comply with the Manual.

(e) In the event a domestic insurer desires to deviate from the accounting guidance in a Texas statute or any applicable regulation, the insurer shall file a written request for a permitted accounting practice. Such filing shall be made with the Associate Chief Examiner, Texas Department of Insurance, Mail Code 305-2E, P.O. Box 149104, Austin, Texas 78714-9104 at least 30 days before filing the financial statement affected by the deviated accounting practice. Insurers shall not use deviated accounting practice without the department's prior approval.

(f) This section shall not be construed to either broaden or restrict the authority provided under the Insurance Code to insurers, including health maintenance organizations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 15, 2005.

TRD-200500695
Brenda Caldwell
Special Regulatory Counsel
Texas Department of Insurance
Effective date: March 7, 2005
Proposal publication date: December 24, 2004
For further information, please call: (512) 463-6327

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PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 108. FEES

28 TAC §108.1

The Texas Workers' Compensation Commission (the Commission) adopts amendments to §108.1 (concerning Charges for Copies of Public Information) without changes to the proposed text published in the November 5, 2004, issue of the *Texas Register* (29 TexReg 10216).

As required by the Government Code §2001.033(1), the Commission's reasoned justification for this rule is set out in this order, which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis for the rule.

No comments were received in writing or at a public hearing.

The amendments are adopted to replace references to the General Services Commission with references to the Texas Building and Procurement Commission.

The General Services Commission was abolished and its functions were transferred in part to the Texas Building and Procurement Commission, newly created by the 77th Texas Legislature in Senate Bill 311. The amendments delete from §108.1 all references to the General Services Commission and replace them with "Texas Building and Procurement Commission" to reflect the correct agency with the responsibility of establishing charges for providing copies of public information or making public information available for inspection.

The rule amendments are adopted pursuant to the Texas Labor Code, §401.021, which sets out the application of other acts, including The Texas Public Information Act, to records of the Commission; Texas Labor Code, §402.61, which authorizes the Commission to adopt rules necessary for the implementation and enforcement of the Texas Workers' Compensation Act; Texas Labor Code, §402.64, which authorizes the Commission to set reasonable fees for services provided to persons requesting services from the Commission; Texas Labor Code, §402.81(d), which authorizes the Commission to charge a reasonable fee for other confidential information when access to confidential commission records is requested; Texas Labor Code, §402.083, which provides for confidentiality of claim file information; Texas Labor Code, §402.084, which provides for the release of a record check on an employee; Texas Labor

Code, §402.086, which provides for the transfer of confidentiality of information released to persons by the Commission; Texas Labor Code, §402.087, which allows a prospective employer to obtain information on the prior injuries of an applicant for employment under certain circumstances; Texas Labor Code, §402.088, which sets out the information available under §402.087; Texas Labor Code, §402.092, which provides for the confidentiality of information in commission investigation files; Texas Labor Code, §411.048, which requires the Commission to charge employers for the reasonable cost of services provided by the Health and Safety division; Texas Labor Code, §413.018, which provides for the periodic review of medical care in claims where return to work time frames are exceeded; Texas Labor Code, §413.020, which authorizes the Commission to charge for access to, evaluation of, and review of health care treatment, fees or charges; Texas Labor Code, §414.004, which authorizes the Commission to review the records of insurance carriers and to charge for the reasonable expenses of such review; and Texas Government Code §552.262, which requires the Commission to use the rules adopted by the General Services Commission to determine charges for providing copies of public information or making public information available for public inspection.

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 February 18, 2005.

TRD-200500762
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: March 10, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 804-4287

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER E. HEALTH FACILITY FEES

28 TAC §134.402

The Texas Workers' Compensation Commission (the commission) adopts amendments to §134.402, concerning the Ambulatory Surgical Center Fee Guideline with changes to the proposed text published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11257). The Ambulatory Surgical Center Fee Guideline is one of several rules that will comprise Subchapter E, regarding Health Facility Fees.

As required by the Government Code §2001.033(1), the commission's reasoned justification for this rule is set out in this order, which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were in support or opposition to adoption of the rule, and the reasons why the commission disagrees with some of the comments and recommendations.

Changes made to the proposed rule are in response to public comment received in writing and at a public hearing held on January 6, 2005, and are described in the summary of comments and responses section of this preamble.

The commission proposed the amendments to address information received by the commission subsequent to the April 15, 2004 adoption of this rule concerning certain impacts of the new rule guideline on participants in the Texas workers' compensation system.

The Texas Workers' Compensation Act (Act) requires that guidelines for medical services fees be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control. The guidelines may not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf. The commission must consider the increased security of payment afforded by the Act in establishing the fee guidelines (see Texas Labor Code §413.011(d)).

More recent statutory requirements added to §413.011(a) of the Texas Labor Code also require that the commission use health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. The statute additionally requires the commission to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Health Care Financing Administration (HCFA), (now called the Centers for Medicare and Medicaid Services (CMS)), to achieve standardization, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet the requirements of §413.053 of the Act (relating to Standards of Reporting and Billing).

Under Texas Labor Code §413.011(b), the commission is required to develop conversion factors or other payment adjustment factors (PAFs) in determining appropriate fees when writing these guidelines, taking into account economic indicators in health care by not adopting conversion factors or other PAFs based solely on those factors as developed by the CMS. The subsection further states that it does not directly itself adopt the Medicare fee schedule into Texas law.

This rule applies to facility services provided by an ambulatory surgical center (ASC), other than professional medical services. An "ambulatory surgical center" means such a center that is properly licensed by the Texas Department of Health under the Texas Ambulatory Surgical Center Licensing Act, which was first enacted in 1985 by the 69th Texas Legislative Session. Further information can be obtained at http://www.tdh.state.tx.us/hfc/asc.htm. ASCs located outside the state of Texas should be licensed by that jurisdiction's licensing body, if such licensing exists, when providing services to Texas injured workers under the Act.

At the request of, and based on some preliminary information provided by some system participants, the commission re-examined two specific areas within §134.402, regarding the Ambulatory Surgical Center Fee Guideline, for potential amendment. The two specific areas explored were: (1) amending the ASC List

of Medicare Approved Procedures (Medicare's List) for the inclusion/exclusion of procedures with appropriate ASC group payment; and (2) exploring reimbursement options for implantable devices.

The commission requested information on procedures not on Medicare's List by procedure code to include number of cases, charged and paid amounts by commercial insurance groups, Medicare, Medicaid and worker's compensation in all settings (i.e., physician office, ASC, hospital outpatient and inpatient) for 2003. The commission also requested specific information for implantable devices by procedure code to include number of cases, charged and paid amounts by commercial insurance groups, Medicare, Medicaid and workers' compensation in all settings, and a description of the reimbursement methodologies used for 2003.

The commission received a limited amount of information in response to this request. The information provided showed that changes in technology and other developments in the health care industry have resulted in some procedures safely being provided to injured workers in ASCs and that continuing to allow some of these procedures to be provided in ASCs is safe and appropriate, and could in some instances, be cost-effective. These amendments proposed for adoption are based on this information, discussions held with, and information from, ASC Focus Group members, public comment and research and analysis by the commission staff, including the commission's Medical Advisor. The amendments also address concerns raised by system participants and members of the ASC Focus Group regarding whether the current case rate reimbursement adequately reimburses for devices integral to the surgery.

To help in understanding the full picture, the commission has addressed the background and basis for the rule, and requirements of the current rule, including those parts and issues that are not the subject of this rulemaking.

This rule was initially adopted in April 2004 to comply with numerous and complex statutory mandates in Texas Labor Code §413.011. House Bill 2600 (HB-2600), adopted during the 2001 Texas Legislative Session, amended §413.011 of the Act to add new requirements for commission reimbursement policies and guidelines. The statute requires the commission to balance the rigorous, and often competing, statutory requirements in setting reimbursement levels and guidelines for medical services. The commission's mandate is to:

* Establish fees that are fair and reasonable and sufficiently high to ensure the quality of medical care and sufficiently low to achieve effective medical cost control;

* Establish fees that do not exceed those paid by or on behalf of individuals with an equivalent standard of living to that of injured employees;

* Consider the increased security of payment afforded by the Act in establishing the fee guidelines;

* Use health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements;

* Adopt the most current reimbursement methodologies, models, and values or weights used by the federal HCFA to achieve standardization, including applicable payment policies relating to coding, billing, and reporting;

* Modify documentation requirements as necessary to meet the requirements of §413.053 of the Act (relating to Standards of Reporting and Billing); and

* Develop conversion factors or other PAFs in determining appropriate fees, taking into account economic indicators in health care.

Prior to adoption of §134.402, the Texas workers' compensation system did not have a fee schedule for healthcare provided in outpatient settings, which includes ASCs. Therefore, those services were reimbursed on a case-by-case determination of what is fair and reasonable under section §134.1 of this title (relating to Use of the Fee Guidelines). Reimbursements for all reasonable and medically necessary medical and/or surgical inpatient services are currently covered by §134.401 of this title (relating to Acute Care Inpatient Hospital Fee Guideline). Professional medical services are covered in §134.202 of this title (relating to Medical Fee Guideline) and Chapter 134, Subchapter F (relating to Pharmaceutical Benefits) of the commission rules.

Section 413.011 of the Act states that it does not adopt the Medicare fee schedule; it states, further, that the commission shall not adopt conversion factors or other PAFs based solely on those factors as developed by CMS. Consistent with these statutory directives, the reimbursement levels and fee guideline established by the original rule use the Medicare reimbursement structure as a baseline, or reference point, for the maximum allowable reimbursement (MAR) calculations for services provided in an ASC health care facility. However, the commission did not adopt the Medicare fee schedule nor were MARs based solely on the Medicare reimbursements. The commission's adoption of the ASC PAF was based upon due consideration of all of the statutory requirements for fee guidelines. These statutory criteria, found in §413.011, are different from the Medical Economic Index (MEI), the Sustainable Growth Rate (SGR) factors and other indices that Medicare is required by federal law to consider in establishing its reimbursement rates. The MEI is a weighted average of price changes for goods and services used to deliver physician services. The goods and services include physician time and effort as well as practice expenses. (MedPAC Report to Congress, Medicare Payment Policy, March 2002, p.77). The adjustments made each year reflect the previous year's changes in the prices of the needed goods and services. In general, reimbursement rates would increase in relation to changes in the prices of such goods and services as measured by the MEI. The SGR formula serves as a restraint on price increases driven by inflation in that it ties overall expenditures to a target based on the real level of growth in the gross domestic product. Additionally, Medicare considers the Consumer Price Index - Urban (CPI-U) in ambulatory surgery reimbursement rate updates. Thus, Medicare considers economic factors in establishing reimbursement rates. Although these factors have been considered in setting Medicare's reimbursement rates, the Medicare Modernization Act impacted these adjustments. As a result, Medicare ASC group rates have been rolled back and frozen at the 2002 rates.

In establishing a reimbursement methodology for services provided by ASC facilities, the current rule uses the required Medicare methodology for determining reimbursement in the Texas workers' compensation system, providing standardization of reimbursement structures by aligning the workers' compensation reimbursement methods and billing procedures with those used

by CMS. As an exception and minimal modification to this standardization, the rule specifically did not adopt Medicare retroactive payment policy changes for services already provided within the Texas workers' compensation system.

The challenge in this rule amendment has been for the commission to establish reimbursement rates, including the PAF, which take the diverse Texas statutory factors into account and provide an appropriate fee guideline for the Texas workers' compensation system. The statutory criteria of §413.011 establish a range within which the commission is directed to exercise administrative discretion to select conversion factors. The statutory requirement ensures quality of medical care and requires that fees not be set so low as to deprive covered workers of access to qualified providers. While the statutory criterion does not require that fees be set high enough to induce all physicians to participate, or to prevent every single individual physician from deciding to stop participating, it does require consideration of potential impacts on participation by providers generally. The statutory requirement that workers' compensation not pay more than payers pay on behalf of patients from populations with equivalent standards of living address a cap on workers' compensation fees, except and to the extent that special features of workers' compensation require higher fees. It therefore permits consideration of any special features of workers' compensation and what additional payment, if any, they warrant. The statutory requirement to take account of the increased security of workers' compensation payment permits consideration of what offsetting reductions in payments, compared with other payer systems that do not pay 100%, is warranted. Within these limits, the commission must consider how payments may be set to control medical costs without compromising access to quality medical care to injured workers. The commission adopted the Medicare reimbursement methodology and adopted an appropriate PAF that meets the statutory requirements, taking into account all pertinent information and having given full consideration to public comment received at the time.

"The underlying question in most state public policy debates about fee schedules is 'What is the optimal fee level?'" Studies at the time of the rule's adoption, and to date, in either workers' compensation or Medicare have yet to determine the optimal fee level. A review of the literature revealed, "Conceptually, most would agree that the optimal fee level is one that provides access to quality care in the most cost-efficient manner. According to the economic model, it is the price that would induce health care providers to supply services that characterize 'good quality care' - not too much, not too little, and only those services that produce positive outcomes whose benefits are more valuable than the costs paid for the services. The optimal fee level, then, is one that minimizes incentives to over-treat or treat with more costly services, even though less expensive, equally effective services exist. If, for example, complex surgeries provide relatively high profit margins (and therefore greater financial incentives), the optimal balance between cost and quality would not be achieved. On the other hand, if reimbursements do not provide a fair and competitive rate of return to providers, access to particular services would be hampered by financial disincentives, thereby jeopardizing access to care." (WCRI August 2002, p. 5)

The statutory requirements mirror the factors, concerns, and objectives (access, quality, outcomes, utilization, cost) mentioned above. The commission considered each in its initial adoption of the rule and in this adoption of amendments to the rule.

In developing this rule, and in this subsequent amendment, the commission carefully and fully analyzed all of the statutory and policy mandates and objectives and all the facts and evidence gathered and submitted, as well as all comments received. The commission utilized all of this, and its expertise and experience, including recommendations from the commission's Medical Advisor to amend this rule which balances the statutory mandates, including those to ensure that injured workers receive the quality health care reasonably required by the nature of their injury as and when needed and to ensure that fee guidelines are fair and reasonable, with the statutory mandate to achieve effective medical cost control. Full and objective analysis and consideration were given to all of the relevant comments received pertaining to the proposed amendments, as evidenced by the revisions made from the rule as proposed and the commission's responses to comments in this preamble.

Several research reports have shown that Texas workers' compensation medical costs continue to exceed those in other states and other health care delivery systems.

* Policy year 1995 data show that the average medical cost per claim in Texas exceeds the national average by almost 80% ($4,912 in Texas compared to $2,735 nationwide). (Texas Research and Oversight Council (ROC) on Workers' Compensation and Med-FX, LLC., Striking the Balance: An Analysis of the Cost and Quality of Medical Care in the Texas Workers' Compensation System, A Report to the 77th Texas Legislature, January 2001, citing National Council on Compensation Insurance (NCCI), Annual Statistical Bulletin, 1999)

* The average medical payment (paid and incurred) per claim with more than seven days' lost-time in Texas was the highest of the eight states analyzed (California, Connecticut, Florida, Georgia, Massachusetts, Minnesota, Pennsylvania, and Texas). Together these states account for at least 40% of the nation's workers' compensation benefits. (WCRI, Benchmarking the Performance of Workers' Compensation Systems: CompScope Multistate Comparisons, July 2000)

* In claims from 1996, the average medical payment per claim in Texas was $6,495, which is 35% higher than the states' average. (WCRI, July 2000)

* The average of medical payments in Texas per claim with seven or more days lost time was the highest of the states in the analysis (33% higher than the states' average and 36% higher than the states' median). (WCRI, The Anatomy of Workers' Compensation Medical Costs and Utilization: A Reference Book, December 2000)

* The average of medical payments in Texas for all claims was 47% higher than the states' average and 53% higher than the states' median. (WCRI, December 2000)

* Of nine states analyzed (California, Colorado, Florida, Georgia, Kentucky, Minnesota, New Jersey, Oregon, and Texas), Texas has the highest average medical costs per claim (more than 20% higher than the second-highest state, New Jersey, and more than 2.5 times higher than the lowest-cost state, Kentucky). (ROC, January 2001)

* When similar types of injuries were compared in the group health and workers' compensation systems, Texas had higher than average medical costs for the top five types of injuries. (ROC, January 2001)

* When compared with group health (a State of Texas employee Preferred Provider Organization (PPO) group health plan),

average workers' compensation medical costs for State of Texas injured employees were approximately six times higher per worker ($578 per worker in this group health system compared to $3,463 per worker in the Texas workers' compensation system, 18 months post-injury). (ROC, January 2001)

* Texas continues to have the highest average medical payment per claim among the study states - 78 percent higher than the 12-state median for all claims and 39 percent higher than the 12-state median for claims with more than seven days of lost time for 1999/2000. (WCRI, The Anatomy of Workers' Compensation Medical Costs and Utilization: Trends and Interstate Comparisons, 1996-2000, July 2003)

* Texas continues to have the highest average medical payment per claim among the study states - 29 percent higher than the 12-state average for claims with more than seven days of lost time for 1999/2000. (WCRI, The Anatomy of Workers' Compensation Medical Costs and Utilization: Trends and Interstate Comparisons, 1996-2000, July 2003)

* Texas continues to have the highest average medical payment per claim among the study states - 57.2 percent higher than the 12-state average for all claims for 1999/2000. (WCRI, The Anatomy of Workers' Compensation Medical Costs and Utilization: Trends and Interstate Comparisons, 1996-2000, July 2003)

* The average medical payment paid per claim for 2001 claims with more than seven days' lost-time in Texas was the highest of the twelve states analyzed (California, Connecticut, Florida, Illinois, Indiana, Louisiana, Massachusetts, North Carolina, Pennsylvania, Tennessee, Wisconsin and Texas). Medical payments per claim have been growing at double digit-rates since 1998/1999. (WCRI, Compscope Benchmarks: Multistate Comparisons, 4th Edition, February 2004)

* In claims from 2001, the average medical payment paid per claim in Texas was $9,314, which is 38.3% higher than the median for the 12 states mentioned above. (WCRI, February 2004)

* Medical costs and the quantity of medical care in Texas were among the highest of the four states studied. Despite that, outcomes achieved by Texas workers, who received more medical care, were much lower than the outcomes achieved by workers in Massachusetts and Pennsylvania where average medical costs per claim were 58% and 31% lower respectively than in Texas. (WCRI, Outcomes for Injured Workers in California, Massachusetts, Pennsylvania and Texas, December 2003)

The Medicare reimbursement system has primarily progressed from a retrospective fee for service reimbursement system to a prospective payment system (PPS). Under the Medicare PPS, facilities receive a fixed amount for treating patients in certain diagnostic and/or procedural categories. Reimbursement is based on specific diagnostic and/or procedural groupings, resource utilization, national and regional averages, and costs specific to the facility. The Medicare ASC reimbursement methodology prospectively establishes a set payment amount for each type of facility service that CMS has determined may be reimbursed in an ASC setting; each of these services falls into one of nine specific categories, or ASC groups.

Currently for ASC services (which are primarily surgeries and items incident to surgery), Medicare reimburses using the ASC case rate methodology. Payment is determined based on the surgeries performed, the associated grouping(s), payment rates for each surgery, and the geographic wage index of the facility. This rule amendment applies this Medicare ASC grouping reimbursement methodology for ASC facility services within the Texas workers' compensation system, and allows a few surgical procedures in the Texas workers' compensation system to be performed in an ASC setting, even though not allowed in the Medicare system.

Medicare reimburses ASCs for the facility fee when a covered surgical procedure is billed. The coverable surgical procedures are approved by CMS. In general, items that are bundled or integral to the service performed are included in the facility fees and are not reimbursed separately. A single payment is made to an ASC that encompasses all "facility services" furnished by the ASC, as published by CMS in its Medicare Carriers' Manual. However, additional reimbursement is made for a number of items and services covered under other Medicare fee schedules. Examples of such "non-facility" items and services include physician services and certain durable medical equipment items. Further, Medicare sets both ASC locality specific (specific to a facility's geographic location, in accordance with Medicare payment policy) and other Part B fee schedule reimbursement amounts, such as the physician's fee schedule.

Medicare requires the use of the uniform Healthcare Common Procedure Coding System (HCPCS) for reporting professional services, procedures and supplies including those, which are separately reimbursable. Most services, procedures and supplies have a corresponding HCPCS code, that are specific and available for ASC facilities to use to bill the items for separately reimbursable items. There may be a few miscellaneous HCPCS codes available for ASC facilities to use to bill the items that do not have a code specifically describing the item, and Medicare allows reimbursement of 100% of the cost with an invoice submitted upon bill submission. Separately reimbursed surgically implanted devices previously addressed through the commission's 2002 MFG are now reimbursed separately in accordance with this rule amendment.

The term "benchmarking" as used with respect to fees in the health care industry is often misunderstood. As commonly used in the industry, and in this preamble, a benchmark is nothing more than a relevant point of reference. Saying that something is a benchmark does not mean that it is the standard or goal which one should strive to achieve. Nor does it mean that it, in and of itself, establishes the presumptive starting point, without evaluation of relevant similarities and differences.

There has been considerable discussion in the previous ASC rulemaking effort, as well as this rule amendment, related to whether use of Medicare fees as a benchmark in workers' compensation is appropriate. The commission determined that it is, for several reasons. Because of HB-2600's extensive emphasis on the Medicare system, it is appropriate to benchmark to the Medicare reimbursement system. HB-2600 requires the commission to adopt the most current reimbursement methodologies, models, and values or weights used by the federal CMS to achieve standardization, including applicable payment policies relating to coding, billing, and reporting; the commission may modify documentation requirements as necessary to meet the requirements of §413.053 of the Act (relating to Standards of Reporting and Billing). The statute also states that this section of the law does not adopt the Medicare fee schedule, and that the commission shall not adopt conversion factors or other payment adjustment factors based solely on those factors as developed by the federal CMS. Use of Medicare as a benchmark, or point of reference, does not violate these statutory provisions. As required by the statute, the commission has considered economic

indicators in health care and the requirements of §413.011(d). The commission has also considered and adopted minimal modifications to the Medicare reimbursement methodology, both in the current rule and in these adopted rule amendments.

Although the Medicare system was established primarily to serve the needs of the elderly population, the program is a main component of the national health care system and has become a standard and benchmark for development and operation for many commercial and governmental health care programs. Medicare's payment policies largely define "main stream medicine." Furthermore, as noted by WCRI, workers' compensation policymakers have been showing increased interest in Medicare as a benchmark. (WCRI: Benchmarks for Designing Workers' Compensation Medical Fee Schedules, 1995-96, May 1996)

Complete information concerning all Medicare reimbursement methodologies for facilities can be found at the CMS website (www.cms.hhs.gov), Code of Federal Regulations, and the Federal Register.

Some Texas workers' compensation system participants continue to question, misinterpret, or misrepresent the data, reports and recommendations provided by Ingenix, Inc. (Ingenix) which were the basis for the PAF adopted by the commission in the original rule. Although the Ingenix report did not address the issues presented by this rule amendment, proposal and adoption, the Ingenix report and recommendations are discussed here to assist in understanding the full picture. As previously described upon initial adoption of this rule, the commission entered into a professional services agreement in June 2001, with Ingenix. Ingenix is a professional firm specializing in actuarial and health care information services, and assisted the commission in developing this and other new fee guidelines, which address fees for health care services provided in inpatient and outpatient facilities. Ingenix reviewed Medicare payment policies and reimbursement methodologies in reference to the Texas workers' compensation system to make recommendations to the commission for achieving standardization and adoption of the most current reimbursement methodologies, models, and values or weights used by the CMS, including applicable payment policies relating to coding, billing, and reporting, as mandated by Texas Labor Code §413.011. Ingenix also considered the additional statutory mandates of §413.011, which are described in earlier sections of this preamble.

Again, as detailed previously in the April 2004 adoption preamble, Ingenix analyzed hospital inpatient and outpatient, and ASC services separately. In general, the following steps were performed for each service type. The specific process used, as well as the methodology, data, and data sources is detailed in the Ingenix Final Report, which has been and remains available for review from the commission.

Ingenix considered certain economic indicators in health care, which it took into account in developing its recommendations concerning conversion factors or PAFs to be adopted by the commission. Ingenix recognized that the Medicare system reviews cost inputs in the overall health care industry, including ASCs, and updates ASC reimbursement on an annual basis. Further, in defining the market, Ingenix utilized commercial payer information that is reflective of the current reimbursement for the various payer types such as health maintenance organizations, preferred provider organizations, point of service plans, and traditional fee for service health plans (indemnity). Commercial reimbursement reflects, for the most part, negotiated rates based on both carriers' and providers' business plans. The combined Medicare market data and commercial market data reflects the actual reimbursement for services provided in the health care market; Ingenix considered all of these economic indicators of health care in its analysis and resulting recommendations.

To ensure that its recommended PAFs would not result in fees that exceed those paid by or on behalf of individuals with an equivalent standard of living to that of injured employees, Ingenix interpreted the statutory term, "equivalent standard of living," as including families with working or self-employed individuals and families that include Medicare enrollees. Medicaid enrollees were excluded since eligibility for Medicaid coverage generally occurs because of a significantly lower economic circumstance. This interpretation is supported by "A Standard of Living Comparison Between the Working Population, the Medicare Population, and the Managed Care Population," published in March of 1997 (addendum to report April 2001) and previously considered by the commission in establishing reimbursement levels. The commission has recognized that Medicare recipients have a similar standard of living as the general working population. In the study prepared by Research and Planning Consultants, the standard of living of the population covered by the Medicare program was found to exceed that of the population covered by the Act. The study further found that the standard of living of the population covered by managed care plans was at least as high as the population covered by the Act. Consequently, Medicare reimbursement is an appropriate standard for comparison to workers' compensation reimbursement.

Although Medicare is an appropriate benchmark, the commission also used other benchmarks. As required by the statute, the commission developed conversion factors or other PAFs in determining appropriate fees, taking into account economic indicators in health care. This includes the commercial private payer market and the median of that market. As stated by WCRI, it would be difficult to justify a fee schedule as a major cost containment tool if it exceeded what providers elect to receive, on average, in the free market. (WCRI: Benchmarks for Designing Workers' Compensation Medical Fee Schedules, 1995-1996, May 1996)

Reimbursement rates used in the market to pay providers include an additional amount to account for the fact that providers are not always reimbursed fully for all services. Ingenix stated, that because of the workers' compensation benefit structure and the financial stability of workers' compensation payers, providers are expected to receive payment of the proper reimbursement amounts for their goods and services that are medically necessary for the treatment of injured employees and this security of payment alleviates the need to increase reimbursement rates for possibilities of non-payment in the market.

Recognizing the statutory mandate that the commission establish guidelines that provide the assurance of quality medical care together with achieving effective medical cost control, Ingenix observed that "reimbursement levels must therefore must be sufficiently high to ensure access to quality care, sufficiently low to achieve medical cost control, and not in excess of fees paid by or on behalf of individuals with an equivalent standard of living." Ingenix's recommended range for ASC reimbursement within the Texas workers' compensation system successfully achieved these goals.

In developing the recommended range, Ingenix used the following process:

* Estimate the number of covered lives and utilization for Medicare and for each type of commercial insurance contract;

* Determine historical Texas payment levels for Medicare and for commercial insurance by type of contract;

* Adjust the Medicare and commercial contract history to a workers' compensation mix of services;

* Trend forward the historical payment levels;

* Project the 2004 payment level currently in place for commission payers; and

* Establish a recommended range for reimbursement as a percent of Medicare.

Additionally, Ingenix reviewed and analyzed the current market using Medicare, commercial, and commission historical medical claims reimbursement information. Ingenix also reviewed other states' workers' compensation facility reimbursement in comparison to Medicare reimbursement, but was unable to develop comparisons because each state approached its reimbursement methodology differently. Taking into account relevant health care economic indicators, Ingenix made recommendations concerning Medicare reimbursement methodologies and PAFs to be used in determining appropriate reimbursement and estimated system impact. Ingenix further provided recommendations regarding minimal modifications to Medicare reimbursement methodologies and payment policies necessary to meet occupational injury requirements.

Historical commission medical claims data provided a Texas workers' compensation mix of services for use in the analysis. This utilization pattern was applied to the commercial market (health maintenance organization, preferred provider organization, point of service, and indemnity plans) and Medicare reimbursement levels, establishing an estimated reimbursement for a workers' compensation case mix. This reimbursement was expressed as a percent of charges and as a percent of Medicare reimbursement. Information considered by Ingenix in the development of its analysis included:

* Commission historical claims data available for the years 1999 through 2002;

* The Mercer/Foster Higgins National Survey of Employer-Sponsored Health Plan 2001, which summarized enrollment and market share information for commercial managed care plans in Texas;

* Texas commercial indemnity and managed care reimbursement rates from Ingenix Employer Group for the years 1999, 2000 and 2001;

* Ingenix proprietary national managed care payer data regarding volume of services, charged and allowed reimbursement amounts to estimate the level of ASC business compared to outpatient, and ASC allowed-to-charge ratios compared to outpatient allowed-to-charge ratios, from 2001 data;

* National Center for Health Statistics and Bureau of the Census data to estimate the covered lives in the 2002 Texas commercial insurance/managed care market;

* Data published in 2001 by InterStudy Publications, which provided national commercial managed care reimbursement rates;

* Data published by the American Hospital Association from 1997-2001, which provided hospital outpatient charges per service;

* Source Book of Health Insurance Data for 2002; and

* Medicare reimbursement amounts, from 1999 for hospital outpatients and 2001 for ASCs.

ASC market reimbursement percentages were based on a mix of services that were equivalent to the Texas workers' compensation mix of services and reimbursement rates trended forward to 2003, and ultimately 2004. Ingenix also trended forward the Medicare ASC reimbursement rates to 2004. Ingenix concluded, as a result of its market analysis, that if current reimbursement trends continue, in 2004 Texas workers' compensation ASC claims will be reimbursed at approximately 320% of 2004 Medicare reimbursement. Ingenix also projected that 2004 commercial market reimbursement for the same mix of claims would be approximately 274% (not including indemnity plans) to 293% (including indemnity plans) of 2004 Medicare reimbursement.

In setting the recommended PAF range, Ingenix considered whether to include indemnity experience in the commercial market experience. While Ingenix found no difference in standards of living between people with commercial indemnity experience and injured workers, there are several reasons to consider excluding indemnity experience:

* Commercial indemnity represents only about 4% to 5% of the combined Medicare and commercial market. Removing commercial indemnity from the analysis removes experience that is higher than 95% of the payment levels for people of a similar standard of living.

* Payments for commercial indemnity plans are disproportionately higher than payments for the rest of the market, indicating that commercial indemnity payments are atypical of the commercial market experience.

* Statutory requirements set forth in §413.011 mandate that payment be made no higher than would be paid by or for people with similar standards of living.

* No cost controls are in place in the commercial indemnity market, and the Texas workers' compensation law mandates that in setting the fee structure, consideration be given to cost control.

Although commercial indemnity plans provide coverage for individuals with standards of living similar to the rest of the commercial market, including the data from these plans would increase the PAF because more weight would be placed on commercial reimbursement rates, thus reducing the impact of the lower Medicare payments. In contrast, the indemnity market share currently represents a small, decreasing fraction of the overall market, with payment levels far exceeding those in other commercial policy types, suggesting that they are uncharacteristic of the commercial market and, therefore, should be excluded. Excluding indemnity plans would decrease the PAF because less weight would be placed on commercial reimbursement rates, thus increasing the impact of the lower Medicare payments.

In order to provide the most comprehensive range of fair and reasonable reimbursement rates, and address the statutory requirement for cost control and prohibition against paying higher than would be paid by or for persons with similar standards of living, Ingenix excluded the indemnity experience at the lower end of the range and included it at the higher end of the range.

Ingenix initially recommended a 2003 range of 230% (not including indemnity plans) to 250% (including indemnity plans).

Upon the commission's request for 2004 projections, Ingenix recommended the 2004 PAF range of 237% (not including indemnity plans) to 264% (including indemnity plans) of Medicare for ASC reimbursement. However, Ingenix's recommended reimbursement range did not contain an explicit reduction for security of payment or for extraordinary encouragement of medical cost control related to reimbursement rates. Consequently, Ingenix indicated that if the commission were to choose a different balance of the statutory objectives, implementation of the ASC rule with PAFs outside the recommended ranges (i.e., 90% of the 237% low endpoint, up to 110% of the 264% of the high endpoint within the ASC recommended range) would be appropriate and meet the statutory standards.

Subsequent to the rule adoption on April 15, 2004, ASCs expressed concerns regarding various components of the rule and their relationship to the overall reimbursement. These concerns included the site of service limitations tied to the Medicare List incorporated into the rule, as well as concerns regarding implant reimbursement. At the August 19, 2004 public meeting, the commissioners directed agency staff to revisit the sites of service and implant issues in light of new information submitted by system participants.

The commission requested public input on these two issues by:

* Posting a notice on the commission's website;

* Mailing the same notice in a letter to all Texas licensed ASCs;

* Providing the notice in all insurance carrier representative boxes;

* Requesting utilization and reimbursement data for CPT codes not currently on the ASC list of Medicare approved procedures (Medicare's List);

* Requesting utilization and reimbursement data for implantables; and

* Establishing a commission email address specifically for electronic submission of information.

The notice, "Public Request for ASC Information" was posted August 27, 2004. The notice stated the commission was exploring two specific areas within §134.402 for potential amendment: (1) amending Medicare's List for the inclusion/exclusion of procedures with appropriate ASC group payment; and (2) exploring reimbursement options for implantable devices. The commission requested information that would help determine if such considerations can be safely, appropriately and economically performed in an ASC setting, given the agency's rules and statutory mandates.

The commission received approximately 50 responses representing 20 separate entities. The responses were summarized and presented to an ASC Focus Group comprised of representatives from ambulatory surgical center providers, implant device supplier, insurance carriers, and self-insured businesses. Meeting on October 13, 2004, the ASC Focus Group reviewed and discussed the information received and the issues in general. However, the ASC Focus Group did not reach a consensus.

Despite a lack of consensus from the ASC Focus Group, agency experts and other staff conducted in-depth analyses of the new information received to that point and drafted a preliminary version of possible rule amendments to serve as a primary topic of discussion for a follow-up ASC Focus Group meeting.

The follow-up ASC Focus Group meeting was held on October 27, 2004 to discuss draft amendments to the rule in anticipation of formally proposing amendments in November 2004. Again, no consensus was reached. Some ASC Focus Group members recommended: a higher PAF, allowances for procedures to be performed in an ASC facility that are not on Medicare's List, a higher reimbursement for surgically implanted devices whether reimbursed separately or included in the ASC case rate by Medicare, and a retroactive effective date of September 1, 2004. Conversely, other ASC Focus Group members expressed concerns that such recommendations will increase administrative burdens and medical costs, and will ultimately negate the cost control measures of the existing rule (required under the Act).

Following the second ASC Focus Group meeting, the commission staff posted a pre-proposal draft rule for informal public input on the commission's website from November 2, 2004 through November 10, 2004. The commission reviewed the input and other available information, sought clarification, proposed amendments at the November 2004 public meeting, and now adopts these rule amendments.

The commission believes that the adopted rule will provide an effective regulatory framework for ambulatory surgical centers under the Texas workers' compensation system.

The commission is required by Texas Labor Code §413.011 to apply exceptions or minimal modifications necessary for adaptation of the Medicare methodology to the Texas workers' compensation system. Medicare payment policies may retroactively alter payment amounts of previously paid claims and require the Medicare system participants to re-adjudicate claims and reconcile payments. The commission determined that such retroactive payment policies would create undue administrative burdens if applied to the Texas workers' compensation system. The adopted rule requires the use of the most current Medicare policies in effect when the services were provided, including Medicare's site of service restrictions, with the exception of retroactive payment policies (no change from the rule adopted April 2004). The adopted amendments add minimal modifications to that exception by including procedures to the ASC List of Medicare Approved Procedures, and separate reimbursement for surgically implanted devices.

Texas Labor Code §413.011 requires the commission to adopt necessary conversion factors or PAFs to take the diverse statutory requirements into account in establishing a fee guideline that uses the federal Medicare reimbursement methodology. Additionally, the commission must take into account economic indicators in health care and the requirements found in subsection (d) of §413.011. The statute also states that the commission shall not adopt a PAF based solely on those PAFs developed by CMS. The commission adopted a multiplier, or PAF, of Medicare reimbursement rates for the reimbursement of ASC facility services to satisfy the statutory requirements.

The rate adopted establishes fair and reasonable reimbursement that is designed to ensure continued access to quality care, along with appropriate medical cost control. Ingenix also stated that in certain instances, going outside the recommended range to meet statutory requirements would be appropriate. Given the data available for analysis, Ingenix indicated that anywhere down to 90% of the low endpoint and up to 110% of the high endpoint of the recommended ASC range would be an appropriate "extended range." Ingenix noted that points in the extended range satisfactorily balance the complex statutory objectives, and the rate adopted in this rule is within the Ingenix

extended range. To further address cost containment efforts provided by the statute, the commission adopted a PAF within the extended range.

The PAF multiplier for ASCs is considerably higher than the 125% multiplier provided in §134.202, the commission's Medical Fee Guideline, which covers reimbursement of professional medical services provided within the Texas workers' compensation system. There are several reasons for this. Unlike professional medical services, whose cost inputs are continuously updated by CMS, Medicare has not significantly revised ASC cost inputs since 1994. Moreover, the percentage of Medicare patients who receive ASC services (surgeries) is significantly less than the percentage of Medicare patients who receive professional medical services (typically, physician services). Finally, Medicare reimbursements for professional medical services are generally within the range of payments made by commercial payers; however, Medicare reimbursements for ASC services are well below the range of payments made by most commercial payers for those services. Thus, while the resulting multipliers are different in the two contexts, they are consistent with one another to the extent that the commission has determined that reimbursement for the two types of services is appropriate at the low end of the range of reimbursement provided within the commercial market.

The commission will in the future propose fee guidelines for outpatient facility services, and amendments to the current inpatient fee guideline. Inpatient hospital services are currently reimbursed under the existing commission rules that provide for per diem payments. Ingenix has noted that the current inpatient methodology is reasonably standardized but does not reflect the recent statutory requirement to use Medicare reimbursement methodologies. Ingenix also noted, at the time of its October 2003 report, that outpatient hospital and ASC payments were not standardized in the commission system, or the market in general, and the lack of detail in the available data makes it difficult to determine the current mix of services that are being delivered. Consequently, Ingenix recommended that the commission adopt a separate PAF for each setting (inpatient hospital, outpatient hospital, and ASC), based on Medicare reimbursement methodology and policies in accordance with the statutory mandates, resulting in standardization of all three facility fee guidelines, once adopted or revised. Because the relationship of the Medicare reimbursement to the commercial market varies between inpatient, outpatient, and ASC services, it is likely that the PAF proposed for the inpatient hospital and outpatient hospital facility fee guidelines will differ from the PAF adopted for ASCs in this rule.

In setting the ASC fees in this rule, the commission used Medicare fees as a reference and considered commercial market payments as indicative of economic indicators in health care, as required by the statute. The commission determined "fair and reasonable" is not based solely on the market value of services provided to injured employees. Fair and reasonable compensation in the Texas workers' compensation system is a balance of all the required components of the Act. These are rigorous statutory requirements, which are not easily balanced. In balancing the statutory mandates and objectives, the commission considered numerous issues, with the goal of establishing fair and reasonable fees that will assist in achieving effective medical cost control.

To help in understanding the full picture, the commission has addressed the background and basis for the rule, and requirements of the current rule, including those parts and issues that are not the subject of this rulemaking.

Rule 134.402 establishes reimbursements for ASC health facility services. The rule provides a standardized reimbursement method and billing procedures by aligning the workers' compensation reimbursement structure with the structure used by the CMS. The rule provides minimal modifications within this CMS structure to meet occupational injury requirements.

No amendments to (a) were proposed, other than the effective date for these amendments. Subsection (a) of the adopted rule provides for the reimbursement of health care facility services, as defined by the CMS, other than professional medical services, provided in an ASC on or after September 1, 2004. Paragraph (a)(2) provides for an amended effective date of April 1, 2005 for the amendments in paragraphs (e)(2), (e)(3), and (e)(4), and subsection (f). Subsection (a) also provides that the policies and reimbursement methodologies in effect for Medicare on the date a service is provided are the policies and reimbursement methodologies to be used in the Texas workers' compensation system. Subsection (a) requires use of the most recent payment policies adopted by the Medicare program for compliance with commission rules, decisions, and orders is required. This will prevent the Texas workers' compensation system from falling out of synchronization with Medicare and will achieve the standardization goals established in Texas Labor Code §413.011. However, specific provisions contained in the Act and commission rules shall take precedence over any conflicting provision adopted or utilized by CMS in administering the Medicare program. Pursuant to §408.021 of the Texas Labor Code, injured employees are entitled to all health care reasonably required by the nature of the injury as and when needed to cure or relieve the effect naturally resulting from the compensable injury, promotes recovery or enhances the ability of the employer to return to or retain employment. To the extent that this entitlement may differ from the entitlement of the Medicare recipients, the decision of the commission through its dispute resolution process must take precedence over the provisions adopted or utilized by CMS in administering the Medicare program. Subsection (a)(3) states that: "Specific provisions contained in the Texas Workers' Compensation Act (Act), or Texas Workers' Compensation Commission (commission) rules, including this rule, shall take precedence over any conflicting provision adopted by utilized by CMS in administering the Medicare program. Exceptions to Medicare payment policies for medical necessity may be provided by commission rule. Independent Review Organization (IRO) decisions regarding medical necessity are made on a case-by-case basis. The commission will monitor IRO decisions to determine whether commission rulemaking action would be appropriate."

There is a change from the text of subsection (a) as proposed. The adopted revision of paragraph (a)(2) changes the effective date of these rule amendments from March 1, 2005 to April 1, 2005, thereby allowing system participants adequate time to prepare for these rule amendments. The commission again clarifies nothing in these amendments would have retroactive effect.

No changes to subsection (b) were proposed. Subsection (b) requires system participants to utilize the Medicare reimbursement methodologies, models, and values or weights, including its coding, billing, and reporting payment policies for coding, billing, reporting, and reimbursement of health facility services provided in the Texas workers' compensation system. This allows for the basic Medicare program provisions to be applied with any additions or exceptions necessary for the adaptation to the Texas

workers' compensation system. The Medicare program is not a static system. Medicare policies change frequently. To achieve standardization it is necessary to use the Medicare billing and reimbursement policies as they are modified by CMS. Adoption of policies in effect on a particular date would require participants in the Texas workers' compensation system to bill and reimburse in a manner different from the current Medicare system and the standardization required by the statute would be eliminated. However, Medicare also makes some policies retroactive, which is not workable for the workers' compensation system that has approximately 250 insurance carriers. Therefore, the rule, in compliance with the statute, did not adopt the retroactivity aspect of Medicare payment policies, and instead requires the use of the Medicare policies in effect on the day that a service was provided.

No changes from the text of subsection (c) were proposed. Subsection (c) establishes the method to be used for determining the MAR for ASC health facility services in the Texas workers' compensation system. In establishing the PAF for the rule, which is 213.3% of Medicare, the commission previously considered the statutory requirements and objectives and utilized Medicare data, current commission reimbursement levels, and available commercial payer information. As stated in the April 2004 adoption preamble, the adopted PAF is the low limit of the extended range of acceptable fair and reasonable reimbursements included in the Ingenix report and reflects the commission's statutory responsibility related to effective medical cost control and fair and reasonable reimbursement. The adopted PAF is in the range of commercial reimbursement. Ingenix estimated that 2004 ASC reimbursement under current commission rules (requiring fair and reasonable reimbursement) equals approximately 320% of 2004 Medicare reimbursement. Additionally, Ingenix estimated commercial (HMO/PPO/POS/Indemnity) payer reimbursement equal to a range of 168% to 564%. This commercial range produces a weighted average of approximately 274% (not including indemnity plans) to 293% (including indemnity plans) of Medicare reimbursement. With Medicare added to the commercial market, the weighted average for ASC services trended to 2004 is 237% (not including indemnity plans) to 264% (including indemnity plans) of Medicare reimbursement. This identified range (237% to 264%) was extended in the Ingenix report to 213.3% to 290.4% to recognize the potential for the commission to emphasize a different balance of the statutory objectives than that emphasized by Ingenix.

There are no changes from the text of subsection (d) as proposed. Adopted subsection (d) provides that the reimbursement for ASC services is the lesser of the MAR amount regardless of billed amount, or the facility's and payer's workers' compensation negotiated and/or contracted amount that applies to the billed service(s).

There are changes from the text of subsection (e) as proposed, which reformatted and expanded the current rule. Subsection (e) addresses the exceptions and minimal modifications to the Medicare payment policies.

As adopted, amended paragraph (e)(1) reformatted the language, which states that Texas will not incorporate any retroactive portions of Medicare payment policy changes.

There are changes from the text of paragraph (e)(2) as proposed. Amended paragraph (e)(2) supplements Medicare's List with additional procedures, and the associated group assignments (e.g., Medicare Group 1-9). These additions were proposed following review and approval by the commission Medical Advisor. After receiving the various recommended procedures for an ASC setting from the public request for information, staff compared the list with the procedures that were currently allowed in an ASC setting and the number of times that these procedures were performed. Additional information was received and considered regarding those procedures commonly performed for the workers' compensation population in ASCs. As a result of the review of recommended procedures, discussions during the focus group meetings, and input from the Medical Advisor, staff believes that the adopted list reflects those items that can not only safely be performed in an ASC setting, but also are appropriate for that setting. To prevent unnecessary charges, the adopted list excludes procedures that are bundled within another primary procedure. To determine the appropriate reimbursement group for these procedures, staff assigned groups, which were consistent with the reimbursement groups for similar procedures, including ASC input where available. In order to ensure the proper administrative actions by ASCs and insurance carriers, the individual procedures are referenced by the applicable American Medical Association's Current Procedural Terminology (CPT) codes. Subparagraph (e)(2)(F) has been changed from proposal to reflect Medicare's proposed inclusion of CPT code 29873 in payment group 3, rather than the rule's proposed payment group of 4. The CPT code has not been deleted because the likely CMS implementation date will occur after the effective date of this rule revision. Proposed subparagraph (e)(2)(K) has been deleted. After additional consideration of comments, fluoroscopy has been deleted from the list of commission-approved procedures because it does not qualify as a surgical procedure and is a radiological code. Further, proposed CPT code 76000 is noted as commonly miscoded according to the Ingenix 2004 CPT Expert, consequently including only one fluoroscopic code is likely to encourage inappropriate coding in order to obtain additional reimbursement. Fluoroscopy is a service furnished by ASC staff in connection with a covered surgical procedure. The Medicare ASC reimbursement methodology includes most diagnostic or therapeutic items or services in the group case rate. Additionally, Medicare Hospital Outpatient Prospective Payment System (HOPPS) generally bundles fluoroscopic services with a more extensive surgical procedure. This means no additional reimbursement is provided for these procedures.

There are no changes to the text of paragraph (e)(3) as proposed. Amended paragraph (e)(3) allows a service that is not included on Medicare's List, or on the commission's List at paragraph (e)(2), to be performed in an ASC by prospective agreement between the carrier, the doctor, and the ASC, occurring before, during, or after preauthorization. This will allow ASCs the opportunity to present to carriers the cost effectiveness of performing certain procedures in an ASC setting, which currently are not on Medicare's List or on the commission's List at paragraph (e)(2). Details that must be included in an agreement are specified to minimize disputes, which add costs to the system and drain the commission's resources. Flexibility in the process is provided to allow use of the timing and manner of negotiation that suits the particular case.

There are no changes to the text of paragraph (e)(4) as proposed. Amended paragraph (e)(4) allows a separate reimbursement for surgically implanted, inserted, or otherwise applied devices at the lesser of the manufacturer's invoice amount or the net amount (exclusive of rebates and discounts) actually paid for such device to the manufacturer by the ASC. Reimbursement

for the cost of medical supplies related to the surgical procedure is included in the group case rate payment and is not included under this provision. The ASC is required to certify that the billed amount meets this standard, using specific certification language provided in the proposed paragraph.

The amendment providing reimbursement for implantables is a targeted approach to address situations where the cost of an implantable, by itself, exceeds the ASC group case rate or the MFG rate allowed in the workers' compensation system. Assuring sufficient reimbursement for these specific items enhances access to ASC services for injured workers. Although the Medicare system includes limited additional reimbursement for implantables, it was generally accepted in the ASC Focus Group meetings that orthopedic procedures were performed relatively infrequently in an ASC setting for the Medicare population. The limited Medicare reimbursement for high-cost, high-tech implantables associated with orthopedic procedures was cited as a primary reason for this suppressed utilization. The information provided by some of the ASC Focus Group members highlighted the high-cost of surgically implanted devices due to technology advances and medical cost inflation. The amended rule enhances consistency of reimbursement for surgically implanted devices by implementing a cost-based reimbursement, similar to the inpatient hospital methodology.

This fee guideline requires that provider billing must include a certification statement that the amount sought represents its actual costs (net amount, exclusive of rebates and discounts). This information should facilitate the billing process by providing cost information with the original billing. Consequently, processing times should improve, and confusion related to implant costs should decrease, which should additionally decrease the opportunity for disputes. The implant cost certified by the ASC is subject to insurance carrier or commission audit and verification.

There are no changes to the text of subsection (f) as proposed. Amended subsection (f) references that insurance carriers may conduct audits under §133.302 and §133.303 (relating to Preparation for an Onsite Audit and Onsite Audits) if they wish to challenge whether the certified amount referenced in subsection (e)(4) of these proposed amendments actually reflects the standard given in that subsection. Also, it is reiterated that the Medical Dispute Resolution process under §133.307 (relating to Medical Dispute Resolution of a Medical Fee Dispute) may be a forum where disputes concerning the certified amount under subsection (e)(4) are argued.

The ability to audit is an important check and balance feature related to reimbursement of the invoice cost. The audit allows the carrier to verify the actual cost of an item and auditing and assists the commission in the statutory requirements related to effective medical cost control. Additionally, members of the ASC Focus Group agreed that auditing was an acceptable trade off when combined with additional reimbursement.

Former subsection (f) concerning severability is now subsection (g), and there are no changes to the text of subsection (g) as proposed.

Comments generally supporting amendments to §134.402 as proposed were received from the following groups: Central Park Surgery Center; Clear Fork Surgery Center; East Houston Surgery Center; Medtronics; Northeast Baptist Surgery Center; NorthStar Surgical Center; Surgery Center of Duncanville; Symbion; Texarkana Surgery Center; and Texas Mutual Insurance Company.

Comments generally opposing or concerned with amendments to §134.402 as proposed were received from the following groups: Alamo Heights Surgery Center; Ambulatory Surgery Association of Texas; Ambulatory Surgery Center of Tyler; American Insurance Association; Calallen Orthopaedics L.L.P.; Christus, Santa Rosa Surgery Center; Corpus Christi Outpatient Surgery; Dallas Anesthesiology Association; Dallas Surgical Partners; Denton Surgicare; Doctors Outpatient Surgicenter; Flahive, Ogden & Latson; Garland Eye Associates, P.A.; Genesee Affiliates; Grapevine Surgicare; Heath SurgiCare; Insurance Council of Texas; Kirby Surgery Center; MacArthur Surgery Center; Mary Shiels Hospital; Memorial Herman Surgery Center Northwest; Memorial Northwest Otolaryngology; Metroplex Surgicare; North Texas Surgery Center; Northwest Houston Surgical Association; Park Cities Surgery Center; Property Casualty Insurers Association of America; San Marcos Surgery Center; Shannon Surgery Center; Smith & Nephew; South Austin Surgery Center; Southwest Podiatry, LLP; Specialty Surgery and Pain Center; Surgery Center of Arlington; Surgery Center of Lewisville; Texan Surgery Center; Texas Ambulatory Surgery Center Society; Texas Association of Business; Texas Mutual Insurance Company; Texas Sports Medicine and Orthopeadic Group; The Austin Diagnostic Clinic; The Urology Institute; United Surgery Center Southeast; United Surgical Partners International; and Valley View Surgery Center.

Comments neither generally supporting nor opposing amendments to §134.402 as proposed, but suggesting changes or asking questions were received from the following groups: Ambulatory Surgery Association of Texas; Alamo Heights Surgery Center; Ambulatory Surgery Center of Tyler; Calallen Orthopaedics, L.L.P.; Central Park Surgery Center; Christus; Santa Rosa Surgery Center; Clear Fork Surgery Center; Corpus Christi Outpatient Surgery; Dallas Anesthesiology Associates; Dallas Surgical Partners; Denton Surgicare; Doctors Outpatient Surgicenter; East Houston Surgery Center; Foundation West Houston Surgery Center; Foundation Surgery Affiliates; Garland Eye Associates, P.A.; Genesee Affiliates; Grapevine Surgicare; HealthSouth Corporation; Heath Surgicare; Heritage Eye Center; Insurance Council of Texas; La Vista Solutions, LLC; MacArthur Surgery Center; Mary Shiels Hospital; Medtronics; Memorial Herman Surgery Center Northwest; Memorial Northwest Otolaryngology; Metroplex Surgicare; Mirage Medical Group; North Texas Surgery Center; Northeast Baptist Surgery Center; NorthStar Surgical Center; Northwest Houston Surgical Association; Orthopedic Surgery Pavilion; Park Cities Surgery Center; San Marcos Surgery Center/Kirby Highland Lakes Surgery Center; Shannon Surgery Center; Smith & Nephew; South Austin Surgery Center/San Marcos Surgery Center; Southwest Podiatry, LLP; Special Surgery of Houston; Specialty Surgery and Pain Center; Surgery Center of Arlington; Surgery Center of Duncanville; Surgery Center of Lewisville; Surgical & Diagnostic Center; Symbion; Texan Surgery Center; Texarkana Surgery Center; Texas Ambulatory Surgery Center Society; Texas Association of Business; Texas Mutual Insurance Company; Texas Sports Medicine and Orthopeadic Group; The Austin Diagnostic Clinic; The Clinic for Special Surgery; The Urology Institute; United Surgery Center Southeast; United Surgical Partners; United Surgical Partners International; Valley Baptist Medical Center; Valley View Surgery Center; and Whitley Penn.

Summaries of the comments and commission responses to the proposed rule amendments are as follows:

Subsection (a)

COMMENT: Commenters recommended the rule amendments be retroactive to the original rule effective date, September 1, 2004. Commenters stated that this practice of implementing retroactive changes is often used by the Centers for Medicare and Medicaid Services (CMS) when adjustments are made to Medicare's physician fee schedule. This would allow ASCs to more easily transition and recover some of the costs associated with the original rule change.

RESPONSE: The commission disagrees with commenters' recommendation to apply a retroactive date to this amended rule. Many commenters requested that these amendments be retroactive to September 1, 2004, which was the effective date of the original rules. The commission declines to make this change. The commission notes that the Texas Constitution states that "no bill of attainer, ex post factor law, retroactive law, or any law impairing the obligation of contracts, shall be made" [Tex. Const., Art. I, Sec.16]. As a matter of policy, the commission believes that system participants involved in the ASC reimbursement rate issue need to be able to know what rates are in effect at any given time so that informed decisions can be made regarding matters like whether appeals are pursued during billing processing and during medical dispute processes. Also, it is likely that retroactive application of these amendments would lead to increased disputes due to retroactive adjustments.

Subsection (b)

COMMENT: Commenter recommended that the American Academy of Orthopedic Surgeons (AAOS) Complete Global Surgery Data be the standard for application of the multiple procedure rule.

RESPONSE: The commission disagrees there is a need to recognize AAOS Complete Global Surgery Data to be the standard for application of the multiple procedure rule. Adoption of AAOS Complete Global Surgery Data would contradict the CMS National Correct Coding Initiatives (NCCI) and would apply a different set of rules to ASCs and surgeons paid under the MFG.

Subsection (d)

COMMENT: Commenter recommended adding "billed amount" since requiring carriers to pay more than the billed amount does not achieve the objective of cost control. Commenter recommended deleting the "lesser of" provision and requiring reimbursement to be either the MAR or a negotiated rate.

RESPONSE: The commission disagrees with the recommendations. The CMS prospective payment methodology is based on a case rate concept, which recognizes that at times reimbursement will likely be different than the billed amount. Sometimes this reimbursement will be less than, sometimes more than, the billed amount. This concept encourages the efficient delivery of care without an unnecessary utilization of resources. The commission disagrees that the "lesser of" provision should be deleted from the rule. This provision facilitates cost control by setting an upper limit on reimbursement.

Subsection (e)(2)

COMMENT: Commenter generally supported the added procedures codes, and stated, "we are pleased to see that TWCC added some non-covered codes that the Medicare methodology did not have."

RESPONSE: The commission agrees that the proposed amendments of subsection (e) are an appropriate amendment to the rule.

COMMENT: Commenters recommended CPT code 76005 be added to the commission's List of procedures to be performed in an ASC, and be placed in Medicare's Group 9. Other commenters recommended CPT code 76005 be added and placed in Medicare's Group 1, in part due to the CMS NCCI edits, and because it requires the use of the most costly piece of ASC equipment, a C-arm, which is commonly used on injured workers. CPT code 76005 is defined as "fluoroscopic guidance and localization of needle or catheter tip for spine or paraspinous diagnostic or therapeutic injection procedures (epidural, transforaminal epidural, subarachnoid, paravertebral facet joint, paravertebral facet joint nerve or sacroiliac joint), including neurolytic agent destruction." Commenter recommended CPT code 76005 be used in lieu of proposed CPT code 76000. Other commenters opposed the proposed inclusion of CPT code 76000 and suggested that for consistency in both training and administration of the rule, the procedure should remain global. Commenters advised that CPT code 76000 is a radiological procedure, which would only be performed in an ASC as a part of a more extensive surgical procedure, and should not be subject to ASC facility reimbursement. Commenter advised that most diagnostic or therapeutic items or services, such as this code, are considered inclusive of the ASC facility fee, and further noted that NCCI edits deem 76000 as global to over 700 other procedures. Commenter opined that radiological services that are not global to other procedures should remain reimbursable per §134.202.

RESPONSE: The commission declines to replace CPT code 76000 with CPT code 76005 or add CPT code 76005 to the commission's List. After full consideration of comments received and after researching the matter further, CPT code 76000, which was proposed to be added, (fluoroscopy) has now been deleted from the commission's List because it does not qualify as a surgical procedure and is a radiological code. Further, CPT code 76000 is noted as commonly miscoded according to the Ingenix 2004 CPT Expert, consequently, including only one fluoroscopic code is likely to encourage inappropriate coding in order to obtain additional reimbursement. Fluoroscopy is a service furnished by ASC staff in connection with a covered surgical procedure. The Medicare ASC reimbursement methodology includes in the group case rate, most diagnostic or therapeutic items or services (such as CPT code 76000). Additionally, Medicare HOPPS generally bundles fluoroscopic services with a more extensive surgical procedure. This means no additional reimbursement is provided for these procedures. Regarding commenter's opinion that radiological procedures should remain reimbursable according to §134.202, the commission clarifies that the proposed radiological procedure has been deleted from the adopted rule.

COMMENT: Commenters opposed the inclusion of any proposed surgical procedure not approved by CMS (Medicare) to be performed in an ASC setting, and advised such deviations compromise the CMS methodology as applied to Texas through §413.011 of the Act. Commenter further recommended that Medicare's determination be given presumptive weight. Commenter indicated Medicare's List prohibition was intended to discourage the shift of services from physician offices to ASCs, and commenter recommended the commission should also strive toward patient safety and prevention of shifting procedures to a different setting that results in greater reimbursement amounts.

RESPONSE: The commission disagrees that supplementing Medicare's List to meet Texas workers' compensation system needs negatively impacts the Medicare's List methodology. The additions to Medicare's List impact only a limited number of

CPT codes, maintain the CMS criteria as presumptive weight for over 2400 CPT codes, and are intended to facilitate certain procedures that previously have been provided in an ASC setting. The commission disagrees that Medicare's List was only developed to discourage a shift of services from physician offices to ASCs, as the CMS methodology considers many other factors in modifying its list. The commission agrees that patient safety and quality care is a significant factor in the workers' compensation system. The additions to commission's List have previously been performed in the ASC setting, and were reviewed and approved for inclusion by the commission's Medical Advisor.

COMMENT: One commenter suggested inclusion/exclusion of procedures to the commission's List beyond what's on the current Medicare's List will become a recurring theme for the commission each time CMS updates their list or when health care providers demand further changes. Commenters additionally advised that CMS has an established procedure for timely updating their list, and CMS is required to do so every two years. CMS is currently in the process of an update for services provided on or after July 1, 2005.

RESPONSE: The commission disagrees that careful consideration of "minimal modifications" to the rule under §413.011 of the Act, with the public's input, is inappropriate in this rulemaking or would be inappropriate in the future. Each time CMS updates its list, the rule includes such updates as stated in paragraph (4) of subsection (a) of the rule. Further, the commission has a responsibility to abide by the statutory requirement of reviewing and, if necessary, revising its medical policies and fee guidelines. The commission believes that these amendments are needed now, given the uncertainty of content and timing for any pending changes to CMS.

COMMENT: Commenters observed that the rule as proposed would have the unintended consequences of unbundling Medicare's List as established by CMS for the sole purpose of seeking a higher reimbursement. Commenters recommended the commission adhere to and not modify CMS' scheduled updates and methodology, which prevents unbundling.

RESPONSE: The commission disagrees that the creation of a commission's List within the rule will result in the unbundling of procedures. Although members of the ASC Focus Group recommended additional reimbursement for some procedures currently bundled into a primary procedure code, the commission did not include any of these procedures in the commission's List. The commission does not encourage unbundling, and clarifies that the minimal modifications made to Medicare's List do not encourage inappropriate unbundling and subsequent overpayment.

COMMENT: Commenters opposed additions or deletions from Medicare's List, stating the commission provided no reasonable basis, objective or consistent criteria for them. Commenter further stated that without providing the criteria for selection, it would appear the commission had insufficient expertise to make such modifications.

RESPONSE: The commission disagrees that it provided no reasonable basis/criteria for selection of additions or deletion from Medicare's List. The commission also disagrees that it has insufficient expertise to make such modifications. The supplements to Medicare's List in paragraphs (2) and (3) of subsection (e) of the rule constitute what the commission considers "minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements." The commission's proposal preamble cited that by the expansion of the number of services allowable in an ASC setting, the commission increases the injured worker's ASC access to procedures that are not on Medicare's List. In addition, by allowing the procedures to be performed in an ASC setting, the commission increases flexibility for system participants and promotes provision of services in a setting that ultimately lowers costs to the system and system participants. The site of service flexibility enhances the cost containment efforts of the commission to meet the requirements of the Act. This is especially important considering the documented high medical cost per claim in the Texas workers' compensation system, which also was outlined in the commission's previous April 2004 adoption preamble of §134.402. The commission compiled and evaluated information submitted by ASCs, carriers, and ASC Focus Group members. The commission also conducted its own research, which was evaluated with the input and expertise of the commission's Medical Advisor. Further, the commission clarifies that it sought the expertise of system participants through a data call, and then established an ASC Focus Group that was comprised of health care providers, including physicians and ASCs, and insurance carriers. Additionally, a device manufacturer participated in the ASC Focus Group meetings and assisted the commission with recommended amendments to the rule as proposed. Reasons for individual amendments to the rule are given throughout this preamble and the December proposal preamble for these amendments.

COMMENT: Commenters opined that the proposed deviations from the Medicare's List constitute more than a "minimal modification," are unrelated to any conditions specific to occupational injuries as required by statute, and are consequently beyond the statutory authority granted the commission.

RESPONSE: As previously stated, the commission disagrees that supplementing Medicare's List to meet workers' compensation system needs constitute more than a "minimal modification." The commission's List impacts only a limited number of CPT codes, maintains the CMS criteria as presumptive weight for over 2400 CPT codes, and is intended to facilitate certain procedures that previously have been provided in an ASC setting. The additions to the commission's List have previously been performed in the ASC setting, and were reviewed and approved for inclusion by the commission's Medical Advisor. The commission further disagrees with commenters' statement regarding "occupational injuries" as a statutory criterion. The statute directs the commission to use health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery system, including Medicare, with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. This the commission has done, as detailed throughout this preamble.

COMMENT: Commenter suggested the proposed commission's List is contrary to the commission's requirement to control medical costs because the significant advantage for access to ASCs is to ensure the service can be performed safely in that environment and is less costly. A commenter indicated there has been no showing of any injured worker not having received a medically necessary procedure because it is not deemed appropriate to be performed in an ASC setting, and such expansion of ASC services is not necessary to ensure injured workers' access to medical care.

RESPONSE: The commission disagrees that the commission's List is contrary to the commission's requirement to control medical costs. Each procedure is grouped into a prospectively determined case rate, which inherently controls costs. By adopting Medicare's List and the multiplier, the ASC reimbursement was projected in the initial proposal of §134.402 to decrease overall ASC reimbursement by approximately $31 million. The reimbursement for the additional CPT codes is unlikely to unduly impact overall system costs because of their relatively infrequent use in the system. For those procedures added to the commission's List, access is anticipated to increase due to scheduling and other patient/doctor conveniences afforded by allowing an ASC to perform these procedures.

COMMENT: Commenter specifically opposed the inclusion of procedure codes 11750, 11760, 20526, 20552, and 64405 (subparagraphs A, B, C, D, and I of (e)(2) of the rule proposal) noting that CMS indicates these procedures are most commonly performed in a doctor's office setting, which the commenter agrees with, and stated that inclusion will guarantee inappropriate migration from the doctor's office to the ASC setting, which in turn will cause increased medical costs to the system without incremental benefit to the injured worker. Commenter stated, "The more significant events may be performed in an outpatient setting."

RESPONSE: The commission disagrees. In general, prior to the implementation of this rule in September 2004, there were no restrictions regarding site of service. Further review of the commission's medical billing database indicated these procedures were performed in several settings, including ASCs. This history suggests that it is unlikely that these procedures will automatically or inappropriately shift from the doctor's office to an ASC setting. The amendments continue to allow these procedures to be performed in an ASC; however, reimbursement is now standardized according to this fee guideline. The rates reimbursed prior to September 1, 2004, were on average 50% more than the current reimbursement rate.

COMMENT: A commenter noted CMS' current proposal to include procedure code 29873 to its list.

RESPONSE: The commission agrees and recognizes that CMS is proposing to add this procedure to its list. The commission has also determined that it is appropriate for this procedure to be performed in an ASC setting, and thus the rule has been changed from proposal to adoption to reflect Medicare's inclusion of CPT code 29873 in payment group 3. The CPT code has not been deleted from the commission's List because it is likely CMS implementation date will occur after the effective date of this rule revision.

COMMENT: Commenter generally supports addition of the procedure codes that the Medicare methodology does not include.

RESPONSE: The commission agrees that the additional CPT codes included in the rule amendment are an appropriate minimal modification to Medicare's List in order to meet the reimbursement requirements for occupational injuries as well as the other factors of §413.011 of the Act.

COMMENT: Commenter stated the proposed modifications do not cover the ASC's costs.

RESPONSE: The commission disagrees that the assigned group number does not cover the costs associated with the proposed modifications because the commission has received no independent cost data to determine actual costs in Texas ASCs. Unlike hospitals, ASCs do not publicly report operating expenses and revenues. Additionally, any cost information provided by an ASC is unique to that facility and not necessarily indicative of the cost structure or profitability of any other ASC facility. Without this cost-based information, the commission has relied on Ingenix's expertise in analyzing market reimbursement, and the commission has set reimbursement within the range recommended by Ingenix.

Through this rule amendment, the commission clarifies that the additional procedures are those that have been commonly performed in ASCs prior to this rule's implementation, and further clarifies that the rate of reimbursement is 213.3% over that of Medicare's established rate. Additionally, ASC Focus Group members, which included numerous ASC representatives, recommended the procedures. Several of the additional codes are currently commonly performed in other settings with no, or minimal, facility reimbursement. Based on this information and the ASC comments of efficiency and low cost, the additional reimbursement ($710 (Group 1 rate of $333 x 213.3 %) at a minimum per procedure) is not appropriate.

COMMENT: Commenter opposed the grouping of the 11 proposed procedures for inclusion and suggested that the 11 codes should be grouped to a higher group. Commenter recommended that if additional procedures are added to the commission's List they be grouped to a higher group.

RESPONSE: The commission disagrees that the additional codes should be regrouped. The groupings are based on the relationship to the other codes on Medicare's List and in general, are reflective of the relative time and resources necessary for the procedure. Additionally, unlisted codes are included to allow flexibility for certain procedures, and are grouped with similar procedures to discourage inappropriate use of the unlisted codes to increase reimbursement. The commission disagrees that the proposed 11 procedures should be grouped to a higher group. The commission clarifies that if further additional codes should be added, they will be grouped using the same concept.

COMMENT: Numerous commenters recommended other common codes be included in the commission's List (but not provided in written public comment) as recommended by various ASCs prior to rule proposal, and commenters recommended the commission adopt the previously recommended Texas Ambulatory Surgical Center Society's group assignments.

RESPONSE: The commission disagrees that other CPT codes should be included in the commission's List at this time. As previously stated in this preamble, and prior to proposal of this rule amendment, the commission requested and received from the public those procedures they requested to be added and indicated were commonly performed in an ASC setting. The commission evaluated the entire list of suggested procedures and removed those procedures that were already on Medicare's List; procedures that Medicare (CMS) determined could only safely be performed in an inpatient hospital setting; and in general, those procedures that had not been or had rarely been performed in the workers' compensation system in calendar year 2002. The commission discussed and received general support from the ASC Focus Group members as to the process for procedure removal from the broader list of suggestions. The commission then evaluated remaining procedure suggestions and further removed those, which through NCCI edits, are considered as bundled to a primary surgical procedure. The commission disagrees with the recommendations for group assignments provided by the Texas Ambulatory Surgical Center Society. The

commission, with the input of the commission's Medical Advisor, utilized the previously described general concept in assigning groups to maintain consistency with Medicare's List. The final results are rule amendments, which satisfy the criteria of §413.011 of the Act.

COMMENT: Commenter recommended the specific procedure codes 62290, 72295, 20600, 20605, 20610, 72275, 27096, 24220, 27648, and 23350 be added to the commission's List. Commenter suggested these additional codes would assure mistakes are kept to a minimum, allowing them to be performed in an ASC setting would decrease the reimbursement allowance, which would benefit insurance carriers. Commenter further stated if these codes were to remain allowed to be performed just in a hospital outpatient surgery department setting, it would cause an increase in system expenditures.

RESPONSE: The commission disagrees with commenter's recommendation of additional procedures codes 62290, 72295, 20600, 20605, 20610, 72275, 27096, 24220, 27648, and 23350 to be included on the commission's List through this rule amendment. The previously described vetting process by the commission was thorough. Additionally, the commission disagrees that there is any proof or validity to the commenter's statement that the addition of these codes would necessarily reduce mistakes, and reduce ASC's monetary allowance. There is no set reimbursement for specific hospital outpatient surgical procedures that would support commenter's assertion that reimbursement for services provided in a hospital outpatient setting are more expensive than adding these procedures to the commission's List, and thereby reducing their costs to the system.

COMMENT: Commenter recommended the commission completely remove the Medicare site of service restrictions from the rule by allowing any and all ASC certified procedures to be performed in ASCs. Commenter recommended, for those procedures without assigned Medicare groupers, a provisional grouper assignment be allowed from 2 to 5, depending on the complexity of the procedure. Commenter's reason for this recommendation is that the adoption of Medicare's site of service restrictions in rule 134.402 does not meet the statutory requirement of setting fair and reasonable fee guidelines. Commenter further stated the commission rules should not re-distribute or re-direct patient flow preferentially from one type of site to another.

RESPONSE: The commission disagrees that alternative inclusion of all procedures and groupings for currently ungrouped procedures be applied in the Texas workers' compensation system. To do so would be contrary to the standardization requirements of the Act regarding Medicare methodology. Additionally, the commission's limited list assures that procedures are performed in settings appropriate to the complexity of the procedure and the safety of the patient. This standardization promotes consistency within the workers' compensation system, eliminating unnecessary administrative burdens and the potential for disputes based on site of service issues - all of which would be problems associated with the commenter's suggestion. The commission disagrees that incorporating the site of service restrictions does not meet "the statutory requirement of setting fair and reasonable fee guidelines." Section 413.011(a) of the Act states, "to achieve standardization the commission shall adopt the most current reimbursement methodologies, models and values, or weights used by the Health Care Financing Administration (now called the Centers for Medicare and Medicaid Services (CMS)) including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet the requirements of Section 413.053." Additionally, §413.011(d) states, "guidelines for medical services fees must be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control...." Adoption of these rule amendments is consistent with these requirements of the Act. The commission disagrees that commission rules should not re-distribute or re-direct patient flow from one site to another, because re-directing services between sites is an essential tool the commission must use to assure services are provided safely and in appropriate settings and to assure effective medical cost control. There is nothing "preferential" about such commission actions, however. They are, rather, a function of the commission's following its statutory mandates as set out by the Texas Legislature.

COMMENT: Commenters opposed the inclusion of procedure codes 27599, 29999, and 64999 (subparagraphs E, G, and J of (e)(2) of the rule proposal) stating that their inclusion would lead to unbundling, and increase the abuse of "unlisted procedure codes," rather than use of more appropriate codes. Commenter provided an example of an injection being billed as code 64999, which is defined as "unlisted procedure, nervous system," and potentially reimbursed at a much higher rate. Commenter suggested inclusion of the codes at issue would result in increased audit and dispute costs to the system.

RESPONSE: The commission disagrees that inclusion of procedure codes 27599, 29999, and 64999 (subparagraphs E, G, and J of (e)(2) of the rule proposal) will lead to unbundling and increase the abuse of unlisted procedure codes. The commission clarifies that unlisted codes are included to allow flexibility for certain procedures, and are grouped with similar procedures to discourage inappropriate use of the unlisted codes to increase reimbursement. The commission disagrees that audit and dispute costs will increase. Adding these procedures assures their reimbursement when provided in an ASC setting, and eliminates confusion when these services are provided as a secondary procedure, or in lieu of a procedure already on Medicare's List.

COMMENT: Commenters expressed concern regarding procedure code 29873 (subparagraph F of (e)(2) of the rule proposal) and its proposed group assignment of 4 because CMS is currently in the process of proposing the same code for Medicare's List inclusion, only in group 3, and not group 4. A commenter recommended the commission defer to CMS' expertise and not deviate from the methodology used by CMS for group assignment, as it would set the stage for future deviations.

RESPONSE: The commission agrees with commenters' concerns and recommendations regarding the proposed inclusion of CPT code 29873 and corresponding group assignment. The commission recognizes that CMS is proposing to add this procedure to its list. The rule has been changed from proposal to reflect Medicare's proposed inclusion of CPT code 29873 in payment group 3.

COMMENT: Commenter asked if the codes proposed to be added to the commission's List would be assigned a Medicare group and paid from the established Medicare fees. Commenter additionally asked if the cost of grafting, anchors and screws would be paid separate from the procedure code 29873.

RESPONSE: The commission clarifies the additional procedure codes for inclusion in the commission's List, (e)(2) of the adopted rule, do have an assigned Medicare case rate group, which is

multiplied by 213.3% for a reimbursement of Texas workers' compensation claims. The reimbursement of grafts, anchors and screws is reimbursed separately as clarified further in (e)(4) of the adopted rule.

COMMENT: Commenters opposed any payment that is based on Medicare fee schedules for ASCs and stated that the CMS ASC Grouper System is outdated.

RESPONSE: The commission disagrees that payments should not be based in part on Medicare. The commission is required by §413.011 of the Act to adopt the most current Medicare program reimbursement, methodologies, models, and values or weights, including its coding, billing, and reporting payment policies. The Medicare ASC reimbursement system model adopted by the commission fulfills these requirements.

COMMENT: Commenter specifically recommended procedure code 64999 (subparagraph J of (e)(2) of the proposed rule) be considered for higher reimbursement than the proposed group 1 category, as the reimbursement does not cover the cost of supplies and use of the ASC facility. Commenter advised that as an example, in the use of a Spine Cath, the catheter alone cost in excess of $1,000.00, yet it would be less expensive to have this procedure performed in an ASC than in a hospital outpatient surgery department setting.

RESPONSE: The commission disagrees that procedure code 64999 should be regrouped. The commission clarifies that such supplies as referenced by commenter are integral to the procedure and are consequently included in the group rate reimbursement. The groupings are based on the relationship to the other codes on Medicare's List and in general, are reflective of the relative time and resources necessary for the procedure. The commission clarifies that unlisted codes such as 64999 are included to allow flexibility for certain procedures, and are grouped with similar procedures to discourage inappropriate use of the unlisted codes to increase reimbursement.

COMMENT: Commenter opposed the commission's recommended group payment codes for the proposed additional list codes, and indicated a detailed explanation of the methodology used to assign these specific groups is lacking.

RESPONSE: The commission clarifies that the groupings are based on the relationship to the other codes on the Medicare's List and in general, are reflective of the relative time and resources necessary for the procedure. Unlisted codes, e.g., 64999, are included to allow flexibility for certain procedures, and are grouped with similar procedures to discourage inappropriate use of the unlisted codes solely to increase reimbursement.

COMMENT: Commenter opposed the inclusion of procedure code 63030 to the commission's List because of the increased safety risk of the surgery to the injured worker/patient if performed in any setting other than a hospital setting. Commenter additionally stated such inclusion would increase the number of fee disputes. Commenter asserted that this procedure has the potential for additional spinal procedures to be performed (e.g., 63035), with risk of complications, and consequently risk to the patient.

RESPONSE: The commission disagrees that CPT code 63030 should not be included on the commission's List. As previously stated in this preamble, and prior to proposal of this rule amendment, the commission requested and received from the public those procedures they requested to be added and indicated were commonly performed in an ASC setting. The commission evaluated the entire list of suggested procedures and removed those procedures that were already on Medicare's List, procedures that Medicare determined could only safely be performed in an inpatient hospital setting, and in general, those procedures that had not been or had rarely been performed in the system in calendar year 2002. The commission discussed and received general support from the ASC Focus Group members as to the process for procedure removal from the broader list of suggestions. The commission then evaluated remaining procedure suggestions and further removed those, which through NCCI edits, are considered as bundled to a primary surgical procedure. The commission, with the input of the commission's Medical Advisor, utilized the previously described general concept in assigning groups to maintain consistency with Medicare's List. The commission disagrees that medical disputes will significantly increase as a result of this addition to the Medicare List. During preauthorization and according to subsection (e)(3) of the rule, health care providers and carriers have the responsibility to discuss all procedures to be performed during a single operative session. The commission recognizes that any surgical procedure has a risk for complications. Health care providers have a responsibility to consider the risk for complications when determining a particular setting for a particular patient.

COMMENT: Commenters stated proposed amendments that establish a separate list of codes for ASC reimbursements, and the additional carve-out for implant reimbursements, are more than a "minimal modification." Commenters stated the proposed amendments far exceed the minimal modifications authority granted to the commission by §413.011(a) of the Texas Labor Code. Commenters stated that Medicare ASC payment policies determine which procedures may be performed in an ASC and include those bundled items (certain implants) in the base fee as opposed to those unbundled items, which are reimbursed according to Medicare's DMEPOS fee schedule.

RESPONSE: The commission disagrees. As previously stated, the supplements to Medicare's List in paragraphs (2), (3) and (4) of subsection (e) of the proposed rule, constitute what the commission considers "minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements." Although the commission has supplemented the Medicare ASC methodology, this methodology is still maintained as the primary framework of the guideline. The statute directs the commission to use health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. The remainder of §413.011 of the Act gives further criteria, which are met by these rule recommendations.

The commission also disagrees that the commission's List will enable ASCs to unbundle procedures. The commission discouraged unbundling by removing those suggested procedures, which through NCCI edits were considered as bundled to a primary surgical procedure. In general, prior to the implementation of this rule in September 2004, there were no restrictions regarding site of service and consequently any preauthorized service could be performed in an ASC. Further review of the commission's medical billing database indicated these procedures were performed in several settings, including ASCs. This history suggests that it is unlikely that these procedures will automatically or inappropriately shift from the doctor's office to the ASC setting.

The amendments continue to allow these procedures to be performed in an ASC; however, reimbursement is now standardized according to this fee guideline.

Subsection (e)(3)

COMMENT: Commenter recommended the elimination of CMS site of service restrictions from rule 134.402, to allow physicians to decide where best to treat their patients and to avoid administrative burden and contentious situations. Such restrictions in the commission's rule are not within the agency's statutory authority because it is "not fair and reasonable," and because the agency does not have the authority to "redirect patient flow." Commenter recommended allowing any and all procedures to be performed in ASCs. Commenter further recommended assigning a grouper for procedures without CMS assigned groupers as follows: "Group 2 - No break in skin (e.g., joint manipulation; or fracture dislocation reduction); Group 3 - Percutaneous; Group 5 - Open or endoscopic surgery (e.g., all repair, revision or reconstruction procedures, including fracture ORIF and dislocation open reductions); Group 4 - All other open or endoscopic surgery."

RESPONSE: The commission disagrees that CMS site of service restrictions (Medicare List) should be eliminated, for reasons previously stated in this preamble. Eliminating Medicare's List is contrary to the standardization and Medicare methodology requirements of the Act. Additionally, a restrictive list assures that procedures are performed in settings appropriate to the complexity of the procedure and the safety of the patient. These minimal modifications promote consistency within the workers' compensation system, eliminating administrative burdens and the potential for disputes based on site of service issues - all of which would be problems associated with the commenters' suggestions. The commission further disagrees that the sites of service restrictions do not meet "the statutory requirement of setting fair and reasonable fee guidelines." The commission clarifies that §413.011(a) states, "to achieve standardization the commission shall adopt the most current reimbursement methodologies, models and values, or weights used by the Health Care Financing Administration (now called CMS) including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet the requirements of Section 413.053." Additionally, §413.011(d) states, "guidelines for medical services fees must be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control...." Adoption of these rule amendments is consistent with these requirements of the Act. The commission disagrees that commission rules should not re-distribute or re-direct patient flow from one site to another because re-directing services between sites is an integral part of the Medicare methodology and is an essential tool the commission must use to assure services are provided safely and in appropriate settings and to assure effective medical cost control.

The commission disagrees with commenter's recommendation to provide groupings for procedures without CMS or commission assigned groups. The commission clarifies that subsection (e)(3) allows the carrier and ASC to negotiate the reimbursement amount for procedures without CMS or commission assigned groups. The agreed upon reimbursement amount could conceivably be based on the alternative groupings mentioned above.

COMMENT: Commenter recommended that any procedure identified by Medicare as an office-based procedure, which is billed as the primary procedure in an ASC, must have prior authorization between the ASC and the insurance carrier, otherwise it is not billable. The secondary procedure (e.g., nail bed repair after repairing the smashed finger) would not require preauthorization.

RESPONSE: The commission clarifies that Medicare does not restrict procedures to an "office only" category. Additionally, by statute §413.014, any outpatient surgical or ambulatory surgical services, as defined by commission rule 134.600, must be preauthorized.

COMMENT: Commenters opposed the process outlined in (e)(3) of the proposed rule for negotiation of procedures not on Medicare's or the commission's Lists.

RESPONSE: The commission disagrees. The negotiation process allows the health care provider and carrier to reach agreement for special circumstances not envisioned in the development of the commission's List. This additional flexibility increases access to care for injured workers when parties agree to site of service and reimbursement. Nothing in these amendments forces parties to enter into such an agreement.

COMMENT: Commenters stated the following about the proposed negotiation process: will further complicate and delay the preauthorization and retrospective review audit; carrier staff are not trained in the appropriate reimbursement for ASC services; carrier staff would be put in the position of "second-guessing" CMS; a facility would need to seek an ASC agreement, and then preauthorization; and, site of service decision requires an initial determination if the procedure is medically necessary (normally a preauthorization request does not contain all of the information needed to make a decision on both issues) compounded by a three-day timeframe to make the decision. Commenters further stated that the proposed process would: compromise CMS methodology and standards; could potentially delay treatment; and, cause more time for carriers to process requests. Commenter stated that the proposed amendment is not an appropriate format or methodology to establish the medical necessity of a procedure or reimbursement rate.

RESPONSE: The commission disagrees that the proposed negotiation process will complicate and delay preauthorization and retrospective review. The process is designed to enhance flexibility and encourage communication between health care providers and carriers when reviewing requests for procedures not on Medicare's or the commission's Lists. Although not required, system participants are allowed the flexibility to request, approve, and utilize alternate sites, as determined to be appropriate, by agreement between the health care provider and carrier. Further, the commission disagrees that CMS methodology and standards are compromised. Adoption of these rule amendments maintains the concept of the Medicare List while allowing deviations from Medicare's and the commission's Lists when determined to be medically appropriate and financially prudent. This is consistent with the medical necessity and effective cost control concepts of the Act, as well as the "minimal modifications" concept in §413.011. The commission disagrees that the training of carrier staff is a significant problem since carriers, prior to September 1, 2004, evaluated all ASC services (including items not on Medicare's or the commission's Lists) and determined fair and reasonable reimbursement. Since the opportunity for negotiation is voluntary, the carrier may choose to develop its internal processes and training to supplement existing procedures based on past experience. Section (e)(3) provides considerable flexibility on both the timing of, and process for, negotiation.

COMMENT: Commenter stated that the proposed amendment regarding negotiation would increase medical disputes and appeals.

RESPONSE: The commission disagrees that the proposed amendment would increase medical disputes and appeals because negotiated agreements allow reconciliation of potential disagreements prior to the provision of services. As previously stated, entering into such agreements are voluntary.

COMMENT: Commenter stated that the proposed amendment regarding negotiation would increase administrative costs; increase costs to employers, and ultimately the workers' compensation system.

RESPONSE: The commission disagrees that the process will increase administrative costs, costs to employers, or the workers' compensation system since medically necessary services, if not provided in an ASC setting, will be provided in an alternate office or hospital setting. Any difference in administrative costs is likely to be minimal and is potentially offset by the ability to negotiate reimbursement.

COMMENT: Commenters also stated the proposed negotiation process could potentially cause the migration of procedures performed in a doctor's office, or in a hospital, to an ASC setting, resulting in overuse of ASC facilities due to financial incentives, and all without any additional benefits to the injured worker.

RESPONSE: The commission disagrees that an agreement between the health care provider, ASC, and carrier that includes the procedure, setting, and reimbursement will result in inappropriate use of ASC facilities. The purpose of this adopted amendment is to encourage negotiation and mutual agreement for medically appropriate and financially prudent decisions, all benefiting the injured worker. This is consistent with the medical necessity and effective cost control concepts of the Act.

COMMENT: Commenter disagreed that the proposed negotiation process is a "minimal modification" in Medicare payment policies and stated it is outside the commission's rulemaking authority.

RESPONSE: As previously stated, the commission disagrees that allowing the negotiation of a procedure, setting, and reimbursement as provided in (e)(3) of the rule proposal, is outside the commission's rulemaking authority. The statute directs the commission to use health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems, including Medicare, with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. The commission has maintained the Medicare methodologies as the primary framework for ASC reimbursement. The commission does not anticipate that these agreements will significantly impact the site of service provisions. Additionally, any agreements reached are anticipated to be consistent with the medical necessity and effective cost control concepts of the Act.

COMMENT: Commenter recommended the addition of language to offset the additional time it will take health care providers' staff to get ungrouped procedures approved and reimbursed. The recommended language is "Prompt payment within 15 days of preauthorized and contracted procedures being performed and billed...." to be inserted at (e)(3)(B) of the rule.

RESPONSE: The commission disagrees with the recommended language. Section 408.027 of the Act, Payment of Health Care Provider, specifies the applicable timeframes. However, negotiated agreements could include other specified timeframes and should be noted in the agreement between the carrier and the ASC, as per amended rule (e)(3)(B)(ii).

Subsection (e)(4)

COMMENT: Commenters opposed a separate reimbursement for implants, including some who opposed a separate reimbursement except when Medicare allows a separate implant payment, because such payments are not necessary to provide injured workers with reasonable access to quality medical care.

RESPONSE: The commission disagrees that the additional reimbursement for all surgically implanted devices is unnecessary to maintain or improve access to care. The amendment providing reimbursement for implantables is a targeted approach to address situations where the cost of an implantable, by itself, exceeds the ASC group case rate or the MFG rate allowed in the workers' compensation system. Assuring sufficient reimbursement for these specific items enhances access to ASC services for injured workers.

COMMENT: Commenters stated that the Medicare reimbursement rates for ASCs includes the costs of implantables, and that this was considered by the Texas Legislature when enacting HB-2600. Commenters stated that the rule amendment will result in over-reimbursing ASC services and increasing system costs without any additional benefit to injured workers permitting the ASC to unbundle its services - a practice forbidden by Medicare payment policies.

RESPONSE: The commission agrees that the Medicare system includes limited additional reimbursement for implantables. It was generally accepted in the ASC Focus Group meetings that orthopedic procedures were performed relatively infrequently in an ASC setting for the Medicare population. The limited Medicare reimbursement for high-cost, high-tech implantables associated with orthopedic procedures was cited as a primary reason for this suppressed utilization. The information provided by some of the ASC Focus Group members highlighted the high cost of surgically implanted devices due to technology advances and medical cost inflation. As previously stated, the reimbursement for implantables is a targeted approach to address situations where the cost of an implantable, by itself, exceeds the ASC group case rate or the MFG rate allowed in the workers' compensation system. Assuring sufficient reimbursement so that the ASC's cost of providing services involving these specific items is covered will enhance access to ASC services, which benefits injured workers. Consequently, the commission disagrees that this amendment will result in an over-reimbursement for an otherwise bundled or separately reimbursed item to ASCs for those orthopedic procedures involving surgically implanted devices.

COMMENT: Commenters stated that ASC fees set at 213.3% of Medicare plus a separate reimbursement for all implants would raise ASC fees above hospital inpatient fees for the same surgeries.

RESPONSE: The commission disagrees that separate reimbursement for implantables would necessarily reimburse more than hospital inpatient reimbursement for the same surgeries. Both hospital inpatient and ASC settings will now reimburse surgically implanted devices based on a "invoice cost" methodology. The hospital surgical per diem of $1,118 is not directly comparable to an ASC group rate. Overall, a two-day inpatient surgical stay (per diem with invoice cost plus 10% of implantables) is very similar to reimbursement in an

ASC (when compared to the ASC Group 9 most expensive case rate with invoice cost of implantables). In general, in this comparison, services in groups 1 through 8 would likely be reimbursed less than a two-day inpatient surgical stay.

COMMENT: Commenter stated that logic used by the commission to arrive at this figure for implantable reimbursement is flawed and based on the commission's Rule 134.401, concerning Acute Care Inpatient Hospital Fee Guideline. Commenter summarized that rule's adoption preamble (22 TexReg 6268-69, July 4, 1997) included the percentage of billed charges approach in determining fees is ineffective; explained that the percent of billed charges does not achieve effective cost control because each hospital determines its own charges and can raise them far above costs, inflation, or what other payers pay. Further, hospital charges are not a valid indicator of a hospital's costs, and if reimbursement levels are based on a percentage of billed charges, a hospital or ASC can independently affect its reimbursement without its costs being verified.

RESPONSE: The commission disagrees and clarifies that billed charges are not a component of the adopted reimbursement methodologies for §134.402, Ambulatory Surgical Center Fee Guideline. The implant reimbursement is based on cost, certified by the ASC and subject to insurance carrier or commission verification and audit.

COMMENT: Commenter did not support the proposed "prosthetic device" reimbursement methodology, stating it is inconsistent with the requirements of Labor Code §413.011. Commenter said that continuing to reimburse ASCs for prosthetic devices under the provisions of §134.202 would provide a consistent reimbursement structure for such devices.

RESPONSE: The commission disagrees that the reimbursement methodology is inconsistent with §413.011 of the Act because the amended rule establishes fair and reasonable reimbursement based on Medicare methodologies to assure access to quality health care and enhance effective medical cost control. Subsequent to the original adoption of this rule, information was submitted to the commission which included cost information and taken with information previously submitted, led the commission to believe that there were some inadequacies regarding separately reimbursed devices under the provisions of §134.202. The commission disagrees that continuing to utilize the §134.202 methodology for surgically implanted devices in ASCs is appropriate. The amended rule enhances consistency of reimbursement for surgically implanted devices by implementing a cost-based reimbursement, similar to the inpatient hospital methodology.

COMMENT: Commenter opined that the methodology change from a fee schedule for separately reimbursed surgically implanted devices to an "actual cost-driven" methodology will increase costs incrementally because some items are currently being reimbursed in the system at 125% (DMEPOS) fee schedule.

RESPONSE: The commission agrees that a change in reimbursement methodologies will result in additional reimbursement for surgically implanted devices. As previously stated, this change was necessary as a targeted approach to address situations where the cost of an implantable, by itself, exceeds the ASC group case rate or the MFG rate allowed in the workers' compensation system. Assuring sufficient reimbursement so that the ASC's cost of these specific items is covered will enhance access to ASC services, which benefits injured workers. Subsequent to the original adoption of this rule, information was submitted to the commission which included cost information and taken with information previously submitted, led the commission to believe that there were some inadequacies regarding separately reimbursed devices under the provisions of §134.202.

COMMENT: Commenter stated that under the proposed amendments, costs will increase since certain implantables, (i.e., pins, rods, screws, and plates), which were previously reimbursed as part of the group case rate will now be reimbursed separately at the lesser of the manufacturer's invoice amount or the net amount. Commenter stated that a separate reimbursement of cost or cost plus payment is inconsistent with effective medical cost control, inconsistent with the requirements of the Act, and constitutes a major change in Medicare payment policy of paying 125% of the Medicare DMEPOS Fee Schedule only for selected implants.

RESPONSE: The commission disagrees with commenters' assertions for reasons previously stated concerning the targeted approach to amending reimbursements for surgically implanted devices. The commission disagrees that the amended reimbursement methodology is inconsistent with effective medical cost control, and other requirements of the Act. The amended methodology impacts only surgically implanted devices. Without a change in reimbursement methodology, these cases could potentially be diverted to more costly settings, and if provided in a hospital setting, would likely be paid at a cost plus 10% basis, which is more than the amended methodology. The commission further disagrees that the change in methodology is a major change in Medicare payment policy of paying 125% of the Medicare DMEPOS Fee Schedule. The amendments better establish consistency of reimbursement for surgically implanted devices between the hospital and ASC settings. Subsequent to the original adoption of this rule, information was submitted to the commission which included cost information and taken with information previously submitted, led the commission to believe that there were some inadequacies regarding separately reimbursed devices under the provisions of §134.202.

COMMENT: Commenter stated that allowing an ASC to obtain payment for whatever cost it incurs for an implant: removes any incentive for the ASC to negotiate for lower costs; creates an environment of fraud and abuse; and creates an opportunity for suppliers to inflate costs of implants in a way audits may not detect.

RESPONSE: The commission disagrees that the amended rule relating to reimbursement of surgically implanted devices removes incentives for an ASC to negotiate lower costs. Such negotiations for lower cost expenditures are a common business practice that ASCs are likely to integrate into all aspects of their procurement process. The commission disagrees that the amended provisions will create an environment of fraud and abuse or an opportunity for suppliers to inflate costs. ASCs are required by commission rule 134.600 to obtain preauthorization approval for procedures and services performed in an ASC, including surgically implanted devices to be included as a component of certain requested surgical procedures. To further establish effective medical cost control and deter fraud, the commission additionally, through this amended rule, requires an ASC to certify that the amount of the surgically implanted device(s) represents the ASC's actual cost (net amount, exclusive of rebates and discounts). The certification is subject to verification and audit by the insurance carrier or the commission.

COMMENT: Commenters were pleased with proposed implant reimbursement and the addition of non-covered codes, and stated it is a step in the right direction and an improvement over the current guideline.

RESPONSE: The commission agrees that the adopted amendments regarding reimbursement for surgically implanted devices and the addition of commission-approved codes is an appropriate modification of the rule, given information submitted to the commission since the original rule 134.402 was adopted.

COMMENT: Commenters recommend that surgically implanted devices and supplies be reimbursed at a "reasonable amount" that includes case processing, accounting, collections, and cost of capital. Commenter defined "case processing" as the clerical, procedural steps in ordering and acquiring a device for an implant, including: obtaining preauthorization; the pricing for the facility's charge master; the staff time of a nurse or physician spent in ordering the device; costs associated with shipping, handling and for the expense of returning excess inventory if incurred; and staff time managing the inventory of devices. Commenter described "accounting" as staff time spent processing Accounts Paid and Accounts Receivable that are associated with the purchase of, and payment for, the devices. Commenter stated that staff time must be spent on performing follow-up work with carriers to receive payment for devices. Commenter defined "cost of capital" as the management of inventory in order to keep adequate supplies available for physicians, which commenter says can be a considerable cost. Commenter continued that this cost is a function of both the purchase price of the device and the amount of waiting time required for the "high-tech" device to be paid for by a carrier.

RESPONSE: The commission disagrees with commenters' recommendation to include additional factors in determining the reimbursement for surgically implanted devices and supplies. Setting the Medicare ASC group case rate at 213.3% and reimbursing the purchase price of the device is adequate to compensate for case processing, accounting, collections, and cost of capital. This fee guideline requires that provider billing must include a certification statement that the amount sought represents its actual costs (net amount, exclusive of rebates and discounts). This information should facilitate the billing process by providing cost information with the original billing. Consequently, processing times should improve, and confusion related to implant costs should decrease, which should additionally decrease the opportunity for disputes.

COMMENT: Commenter recommended reimbursement at cost plus 10%, with an upper limit of at least $750-$1,000 per invoiced item to account for the true acquisition costs of higher cost devices.

RESPONSE: The commission disagrees with the commenters' recommended reimbursement of cost plus 10% with an upper limit of at least $750-$1,000 per invoiced item. Setting the Medicare ASC group case rate at 213.3%, and reimbursing the actual cost of the device is adequate to compensate for acquisition cost because administrative and acquisition costs are included in the case rate.

COMMENT: Commenters recommended surgically implanted devices and supplies (SIDS) be reimbursed at cost plus 25% to cover the expense of shipping, ordering, stocking and maintaining items for an indeterminate amount of time in inventory. ASCs are the only medical venue not allowed to cover some of these additional costs.

RESPONSE: The commission disagrees with the commenters' recommended reimbursement of cost plus 25%. As previously stated, setting the Medicare ASC group case rate at 213.3% and reimbursing the actual cost of the device is adequate to compensate for the expense of shipping, ordering, stocking and maintaining items for an indeterminate amount of time in inventory.

COMMENT: Commenter recommended a specific language change to state, "or other device suppliers," and "all bills for such devices" to permit other suppliers of devices that may perform purchasing and billing services on behalf of ASCs to be reimbursed for those devices.

RESPONSE: The commission disagrees that other device suppliers should be allowed to bill the carrier for surgically implanted devices. Addition of this language would add complexity to the billing and reimbursement process, would be difficult to administer, and would not be standardized throughout the industry. Adding complexity would likely lead to increased auditing requirements resulting in delayed payments and potentially increase disputes. In addition, the Act limits the definition of health care provider, which precludes recommended language addition in this rule.

COMMENT: Commenter recommended a revision to add language, "Extraordinary Supplies greater than $100" due to the high costs of implants and other "extraordinary" supplies that should be recognized by the commission as a financial burden, and in order to ensure a process for reimbursement of these costs. All items can be processed in a manner in which invoices can be attached as verification of costs and reimbursed accordingly.

RESPONSE: The commission disagrees. Surgically implanted devices were specifically identified as a potential cost barrier for ASC provision of certain orthopedic cases, often with costs exceeding the group rate. "Supplies" were not identified in ASC Focus Group meetings as a cost driver or barrier. Setting the Medicare ASC group case rate at 213.3% is adequate to compensate for ASC supply costs.

Subsection (f)

COMMENT: Commenter opposed an ASC covering the costs associated with an audit initiated by an insurance carrier for implant billing and recommends that insurance carriers should pay for audits unless the ASC is proven fraudulent.

RESPONSE: The commission disagrees that reimbursement for health care provider audit costs should be addressed in this rule. As noted in the adopted rule, requirements for carrier on-site audits are addressed in §133.302 and §133.303, which are not open for comment in this rulemaking action.

COMMENT: Commenter is opposed to insurance carriers auditing the books of ASCs to determine if the billing reflects the true net cost of implants, and stated the audit potentially costs more than the amount recoverable.

RESPONSE: The commission disagrees that carriers should not be allowed audit authority. The ability to audit is an important check and balance feature related to reimbursement of the invoice cost. The audit allows the carrier to verify the actual cost of an item and auditing assists the commission in the statutory requirements related to effective medical cost control. Additionally, members of the ASC Focus Group agreed that auditing was an acceptable trade off when combined with additional reimbursement.

COMMENT: Commenter stated proposal creates an environment for fraud and abuse, allows an opportunity for inflated implant costs, (e.g., creative accounting/pricing), and has a potential for resulting kickbacks. An audit would not detect these discrepancies, and is of no overall benefit to the injured worker.

RESPONSE: The commission disagrees that the ability to audit implant costs is of no value to the workers' compensation system and therefore, the injured worker. As previously stated, the audit provisions are an important check and balance feature of the workers' compensation system. Although it is unlikely that audits will expose every instance of fraud, abuse, or "creative" accounting/pricing, audits are a valuable component to ensure system compliance with commission statute and rules.

General

COMMENT: Commenter supported the commission's decision to make amendments to the rule.

RESPONSE: The commission agrees that the adopted amendments are an appropriate modification of the rule.

COMMENT: Commenters opposed the proposed rule and recommended its withdrawal. Commenters stated the proposed rule will result in unnecessary and inappropriate additional medical costs; will not increase access to quality care or improve injured workers access to outpatient surgery services; will lead to more medical disputes and appeals to SOAH which will cause substantial expenses for the commission and the system, and is of no benefit to carriers or employers.

RESPONSE: The commission disagrees with the recommendation to withdraw the rule because the adopted amendments are an appropriate modification of the rule. The commission disagrees that the adopted rule will result in unnecessary and inappropriate additional medical costs. The extensive analysis provided by Ingenix indicated that the PAF is well within the range of commercial reimbursement levels for ASCs. There is no indication that there are issues of access to quality medical care within the ASC commercial market. The commission disagrees that the rule amendments do not increase injured workers access to outpatient surgery services, both hospital outpatient and ASC services. Improving the overall reimbursement for ASCs with regard to implantables increases the economic viability of procedures requiring those implantables and as such increases access and availability. The commission disagrees that rule amendments will lead to more medical disputes and appeals to SOAH and clarifies that with consistency in the reimbursement methodology, the number of fee disputes should ultimately decrease. The commission is confident that this rule amendment will ultimately reduce the number of disputes requests and any associated appeals of commission decisions to the SOAH level. With the established fee guideline, amended as described in this preamble, reimbursement for all system participants should be predictable and consistent. Rule 134.402, with these amendments, balance all relevant factors under the Act. The commission anticipates that aggregate medical costs will decrease in the system and there will be fewer ASC dispute requests and decreased probability of ongoing or new litigation associated with ASC services. The commission disagrees that the rule amendments are of no benefit to carriers or employers. For reasons previously stated throughout this preamble, appropriate reimbursement improves the workers' compensation system and ultimately benefits all system participants.

COMMENT Commenters expressed concern that amendments were proposed in response to complaints from several physician-owned ASCs that are not satisfied with the current reimbursement rate and lobbied their legislators and the commission for further payment increases. Commenter stated that proposal is a windfall for ASCs, implant suppliers, and surgeons at the expense of injured workers and employers. Commenters stated that it is a display of bad judgment and distorted priorities for the commission to respond to these "squeaky wheels" and devote its limited time, staff resources, and rulemaking process to respond to the greed of a small number of health care providers.

RESPONSE: The commission clarifies that the existing rule was initially reviewed as a response to ASC stakeholder concerns. The commission reviewed those concerns and formed an ASC Focus Group comprised of ASCs, carriers, implant device manufacturer, and employer. The commission carefully considered the ASC Focus Group input regarding ASC issues with specific focus on Medicare's List of approved procedures and reimbursement for surgically implanted devices. These rule amendments reflect input from the ASC Focus Group, stakeholders and public commenters to establish the most appropriate reimbursement to facilitate access to quality ASC care while still adhering to the statutory mandate for cost control. The commission disagrees that the rule amendment is a windfall for ASCs, implant suppliers, and surgeons at the expense of injured workers and employers. Although reimbursement to ASCs will increase as a result of these amendments, the added reimbursement of implantables is consistent with the cost plus reimbursement provided in the hospital inpatient setting. Assuring sufficient reimbursement enhances access to ASC services, which benefits injured workers. The commission disagrees that the rulemaking activity was an ineffective use of staff time for an inappropriate purpose, for reasons stated throughout this preamble.

COMMENT: Commenters sought clarification as to what sort of "stability" was referenced in the proposal preamble, which stated, "insurance carriers will benefit from the amended rule as proposed with new commission approved procedures and assigned groupings, which lends certainty and 'stability' to the system." Commenters stated no facts or analysis were included in the proposal preamble that showed ASCs are currently financially unstable as a result of being paid 213.3% of Medicare rates for treating injured workers. Commenters further stated that unsubstantiated assertions by ASC owners do not constitute credible evidence of a reasoned justification.

RESPONSE: The commission clarifies the term stability referenced in the proposal preamble was used in the context of describing the proposed rule amendments as a process of continuing and augmenting the ASC Fee Guideline, adopted and implemented September 1, 2004, when previously there was none. As previously discussed, stability and standardization through the implementation of this guideline promotes consistency within the workers' compensation system.

COMMENT: Commenters stated that the amended rule proposal is inconsistent with the statutory authority of §413.011(d) because it would result in an ASC receiving a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living (i.e., a Medicare patient) and paid by that individual or by someone acting on that individual's behalf.

RESPONSE: The commission disagrees that the adopted amendments would allow an ASC to receive a fee in excess of the fee charged for similar treatment of an injured individual

of an equivalent standard of living, and disagrees that the amendments are inconsistent with the statutory authority of §413.011(d). The cap on workers' compensation fees is addressed in the statutory requirement that workers' compensation not pay in excess of what is paid on behalf of patients from populations with equivalent standards of living, except and to the extent that special features of workers' compensation require higher fees. It therefore permits consideration of any special features of workers' compensation and what additional payment, if any, they warrant. For example, the statutory requirement to take account of the increased security of workers' compensation payment permits consideration of what offsetting reductions in payments, compared with other payer systems that do not pay 100%, is warranted. Within these limits, the commission must consider how payments may be set to control medical costs without lowering the access to quality of medical care to injured workers that would affect quality care. The commission has determined these amendments meet the statutory standards.

COMMENT: Commenters argued that in accordance with §413.011(b), no reasoned justification was provided in the proposal preamble to prove: that the economic indicator (i.e., injured workers' access to quality health care) was necessary for this fee guideline to pay more than Medicare; that occupational injuries required these modifications; and failed to prove the full impact assessments of the proposed rule.

RESPONSE: The commission disagrees that the commission has not previously provided reasoned justifications as to why the economic indicator of injured workers' access to quality care was necessary for this fee guideline to pay more than Medicare, that occupational injuries required these modifications, and the assertion that the commission has failed to prove the full impact assessments of the rule. As previously stated and also addressed in the adoption preamble of April 2004 (28 TexReg 4191), the adopted PAF is the result of careful analysis by Ingenix and consideration by the commission. The commission considered the requirement of the Act in adopting the PAF by thoroughly analyzing Medicare reimbursement and commercial reimbursement for ASCs. This included both the reimbursement rates and market share. These factors combined allowed Ingenix to provide the commission with an appropriate range of PAFs. The PAF itself is well within the range of reimbursement accepted by ASCs in the commercial market. Additionally, the PAF was well within the estimated range of payments previously paid (i.e., prior to rule implementation) within the Texas workers' compensation system.

The commission clarifies that access to care for occupational injuries requires these rule amendments. The amendments increase flexibility for system participants and promote provision of services that ultimately lowers costs to the system and system participants. Improving the economic viability of providing certain procedures in an ASC setting by definition improves access to care balanced with cost control.

With regard to the alleged failed proof of the proposed rules' full impact, the commission anticipates that aggregate medical costs will decrease in the system with fewer ASC dispute requests, that there will be decreased probability of on-going or new litigation associated with ASC services, and that appropriate reimbursement improves the workers' compensation system and benefits all system participants, as discussed throughout this preamble.

COMMENT: Commenters opposed the amended rule as proposed for reasons that it exceeds the Act under §413.011(a), which provides for health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems, including Medicare, with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. Commenters further stated that the proposed rule makes major modifications, rather than minimal modifications, to these payment policies that significantly increase medical costs to the system.

RESPONSE: The commission disagrees that the rule amendments exceed the Act under §413.011(a). The supplements to Medicare's List in paragraphs (2), (3), and (4) of subsection (e) of the proposed rule constitute what the commission considers "minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements." These modifications increase flexibility for system participants and promote provision of services in a setting that ultimately lowers costs to the system and system participants, therefore enhancing the cost containment efforts of the commission to meet the requirements of the Act. This is especially important considering the documented high medical cost per claim in the Texas workers' compensation system, which also was outlined in the commission's previous April 2004 adoption preamble of §134.402, and the December proposal preamble of §134.402. Improving the economic viability of providing certain procedures in an ASC setting by definition improves access to care balanced with cost control. Thus the commission has maintained the statutory requirement to use health care policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems, including Medicare, with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements.

COMMENT: Commenter sought clarification as to what "fair and reasonable" rates are, and if there are fair and reasonable guidelines.

RESPONSE: The commission clarifies that the terminology "fair and reasonable" is contained within the Act, §413.011(d) and refers to the statutory requirement of the commission to ensure all fee guidelines are fair and reasonable.

COMMENT: Commenter was concerned that the commission found, in the 1997 Hospital Fee Guideline and in a number of other contexts, that payments based on a percentage of billed charges cannot achieve effective cost control because the amount of the billed charges is entirely within the control of the health care provider. Commenter stated that by basing the 213.3% of Medicare plus an implant reimbursement on payment made by commercial payers based on the percentage-of-billed-charges method, Ingenix has essentially recommended an ASC fee payment based on the percentage-of-billed-charges method.

RESPONSE: The commission disagrees. As previously stated, billed charges are not a component of the adopted reimbursement methodology for §134.402, Ambulatory Surgical Center Fee Guideline. The guideline bases the MAR calculation on the Medicare prospectively determined group case rate, not on billed charges from the ASC. Additionally, reimbursement associated with surgically implanted devices according to subsection (e)(4) is based on the actual certified cost paid by the ASC to the manufacturer, not on the ASC billed charges.

COMMENT: Commenter stated the costs to the system will be even more substantial than reflected in the fiscal note of the proposal preamble. Commenter expressed concern with the proposal preamble statement that the commission expects there to be a 8.7 to 13.5 million dollar cost increase per year once the proposed amendments are adopted, when actually it would be a lot more because some of the less honest ASCs and doctors will try to "game the system" when the proposed CPT codes are added.

RESPONSE: The commission clarifies that the estimated increases are a reasonable projection based on the information available to the commission. The commission agrees that providers' business models, in general attempt to maximize reimbursement. The commission's Compliance and Practices Division, its Fraud Unit, and the carrier's audit opportunities provide a means to minimize fraud and abuse in the Texas workers' compensation system.

The following comments are a listing of other issues raised by commenters. Because the PAF has not changed since the rule was originally adopted, these comments are beyond the scope of this rulemaking action and do not require a new, separate response under the Administrative Procedures Act. The reasons for selection of the particular PAF were explained thoroughly in the adoption preamble to the original rule (see 28 TexReg 4191, April 30, 2004). Subsequent to the adoption of that rule, information was submitted to the commission, which in the aggregate, taken with information previously submitted during the original rulemaking process, led the commission to believe that there were some inadequacies regarding reimbursements to ASCs that needed to be addressed. Stakeholder and Focus Group meetings were held and extensive discussions were conducted on these issues. The commission requested additional information from concerned entities. After careful analysis of available data, amendments to the rule were proposed and comments on that proposal were given full consideration. These amendments are the result of that process. The commission has determined, for all the reasons given elsewhere in this preamble that these amendments provide for appropriate compensation to ASCs in the Texas workers' compensation system. However, to assist persons in understanding the actions that led to the rule as it was originally adopted in April 2004, the commission has chosen to respond to the individual comments.

COMMENT: Commenters opposed the rule amendments and stated the most "glaring" problem with the proposed rule changes is the failure to address the payment adjustment factor (PAF). Commenters stated that the proposed modification will not allow adequate payment, would not cover ASC costs, and that injured workers would suffer.

RESPONSE: The commission disagrees that the PAF is inappropriate and should be addressed in the amended rule. The rationale for the PAF was outlined extensively in the §134.402 Adoption Preamble. The adopted PAF is the result of careful analysis by Ingenix and consideration by the commission. The commission considered the requirements of the Act in adopting the PAF by thoroughly analyzing Medicare reimbursement and commercial reimbursement for ambulatory surgery center services. This included both the reimbursement rates and market share. These factors combined allowed Ingenix to provide the commission with an appropriate range of PAFs. The PAF is well within the range of reimbursements accepted by ambulatory surgery centers in the commercial market. Additionally, the PAF is within the estimated range of payments currently made within the Texas workers' compensation system.

The commission disagrees that the PAF does not cover ASC costs. The commission has received no independent cost data to determine actual costs in Texas ASCs. Unlike hospitals, ASCs do not publicly report operating expenses and revenues. Additionally, any cost information provided by an ASC is unique to that facility, and not necessarily indicative of the cost structure or profitability of any other ASC facility. Without this cost-based information, the commission has relied on Ingenix's expertise in analyzing market reimbursement, and the commission has set reimbursement within the range recommended by Ingenix. The commission disagrees that the injured worker would suffer as a result of the PAF. The commission has maintained the 213.3% PAF and made other minimal modifications which increase reimbursement in an effort to assure sufficient reimbursement for ASC services and to enhance access to ASCs which benefits injured workers.

COMMENT: Commenter stated of the three places services can be performed, the ASC is the least expensive. Commenters opposed the low reimbursement rate and stated it was a "determination" against ASCs, and the first step to ensure that ASCs would not be able to compete with hospital outpatient departments. Commenter stated the commission does not monitor and/or hold hospitals accountable for costs.

RESPONSE: The commission agrees that the ASC should be the least intense venue for facility reimbursement and all health care providers should be reimbursed commensurate with actual costs based on resource consumption. Unlike hospitals, ASCs do not publicly report operating expenses and revenues. Cost information provided by an ASC is unique to that facility, and not necessarily indicative of the cost structure or profitability of any other ASC facility. Lacking independent cost data to determine actual costs in Texas ASCs, the commission has relied on market-based reimbursement to establish the PAF. The commission disagrees that the PAF will make ASCs non-competitive with hospital outpatient departments. For reasons previously stated, the Ingenix report indicated that the adopted PAF was well within the range of commercial reimbursement accepted by ASCs.

The commission disagrees that hospitals are not accountable for costs. The commission has adopted §134.401, which regulates reimbursement for inpatient hospital services. The commission has not yet adopted hospital outpatient fee guidelines. Ingenix estimated 2002 hospital outpatient reimbursement in the workers' compensation system at approximately 150% of Medicare reimbursement, which was significantly less than the estimated ASC reimbursement in 2002 at 320% of Medicare. This indicated a greater need to address ASC reimbursement than hospital outpatient reimbursement.

It should also be noted that sometimes a procedure may be most cost-effectively performed in a doctor's office (when it is medically appropriate to do so), and this is something the commission considered in adopting these amendments.

COMMENT: Commenter stated their ASC workers' compensation business had declined 12% since September 1, 2004, the date of this rule's implementation, and assumed the decline was due to cases being shifted to a more expensive setting (i.e., hospital outpatient departments) than an ASC. In addition, commenter stated that 20% of procedures by volume performed on workers' compensation patients are not currently reimbursed under the existing rule.

RESPONSE: The commission recognizes that business models may change as the result of implementation of new reimbursement methodologies. The commission has not received enough data to validate the commenter's assertion of a systemic decline in services provided in ASCs. However, since some services provided by ASCs prior to September 1, 2004, are not on Medicare's List, a decline in services is likely and appropriate. Additionally, there is no information to indicate the change of setting for those services. It should also be noted that sometimes a procedure may be most cost-effectively performed in a doctor's office (when it is medically appropriate to do so), and this is something the commission considered in adopting these amendments. Consequently, the commission cannot evaluate the commenter's assertion of movement to a more expensive setting.

COMMENT: Commenters stated the ASCFG is being revisited less than seven months after it was adopted and at a time when the commission has failed to complete "more important" rulemaking tasks it was given by the Legislature in 2001 and earlier.

RESPONSE: The commission disagrees that the rulemaking activity was an ineffective use of staff time for an inappropriate purpose, for reasons stated throughout this preamble.

COMMENT: Commenter recommended withdrawal of the proposed rule and that a new rule be proposed that establishes reimbursement at 100% of Medicare Hospital Outpatient Prospective Payment System (HOPPS) for ASCs and Hospital Outpatient. According to the commenter, this would comply with statutory requirements and fill "major gaps" in fee guidelines; and facility fees would be reimbursed for only those procedures Medicare authorizes ASCs to perform. Commenter stated this would be preferable to the proposed rule because there is no urgent need to amend the current rule, as there is no documented problem with injured workers' access to outpatient surgery facilities. Commenter also stated that by adopting HOPPS: ASCs and hospital will both be reimbursed equally for providing the same service which increases the fairness and reasonableness of the payment system; would not create a change in ASC billing practices; and, software to determine the payment due under the suggested methodology is available and easily obtained. Commenter states that HOPPS has been implemented with little difficulty and contains 808 APCs, making it much more precise in differentiating between procedures in the payment due than is the Medicare ASC payment mechanism.

RESPONSE: The commission disagrees because the statute requires the use of the most current Medicare reimbursement methodologies. The ASC group reimbursement methodology is the most current Medicare payment methodology for ASCs. The HOPPS system is not currently designed for ASC use and is not consistent with statutory requirements.

COMMENT: Commenters recommended the PAF be established at the highest level the commission is empowered to do so, which is the upper end (250% - 290% of Medicare) of the Ingenix range, (213% - 290% of Medicare). Commenter stated this would enable ASCs to cover their costs and remain in the workers' compensation system, which would result in quality providers reentering the workers' compensation system, thereby improving access to quality care.

RESPONSE: The commission disagrees with commenters' recommendation, as the PAF itself was not a proposed amendment to this rule. Nevertheless, the commission addressed this concern in the adoption preamble of April 2004 (28 TexReg 4191) and the adopted PAF is the result of careful analysis by Ingenix and consideration by the commission.

COMMENT: Commenters recommended use of Medicare rates as the benchmark for ASC fees, just as it did for the MFG, rather than using the methodology employed by Ingenix. Commenters stated the Medicare ASC fees meet the statutory criteria for workers' compensation fees for the same reasons that the Medicare professional fees meet those statutory criteria. Those reasons as provided by commenters included: March 2003 MedPAC reports indicate fees are high enough to be fair and reasonable and the number of ASCs providing services in the Medicare system has increased since the current Medicare ASC fee schedule was adopted; health care providers voluntarily choose to accept Medicare fee levels; Medicare fees ensure access to quality care as studies show the majority of health care providers accept Medicare payment levels; Medicare fees achieve effective medical cost control because they are the lowest in common use for a population with an equivalent standard of living; and the security of payment afforded by the workers' compensation system is greater than Medicare's because the workers' compensation system pays 100% of the appropriate reimbursement amount, while Medicare pays only 80%.

RESPONSE: The commission disagrees with commenters' recommendation, as the PAF itself was not a proposed amendment to this rule. Nevertheless, the commission addressed this concern in the adoption preamble of April 2004 (28 TexReg 4191) and the adopted PAF is the result of careful analysis by Ingenix and consideration by the commission.

COMMENT: Commenter was concerned that the administrative expense factors that supported a 125% conversion factor (CF) in the 2002 MFG adoption preamble support a much smaller CF (i.e., PAF) for ASC fees for several reasons: (1) additional reports and administrative functions required when treating workers' compensation patients create increased administrative costs for professionals, but is not the case for ASCs who are not required to file any reports beyond those required for Medicare; (2) additional training requirements for professionals practicing in the workers' compensation system caused some additional administrative expenses, but is not the case for ASCs as they are not required to receive any additional training to participate in the workers' compensation system; (3) the commission's claim that there will be reduced medical fee disputes as a result of this rule implementation; and (4) lack of electronic billing and payment increases administrative costs of workers' compensation as opposed to Medicare, but the commission previously stated that increased security of payment in the workers' compensation system offsets any additional costs.

RESPONSE: The commission clarifies that differing methodologies were used for the commission's rule 134.202, the 2002 Medical Fee Guideline (MFG), and this adopted rule. As previously stated in the initial rule 134.402 adoption preamble, the adopted PAF multiplier for ASCs is considerably higher than the 125% multiplier provided in the MFG, which covers reimbursement of professional medical services provided within the Texas workers' compensation system. There are several reasons for this. Unlike professional medical services, whose cost inputs are continuously updated by CMS, Medicare has not significantly revised ASC cost inputs since 1994. Moreover, the percentage of Medicare patients who receive ASC services (surgeries) is significantly less than the percentage of Medicare patients who

receive professional medical services (typically, physician services). Medicare reimbursements for professional medical services are generally within the range of payments made by commercial payers; however, Medicare reimbursements for ASC services are well below the range of payments made by most commercial payers for those services. The methodology used by Ingenix in developing its recommendation stands alone and is not dependent on the methodologies used in previous reimbursement guidelines. The Medicare rate is the benchmark on which the reimbursement rate is built, but is neither a ceiling nor a floor. Development of the PAF is a balance of all the components of the Act. Thus, while the resulting multipliers are different in the two contexts, they are consistent with one another to the extent that the PAF adopted by the commission in each context is at the low end of the range of reimbursement provided within the commercial market.

COMMENT: Commenters were concerned that the reasons and explanations for rejecting the MFG methodology were flawed when provided by the commission in the April 2004 adoption preamble of §134.402. Commenters further provided varying thoughts for these concerns, including: (1) Medicare's failure to update 1994 cost data does not support setting ASC fees at 213.3% of Medicare fees plus a reimbursement for implants, when a recent study shows that Medicare ASC fees are not too low, and may be too high. (2) The fact that more Medicare patients receive professional services than ASC services does not distinguish Medicare from workers' compensation. (3) ASC fees based on fees paid by commercial payers fail to achieve effective cost control. (4) The methodology used to set the ASC fees are factually wrong and logically flawed because the Ingenix methodology ignores other states' workers compensation ASC fee schedules, some of which are at much lower percentages of Medicare ASC fees. (5) The Ingenix methodology relies, in effect, solely on commercial insurers' ASC payments. But commercial insurers are not required, as the commission is required, to achieve effective medical cost control. They do not have to achieve cost control because, unlike the commission, they can and do expect the higher costs to be passed on to employers and employees. (6) Ingenix excluded indemnity payer types when calculating averages, thereby lowering their reimbursement recommended range. (7) Commenter stated that according to a new national survey by Mercer Human Resources Consulting, employers' costs are rising by double digits, forcing employers to shift costs to employees. ["Shifting Burden Helps Employers Cut Health Costs," The Wall Street Journal (Dec. 8, 2003)]

RESPONSE: The commission disagrees that the rationale used in developing the ASC PAF is flawed. The methodology used by Ingenix to develop their recommendation stands alone and is not dependent on the methodologies used in previous reimbursement guidelines. The Medicare rate is the reference point from which the reimbursement rate is built, but is neither a ceiling nor a floor. Development of the PAF is a balance of all the components of the Act.

The commission disagrees with commenters' concerns. The adopted PAF is the result of careful analysis by Ingenix, which confirmed a significant misalignment of ASC reimbursement in the Texas workers' compensation system. The adopted PAF is the lower limit of the extended range of acceptable fair and reasonable reimbursements included in the Ingenix report and reflects the commission's statutory responsibility related to effective medical cost control and fair and reasonable reimbursement. The adopted PAF remains in the range of commercial reimbursement. Ingenix estimated that 2004 ASC reimbursement under current commission rules (requiring fair and reasonable reimbursement) equals approximately 320% of 2004 Medicare reimbursement. Additionally, this review estimated commercial (HMO/PPO/POS/Indemnity) payer reimbursement equal to a range of 168% to 564%. This commercial range produces a weighted average of approximately 274% (not including indemnity plans) to 293% (including indemnity plans) of Medicare reimbursement. With Medicare added to the commercial market, the weighted average for ASC services trended to 2004 is 237% (not including indemnity plans) to 264% (including indemnity plans) of Medicare reimbursement. This identified range (237% - 264%) is extended in the Ingenix report to 213.3% - 290.4% to recognize the potential for the commission to place special emphasis on the requirements of the Act. The adopted rate is well within the range of commercial reimbursements at which ASCs provide services.

The Ingenix analysis thoroughly analyzed Medicare reimbursement and commercial reimbursement for ambulatory surgery center services. This included both the reimbursement rates and market share by payer type for persons with a similar standard of living, and allowed Ingenix to provide the commission with a recommended acceptable range of PAFs. This Ingenix recommendation reflects the weighted average reimbursement for individuals with a similar standard of living. The commission carefully considered the Ingenix analysis and recommendation and the requirements of the Act in adopting the PAF, which is well within the range of reimbursements accepted by ambulatory surgery centers in the commercial market and within the "fair and reasonable" reimbursements currently accepted by ASCs participating in the Texas workers' compensation system. Further, the commission clarifies that the methodology Ingenix used (as fully described in the April 2004 adoption preamble of §134.402) to develop its recommendation stands alone and is not dependent on the methodologies used in previous reimbursement guidelines proposed or adopted by the commission. The Medicare rate is the reference point from which the reimbursement rate is built, but is neither a ceiling nor a floor. Development of the PAF is a balance of all the components of the Act. Ingenix concluded that, if there are additional administrative burdens for facilities, they are more than offset and accounted for in the rates within the Ingenix range.

The commission clarifies that Ingenix removed indemnity reimbursement, which was extraordinarily high as compared to commercial reimbursement generally, from the calculation. Removing this potential aberration resulted in a decrease at the lower end of the PAF. The commission clarifies that the adopted PAF falls within the acceptable range of reimbursements recommended by Ingenix. Additionally, Ingenix suggested that the commission could use its discretion to consider a different balance of the statutory objectives -- for instance, by placing greater emphasis on cost containment or increased security of payment within the Texas workers' compensation system -- and deviate up to 10% at either end of the recommended range. In response to the high medical costs per claim in Texas and the desire by the Legislature and the commission to reverse the cost per claim trends, the commission adopted an appropriate PAF. The commission agrees that it is appropriate to review other states' ASC reimbursement methodologies; however, due to each state's unique system requirements, those methodologies are not determinative of reimbursement in Texas. Analysis of Medicare reimbursement methodologies in other states showed

PAFs to be within a range from at or near the Medicare rate to over 250% of the Medicare rate. Commission staff surveyed several other states that use the Medicare ASC reimbursement methodology. The reimbursement in those states as a percentage of Medicare ranged from 100% to 255%. The adopted PAF is well within this range of other states' reimbursement for ASC's.

The commission disagrees that commercial indemnity was not included as part of the recommendation, or on the other hand that commercial indemnity was the only type considered; on the contrary, it was included in one portion of the recommended range which yielded the 264% PAF. When indemnity reimbursement is excluded from the weighted market calculation, the lower limit of the Ingenix recommendation becomes 237% of Medicare. The indemnity market share currently represents a small, decreasing fraction of the overall market, with payment levels far exceeding those in other commercial policy types, suggesting that they are uncharacteristic of the commercial market. In order to provide the most comprehensive range of fair and reasonable reimbursement rates, and address the statutory requirement for cost control and prohibition against paying higher than would be paid by or for persons with similar standards of living, Ingenix recommended, and the commission agreed, that it was appropriate to exclude the indemnity experience at the lower end of the range and include it at the higher end of the range. In all scenarios, Medicare reimbursement and market share were included in the weighted average to establish a range.

The commission agrees that health care costs throughout all sections of the health care system are rising, and that some employers are re-visiting options relating to employee contributions to group health plans.

COMMENT: Commenters recommended varying increases in the PAF of the Medicare fee schedule for additional reasons, including: (1) Medicare's ASC rates will remain frozen until 2009. (2) Cases have been turned away from ASCs since this rule implementation causing a 42% difference that is annualized over the year, which will cost the workers' compensation system over $500,000 in additional costs. This figure represents a 60% reduced ASC reimbursement, and not the 30% the commission estimated. (3) Other states have found 100% of Medicare as a reasonable reimbursement rate. A commenter additionally stated that consultants have found, based on Florida's Agency for Health Care Administration (AHCA) discharge data, that there is no material difference in the total number of ASCs performing each procedure and the number of ASCs performing each procedure on Medicare patients indicating any lack of access for Medicare patients.

RESPONSE: The commission disagrees that future changes in the Medicare ASC reimbursement system should prevent the commission from adopting the most current Medicare ASC reimbursement system as required by the Act. Because the commission is also required to meet other provisions of the Act regarding fair and reasonable reimbursement during its required reviews of guidelines, regardless of any current or potential future changes in Medicare reimbursement, the commenters' reference to the future potential Medicare revisions is irrelevant. The commission disagrees that the overall difference in reimbursement is 42% and this change has added over $500,000 in costs to the system, since the commission has not been provided information to document or support the commenters' assertions. Anecdotally, carriers generally make the opposite assertion that similar services are being provided at a lower reimbursement in the hospital outpatient setting than the ASC setting in many instances. The commission disagrees that other states reimbursement at 100% of Medicare is an indicator of the appropriate reimbursement rate for the Texas workers' compensation system. The commission has surveyed several states and found a wide range of ASC reimbursement rates from 100% of Medicare to over 250% of Medicare, each with unique statutory requirements. The rate adopted by the commission reflects the requirements of the Act and is appropriate for use in the Texas workers' compensation system.

COMMENT: Commenter recommended a rate of 250% of Medicare is necessary for cases to remain as they were done in an ASC rather than the surgery department in a hospital.

RESPONSE: The commission disagrees with commenters' recommendation, as the PAF itself was not a proposed amendment to this rule. Nevertheless, the commission addressed this concern in the adoption preamble of April 2004 (28 TexReg 4191) and the adopted PAF is the result of careful analysis by Ingenix and consideration by the commission.

COMMENT: Commenter opined that the new system of payment for ASCs that Congress directed CMS to consider is based on Medicare APC fee schedule, and commenter recommends the commission use this new system.

RESPONSE: The commission clarifies that the Act requires "... the commission shall adopt the most current reimbursement methodologies, models, and values or weights used by the federal Health Care Financing Administration, including applicable payment policies related to coding, billing, and reporting, ..." The commission has adopted the most current Medicare ASC reimbursement methodology. If and when, Medicare implements a revised ASC reimbursement methodology, the commission would move to implement that methodology to maintain standardization as required by the Act.

COMMENT: Commenter stated that Ingenix did not compare its recommended conversion factors with conversion factors in other states because each state approached its reimbursement methodology differently. This statement is inconsistent with the Workers' Compensation Research Institute (WCRI) analysis and the commission's handling of the same issue in the 2002 MFG.

RESPONSE: The commission clarifies that there is no WCRI ASC reimbursement analysis. The Ingenix report and commission research found a wide range of reimbursement rates for ASC services provided in other states' workers' compensation systems as previously noted elsewhere in this preamble.

COMMENT: Commenter advised that changes to Medicare fees, as a result of recent federal legislation (e.g., Medicare Prescription Drug Bill, The Secretary of Health and Human Services' revised payment schedule), will require the commission to again re-examine ASC fees in the near future.

RESPONSE: The commission agrees as it is required to review guidelines bi-annually and will continue to proactively monitor changes as evidenced by this rule revision.

COMMENT: Commenter states the problem is that since SB-1 in 1989, ASCs have never been regulated by the workers' compensation system. As time went on, more care was shifted to the ASC setting, more ASCs were established, and physicians found them a good way to supplement their income. As a result of ASCs not being regulated, the ASCs profited. The insurance industry is at fault for paying ASC bills with very little scrutiny, until over time they had to change this practice and the commission in not passing a rule years ago to avoid what we are facing today.

RESPONSE: The commission acknowledges commenter's historical perspective in the development of ASC fee guidelines, but does not see anything here that warrants a change to those amendments. These changes are necessary and appropriate, given information provided to the commission and the balance of statutory mandates that apply.

The amendment is adopted under Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; Texas Labor Code §408.021, which entitles injured employees to all health care reasonably required by the nature of the injury as and when needed; Texas Labor Code §413.002, which requires the commission's Medical Review Division monitor health care providers, insurance carriers and claimants to ensure compliance with commission rules; Texas Labor Code §413.007, which sets out information to be maintained by the commission's Medical Review Division; Texas Labor Code §413.011, which mandates that the commission by rule establish medical policies and guidelines; Texas Labor Code §413.012, which requires review and revision of the medical policies and fee guidelines at least every two years; Texas Labor Code §413.013, which requires the commission by rule to establish programs related to health care treatments and services for dispute resolution, monitoring, and review; Texas Labor Code §413.014, which requires express preauthorization by the insurance carrier for health care treatments and services; Texas Labor Code §413.015, which requires insurance carriers to pay charges for medical services as provided in the statute and requires that the commission ensure compliance with the medical policies and fee guidelines through audit and review; Texas Labor Code §413.016, which provides for refund of payments made in violation of the medical policies and fee guidelines; Texas Labor Code §413.017, which provides a presumption of reasonableness for medical services fees that are consistent with the medical policies and fee guidelines; Texas Labor Code, §413.019, which provides for payment of interest on delayed payments refunds or overpayments; and Texas Labor Code §413.031, which provides a procedure for medical dispute resolution.

The amendment is adopted under the Texas Labor Code §§402.061, 408.021, 413.002, 413.007, 413.011, 413.012, 413.013, 413.014, 413.015, 413.016, 413.017, 413.019, and 413.031.

The previously cited sections of the Texas Labor Code are affected by this rule action. No other code, statute, or article is affected by this rule action.

§134.402. Ambulatory Surgical Center Fee Guideline.

(a) Applicability of this rule is as follows:

(1) This section applies to facility services provided by an ambulatory surgical center (ASC), other than professional medical services.

(2) This section applies to facility services provided by an ASC on or after September 1, 2004. The provisions of subsection (e)(2), (3), and (4), and subsection (f) of this section apply to facility services provided by an ASC on or after April 1, 2005.

(3) Specific provisions contained in the Texas Workers' Compensation Act (Act) or Texas Workers' Compensation Commission (commission) rules, including this rule, shall take precedence over any conflicting provision adopted or utilized by the Centers for Medicare and Medicaid Services (CMS) in administering the Medicare program. Exceptions to Medicare payment policies for medical necessity may be provided by commission rule. Independent Review Organization (IRO) decisions regarding medical necessity are made on a case-by-case basis. The commission will monitor IRO decisions to determine whether commission rulemaking action would be appropriate.

(4) Whenever a component of the Medicare program is revised and effective, use of the revised component shall be required for compliance with commission rules, decisions and orders for services rendered on or after the effective date of the revised component.

(b) For coding, billing, reporting, and reimbursement of facility services covered in this rule, Texas workers' compensation system participants shall apply the Medicare program reimbursement methodologies, models, and values or weights including its coding, billing, and reporting payment policies in effect on the date a service is provided with any additions or exceptions in this section.

(c) To determine the maximum allowable reimbursement (MAR) for a particular service, system participants shall apply the Medicare payment policies for these services and the Medicare ASC reimbursement amount multiplied by 213.3%.

(d) In all cases, reimbursement shall be the lesser of the:

(1) MAR amount regardless of billed amount; or

(2) facility's and payer's workers' compensation negotiated and/or contracted amount that applies to the billed service(s).

(e) Exceptions and modifications to the Medicare payment policies are as follows:

(1) Whenever Medicare requires a payment policy change to be retroactive, that change shall only apply to services provided on or after the date of that change.

(2) In addition to the ASC List of Medicare Approved Procedures, the following procedures will be reimbursed when provided in an ASC at the reimbursement rate provided by this section as if they were on that list (using the same Medicare group assignment values):

(A) 11750 - Group 1

(B) 11760 - Group 1

(C) 20552 - Group 1

(D) 20526 - Group 1

(E) 27599 - Group 1

(F) 29873 - Group 3

(G) 29999 - Group 4

(H) 63030 - Group 6

(I) 64405 - Group 1

(J) 64999 - Group 1

(3) If a service is not included on the ASC List of Medicare Approved Procedures or listed in subsection (e)(2) of this section, the insurance carrier (carrier), health care provider, and ASC may agree to an ASC setting as follows:

(A) The agreement may occur before, during, or after preauthorization.

(i) A preauthorization request may be submitted for an ASC setting only if an agreement has already been reached and a copy of the signed agreement is filed as a part of the preauthorization request.

(ii) A preauthorization request or approval for a non-ASC facility setting may be revised to an ASC setting by written agreement of the carrier and the health care provider during or after preauthorization.

(B) The agreement between the carrier and the ASC must be in writing, in clearly stated terms, and include:

(i) the reimbursement amount;

(ii) any other provisions of the agreement; and

(iii) names, titles and signatures of both parties with dates.

(C) Copies of the agreement are to be kept by both parties.

(D) Upon request of the Commission, the agreement information shall be submitted in the form and manner prescribed by the Commission.

(4) The carrier shall reimburse all surgically implanted, inserted, or otherwise applied devices at the lesser of the manufacturer's invoice amount or the net amount (exclusive of rebates and discounts) actually paid for such device to the manufacturer by the ASC. Provider billing shall include a certification that the amount sought represents its actual cost (net amount, exclusive of rebates and discounts). That certification shall include the following sentence: "I hereby certify under penalty of law that the following is the true and correct actual cost to the best of my knowledge."

(f) A carrier may use the audit process under §133.302 and §133.303 of this title (relating to Preparation for an Onsite Audit and Onsite Audits) to seek verification that the amount certified under subsection (e)(4) of this section properly reflects the actual cost standard contained in that subsection. Such verification may also take place in the Medical Dispute Resolution process under §133.307 of this title (relating to Medical Dispute Resolution of a Medical Fee Dispute), if that process is properly requested.

(g) Where any terms or parts of this section or its application to any person or circumstance are determined by a court of competent jurisdiction to be invalid, the invalidity does not affect other provisions or applications of this section that can be given effect without the invalidated provision or application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 18, 2005.

TRD-200500769
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Effective date: March 10, 2005
Proposal publication date: December 3, 2004
For further information, please call: (512) 804-4287

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 373. GRANTS ADMINISTRATION

31 TAC §§373.1 - 373.14, 373.16 - 373.30, 373.32 - 373.44

The Texas Water Development Board (the board) adopts the repeal of 31 TAC Chapter 373, §§373.1 - 373.14, 373.16 - 373.30 and 373.32 - 373.44, concerning the Grants Administration, without changes to the proposal as published in the December 31, 2004, issue of the *Texas Register* (29 TexReg 12109) and will not be republished. The repeal is adopted for cleanup and clarification as a result of the four-year rule review requirement of Texas Government Code, §2001.039.

The board adopts the repeal of §§373.1 - 373.14, 373.16 - 373.30 and 373.32 - 373.44. The Construction Grants Program has expended all the funds provided for it and all projects receiving funding from the program have been closed out. In addition, there is no evidence that funding for this program will be revived by the federal government.

No comments were received on the proposed repeal.

The repeal is adopted under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State.

The statutory provision affected by the repeal is Texas Water Code, §16.093.

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 February 15, 2005.

TRD-200500721
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: March 7, 2005
Proposal publication date: December 31, 2004
For further information, please call: (512) 475-2052

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 143. EXECUTIVE CLEMENCY

SUBCHAPTER A. FULL PARDON AND RESTORATION OF RIGHTS OF CITIZENSHIP

37 TAC §143.2

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §143.2, concerning pardons for innocence without changes to the proposed text as published in the December 31, 2004, issue of the *Texas Register* (29 TexReg 12110). The text of the rule will not be republished.

The amended rule is adopted in order to clarifying the procedures for consideration of a pardon based on actual innocence. Specifically, in order for the Board to consider the petition, the Board must receive recommendations from at least two trial officials, with one of those trial officials submitting documentary evidence of actual innocence, or the Board must receive a certified order or judgment of the district court accompanied by certified copies of the findings of fact and conclusions of law where the court recommends that the Court of Criminal Appeals grant state habeas relief on the grounds of actual innocence. In addition, evidence submitted must include results of any DNA or other forensic tests and may include affidavits of witnesses upon which the recommendation of actual innocence is based.

Note that the Board has no authority under the Texas Constitution to order DNA or other forensic testing.

No public comment was received regarding adoption of the amendment.

The amendment is adopted under Article IV, Section 11 of the Texas Constitution, that invests the Board of Pardons and Paroles with the power to recommend clemency, including pardons, commutations of sentence, and reprieves; under Article 48.01, Code of Criminal Procedure, which cites the constitutional provision; and under §508.036(b), Government Code, that provides the Board with authority to adopt rules relating to the decision-making processes used by the Board of Pardons and Paroles.

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 February 18, 2005.

TRD-200500777
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Effective date: March 10, 2005
Proposal publication date: December 31, 2004
For further information, please call: (512) 406-5388

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 720. 24-HOUR CARE LICENSING

SUBCHAPTER H. CONSOLIDATED STANDARDS FOR 24-HOUR CARE FACILITIES

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), the repeal of §720.550; new §720.550; and amendments to §720.553 and §720.560. New §720.550 and the amendment to §720.553 are adopted with changes to the proposed text published in the October 15, 2004, issue of the *Texas Register* (29 TexReg 9635). The repeal of §720.550 and the amendments to §720.560 are adopted without changes and will not be republished.

All but one of the therapeutic camps licensed by DFPS also operate as residential placements for the children in care. Because these camps can and do serve as children's' homes, Licensing staff believe the children need similar health and safety protections as children in other residential child-care settings. Therapeutic camps admit and serve children with the same service needs as children in residential treatment settings. This was not true 20 years ago when the standards were written and consequently, therapeutic camps are not required to have the same level of professional staff as residential treatment centers. This means that the treatment and service-planning a child receives in a therapeutic camp can be conducted by professionals with fewer qualifications and experience than the professionals treating and planning services for children with the same treatment needs in residential treatment centers. As a result, DFPS is revising the following therapeutic camp standards so that they meet the residential treatment center standards. Section 720.550 (1) adds requirements for a person responsible for the overall treatment program to be a full-time employee and who meets minimum qualifications; (2) amends minimum qualifications for staff responsible for evaluating potential admissions; (3) adds minimum qualifications for staff responsible for developing the admission assessment of a child in care; (4) adds minimum qualifications for staff responsible for developing a preliminary treatment plan for a child in care; (5) adds a requirement for a therapeutic camp to have to assess and address the needs of children in care; and (6) adds requirements for a staffing plan that outlines how the operation will meet the requisite for sufficient appropriately qualified professional staff. Section 720.553 is revised to increase the minimum age for admission into a therapeutic camp from 7 to 13. Section 720.560 is revised to require therapeutic camps to have a permanent camp that meets permanent camp standards, limits primitive camping excursions or activities to 14 days, and requires children to stay in the permanent camp in between primitive camping excursions or activities.

The sections will enhance the protection of children and improve the quality of care of children.

During the comment period, DFPS received comments from Pathways Youth and Family Services, Inc. A summary of the comments and responses follows:

Comment concerning new §720.550: Due to the educational and experience requirements to obtain a child-care administrators license, the commenter stated that licensed child-care administrators should continue to be considered a qualified person to evaluate potential admissions.

Response: Being a licensed child-care administrator does not preclude the person from evaluating potential admissions if minimum qualifications are met. DFPS is, however, adopting the section with changes to correct the name of the social work licensing board in §720.550 (a), (b) and (d) to Texas State Board of Social Worker Examiners.

Comments concerning §720.553:

(1) The commenter agrees with increasing the minimum age for admission to 11 years of age, but not 13 as proposed. The commenter stated the 11, 12, and 13 year age group is one of the best groups of children for treatment in wilderness camps. Children begin full participation in activities such as Boy Scouts and 4H at 11 years old.

Response: Due to the structure of a therapeutic camp, younger children are more vulnerable to the elements and to older residents. DFPS is adopting this subsection without change.

(2) The commenter disagrees with restricting a child's stay in a therapeutic camp to 12 months, stating it would be unethical to discharge a child who is making progress and nearing completion of his treatment goals simply because he had reached his 12- month limit and may occasionally require a prolonged stay because of multiple and severe behavioral problems. The commenter recommends a limit closer to 15 months.

Response: DFPS agrees with this comment and is deleting subsection (c), which states the time limit. As DFPS works to revise all minimum standards, we will look for different ways to address this issue.

Comment concerning §720.560: The commenter supports this change.

40 TAC §720.550

The repeal is adopted under Government Code §531.0055, which provides 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; Human Resources Code (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; HRC, §40.029, which authorizes FPS to propose and adopt rules to facilitate implementation of Department programs; and HRC §42.042 which authorizes DFPS to propose rules to carry out the provision of Chapter 42, Regulation of Certain Facilities, Homes, and Agencies that provide child-care services.

The repeal implements the Human Resources Code, §42.002.

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 February 15, 2005.

TRD-200500696
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 15, 2005
Proposal publication date: October 15, 2004
For further information, please call: (512) 438-3437

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40 TAC §§720.550, 720.553, 720.560

The new section and amendments are adopted under Government Code §531.0055, which provides 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; Human Resources Code (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; HRC, §40.029, which authorizes FPS to propose and adopt rules to facilitate implementation of Department programs; and HRC §42.042 which authorizes DFPS to propose rules to carry out the provision of Chapter 42, Regulation of Certain Facilities, Homes, and Agencies that provide child-care services.

The new section and amendments implement the Human Resources Code, §42.002.

§720.550. Program Staff --Therapeutic Camps.

(a) The person responsible for the overall treatment program must be full-time staff with at least the following minimum qualifications:

(1) A master's degree in a mental health field from an accredited college or university or licensure by the Texas State Board of Social Worker Examiners as a licensed master social worker (LMSW); and

(2) Three years of experience providing treatment services to emotionally disturbed persons; one year of this experience must have been in a residential treatment setting.

(b) Staff responsible for evaluating potential admissions on the basis of data collected as part of the admission assessment must have at least the following minimum qualifications:

(1) A master's degree in a mental health field from an accredited college or university or licensure by the Texas State Board of Social Worker Examiners as a licensed master social worker (LMSW); and

(2) One year of experience in a residential treatment setting.

(c) Staff responsible for developing the admission assessment must have at least the following minimum qualifications:

(1) A bachelor's degree from an accredited college or university; and

(2) One year of experience in a residential treatment setting.

(d) Staff responsible for developing a preliminary treatment plan for each child must have at least the following minimum qualifications:

(1) A master's degree in a mental health field from an accredited college or university or licensure by the Texas State Board of Social Worker Examiners as a licensed master social worker (LMSW); and

(2) One year of experience in a residential treatment setting.

(e) The therapeutic camp must have sufficient appropriately qualified professional staff available on a full-time, part-time, and/or continuing consultative basis to assess and address the needs of children in care.

(f) The therapeutic camp must have a staffing plan that outlines how it meets subsection (e) of this section.

(1) The professional staffing plan must be in writing and implemented by the camp.

(2) The professional staffing plan must document that the number, qualifications, and responsibilities of professional staff are appropriate to the camp's size and the scope of its program.

(3) The professional staffing plan must include a detailed description of the qualifications, duties, responsibilities, and authority of professional positions. For each position, the plan must show whether employment is on a full-time, part-time, or continuing consultative basis. For part-time and consulting positions, the number of hours and/or frequency of services must be specified.

(4) The professional staffing plan must address responsibilities for diagnostic assessment, development and review of the treatment plan, and provision of treatment services.

§720.553. Admission Policies--Therapeutic Camps.

(a) Children under 13 years of age must not be admitted.

(b) Emergency admissions must not be accepted.

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 February 15, 2005.

TRD-200500697
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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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plan

Office of the Governor

Title 1, Part 1

Filed: February 23, 2005

TRD-200500826

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Proposed Rule Review

Office of the Governor

Title 1, Part 1

In accordance with §2001.039 of the Texas Government Code, the Office of the Governor submits the following notice of intention to review the rules found in Chapter 3, relating to the Criminal Justice Division and Chapter 5, relating to Budget and Planning. Review of the rules under these chapters will determine whether the reasons for adoption of the rules continue to exist.

Comments on this rule review may be submitted to Heather Morgan, Office of the Governor, Criminal Justice Division, at hmorgan@governor.state.tx.us; P.O. Box 12428, Austin, Texas 78711; or (512) 463-1919. Comments must be received no later than 30 days from the date of publication of this Proposed Rule Review in the *Texas Register*.

TRD-200500805
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: February 23, 2005

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Adopted Rule Reviews

Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy adopts the review of Chapter 291, Subchapter A (§291.20), concerning Remote Pharmacy Services, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11989).

No comments were received.

The agency finds the reason for adopting the rule continues to exist.

TRD-200500753
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 18, 2005

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The Texas State Board of Pharmacy adopts the review of Chapter 291, Subchapter A (§291.23), concerning Pilot or Demonstration Research Projects for Innovative Applications in the Practice of Pharmacy, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11989).

No comments were received.

The agency finds the reason for adopting the rule continues to exist.

TRD-200500754
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 18, 2005

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The Texas State Board of Pharmacy adopts the review of Chapter 295 (§295.13), concerning Drug Therapy Management by a Pharmacist Under Written Protocol of a Physician, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11989).

No comments were received.

The agency finds the reason for adopting the rule continues to exist.

TRD-200500755
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 18, 2005

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Texas Workers' Compensation Commission

Title 28, Part 2

In accordance with the requirement of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years, and pursuant to the notice of intention to review published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11101), the Texas Certified

Self-Insurer Guaranty Association (Association) has assessed whether the reason for adopting or readopting this rule continues to exist. No comments were received regarding the review of this rule.

As a result of the review, the Texas Certified Self-Insurer Guaranty Association has determined that the reason for adoption of this rule continues to exist. Therefore, the Association readopts Chapter 181.

CHAPTER 181 - BYLAWS

§181.1. Bylaws of the Texas Certified Self-Insurer Guaranty Association.

TRD-200500761
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: February 18, 2005

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: 22 TAC Chapter 309--Preamble

	FY2006	FY2007	FY2008	FY2009	FY2010
Probable Net Savings to General Revenue Funds	1,934,841	1,934,841	1,934,841	1,934,841	1,934,841

Figure: 22 TAC §851.32(k)

Texas Board of Professional Geoscientists
CONTINUING EDUCATION PROGRAM ACTIVITY LOG

NAME: _____ **P.G. NUMBER:** _____ **RENEWAL PERIOD COVERED:** _____

DATE(s)	ACTIVITY (Title, Location, Instructor)	SPONSORING ORGANIZATION (Name and Address)	Type Code*	Duration	PDH Earned[1]	Carry over (Max 30 PDH)[2]
			Total			

* Code: P=Participant Credit I=Instructor Credit A=Author Credit M=Meeting Credit E=Ethics Related Credit [3]

PDH = Professional Development Hours. This is the standard unit of credit for the TBPG Continuing Education Program.

1 - Minimum of 15 PDH per renewal is required for renewal.
2 - Maximum of 30 PDH can be carried over from the previous year.
3 - Minimum of 1 PDH is required to meet Ethics Requirement.

Conversion to PDH: Direct Hrs = 1 PDH
CEU, Papers, etc. = 10 PDH
College Semester 1 hr = 15 PDH
Professional Orgs = 5 PDH max
College Quarter 1 hr = 10 PDH
A maximum of 5 PDH is allowed for self-directed course work.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Building and Procurement Commission

Request for Proposal

RFP Number: #303-5-10656

Opening Date/Time: March 24, 2005 at 3:00 PM

Description: Lease requirement for approximately 3,777 sq. ft. of Office Space in Dallas, Dallas County, Texas

Agency: Department of Assistive and Rehabilitative Services (DARS)

Purchaser/Contact: Kenneth Ming (512) 463-2743 or through the Electronic State Business Daily at: http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=57687

TRD-200500747
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Filed: February 18, 2005

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of February 11, 2005, through February 17, 2005. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on February 23, 2005. The public comment period for these projects will close at 5:00 p.m. on March 25, 2005.

FEDERAL AGENCY ACTIONS:

Applicant: Wayne Mouton; Location: The project is located at along the Gulf Intracoastal Waterway (GIWW), at the terminal end of 16th Street at Rankin Road, in Port Bolivar in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Bolivar, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 328456; Northing: 3251793. Project Description: The applicant proposes to repair 210 feet of an existing permitted bulkhead, construct approximately 240 feet of new bulkhead, and mechanically dredge a 0.115-acre area to a depth of -10 feet mean low tide. The area on the west end of the project area that is proposed to be dredged was previously authorized to be filled (DA Permit 13093). Approximately 926 cubic yards of the dredge material will be used as backfill in a 0.135-acre area to secure 150 feet of new bulkhead. On the east end of the project area the bulkhead is in a state of disrepair and was previously authorized without backfill. The applicant proposes to reconstruct the bulkhead, add a 90-foot wing wall and backfill this 0.017-acre area with approximately 278 cubic yards of dredge and fill material. Total area to be filled is 0.152 acre. All construction activities will be 250 feet from the centerline of the GIWW. CCC Project No.: 05-0132-F1 Type of Application: U.S.A.C.E. permit application #13093(02) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Gabriel Vanounou; Location: The project is located in the southwest portion of "the fingers" of Port Isabel at 1506 West Highway 100, Port Isabel, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Isabel, Texas. Approximate NAD 83 UTM Coordinates: Zone 14; Easting: 677720; Northing: 2885030. Project Description: This amendment request is considered Phase II of the Treasure Island Village project. The applicant proposes to construct approximately 671 linear feet of bulkhead and place approximately 1000 yds3 of fill material behind it. The purpose of the project is to provide erosion control as required by, and in accordance with, City ordinances to allow construction of a hotel, parking area, and access road. The project would require fill material in approximately 0.151 acres of Section 404 jurisdictional wetlands. No dredging would occur. The bulkhead alignment was chosen to minimize irregularity in the shoreline. To compensate for the loss of wetland habitat, the applicant has proposed to create 0.04 acre of wetland and enhance 0.1 acre of wetland habitat consisting of mud substrate by planting black mangrove in an intertidal zone and other transitional species in a transitional wetlands area between Mean High Water and the proposed bulkhead. CCC Project No.: 05-0134-F1 Type of Application: U.S.A.C.E. permit application #22970(01) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: John Janz; Location: The project is located at 3909 Laguna Shores Road, adjacent to the Laguna Madre, in Corpus Christi, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Pita Island, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 668100; Northing: 3055850. Project Description: The applicant proposes to maintenance dredge an existing marina area and a 65-foot-wide access channel to the Laguna Madre. Current water depth in the channel is approximately -2 feet mean low tide (MLT). Approximately 3,900 cubic yards of material would be mechanically dredged to establish a water depth of -4 feet MLT and the dredged material would be placed on an upland area within the project site. The proposed maintenance dredging would impact approximately 610 square feet of seagrass located near the entrance to the approach channel. A three-foot-wide walkway extending approximately 1,000 feet along the channel would be constructed, with 56 boat slips constructed along the walkway. Each slip would be bordered on one side by a 3-foot-wide by 22-foot-long walkway and by two pilings with a beam in between on the other side that would

support a boatlift. CCC Project No.: 05-0142-F1 Type of Application: U.S.A.C.E. permit application #13093(02) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Program Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200500811
Larry L. Laine
Chief Clerk,/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: February 23, 2005

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to §§403.011, 2155.001, and 2156.121, Texas Government Code, and Chapter 54, Subchapter F, §§54.602, 54.611 - 54.618, and 54.636, Texas Education Code, the Comptroller of Public Accounts (Comptroller), on behalf of the Texas Prepaid Higher Education Tuition Board (Board), announces the issuance of its Request for Proposals (RFP #172c) for Actuarial Services for the Board. The selected actuary will advise and assist the Comptroller and the Board in administering all of the Board's actuarial activities related to the Texas Tomorrow Constitutional Trust Fund ("Fund") as described in this RFP and the contract, if any resulting from it ("Contract"). The Fund currently includes a prepaid tuition program and a college savings plan, both as authorized under Section 529 of the Internal Revenue Code. The prepaid tuition program currently has approximately $1.4 billion dollars in invested assets managed by 12 investment managers and held by one custodial bank. The Comptroller, as Chair and Executive Director of the Board, is issuing this RFP in order that the Board may move forward with retaining the necessary actuary. The Comptroller and the Board reserve the right to award more than one contract under the RFP. If approved by the Board, the successful respondent(s) will be expected to begin performance of the contract on or about June 2, 2005.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 East 17th Street, Room G-24, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, March 4, 2005, between 2:00 p.m. and 5:00 p.m. Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Texas Marketplace after Friday, March 4, 2005, 2:00 p.m. CZT. The website address is http://esbd.tbpc.state.tx.us.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Monday, March 21, 2005. Prospective respondents are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 475-0973 to ensure timely receipt. The Letter of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Non-mandatory Letters of Intent and Questions received after this time and date will not be considered. On or before Wednesday, March 23, 2005, the Comptroller expects to post responses to questions as a revision to the Texas Marketplace notice on the issuance of this RFP.

Closing Date: Proposals must be delivered to the Office of the Deputy General Counsel for Contracts, at the location specified above (ROOM G-24) no later than 2:00 p.m. (CZT), on Tuesday, April 5, 2005. Proposals received in ROOM G-24 after this time and date will not be considered regardless of the reason for the late delivery and receipt. Respondents are encouraged to and solely responsible for verifying timely receipt of proposals in that office (ROOM G-24).

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Board shall make the final decision on any contract award or awards resulting from this RFP.

The Comptroller and the Board each reserve the right, in their sole discretion, to accept or reject any or all proposals submitted. The Comptroller and the Board are not obligated to execute any contracts on the basis of this notice or the distribution of any RFP. The Comptroller and the Board shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows:

Issuance of RFP--March 4, 2005, 2:00 p.m. CZT;

Non-Mandatory Letters of Intent to propose and Questions Due--March 21, 2005, 2:00 p.m. CZT;

Official Responses to Questions posted--March 23, 2005;

Proposals Due--April 5, 2005, 2:00 p.m. CZT;

Contract Execution--June 2, 2005, or as soon thereafter as practical;

Commencement of Project Activities--June 2, 2005, or as soon thereafter as practical.

TRD-200500820
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: February 23, 2005

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in 303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 02/28/05 - 03/06/05 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 02/28/05 - 03/06/05 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 03/01/05 - 03/31/05 is 5.50% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 03/01/05 - 03/31/05 is 5.50% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200500825
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 23, 2005

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Court Reporters Certification Board

Certification of Court Reporters

Following the examination of applicants on January 13, 2005, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

MACHINE SHORTHAND: ANDREA PARISH - KINGWOOD, TX; THU BUI - ARLINGTON, TX; and STEPHANIE REYNOLDS - VICTORVILLE, CA; ELIZABETH CROW - GARLAND, TX; LORI CHILDERS - HOUSTON, TX.

Following the examination of applicants on January 13, 2005, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

ORAL STENOGRAPHY: NANCY MCCAULLEY - FT. WORTH, TX; and BRANDY WAITS - BURLESON, TX.

TRD-200500748
Sheryl Jones
Administrator of Licensing
Court Reporters Certification Board
Filed: February 18, 2005

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Education Service Center, Region X

Request for Proposals

The Education Service Center Region 10 is soliciting proposals for a Texas Credit Recovery Program for Students in Homeless Situations Pilot Project using funds authorized by the McKinney-Vento Homeless Education Assistance Improvements Act of 2001, Public Law 107-110. This project seeks to fund a program that will assist students in homeless situations to recover high school credits that can be counted toward a high school diploma at an accredited institution.

Vendors wishing to receive a complete copy of the Request for Proposal should write or call Sue Hayes, Chief Financial Officer, Education Service Center Region 10, 400 E. Spring Valley Road, Richardson, Texas 75083-1300, (972) 348-1112. Please refer to RFP #2005-01 in your request.

All proposals must be received at the above address by 4:00 P.M. Thursday, March 24, 2005.

The award winning vendor will be selected based on their qualifications and ability to carry out all requirements contained in the RFP. The Region 10 ESC reserves the right to select the vendor that represents the best value to the Center.

TRD-200500824
Kathleen Boswell
Executive Assistant
Education Service Center, Region X
Filed: February 23, 2005

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Texas Commission on Environmental Quality

Notice of District Petition

Notices mailed February 18 through February 22, 2005

TCEQ Internal Control No. 02022005-D01; Iowa Colony Sterling Lakes, Ltd. (Petitioner) filed a petition for creation of Brazoria County Municipal Utility District No. 31 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lienholder, Eagle Mortgage Company, Inc., on the property to be included in the proposed District; (3) the proposed District will contain approximately 692.60 acres located within Brazoria County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction and the corporate limits of the City of Iowa Colony, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. The Petitioner has also provided the TCEQ with a certificate evidencing the consent of Eagle Mortgage Company, Inc. to the creation of the proposed District. By Ordinance No. 2004-6, effective November 15, 2004, the City of Iowa Colony gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; (3) control, abate and amend local storm waters or other harmful excesses of waters, as more particularly described in an engineer's report filed simultaneously with the filing of the petition; and (4) purchase, construct, acquire, improve, maintain, and operate any additional facilities, systems, plants and enterprises consistent with the purposes for which the District is created. According to the petition, the Petitioners estimate that the cost of the project will be approximately $38,546,190.

TCEQ Internal Control No. 02032005-D04; The William Carloss Morris, III, and Sharon Kay Morris Charitable Remainder Unitrust and Hoffman & Morris (Petitioners) filed a petition for creation of Fort Bend County Municipal Utility District No. 168 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioners are the owners of a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 287.63 acres located within Fort Bend County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Houston, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 2005-3, effective January 11, 2005, the City of Houston, Texas, gave its consent to

the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, improve, extend, maintain, and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) purchase, construct, acquire, improve, extend, maintain, and operate works, improvements, facilities, plants, equipment, and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition; and (4) construct, acquire, improve, maintain, and operate additional facilities, systems, plants, and enterprises consistent with the purposes for which the District is created and permitted under State law. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $11,450,000.

TCEQ Internal Control No. 11032004-D01; Highwood Development , Ltd. (Petitioner) filed a petition for creation of Oak Point Water Control and Improvement District No. 1 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lienholder, Wells Fargo Bank, National Association, on the property to be included in the proposed District, and the Petitioner has provided the TCEQ with a certificate evidencing its consent to the creation of the proposed District; (3) the proposed District will contain approximately 191.116 acres located within Denton County, Texas; and (4) the proposed District is within the corporate limits of the City of Oak Point, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Resolution No. 2003-06, effective February 3, 2003, the City of Oak Point, Texas, gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) construct, maintain, and operate a waterworks and sanitary sewer system for residential, industrial and commercial purposes; (2) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition; and (3) construct, acquire, improve, maintain, and operate additional facilities, systems, plants, and enterprises consistent with the purposes for which the District is created and permitted under State law. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $10,000,000.

TCEQ Internal Control No. 12172004-D05; Northway Land Company, Ltd. (Petitioner) filed a petition for creation of Montgomery County Municipal Utility District No. 99 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 379.9 acres located within Montgomery County, Texas; and (4) no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any city, town or village in Texas. The petition further states that the proposed District will: (1) purchase, construct, acquire, improve, extend, maintain, and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) purchase, construct, acquire, improve, extend, maintain, and operate works, improvements, facilities, plants, equipment, and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition; and (4) construct, acquire, improve, maintain, and operate additional facilities, systems, plants, and enterprises consistent with the purposes for which the District is created and permitted under State law. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $26,230,000.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687- 4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200500813
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 23, 2005

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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. 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 **April 4, 2005**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 4, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the commission in **writing**.

(1) COMPANY: Al-Ilam Enterprises, Inc. dba Happy Chap Market 1; DOCKET NUMBER: 2004- 0416-PST-E; TCEQ ID NUMBERS: 31562 and RN101446938; LOCATION: 4310 North Main Street, Liberty, Liberty County, Texas; TYPE OF FACILITY: convenience store with retail sales in gasoline; RULES VIOLATED: 30 TAC §334.8(c)(5)(A)(iii), by failing to ensure that a valid, current TCEQ delivery certificate was posted at the facility and clearly visible at all times; 30 TAC §115.242(3)(A), and Texas Health and Safety Code (THSC), §382.085(b), by failing to provide and maintain the Stage II vapor recovery system in proper operating condition; 30 TAC §334.50(b)(2)(A)(i), and TWC, §26.3475, by failing to equip each pressurized line with an automatic line leak detector; 30 TAC §334.49(c)(4), and TWC, §26.3475, by failing to have the system inspected and tested to determine the adequacy of the cathodic protection by a qualified corrosion specialist or corrosion protection technician at least once every three years; 30 TAC §334.50(b)(2)(A)(i)(III) and TWC, §26.3475, by failing to test a line leak detector at least once per year for performance and operational reliability; and 30 TAC §334.49(c)(2)(C) and TWC, §26.3475, by failing to regularly inspect, at least once every 60 days, the impressed cathodic protection system to ensure that the rectifier and other system components were operating properly; PENALTY: $15,950; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Alvin Massington; DOCKET NUMBER: 2003-0491-MSW-E; TCEQ ID NUMBER: 455090100 and RN103059275; LOCATION: 514 Business Highway 6 South, Marlin, Falls County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste site; RULES VIOLATED: 30 TAC §330.5(a), by failing to dispose of litter and solid waste at an approved facility; PENALTY: $5,250; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710- 7826, (254) 751-0335.

(3) COMPANY: Ansh III, L.P. dba Circle Q Food Store #1; DOCKET NUMBER: 20031001-PST- E; TCEQ ID NUMBER: 0039341 and RN101432219; LOCATION: 3202 Corn Valley Road, Grand Prairie, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate continuous financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the underground storage tanks (USTs); and 30 TAC §334.22 and TWC, §5.702, by failing to pay outstanding UST fees; PENALTY: $1,090; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Domingo Garza dba Mexico Motors; DOCKET NUMBER: 2003-1238-WQ-E; TCEQ ID NUMBER: R15STW0024 and RN102838141; LOCATION: on the south side of 10th Street, approximately five miles south of the intersection of 10th Street and FM Road 1016, Hidalgo, Hidalgo County, Texas; TYPE OF FACILITY: automobile salvage yard with retail sales of used automobile parts; RULES VIOLATED: 30 TAC §281.25(a)(4) and TWC, §26.121(a)(1), by failing to obtain commission authorization to discharge storm water associated with industrial activity to waters in the state through an individual permit, the Multi-Sector General Permit TXR050000, or by qualifying for the Conditional No Exposure Certification for Exclusion; PENALTY: $9,450; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(5) COMPANY: Inaara Group, Inc. dba City Star Texaco; DOCKET NUMBER: 2004-0147-PST-E; TCEQ ID NUMBERS: 13589 and RN102042710; LOCATION: 5400 Brentwood Stair Road, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: gasoline service station; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and 30 TAC §334.22(a) and TWC, §26.358(b)(2) and (d), by failing to pay outstanding UST fees; PENALTY: $3,120; STAFF ATTORNEY: Barbara J. Watson, Litigation Division, MC 175, (512) 239-2044; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Joe Gutierrez dba Joe Gutierrez Trucking; DOCKET NUMBER: 2002-1401- MSW-E; TCEQ ID NUMBER: HAW004 and RN102938644; LOCATION: Alamo Road, approximately 500 feet south of the intersection of Davis Road and Alamo Road, Edinburg, Hidalgo County, Texas; TYPE OF FACILITY: trucking service; RULES VIOLATED: 30 TAC §330.5 and 330.32(b), by failing to ensure that all solid waste collected and transported by him was disposed of only at facilities authorized to accept the type of waste being transported; PENALTY: $3,600; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(7) COMPANY: Lee and Kathy Byrd dba Lighthouse Remodeling; DOCKET NUMBER: 2003- 1479-MSW-E; TCEQ ID NUMBERS: 455100035 and RN102906047; LOCATION: end of Wright Lane in the Sam Houston National Forrest, Willis, San Jacinto County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste (MSW); RULES VIOLATED: 30 TAC §330.5(a)(1), by failing to properly dispose of MSW; PENALTY: $5,250; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(8) COMPANY: Millennium Gasoline Corporation dba Amos Shell; DOCKET NUMBER: 2004- 0085-PST-E; TCEQ ID NUMBER:

RN101555373; LOCATION: 3114 West University Drive, Denton, Denton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and §334.10(b) and TWC, §24.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain Stage II records on site and make them immediately available for review; and 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; PENALTY: $11,100; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Mohammed Mohiuddin dba Palestine Mini Mart; DOCKET NUMBER: 2003- 0868-PST-E; TCEQ ID NUMBERS: 41201 and RN101432847; LOCATION: 321 West Palestine, Palestine Avenue, Anderson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate continuous financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the USTs; and 30 TAC §334.22(a), by failing to pay all outstanding UST fees; PENALTY: $3,270; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(10) COMPANY: Octavio Benitez dba El Paso General Recycling; DOCKET NUMBER: 2004- 0582-MSW-E; TCEQ ID NUMBER: RN100588813; LOCATION: 6807 Industrial Avenue, El Paso County, Texas; TYPE OF FACILITY: recycling; RULES VIOLATED: 30 TAC §328.5(b) and §328.4(b)(1), by failing to submit to the TCEQ a notice of intent to operate a recycling facility prior to commencing operations of the facility and failing to have records to show that the material being stored had an economically feasible means of being recycled; and 30 TAC §328.5(c)(1) and (2), by failing to maintain all records necessary to show compliance with the requirements of 30 TAC §328.4 and failing to show reasonable efforts to maintain source separation of materials received by the facility; PENALTY: $6,420; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(11) COMPANY: Rose Marie Johnson and Andreas Johnson dba Johnson International; DOCKET NUMBER: 2004-0426-PWS-E; TCEQ ID NUMBERS: 1011459, 12288, RN102671443, and RN101191104; LOCATION: corner of Sellers and West Road, Houston, Harris County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2) and (g) and §290.122(c), and THSC, §341.033(d), by failing to collect and submit routine monthly water samples from the site for bacteriological analysis and by failing to provide public notice of the sampling deficiencies; 30 TAC §290.45(b)(1)(A)(i), and THSC, §341.0315(c), by failing to provide a well capacity of 1.5 gallons per minute per connection; 30 TAC §290.45(b)(1)(A)(ii) and §290.43(d)(3), and THSC, §341.0315(c), by failing to provide a pressure tank capacity of 50 gallons per connection, and failing to provide the pressure tank with facilities for maintaining the air-water-volume at the design water level and working pressure; 30 TAC §290.46(r) and §290.110(b)(4), by failing to maintain a minimum free chlorine residual of 0.2 milligrams per liter in the far reaches of the distribution system, and failing to provide a minimum pressure of 35 pounds per square inch throughout the distribution system under normal operating conditions; 30 TAC §290.46(f)(3)(B)(iii), (D)(ii), and (n)(2), and §290.121(a), by failing to make an accurate and up-to-date map of the distribution system, a microbiological monitoring plan, and records of disinfectant residual monitoring results and pressure tank inspections available for review; 30 TAC §§290.41(c)(3)(O), 290.42(e)(5), 290.43(e), and 290.46(m) and (t), by failing to provide the well site with a locked, intruder-resistant fence, failing to house the hypochlorination solution containers and pumps in a secure enclosure, failing to post a legible system ownership sign at each of the production, treatment, and storage facilities with an emergency telephone number where a responsible official could be contacted, and failing to maintain the general appearance of the site's facilities and equipment; 30 TAC §290.44(d)(4), by failing to provide an accurate metering device at each residential connection for the accumulation of water usage data; 30 TAC §290.44(d)(5), by failing to provide the water system with sufficient valves and blowoffs so that necessary repairs could be made without undue interruption of service over any considerable area and for flushing the system when required; 30 TAC §290.46(e)(3)(A) and THSC, §341.033(a), by failing to operate the system under the direct supervision of a water works operator who holds a class D, or higher, license; 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary control easement for all property within 150 feet of the well location; 30 TAC §290.274, by failing to distribute consumer confidence reports and certify the executive director that the reports were distributed; 30 TAC §290.51(a)(6), by failing to pay public health service fees; and 30 TAC §291.93(3), by failing to submit a written planning report to the executive director that clearly explained how the site would provide the expected service demands to the remaining areas within the boundaries of its certificated area; PENALTY: $5,100; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(12) COMPANY: Satina, Inc. dba Donna's Food Market; DOCKET NUMBER: 2003-1117-PST-E; TCEQ ID NUMBERS: 26914 and RN102432390; LOCATION: 255 Peyton Drive, Beaumont, Jefferson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §334.50(b)(1)(A) and (2)(A)(ii)(I) and TWC, §26.3475(c)(1), by failing to provide proper release detection for the UST system and failing to perform tightness testing for all piping; 30 TAC §334.49(c)(2)(C) and TWC, §26.3475(d), by failing to conduct regular inspections of an impressed cathodic protection system at least once every 60 days; 30 TAC §334.48(c), by failing to conduct inventory control for all the USTs involved in the retail sales of petroleum substances used as motor fuel; 30 TAC §334.7(d)(3) and TWC, §26.346(a), by failing to provide notice of any change in the operator information to the TCEQ within 30 days of the change; 30 TAC §115.246(1), (3), (5), and §115.248(1) and (2), and THSC, §382.085(b), by failing to maintain maintenance records, Stage II test results, a copy of the California Air Resource Board Executive Order, documentation of a certified Stage II facility representative, and proof of Stage II training for all employees at the station; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to successfully perform annual pressure decay testing within the preceding 12 months; PENALTY: $18,150; STAFF ATTORNEY: Lindsay Andrus, Litigation Division, MC 175, (512) 239-4761; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: Texas God Bless, Inc. dba Lucky Stop Grocery; DOCKET NUMBER: 2003- 0394-PST-E; TCEQ ID NUMBERS: 5572 and RN101436251; LOCATION: 5001 Fairway Drive, Alvin, Brazoria County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for

taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum USTs; PENALTY: $1,050; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(14) COMPANY: Worash Petroleum, Inc. dba N & B Fina 2; DOCKET NUMBER: 2004-0392- PST-E; TCEQ ID NUMBERS: 52781 and RN102276219; LOCATION: 12950 Coit Road, Dallas, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.242(3)(J) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees, including penalties and interest; PENALTY: $7,200; STAFF ATTORNEY: Wendy Cooper, Litigation Division, MC R-4, (817) 588-5867; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200500797
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 22, 2005

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 4, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 4, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: A. Schulman, Inc.; DOCKET NUMBER: 2003-0156-IWD-E; TCEQ ID NUMBERS: 00337-000 and RN101518533; LOCATION: Thomas Street east of Farm-to-Market Road 105, Orange, Orange County, Texas; TYPE OF FACILITY: carbon black distribution plant with a wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TCEQ Permit Number 00337-000, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and TWC, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $21,723; STAFF ATTORNEY: Gitanjali Yadav, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(2) COMPANY: Bellaire Food Store, Inc. dba Shop N Go No. 2; DOCKET NUMBER: 2003-0763- PST-E; TCEQ ID NUMBERS: 33042 and RN101444388; LOCATION: 8540 Bellaire Boulevard in Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with gasoline pumps; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of underground storage tanks (USTs); PENALTY: $1,900; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(3) COMPANY: Khun Heng dba Billys Beer & Wine; DOCKET NUMBER: 2004-1007-PST-E; TCEQ ID NUMBERS: 71934 and RN102785490; LOCATION: 1405 East Highway 276, West Tawakoni, Hunt County, Texas; TYPE OF FACILITY: store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum storage tanks; PENALTY: $1,050; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Little River Materials, Inc.; DOCKET NUMBER: 2004-1075-WQ-E; TCEQ ID NUMBER: RN104321872; LOCATION: 4734 South Highway 77, Minerva, Milam County, Texas; TYPE OF FACILITY: sand and gravel pit; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations, §122.26(a), by failing to obtain authorization to discharge storm water associated with industrial activity to waters in the state; PENALTY: $10,000; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Mayfair 5 Water Company; DOCKET NUMBER: 2004-0853-PWS-E; TCEQ ID NUMBERS: 0710147 and RN101457182; LOCATION: Canutillo, El Paso County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(e)(3)(A), by failing to have the facility under the direct supervision of a certified operator holding a valid grade D or higher operator's certificate; and 30 TAC §290.51(a)(3), by failing to pay outstanding public health service fees; PENALTY: $300; STAFF ATTORNEY: Jeffrey Huhn, Litigation Division, MC 175, (512) 239- 5111; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(6) COMPANY: Nasir Mughal; DOCKET NUMBER: 2003-1332-PST-E; TCEQ ID NUMBER: 5474 and RN101873081; LOCATION:

1819 61st Street, Galveston, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.242(9), and Texas Health and Safety Code (THSC), §382.085(b), by failing to post operating instructions conspicuously on the front of each dispenser equipped with a Stage II system; and 30 TAC §115.246(1), (3) - (6), and (7)(A), and THSC, §382.085(b), by failing to maintain Stage II records on site and immediately available for review upon request by authorized representatives of the TCEQ or any local air pollution control program with jurisdiction; PENALTY: $4,280; STAFF ATTORNEY: Lindsay Andrus, Litigation Division, MC 175, (512) 239-4761; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: North American Recovery Services, Inc.; DOCKET NUMBER: 2004-0710-MSW- E; TCEQ ID NUMBER: RN104154554; LOCATION: 9002 Sheldon Road, Houston, Harris County, unauthorized landfill in Oilton, Webb County, Texas; TYPE OF FACILITY: salvage business; RULES VIOLATED: 30 TAC §330.5, by contracting for the disposal of municipal solid waste at the site, an unauthorized landfill in Oilton, Webb County; PENALTY: $7,500; STAFF ATTORNEY: Wendy Cooper, Litigation Division, MC R-4, (817) 588-5867; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500; Laredo Regional Office, 1403 Seymour, Suite 2, Laredo, Texas 78040-8752, (956) 791-6716.

(8) COMPANY: SJKR, Inc. dba Steve's Texaco; DOCKET NUMBER: 2004-1206-PST-E; TCEQ ID NUMBERS: 25999 and RN101722528; LOCATION: 110 North 23rd Street, Canyon, Randall County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate continuous financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of its USTs; PENALTY: $1,050; STAFF ATTORNEY: Jeffrey Huhn, Litigation Division, MC 175, (512) 239-5111; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: Steve Eller dba Spencer Mobil; DOCKET NUMBER: 2001-1113-PST-E; TCEQ ID NUMBERS: 32214 and RN101847168; LOCATION: 601 Spencer Highway, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum UST; PENALTY: $970; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Suntex Fuller Corporation and Fuller Utilities Corporation; DOCKET NUMBER: 2002-1057-MWD-E; TCEQ ID NUMBER: CN600695290 and CN602733081; LOCATION: Savannah Plantation Drive, approximately 0.4 miles south of the intersection of FM Road 1462 and Savannah Plantation Drive near Alvin, Brazoria County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §26.121(a), by failing to obtain authorization to dispose of sewage from the facility onto land adjacent to Chocolate Bayou in Segment Number 1108 of the San Jacinto-Brazos Coastal Basin; PENALTY: $26,600; STAFF ATTORNEY: Deborah A. Bynum, Litigation Division, MC 175, (512) 239-1976; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: United Petroleum Transports, Inc.; DOCKET NUMBER: 2003-0552-PST-E; TCEQ ID NUMBER: RN100847581; LOCATION: 10304 North Lamar Boulevard, 4607 Loyola Lane, 310 East Rundberg Lane, Austin, Travis County, and 500 Terminal Road, Georgetown, Williamson County, Texas; TYPE OF FACILITY: fuel distributor; RULES VIOLATED: 30 TAC §334.5(b)(1)(A), by depositing a regulated substance into USTs, which did not have valid, current TCEQ delivery certificates; PENALTY: $7,000; STAFF ATTORNEY: Rebecca Nash Petty, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

TRD-200500796
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 22, 2005

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Notice of Water Quality Applications

The following notices were issued during the period of February 15,2005 through February 22, 2005.

The following require the applicants to publish notice in the newspaper. The public comment period, 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 THIS NOTICE.

THE CITY OF AGUA DULCE has applied for a renewal of TPDES Permit No. 10140-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 160,000 gallons per day. The facility is located approximately 800 feet east of Farm-to-Market Road 70 and approximately 550 feet south of State Highway 44 in Nueces County, Texas.

EDWARDS CONSTRUCTION has applied for a major amendment to Permit No. 14132-001, to authorize an increase in the daily average flow from 3,000 gallons per day to 10,000 gallons per day and to increase the acreage irrigated from 5 acres to 7 acres. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located 2,500 feet south of the intersection of Farm-to-Market Road 2906 and Garrett Road, 8,000 feet south of the Sabine River and 2.4 miles southwest of the Easton community in Gregg County, Texas.

HARRIS COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 133 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014538001, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. This facility was previously permitted as TPDES Permit No. 11153-001 which expired on March 1, 2004. The facility is located at 7415 Smiling Wood Lane, at the intersection of Bauerlein Drive and Smiling Wood Lane in Harris County, Texas.

CITY OF KARNES CITY has applied for a renewal of TPDES Permit No. 10352-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 410,000 gallons per day. The facility is located approximately 0.88 mile north of the intersection of U.S. Highway 181 and Farm-to-Market Road 1144 in Karnes County, Texas.

CITY OF KARNES CITY has applied for a renewal of TPDES Permit No. 10352-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 92,000 gallons per

day. The facility is located approximately 0.5 mile southeast of the intersection of State Highway 80 and Farm-to-Market Road 1144 in Karnes County, Texas.

CITY OF KENEDY has applied for a renewal of TPDES Permit No. 10746-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 983,000 gallons per day. The facility is located approximately 500 feet east of Farm-to-Market Road 792 and 600 feet north of Main Street in the City of Kenedy in Karnes County, Texas.

LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. 12920-003, which authorizes the disposal of treated domestic wastewater at a volume not to exceed a daily average flow of 10,500 gallons per day via subsurface drainfields with a minimum area of 70,000 square feet. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 1,300 feet southeast of Ranch Road 620, 1.9 miles west of Mansfield Dam in Travis County, Texas.

SAN ANTONIO RIVER AUTHORITY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010749006, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility is located 1,900 feet southeast of the intersection of U.S. Highway 181 South and Richter Road in Bexar County, Texas.

SUBLIGHT ENTERPRISES, INC. has applied for a renewal of TPDES Permit No. 11096-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 9,000 gallons per day. The facility is located approximately 200 feet north of U.S. Highway 181 and approximately 3/4 mile southwest of the intersection of Farm-to-Market Road 893 (Portland Road) and U.S. Highway 181 in the City of Portland in San Patricio County, Texas.

CITY OF VENUS has applied for a renewal of TPDES Permit No. 10883-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 175,000 gallons per day. The facility is located approximately 0.5 mile northwest of the City of Venus at a point approximately 500 feet north of U.S. Highway 67 and approximately 200 feet west of Farm-to- Market Road 157 in Johnson County, Texas.

TRD-200500814
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 23, 2005

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 4, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 4, 2005**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: BP Pipelines (North America) Inc.; DOCKET NUMBER: 2004-1143-AIR-E; IDENTIFIER: Regulated Entity Identification Number (RN) 103047833; LOCATION: Deer Park, Harris County, Texas; TYPE OF FACILITY: ethylene meter skid; RULE VIOLATED: 30 TAC §106.355(2) and THSC, §382.085(b), by failing to prevent unauthorized emissions of ethylene; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Bodin Concrete L.P. dba Bodin Concrete Co.; DOCKET NUMBER: 2004-1921-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 63336, RN102070687; LOCATION: Rowlett, Dallas County, Texas; TYPE OF FACILITY: concrete mixing and transport; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all tanks are monitored for releases; PENALTY: $1,920; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Chemcentral Southwest, L.P.; DOCKET NUMBER: 2004-1595-AIR-E; IDENTIFIER: Air Account Number HG0979B, RN102341880; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chemical distribution; RULE VIOLATED: 30 TAC §115.212(a)(1)(A) - (C) and THSC, §382.085(b), by failing to control volatile organic compounds (VOCs) during loading and unloading; and 30 TAC §116.115(c), Air Permit Number C-8544, and THSC, §382.085(b), by failing to conduct fugitive monitoring of valves in VOC service, by failing to maintain records that show the dates and time of corrective actions taken to repair components, and by failing to limit the handling of chemicals to those on the list provided with Air Permit Number C-8544; PENALTY: $15,030; ENFORCEMENT COORDINATOR: Michael Limos, (512) 239-5839; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: Conroe Crown Oaks, Ltd.; DOCKET NUMBER: 2004-1045-WQ-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR158397; LOCATION: Montgomery, Montgomery County, Texas; TYPE OF FACILITY: residential subdivision construction site; RULE VIOLATED: TPDES General Permit Number TXR158397 and the Code, §26.121(a), by failing to maintain all erosion and sediment control measures; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Kim Morales, (713) 767-3520; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: City of Dallas; DOCKET NUMBER: 2004-1484-AIR-E; IDENTIFIER: Air Account Number DB5077A, RN100752146; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: municipal solid waste landfill with gas processing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the Annual Title V Compliance Certification; and 30 TAC §122.145(2)(C) and THSC, §382.085(b), by failing to submit a deviation report; PENALTY: $1,232; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Diamond Shamrock Refining Company L.P. dba Diamond Shamrock McKee Plant; DOCKET NUMBER: 2004-1645-MLM-E; IDENTIFIER: Waste Disposal Well Permit Numbers 020, 225, and 226, RN100210517; LOCATION: Sunray, Moore County, Texas; TYPE OF FACILITY: petroleum refining; RULE VIOLATED: 30 TAC §§331.7(a), 335.2, and 335.43, 40 Code of Federal Regulations (CFR) §270.1, and the Code, §27.011, by failing to prevent the unauthorized injection of characteristically hazardous waste containing benzene into non-hazardous storage tanks and then into non-hazardous waste disposal wells; PENALTY: $15,120; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(7) COMPANY: Dupre Transport, Inc.; DOCKET NUMBER: 2004-2046-PST-E; IDENTIFIER: RN104420419; LOCATION: Carrollton, Denton County, Texas; TYPE OF FACILITY: fuel distribution; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2003-1185-AIR-E; IDENTIFIER: Air Account Number HG0232Q, RN102579307; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.715(a), Permit Number 18287, and THSC, §382.085(b), by failing to conduct semi-annual grab sampling; 30 TAC §101.20(a)(1)(b) and §116.715(a) and THSC, §382.085(b), by failing to notify the TCEQ after the discovery of an emission vent; and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $47,185; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5757; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: City of Gainesville; DOCKET NUMBER: 2004-2004-PST-E; IDENTIFIER: PST Facility Identification Number 32626, RN102433901; LOCATION: Gainesville, Cooke County, Texas; TYPE OF FACILITY: vehicle refueling station; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Brent Hurta, (512) 239-6589; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Lufkin Industries, Inc. dba Lufkin Industries Oilfield Division; DOCKET NUMBER: 2004-1688-AIR-E; IDENTIFIER: Air Account Number AC0028T, Air Operating Permit Number 1852, RN100213453; LOCATION: Lufkin, Angelina County, Texas; TYPE OF FACILITY: surface coating and fabrication; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2) and THSC, §382.085(b), by failing to timely submit the annual permit compliance certification; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Susan Longenecker, (512) 239-0968; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(11) COMPANY: Julie Nguyen dba M & J Market; DOCKET NUMBER: 2004-0567-PST-E; IDENTIFIER: PST Facility Identification Number 8058, RN102307527; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(2)(c) and (4) and the Code, §26.3475(d), by failing to regularly inspect the cathodic protection system; 30 TAC §334.50(b)(1)(A), (2)(A)(I)(III), and (d)(1)(B)(ii), and the Code, §26.3475(a) and (c)(1), by failing to perform a tightness test on the system piping and by failing to keep records of inventory control; and 30 TAC §334.8(c)(5)(C) and the Code, §26.3475(a), by failing to physically label all tank fill pipes; PENALTY: $5,440; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Jim Strong dba Papa's Market; DOCKET NUMBER: 2004-0597-PST-E; IDENTIFIER: PST Facility Identification Number 18253; LOCATION: Skidmore, Bee County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and the Code, §26.3475, by failing to monitor underground storage tanks (USTs) for releases and by failing to monitor the piping of the UST system to detect releases; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Chad Blevins, (512) 239-6017; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(13) COMPANY: Rogelio Ramirez dba Pepe's Drive In No. 2; DOCKET NUMBER: 2004-1761-PST-E; IDENTIFIER: PST Facility Identification Number 48945, RN101685071; LOCATION: La Blanca, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Jill McNew, (512) 239-0560; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(14) COMPANY: Petro Stopping Centers, L.P. dba Petro Stopping Center 50; DOCKET NUMBER: 2004-1947-AIR-E; IDENTIFIER: Air Account Number EE1094B, RN102418142; LOCATION: Vinton, El Paso County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §114.100(a) and THSC, §382.085(b), by failing to meet the 2.7% by weight minimum oxygen content of gasoline; PENALTY: $816; ENFORCEMENT COORDINATOR: Kensley Greuter, (512) 239-2520; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(15) COMPANY: Pilot Travel Centers LLC dba Pilot Point Travel Center 435; DOCKET NUMBER: 2004-1948-AIR-E; IDENTIFIER: Air Account Number EE2327R, RN103125605; LOCATION: Anthony, El Paso County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §114.100(a) and THSC, §382.085(b), by failing to meet the minimum oxygen content requirement of 2.7% by weight for gasoline; PENALTY: $800; ENFORCEMENT COORDINATOR: Ruben Soto, (512) 239-4571; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(16) COMPANY: City of Shepherd; DOCKET NUMBER: 2004-0738-WQ-E; IDENTIFIER: TPDES Permit Number 11380-001; LOCATION: Shepherd, San Jacinto County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11380-001, and the Code, §26.121(a), by failing to comply with permitted effluent limits for total ammonia nitrogen; PENALTY: $2,620; ENFORCEMENT COORDINATOR:

Larry King, (512) 239-7037; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: Randy C. Matocha dba Star Express Lube; DOCKET NUMBER: 2004-1041-PST-E; IDENTIFIER: PST Registration Number 58244, RN101894467; LOCATION: El Campo, Wharton County, Texas; TYPE OF FACILITY: lubrication store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Sunoco, Inc. (R&M); DOCKET NUMBER: 2004-1624-AIR-E; IDENTIFIER: Air Account Number HG0621B, Air Permit Number 4157A, RN103773206; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 4157A, and THSC, §382.085(b), by failing to prevent the unauthorized emission of a highly reactive VOC; PENALTY: $3,625; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: Saidul Kabir dba Super Stop 3; DOCKET NUMBER: 2004-1832-PST-E; IDENTIFIER: PST Facility Identification Number 39070, RN103026951; LOCATION: Henderson, Rusk County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; and 30 TAC §334.22(a) and the Code, §5.702, by failing to pay outstanding UST fees; PENALTY: $5,250; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(20) COMPANY: Three Stars Aviation, L.L.C. dba Town & Country Airpark; DOCKET NUMBER: 2004-1898-PST-E; IDENTIFIER: PST Facility Identification Number 56859, RN102277076; LOCATION: Lubbock, Lubbock County, Texas; TYPE OF FACILITY: private air park service with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(21) COMPANY: Travis Richardson as Executor of the Estate of Carrell Richardson dba River Oaks Water System; DOCKET NUMBER: 2004-1703-PWS-E; IDENTIFIER: Public Water Supply Number 0360090, RN101195519; LOCATION: Baytown, Chambers County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A) and (3), (f)(1)(A), and (g), and §290.122(c), and THSC, §341.033(d), by failing to collect and submit routine water samples for bacteriological analysis, by exceeding the non-acute maximum contaminant level for microbial contamination, by failing to take the appropriate number of repeat samples, by failing to provide public notice, and by failing to take additional routine samples; PENALTY: $1,420; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: W W Cattle Feeds, Inc. dba W W Cattle Feeds; DOCKET NUMBER: 2004-1848-MLM-E; IDENTIFIER: Compost Facility Notification Number 47026, RN100756931; LOCATION: Poolville, Parker County, Texas; TYPE OF FACILITY: animal feed production; RULE VIOLATED: 30 TAC §335.4(2), by failing to prevent the disposal of industrial solid waste; and 30 TAC §332.4(2), by failing to compost material in a sanitary manner; PENALTY: $5,500; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: Weirich Bros., Inc.; DOCKET NUMBER: 2004-1072-WQ-E; IDENTIFIER: Storm Water Permit Identification Number TXR05R713, RN103786729; LOCATION: Fredericksburg, Gillespie County, Texas; TYPE OF FACILITY: sand and gravel mining operation; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(a), by failing to obtain authorization to discharge storm water associated with industrial activity; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Kensley Greuter, (512) 239-2520; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(24) COMPANY: Wallie Jean Wilson dba Wilsons Corner; DOCKET NUMBER: 2004-1941-PST-E; IDENTIFIER: PST Facility Identification Number 59183, RN102267671; LOCATION: Nacogdoches, Nochgdoches County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $950; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(25) COMPANY: Wyman-Gordon Forgings LP; DOCKET NUMBER: 2004-0860-IWD-E; IDENTIFIER: TPDES Permit Number 01402, RN100217413; LOCATION: Cypress, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 01402, and the Code, §26.121(a), by failing to comply with the whole effluent toxicity seven day chronic no observed effect concentration limit of 59% for pimephales promelas; PENALTY: $26,500; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200500743
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 16, 2005

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 11, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 11, 2005**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Jaime Ramirez dba A's Food Store; DOCKET NUMBER: 2004-1614-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 45799, Regulated Entity Reference Number (RN) 101680494; LOCATION: McAllen, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,850; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: Akber Ali Virani dba Airwood Grocery; DOCKET NUMBER: 2004-1777-PST-E; IDENTIFIER: PST Facility Identification Number 53750, RN101853711; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,640; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Benavides ISD; DOCKET NUMBER: 2004-1623-PST-E; IDENTIFIER: PST Facility Identification Number 18779, RN101781839; LOCATION: Benavides, Duval County, Texas; TYPE OF FACILITY: refueling facility for school district vehicles; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Cari Bing, (512) 239-1445; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(4) COMPANY: Zulfiqar Ali Mehar dba Brookeland Country Mart; DOCKET NUMBER: 2004-2063-PST-E; IDENTIFIER: PST Facility Identification Number 8835, RN101783884; LOCATION: Brookeland, Sabine County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,850; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: Continental Cabinets Manufacturing, Inc.; DOCKET NUMBER: 2004-1361-AIR-E; IDENTIFIER: Air Account Number DB0621J, RN100221753; LOCATION: Lancaster, Dallas County, Texas; TYPE OF FACILITY: cabinet refinishing plant; RULE VIOLATED: 30 TAC §122.145(2)(C) and §122.146(2) and THSC, §382.085(b), by failing to submit the annual compliance certification and the semiannual deviation report; PENALTY: $1,540; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Steve Janssen dba Country Convenience; DOCKET NUMBER: 2004-1342-PWS-E; IDENTIFIER: Public Water Supply Number 1700627, RN101251593; LOCATION: Magnolia, Montgomery County, Texas; TYPE OF FACILITY: transient non-community system; RULE VIOLATED: 30 TAC §290.109(c)(1)(A), (2)(A), and (3)(A), and THSC, §341.033(d), by failing to take routine monthly bacteriological samples, by failing to collect and submit the proper number of additional routine bacteriological samples, and by failing to collect and submit repeat bacteriological samples; 30 TAC §290.122, by failing to provide public notification for the microbial monitoring violations; and 30 TAC §290.51(a)(3) and the Code, §5.702(a), by failing to pay public health service fees; PENALTY: $1,450; ENFORCEMENT COORDINATOR: Mauricio Olaya, (915) 834-4949; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Frazier & Frazier Industries, Inc.; DOCKET NUMBER: 2004-1985-AIR-E; IDENTIFIER: Air Account Number LI0010F, RN100835446; LOCATION: Coolidge, Limestone County, Texas; TYPE OF FACILITY: iron foundry plant; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to prevent an off-property nuisance condition; and 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to report an emissions event; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: Kenneth Keith Goins, Jr.; DOCKET NUMBER: 2004-1752-MLM-E; IDENTIFIER: Municipal Solid Waste Unauthorized Site Number 455100043, RN104379789; LOCATION: Silsbee, Hardin County, Texas; TYPE OF FACILITY: unauthorized municipal waste site; RULE VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to meet the exception for disposal fires; and 30 TAC §330.4(b), by failing to dispose of municipal waste at an authorized facility; PENALTY: $1,000; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: HCFM, Inc. dba Hill Country Food Mart; DOCKET NUMBER: 2004-1500-PST-E; IDENTIFIER: PST Facility Identification Number 10966, RN101499143; LOCATION: Burnet, Burnet County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; 30 TAC §334.50(a)(1)(A) and (b)(2)(A)(i)(III), by failing to provide a release detection method to detect a release from any portion of the underground storage tank (UST) system, by failing to monitor the piping of the UST system and by failing to conduct the annual performance test; 30 TAC §334.48(c), by failing to conduct inventory control for all USTs; and 30 TAC §334.8(c)(4)(C) and (5)(A)(i) and the Code, §26.3467(a), by failing to submit a new UST registration and self-certification form and by failing to make available to any common carrier a valid delivery certificate; PENALTY: $7,560; ENFORCEMENT COORDINATOR: Chad Blevins, (512) 239-6017; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(10) COMPANY: Liquid Environmental Solutions of Texas, L.P.; DOCKET NUMBER: 2004-1580-AIR-E; IDENTIFIER: Air Account Number DB1564M, RN103002713; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: grease trap waste processing; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to prevent a nuisance condition; and 30 TAC §312.9 and §330.32 and the Code, §5.702, by failing to pay outstanding waste management sludge fees; PENALTY: $1,120; ENFORCEMENT COORDINATOR: Kensley Greuter, (512) 239-2520; REGIONAL

OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Metro Petroleum Inc.; DOCKET NUMBER: 2004-1749-PST-E; IDENTIFIER: RN104420500; LOCATION: Carrollton, Denton County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to have a valid, current delivery certificate; PENALTY: $6,840; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Momin & Sons Incorporated dba Hearne Food Store; DOCKET NUMBER: 2004-1658-PST-E; IDENTIFIER: PST Facility Identification Number 14909, RN101665388; LOCATION: Hearne, Robertson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,850; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 238-2134; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(13) COMPANY: Mona Enterprises, Inc. dba Shop In Market; DOCKET NUMBER: 2004-1735-PST-E; IDENTIFIER: PST Facility Identification Number 27339, RN101782282; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Sari M. Yousef dba Savannah Food & Deli; DOCKET NUMBER: 2004-0692-PST-E; IDENTIFIER: PST Facility Identification Number 12656; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system (VRS); 30 TAC §115.246(1), (4), and (5), and THSC, §382.085(b), by failing to maintain a copy of the current Stage II California Air Resource Board Executive Order on site and available for review, by failing to maintain proof of attendance and completion of the Stage II VRS training, and by failing to maintain a record of the results of testing conducted at the station; 30 TAC §334.45(c)(3)(A), by failing to install and maintain a secure anchor at the base of each Underwriters Laboratories-listed emergency shutoff valve; 30 TAC §334.8(c)(5)(C), by failing to permanently label all tank fill pipes; 30 TAC §334.7(d)(3), by failing to amend, update, or change the registration information to reflect the new owner/operator; 30 TAC §334.50(b)(1)(A) and (d)(1)(B)(ii), and the Code, §26.3475(c), by failing to ensure that all USTs are monitored for releases and by failing to reconcile inventory control records on a monthly basis; 30 TAC §334.49(a), (c)(2)(C) and (4), and the Code, §26.3475(d), by failing to equip the UST system with corrosion protection, by failing to check the cathodic protection rectifier, and by failing to inspect and test the corrosion protection systems; PENALTY: $11,520; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: R. J. Smelley Company, Inc. dba R. J. Smelley Dairy; DOCKET NUMBER: 2004-1331-AGR-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 0002422000, RN101536886; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: confined animal feeding operation; RULE VIOLATED: 30 TAC §321.31(a), TPDES Permit Number 0002422000, and the Code, §26.121(a), by failing to prevent an unauthorized discharge of wastewater; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Henry Lim dba Sunshine Grocery; DOCKET NUMBER: 2004-1852-PST-E; IDENTIFIER: PST Facility Identification Number 56433, RN101856342; LOCATION: Caney City, Henderson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to equip the UST system with corrosion protection; 30 TAC §334.50(b)(1)(A), (2)(A)(i) and (G), and the Code, §26.3475(a), by failing to have a release detection method capable of detecting releases, by failing to equip each separate pressurized line with an automatic line leak detector, and by failing to provide proper release detection; and 30 TAC §334.48(c), by failing to implement an effective manual or automatic inventory control procedure; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(17) COMPANY: Teppco Crude Oil, LLC; DOCKET NUMBER: 2004-0947-AIR-E; IDENTIFIER: Air Account Number GB0006H, RN102560182; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: crude oil terminal and storage; RULE VIOLATED: 30 TAC §115.112(a)(2)(E) and THSC, §382.085(b), by failing to identify and repair a torn seal sock and the primary seal on an external floating roof tank; 30 TAC §122.145(2) and §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification and by failing to include unauthorized emissions on the semi-annual deviation report; and 30 TAC §101.201(b)(10) and THSC, §382.085(b), by failing to include a feasible cause or the emissions event; PENALTY: $3,959; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2004-0976-MWD-E; IDENTIFIER: TPDES Permit Number 12024-001, RN102075918; LOCATION: Victoria, Victoria County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 12024-001, and the Code, §26.121(a), by failing to comply with effluent limits; and 30 TAC §§30.349, 30.399, 290.36, 305.53, 334.22(a), and 334.128(a), and the Code, §5.702, by failing to pay fees associated with conference/seminar, postage, operator certification, water quality permit application, water works operator certification, and aboveground and UST registrations; PENALTY: $7,400; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(19) COMPANY: Waterside Corporation dba Bayview Marina; DOCKET NUMBER: 2004-1849-PST-E; IDENTIFIER: PST Facility Identification Number 64729, RN102434081; LOCATION: Rowlett, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $950; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200500795
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 22, 2005

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Office of the Governor

Request for Grant Applications (RFA) for the Crime Stoppers Assistance Fund Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications to provide grants to certified Crime Stoppers organizations in Texas during the state fiscal year 2006 grant cycle.

Purpose: The purpose of the Crime Stoppers Assistance funding is to enhance and assist the community's efforts in solving serious crimes.

Available Funding: State funding is authorized for these projects under Article 102.013, Texas Code of Criminal Procedure, which designates CJD as the funds administering agency. The source of funding is a biennial appropriation by the Texas Legislature from funds collected through court costs and fees.

Funding Levels:

(1) Minimum grant award - $1,500.

(2) Maximum grant award - $15,000.

Standards: Grantees will comply with the standards applicable to this funding source cited in the Texas Administrative Code, Title 1, Part 1, Chapter 3.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) admission fees or tickets to any amusement park, recreational activity or sporting event;

(2) attorney fees;

(3) construction;

(4) contributions;

(5) extended equipment services arrangements;

(6) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(7) fundraising;

(8) legal services for adult offenders;

(9) lobbying;

(10) medical services;

(11) membership dues for individuals;

(12) office space rental;

(13) overtime pay;

(14) promotional advertisements of any kind;

(15) promotional gifts;

(16) proselytizing or sectarian worship;

(17) purchase or improvement of real estate;

(18) rewards, except for statewide projects;

(19) subscription fees;

(20) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training;

(21) vehicles or equipment for government agencies that are for general agency use;

(22) weapons, ammunition, explosives or military vehicles;

(23) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (e.g., supplanting); and

(24) any portion of the salary of, or any other compensation for an elected or appointed government official, except in the case of a juvenile court or drug court.

Eligible Applicants: Eligible applicants are Crime Stoppers organizations as defined by Chapter 414.001 of the Texas Government Code that are certified by the Crime Stoppers Advisory Council to receive repayments under Articles 37.073 and 42,152 of the Texas Code of Criminal Procedure, or payments from a defendant under Article 42.12 of the Texas Code of Criminal Procedure. Section 414.001 of the Texas Governments Code defines a "crime stoppers organization" as follows:

(1) a private, nonprofit organization that is operated on a local or statewide level, that accepts and expends donations for rewards to persons who report to the organization information about criminal activity and that forwards the information to the appropriate law enforcement agency; or

(2) a public organization that is operated on a local or statewide level, that pays rewards to persons who report to the organization information about criminal activity, and that forwards the information to the appropriate law enforcement agency.

Requirements: Crime Stoppers programs must focus on reducing crime through the operation of a hotline that receives information about criminal activities and fugitives from members of the public, guarantees anonymity, forwards the information to the appropriate law enforcement agency, and pays rewards.

Project Period: Grant-funded projects must begin on or after September 1, 2005, and will expire on or before August 31, 2006.

Application Process: Eligible applicants can download an application kit from the Office of the Governor's web site at http://www.governor.state.tx.us/divisions/cjd/formsapps/view.

Closing Date for Receipt of Applications: Submit all applications electronically to the Office of the Governor, Criminal Justice Division via email at cjdapps@governor.state.tx.us on or before May 2, 2005.

Selection Process: Applications are reviewed by CJD staff members or a review group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact person: If additional information is needed, contact Betty Bosarge at bbosarge@governor.state.tx.us or (512) 463-1919.

TRD-200500828
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: February 23, 2005

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

Single Family Mortgage Revenue Refunding Bonds

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at 507 Sabine Street, Room 435, Austin, Texas, at 12:00 noon on April 4,

2005, with respect to an issue of tax-exempt single family mortgage revenue bonds and tax-exempt single family mortgage revenue refunding bonds (collectively, the "Bonds") to be issued in an aggregate face amount of not more than $125,000,000.

A portion of the proceeds of the Bonds will be used to refund all or a portion of the Department's outstanding Single Family Mortgage Revenue Bonds, 2004 Series F, thereby making funds available to assist in making single family residential mortgage loans. A portion of the proceeds of the Bonds will be used to refund a portion of the Department's outstanding Single Family Mortgage Revenue Refunding Tax-Exempt Commercial Paper Notes, Series A (AMT) thereby making funds available to make single family residential mortgage loans. All of such single family residential mortgage loans will be made to eligible very low, low and moderate income first-time home buyers for the purchase of homes located within the State of Texas, and are expected to be in an aggregate estimated amount of $125,000,000.

For purposes of the Department's mortgage loan finance programs, eligible borrowers generally will include individuals and families whose family income does not exceed, (i) for families of three or more persons, 115% (140% in certain targeted areas) of the area median income, and (ii) for individuals and families of two persons, 100% (120% in certain targeted areas) of the area median income. In addition, substantially all of the borrowers under the programs will be required to be persons who have not owned a principal residence during the preceding three years. Further, residences financed with loans under the programs will be subject to certain other limitations, including limits on the purchase prices of the residences being acquired. All the limitations described in this paragraph are subject to revision and adjustment from time to time by the Department pursuant to applicable federal law and Department policy.

All interested parties are invited to attend such public hearing to express their views with respect to the Department's mortgage loan finance program and the issuance of the Bonds. Questions or requests for additional information may be directed to Matt Pogor at the Texas Department of Housing and Community Affairs, 507 Sabine Street, 9th Floor, Austin, Texas 78701; (512) 475-3987.

Persons who intend to appear at the hearing and express their views are invited to contact Matt Pogor in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Matt Pogor prior to the date scheduled for the hearing.

TDHCA WEBSITE: www.tdhca.state.tx.us/hf.htm

Individuals who require auxiliary aids for the hearing should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943, or Relay Texas at 1-800-735-2989 at least two days before the hearing so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for the hearing should contact Matt Pogor at (512) 475-3987 at least three days before the hearing so that appropriate arrangements can be made. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

This notice is published and the above-described hearing is to be held in satisfaction of the requirements of State law and Section 147(f) of the Internal Revenue Code of 1986, as amended, regarding the public approval prerequisite to the exclusion from gross income for federal income tax purposes of interest on the Bonds.

TRD-200500827

Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: February 23, 2005

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by DORAL SERVICES OF TEXAS, INC., a domestic Health Maintenance Organization (HMO). The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701, within 20 days after this notice is published in the *Texas Register*.

TRD-200500822
Brenda Caldwell
Special Regulatory Counsel
Texas Department of Insurance
Filed: February 23, 2005

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Notice of Public Hearing

The Commissioner of Insurance has rescheduled to Wednesday, March 16, 2005, at 9:30 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, a public hearing under Docket 2611, originally scheduled for February 28, 2005, to consider the Texas Automobile Insurance Plan Association's (TAIPA) 2005 Private Passenger rate filing pursuant to the Insurance Code, Article 21.81.

Notice of the originally scheduled hearing was published in the February 18, 2005, issue of the *Texas Register* (30 TexReg 931).

Copies of TAIPA's proposed private passenger rate filing are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, TX 78701 during regular business hours. For further information or to request copies of the filing, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. A-0205-01).

Interested persons, including TAIPA, the Office of Public Insurance Council (OPIC), or any other interested person that desires to submit written comments, proposed changes to the filing, actuarial analyses, or other information should file the comments, proposed changes, actuarial analyses, or other information no later than seven days prior to the date of the hearing. All such submissions should be submitted to the Office of the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, TX 78714-9104. An additional copy of the comments should be submitted to Phil Presley, Chief Actuary, P.O. Box 149104, MC 105-5F, Austin, TX 78714-9104. Interested persons may also present oral comments related to the filing at the public hearing. TAIPA, the public insurance counsel, and any other interested person or entity that has submitted proposed changes or actuarial analyses may ask questions of any person testifying at the hearing.

This notification is made pursuant to the Insurance Code, Article 21.81, Subsection 5(f) which requires notification in the *Texas Register* of the proposed TAIPA private passenger auto rate filings. A hearing under Article 21.81, §5 is not a contested case hearing under Chapter 2001, Government Code.

TRD-200500778

Brenda Caldwell
Special Regulatory Counsel
Texas Department of Insurance
Filed: February 18, 2005

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2612 on March 22, 2005, at 10:00 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, in Austin, Texas, to consider a petition by the Texas Windstorm Insurance Association (TWIA) requesting approval of (i) reinsurers to provide per risk reinsurance coverage to TWIA policyholders and (ii) the payment to TWIA that may be included in the total premium charged by TWIA for per risk reinsured excess coverage, as authorized in the Insurance Code Article 21.49 §8E. Section 8E authorizes the TWIA to issue a policy of windstorm and hail insurance that includes coverage for an amount in excess of the maximum limit of liability which is approved by the Commissioner pursuant to the Insurance Code Article 21.49 §8D. The proposed per risk reinsurance program will enable TWIA policyholders to purchase coverage for an amount in excess of the maximum limits of liability currently available through TWIA. The additional windstorm and hail insurance coverage available through TWIA will be available to an individual risk up to the amount of reinsured excess coverage under the reinsured excess coverage program.

Under the Insurance Code Article 21.49 §8E(a), TWIA must obtain such reinsured excess coverage from reinsurers approved by the Commissioner. The Insurance Code Article 21.49 §8E(b) provides that the premium charged by TWIA for the excess coverage shall be equal to the amount of the reinsurance premium charged to TWIA by the reinsurers, plus any payment to TWIA that is approved by the Commissioner.

The reinsurers to provide per risk reinsurance coverage to TWIA policyholders and the payment to TWIA that may be included in the total premium charged by TWIA for per risk reinsured excess coverage under the proposed per risk reinsurance program will be effective as of January 1, 2005. The 2004 per risk reinsurance program was approved by the Commissioner in Commissioner's Order No. 04-0065; this program expired on December 31, 2004.

The hearing is held pursuant to the Insurance Code Article 21.49 §5A, which provides that the Commissioner, after notice and hearing, may issue any orders considered necessary to carry out the purposes of Article 21.49. Any person may appear to testify for or against the approval of the proposed per risk reinsurance program and the additional charge by TWIA.

Copies of TWIA's petition and proposed per risk reinsurance agreement are available for review in the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas, 78714-9104. To request copies of the petition and the proposed per risk reinsurance agreement, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Reference No. P-0205-02).

TRD-200500788
Brenda Caldwell
Special Regulatory Counsel
Texas Department of Insurance
Filed: February 18, 2005

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Texas Lottery Commission

Instant Game Number 541 "Bonus Break the Bank"

1.0 Name and Style of Game.

A. The name of Instant Game No. 541 is "BONUS BREAK THE BANK". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 541 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 541.

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, STACK OF BILLS SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $500,$1,000, $7,500 or $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. 541 - 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
STACK OF BILLS SYBMOL	WIN$
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$

$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. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 541 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize- A prize of $1,000, $7,500 or $75,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (541), 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: 541-0000001-001.

L. Pack - A pack of "BONUS BREAK THE BANK" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded 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.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "BONUS BREAK THE BANK" Instant Game No. 541 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 indicated for that number. If a player reveals a money stack play symbol the player wins prize indicated automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 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 will not have identical play data, spot for spot.

B. No duplicate non-winning Your Numbers on a ticket.

C. No duplicate Lucky Numbers on a ticket.

D. No more than four like 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 auto win 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.

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, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $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 risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "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 more than $600 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 Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 541. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 541 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	1,120,000	5.36
$10	400,000	15.00
$15	160,000	37.50
$20	80,000	75.00
$50	80,000	75.00
$100	15,000	400.00
$500	800	7,500.00
$1,000	150	40,000.00
$7,500	20	300,000.00
$75,000	8	750,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.23. 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. 541 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 541, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200500806
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 23, 2005

♦ ♦ ♦

Instant Game Number 542 "MONEY JAR"

1.0 Name and Style of Game.

A. The name of Instant Game No. 542 is "MONEY JAR". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 542 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 542.

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, DOLLAR BILL SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 or $1,000.

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. 542 - 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
DOLLAR BILL SYMBOL	AUTO
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 542 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

H. Mid-Tier Prize - A prize of $40.00 or $100.

I. High-Tier Prize- A prize of $1,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (542), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 250 within each pack. The format will be: 542-0000001-001.

L. Pack - A pack of "MONEY JAR" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 246 to 250 will be on the last page. A ticket will be folded over on both the front and back of the book so both ticket art and ticket backs are displayed in the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MONEY JAR" Instant Game No. 542 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 "MONEY JAR" Instant Game is determined once the latex on the ticket is scratched off to expose 12 (twelve) Play Symbols. If a player matches any Your Numbers play symbols to either Winning Number play symbol the player wins prize indicated for that number. If a player reveals a dollar bill symbol the player wins prize indicated 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 12 (twelve) 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 12 (twelve) 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 12 (twelve) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 12 (twelve) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the

Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical "spot for spot" play data.

B. No duplicate non-winning Your Numbers play symbols on a ticket.

C. No duplicate Winning Numbers play symbols on a ticket.

D. No duplicate non-winning prize symbols on a ticket.

E. Non-winning prize symbols will never be the same as the winning prize symbol(s).

F. No prize amount in a non-winning spot will correspond with the Your Number play symbol (i.e. 5 and $5).

G. The auto win symbol will never appear more than once on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "MONEY JAR" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $40.00 or $100 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 "MONEY JAR" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MONEY JAR" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MONEY JAR" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MONEY JAR" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players

whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 15,120,000 tickets in the Instant Game No. 542. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 542 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,753,920	8.62
$2	665,280	22.73
$4	423,360	35.71
$5	120,960	125.00
$10	90,720	166.67
$20	60,480	250.00
$40	28,350	533.33
$100	1,827	8,275.86
$1,000	252	60,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.81. 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. 542 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 542, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200500807
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 23, 2005

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Instant Game Number 545 "$30,000 Deal"

1.0 Name and Style of Game.

A. The name of Instant Game No. 545 is "$30,000 DEAL". The play style is "yours beats theirs with add up and auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 545 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 545.

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: 2, 3, 4, 5, 6, 7, 8, 9, 10, J, Q, K, A, JOKER SYMBOL, 14, 15, 16, 17, 18, 19, 20, $3.00, $6.00, $10.00, $15.00, $30.00, $50.00, $100, $500, $3,000 and $30,000.

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. 545 - 1.2D

PLAY SYMBOL	CAPTION
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
J	JCK
Q	QUN
K	KNG
A	ACE
JOKER SYMBOL	JKR
14	FRN
15	FTN
16	SXN
17	STN
18	ETN
19	NTN
20	TWY
$3.00	THREE$
$6.00	SIX$
$10.00	TEN$
$15.00	FIFTEEN
$30.00	THIRTY
$50.00	FIFTY
$100	ONE HUN
$500	FVE HUN
$3,000	THR THOU
$30,000	30 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 545 - 1.2E

CODE	PRIZE
THR	$3.00
SIX	$6.00
TEN	$10.00
FTN	$15.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $3.00, $6.00, $10.00 or $15.00.

H. Mid-Tier Prize - A prize of $30.00, $50.00, $100 or $500.

I. High-Tier Prize- A prize of $3,000 or $30,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (545), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 545-0000001-001.

L. Pack - A pack of "$30,000 DEAL" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Tickets 001 will shown on the front of the pack; the back of ticket 125 will be revealed on the back of the pack. Every other book will reverse i.e., the back of ticket 001 will be shown on the front of the pack and the front of ticket 125 will be shown on the back of the pack.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "$30,000 DEAL" Instant Game No. 545 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 "$30,000 DEAL" Instant Game is determined once the latex on the ticket is scratched off to expose 46 (forty-six) Play Symbols. If the total of any of YOUR HANDS play symbols beats the DEALER'S TOTAL, the player wins prize indicated for that HAND. If any of YOUR HANDS play symbols add up to "21" the player wins double the prize indicated for that HAND. If a player reveals a Joker play symbol the player wins $50.00 instantly. The play symbols "J", "Q", and "K" will have a point value of 10. The play symbol "A" will have a point value of 11. 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 46 (forty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 46 (forty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 46 (forty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 46 (forty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the

Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. Players can win up to fifteen (15) times.

C. Jack, Queen and King will have a point value of ten (10). Ace will have a point value of eleven (11).

D. There will be no ties between the DEALER'S TOTAL and any of the fifteen (15) YOUR HANDS totals.

E. The score of twenty-one (21) will never appear in the DEALER'S TOTAL.

F. All YOUR HANDS will consist of two (2) cards.

G. The DEALER'S TOTAL will consist of one (1) play spot.

H. No YOUR HANDS will consist of two (2) Aces.

I. No ticket will ever contain more than four (4) of the same card symbols, simulating a deck of cards.

J. The total of twenty-one (21) will be used according to the prize structure.

K. The Joker Symbol will never appear in a winning Your Hand that beats the Dealer's Total.

L. The Joker Symbol will only appear as an instant win, as per the prize structure.

M. The total of twenty-one (21) will only appear on winning tickets.

N. Tickets winning with the total of twenty-one (21) will win Double the prize shown for that hand.

O. Winning tickets will not contain more than one (1) Joker Symbol.

P. The Joker symbol will appear only on winning tickets.

Q. The Joker symbol will be used according to the prize structure.

R. Tickets that win with the Joker Symbol, will have a corresponding prize value of $50.

S. Non-winning tickets will never contain three (3) or more identical prize amounts.

T. Non-winning tickets will never contain the total of twenty-one (21) in the entire play area.

U. Non-winning tickets will never contain the Joker symbol in the entire play area.

2.3 Procedure for Claiming Prizes.

A. To claim a "$30,000 DEAL" Instant Game prize of $3.00, $6.00, $10.00, $15.00, $30.00, $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, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $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 "$30,000 DEAL" Instant Game prize of $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "$30,000 DEAL" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "$30,000 DEAL" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "$30,000 DEAL" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 545. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 545 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	516,000	11.63
$6	720,000	8.33
$10	48,000	125.00
$15	60,000	100.00
$30	35,000	171.43
$50	37,050	161.94
$100	12,500	480.00
$500	300	20,000.00
$3,000	60	100,000.00
$30,000	5	1,200,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.20. 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. 545 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 545, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200500808

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 23, 2005

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Instant Game Number 583 "Spicy Cash Tripler"

1.0 Name and Style of Game.

A. The name of Instant Game No. 583 is "SPICY CASH TRIPLER". The play style is "key number match with multiplier".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 583 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 583.

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, 3X SYMBOL, 9X SYMBOL, $1.00, $3.00, $6.00, $9.00, $10.00, $15.00, $18.00, $24.00, $30.00, $60.00, $90.00, $300, $3,300, $7,500 or $33,000.

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. 583 - 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
3X SYMBOL	WINX3
9X SYMBOL	WINX9
$1.00	ONE$
$3.00	THREE$
$6.00	SIX$
$9.00	NINE$

$10.00	TEN$
$15.00	FIFTN
$18.00	EGHTN
$24.00	TWY FOR
$30.00	THIRTY
$60.00	SIXTY
$90.00	NINTY
$300	THR HUND
$3,300	33 HUND
$33,000	33 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 583 - 1.2E

CODE	PRIZE
THR	$3.00
SIX	$6.00
NIN	$9.00
FTN	$15.00
EHT	$18.00
TFR	$24.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $3.00, $6.00, $9.00, $15.00, $18.00 or $24.00.

H. Mid-Tier Prize - A prize of $30.00, $60.00, $90.00 or $300.

I. High-Tier Prize- A prize of $3,000, $3,300 or $33,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (583), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 583-0000001-001.

L. Pack - A pack of "SPICY CASH TRIPLER" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be two (2) fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SPICY CASH TRIPLER" Instant Game No. 583 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 "SPICY CASH TRIPLER" Instant Game is determined once the latex on the ticket is scratched off to expose 33 (thirty-three) Play Symbols. If a player matches of YOUR NUMBERS play symbols to any SPICY CASH NUMBER play symbol the player wins prize indicated for that number. If player reveals 3X play symbol the player wins 3 (three) times the prize indicated for that number. If a player reveals 9X play symbol the player wins 9 (nine) times the prize indicated for that number. 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 33 (thirty-three) 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 33 (thirty-three) 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 33 (thirty-three) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 33 (thirty-three) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

C. No duplicate SPICY CASH NUMBERS on a ticket.

D. No more than three pair of duplicate non-winning prize symbols on a ticket.

E. Non-winning prize symbols will never be the same as the winning prize symbol(s).

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

G. The multiplier symbols will only appear on intended winning tickets as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "SPICY CASH TRIPLER" Instant Game prize of $3.00, $6.00, $9.00, $15.00, $18.00, $24.00, $30.00, $60.00, $90.00 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $60.00, $90.00 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SPICY CASH TRIPLER" Instant Game prize of $3,000, $3,300 or $33,000, 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 "SPICY CASH TRIPLER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim

is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SPICY CASH TRIPLER" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SPICY CASH TRIPLER" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 583. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 583 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	483,840	10.42
$6	322,560	15.63
$9	90,720	55.56
$15	30,240	166.67
$18	50,400	100.00
$24	40,320	125.00
$30	40,320	125.00
$60	16,800	300.00
$90	5,460	923.08
$300	1,176	4,285.71
$3,000	8	630,000.00
$3,300	8	630,000.00
$33,000	10	504,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.66. 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. 583 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 583, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200500809
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 23, 2005

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Instant Game Number 586 "Lucky Times 20"

1.0 Name and Style of Game.

A. The name of Instant Game No. 586 is "LUCKY TIMES 20". The play style is "match up with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 586 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 586.

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: $0.00, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $1,000 $5,000 or $50,000.

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. 586 - 1.2D

PLAY SYMBOL	CAPTION
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTEEN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUN
$1,000	ONE THOU
$5,000	FIV THOU
$50,000	50 THOU
$0.00	ZERO$

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 586 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $100.

I. High-Tier Prize- A prize of $1,000, $5,000 or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (586), 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: 586-0000001-001.

L. Pack - A pack of "LUCKY TIMES 20" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 001 will be shown on the front of the pack; the back of ticket 075 will be revealed on the back of the pack. Every other book will reverse (i.e.) the back of ticket 001 will be shown on the front of the pack and the front of ticket 075 will be shown on the back of the pack.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LUCKY TIMES 20" Instant Game No. 586 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 "LUCKY TIMES 20" Instant Game is determined once the latex on the ticket is scratched off to expose 61 (sixty-one) Play Symbols. If a player reveals two identical prize amounts in any one game, the player wins that prize amount. If a player reveals prize amount in the bonus play area, the player wins that prize amount automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 61 (sixty-one) 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 61 (sixty-one) 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 61 (sixty-one) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 61 (sixty-one) 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 within a book will not have identical patterns.

B. Prize Match Game: Winning Tickets can win up to twenty (20) times in this play area.

C. Prize Match Game: On winning tickets, no non-winning game will have the same three (3) prize amounts as another non-winning game, in the same order.

D. Prize Match Game: No winning ticket will have more than two (2) of the same prize amounts within the same game.

E. Prize Match Game: Except where required by the prize structure, there will never be more than two (2) games with the same three (3) prize amounts and these games will not have the prizes in the same positions (winning or non-winning).

F. Prize Match Game: Tickets winning multiple prizes will utilize all games (Games 1 -20) to win prize combinations so that the same prize amount is not always won in the same game (i.e. $5 x 2 will not always win in the same games).

G. Prize Match Game: On non-winning tickets, there will never be two (2) or more like prize amounts in any one (1) game.

H. Prize Match Game: On non-winning tickets, there will never be two (2) like prize amounts in the two (2) games directly adjacent to one another horizontally (e.g. the prize of $5 will never appear in both Game 1 and Game 11).

I. Bonus Area: Players can win once in this play area.

J. Bonus Area: Winning tickets in this play area will reveal a prize amount.

K. Bonus Area: Winning tickets in this play area will win only the $5, $10, $15, $20, $50, and $100 prize levels.

L. Bonus Area: Tickets that do not win in the Bonus Area will display the non-winning play symbol: $0.00.

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCKY TIMES 20" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $100 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 "LUCKY TIMES 20" Instant Game prize of $1,000, $5,000 or $50,000, 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 "LUCKY TIMES 20" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LUCKY TIMES 20" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LUCKY TIMES 20" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,960,000 tickets in the Instant Game No. 586. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 586 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5.00	554,400	7.14
$10.00	448,800	8.82
$15.00	79,200	50.00
$20.00	52,800	75.00
$50.00	51,480	76.92
$100	10,560	375.00
$1,000	99	40,000.00
$5,000	16	247,500.00
$50,000	3	1,320,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.31. 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. 586 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 586, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200500810
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
February 23, 2005

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Manufactured Housing Division

Notice of Administrative Hearing

Wednesday, March 23, 2005, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor,

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs vs. Abel Narezo DBA Abel's Wholesale Homes AKA Abel's Mobile Home SVC, Inc., to hear alleged violations of Sections 8(d) (currently found under Section 1201.451 of the Occupations Code), by failing to deliver a good and marketable title to a consumer after receiving written notice, as required by (Section 7(j)(3)) currently found under Section 1201.551(a)(3) (requirement to provide title to consumer) and (Section 8(d)) currently found under Section 1201.451 (requirement of seller to provide a good and marketable title) of the Act. SOAH 332-05-3397. Department MHD2004000828-DT.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, james.hicks@tdhca.state.tx.us

TRD-200500812
Timothy K. Irvine
Executive Director
Manufactured Housing Division
Filed: February 23, 2005

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Public Utility Commission of Texas

Notice of Application for Amendment to Certificate of Operating Authority

On February 17, 2005, Sprint Telecommunications Company L.P. filed an application with the Public Utility Commission of Texas (commission) to amend its certificate of operating authority (COA) granted in COA Certificate Number 50006. Applicant intends to expand its geographic area to include the entire State of Texas.

The Application: Application of Sprint Telecommunications Company L.P. for an Amendment to its Certificate of Operating Authority, Docket Number 30773.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 9, 2005. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 30773.

TRD-200500818

Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 23, 2005

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider Pursuant to P.U.C. Substantive Rule §26.418

Notice is given to the public of an application filed with the Public Utility Commission of Texas on February 16, 2005, for designation as an eligible telecommunications carrier (ETC) and eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.418, and P.U.C. Substantive Rule §26.417.

Docket Title and Number: Application of DialToneServices, L.P. for Designation as an Eligible Telecommunications Carrier and an Eligible Telecommunications Provider in Areas Served by SBC, Verizon and Uncertificated Areas Throughout Texas. Docket Number 30765.

The Application: The company is seeking ETC and ETP designation as a competitive federal ETC and ETP for purposes of qualifying to receive federal universal service support.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 18, 2005. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 30765.

TRD-200500794
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2005

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 14, 2005, for a service provider certificate of operating authority (SPCOA), pursuant to Public Utility Regulatory Act (PURA) §§54.151 - 54.156. A summary of the application follows.

Docket Title and Number: Application of CommPartners, LLC, doing business as CP Telco, LLC for a Service Provider Certificate of Operating Authority, Docket Number 30757 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, T1-Private Line, and long distance services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 9, 2005. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 30757.

TRD-200500744
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 16, 2005

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing on February 16, 2005, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214.

Docket Title and Number: Application of Central Telephone Company of Texas, Incorporated, doing business as Sprint, for Approval of LRIC Study to Introduce Non-Listed Number Service Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 30766.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 30766. Written comments or recommendations should be filed no later than forty-five days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 30766.

TRD-200500793
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2005

♦ ♦ ♦

Request for Comments Relating to Amendments to PUC Substantive Rule §25.472(b)(3) Regarding Privacy of Customer Information

The Public Utility Commission of Texas (commission) has initiated Project Number 30769 to amend PUC Substantive Rule §25.472(b)(3) regarding Privacy of Customer Information. The commission seeks comments from interested parties in response to questions regarding the following rule language: "For industrial and commercial customers, the TDU or REP shall not release any information of a prior occupant of the premise, if a prior occupant has designated the information as competitively sensitive."

To date, the commission is not aware of any industrial or commercial customer designating its historical consumption information as competitively sensitive. Historical usage can be requested manually through a Letter of Authorization, or systematically through a switch, move- in or *ad hoc* historical usage transaction request. Because the current systems for the electronic transfer of information among Retail Electric Providers (REPs), Transmission Distribution Utilities (TDUs) and the Electric Reliability Council of Texas, Incorporated (ERCOT) do not include means to relay the competitively sensitive designation nor block the automated disclosure of historical usage data if it is requested, companies have very limited abilities to prevent disclosure of historical usage information, even if an industrial or commercial customer designates its historical usage data as competitively sensitive. To create routines that would ensure that a non-disclosure request would

be honored, ERCOT, REPs and TDUs would have to revise the electronic transactions and back-office systems. This work is estimated to cost approximately $100,000 to $500,000 for ERCOT alone.

In the interest of determining whether the existing rule language is necessary or warrants modification, the commission poses the following questions:

1. Does the Public Utility Regulatory Act require a non-disclosure provision for historical usage data?

2. Could any requirement for non-disclosure be implemented by other means than the existing rule? For example, could disclosure of historical information by a TDU to a REP be permitted, where the REP has been authorized to receive the data, but any further disclosure by the REP be prohibited?

3. Does the benefit of implementing controls in the electronic transaction system to protect "competitively sensitive" information outweigh the cost of implementation?

4. If additional measures to protect "competitively sensitive" information are necessary, are there other methods that would provide for protection of this information at a lower cost?

Responses to the questions may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. All comments should refer to Project Number 30769. Comments must be received by 3:00 p.m. on Monday, April 4, 2005. Reply comments must be received by Monday, April 18, 2005.

TRD-200500799
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2005

♦ ♦ ♦

San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct the South Texas Medical Center Microsimulation Model Expansion project.

A copy of the Request for Proposals (RFP) may be requested by downloading the RFP and attachments from the MPO's website at www.sametroplan.org or calling Jeanne Geiger, Deputy Director, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, April 1, 2005 at the MPO office:

Joanne Walsh, Director

San Antonio-Bexar County Metropolitan Planning Organization

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Policy Board based on the recommendation of the project's oversight committee. The South Texas Medical Center Microsimulation Model Expansion project oversight committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $250,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200500803
Jeanne Geiger
Deputy Director
San Antonio-Bexar County Metropolitan Planning Organization
Filed: February 23, 2005

♦ ♦ ♦

Request for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct the Traffic Signal Re-timing Study III.

A copy of the Request for Proposals (RFP) may be requested by downloading the RFP and attachments from the MPO's website at www.sametroplan.org or calling Jeanne Geiger, Deputy Director, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, April 1, 2005 at the MPO office:

Joanne Walsh, Director

San Antonio-Bexar County Metropolitan Planning Organization

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Policy Board based on the recommendation of the project's oversight committee. The Traffic Signal Re-timing Study III oversight committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $100,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200500804
Jeanne Geiger
Deputy Director
San Antonio-Bexar County Metropolitan Planning Organization
Filed: February 23, 2005

♦ ♦ ♦

Texas Department of Transportation

Request for Proposal for Aviation Engineering Services

The City of Stephenville, through its agent, the Texas Department of Transportation (TxDOT), intends to engage an Aviation Professional Engineering Firm for services pursuant to Subchapter A, Chapter 2254 of the Government Code. TxDOT, Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: City of Stephenville, Clark Field Municipal Airport; TxDOT CSJ No. 0502STVLE; Scope: Provide engineering/design services for site development and associated appurtenances for pre-engineered metal aircraft hangar building system, and for expansion of the existing apron, with associated utility relocations and minor drainage improvements at the Clark Field Airport.

The DBE goal is set at 12%. TxDOT Project Manager is Steve Roth.

To assist in your proposal preparation the most recent Airport Layout Plan and 5010 drawing and project narrative are available online at www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm by selecting "Clark Field Municipal Airport".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number 1-800-68-PILOT (74568). The form may be e-mailed by request or downloaded from the TxDOT web site, URL

address http://www.dot.state.tx.us/avn/avn550.doc. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

(Attention: To ensure utilization of the latest version of Form 550, firms are encouraged to download Form 550 from the TxDOT website as addressed above. Utilization of Form 550 from a previous download may not be the exact same format. Form 550 is an MS Word Template.)

Four completed, unfolded copies of Form AVN 550 must be postmarked by U. S. Mail by midnight March 18, 2005 (CST). Mailing address: TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483. Overnight delivery must be received by 4:00 p.m. (CST) on March 21, 2005; overnight address: TxDOT, Aviation Division, 200 E. Riverside Drive, Austin, Texas, 78704. Hand delivery must be received by 4:00 p.m. March 21, 2005 (CST); hand delivery address: 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704. Electronic facsimiles or forms sent by e-mail will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of local government members.

The final selection by the sponsor's committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at www.dot.state.tx.us/business/avnconsultinfo.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems it necessary. In such case, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager, or Steve Roth, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-200500790
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: February 22, 2005

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, §6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

City of El Paso, 1154 Hawkins Blvd., El Paso, Texas 79925, received December 14, 2004, application for financial assistance in the amount of $10,000,000 from the Clean Water State Revolving Fund.

Fort Hancock Water Control and Improvement District, 801 North Knox Avenue, Fort Hancock, Texas 79839, received November 2, 2004, application for financial assistance in the amount of $616,000 consisting of a $560,000 grant from the Small Community Hardship Program and a $56,000 loan from the Texas Water Development Funds.

Porter Water Supply Corporation, 22162 Water Well Road, Porter, Texas 77365-5380, received January 31, 2005, application for additional financial assistance in the amount of $500,000 from the Texas Water Development Funds.

City of Roma, 77 Convent Street, Roma, Texas 78584, received February 17, 2005, application for additional financial assistance in the amount of $8,339,675 grant/loan from the Economically Distressed Areas Account of the Texas Water Development Funds.

Brooks County, P.O. Box 515, Falfurrias, Texas 78355, received December 16, 2004, application for financial assistance in an amount not to exceed $75,000 from the Research and Planning Fund.

City of Cibolo, 200 South Main, Cibolo, Texas 78108, received December 16, 2004, application for financial assistance in an amount not to exceed $60,000 from the Research and Planning Fund.

City of Fort Worth - Lebow Creek, 1000 Throckmorton Street, Fort Worth, Texas 79102-6311, received December 16, 2004, application for financial assistance in an amount not to exceed $107,500 from the Research and Planning Fund.

City of Fort Worth - Zoo Creek, 1000 Throckmorton Street, Fort Worth, Texas 79102-6311, received December 16, 2004, application for financial assistance in an amount not to exceed $157,000 from the Research and Planning Fund.

City of Friendswood, 10 South Friendswood Drive, Friendswood, Texas 77546-4856, received December 16, 2004, application for financial assistance in an amount not to exceed $175,000 from the Research and Planning Fund.

City of Pasadena, 901 Curtis, Suite 31, Pasadena, Texas 77502, received December 16, 2004, application for financial assistance in an amount not to exceed $201,000 from the Research and Planning Fund.

City of San Marcos, 630 East Hopkins Street, San Marcos, Texas 78666, received December 16, 2004, application for financial assistance in an amount not to exceed $200,000 from the Research and Planning Fund.

City of Taylor, 400 Porter Street, Taylor, Texas 76574, received December 16, 2004, application for financial assistance in an amount not to exceed $100,000 from the Research and Planning Fund.

Upper Brush Creek Water Control and Improvement District c/o Sheets & Crossfield, P.C., 309 East Main Street, Round Rock, Texas 78664-5246, received December 16, 2004, application for financial assistance in an amount not to exceed $162,000 from the Research and Planning Fund.

TRD-200500829
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: February 23, 2005

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Texas Workers' Compensation Commission

Invitation to Apply to the Medical Advisory Committee (MAC)

The Texas Workers' Compensation Commission seeks to have a diverse representation on the MAC and invites qualified individuals from all regions of Texas to apply for openings on the MAC in accordance with the eligibility requirements of the *Procedures and Standards for the Medical Advisory Committee*. The Medical Review Division is currently accepting applications for the following Medical Advisory Committee representative vacancies:

Primary

*Public Health Care Facility

Alternate

*Public Health Care Facility

*Dentist

*Podiatrist

*Employer

*Employee

*General Public Representative 1

*General Public Representative 2

Commissioners for the Texas Workers' Compensation Commission appoint the Medical Advisory Committee members who are composed of 18 primary and 18 alternate members representing health care providers, employees, employers, insurance carriers, and the general public. Primary members are required to attend all Medical Advisory Committee meetings, subcommittee meetings, and work group meetings to which they are appointed. The alternate member may attend all meetings, however during a primary member's absence, the alternate member must attend meetings to which the primary member is appointed. Requirements and responsibilities of members are established in the Procedures and Standards for the Medical Advisory Committee as adopted by the Commission.

The Medical Advisory Committee meetings must be held at least quarterly each fiscal year during regular Commission working hours. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings. Voluntary service on the Medical Advisory Committee is greatly appreciated by the TWCC Commissioners and the TWCC Staff.

The purpose and task of the Medical Advisory Committee, which includes advising the Commission's Medical Review Division on the development and administration of medical policies, rules and guidelines, are outlined in the Texas Workers' Compensation Act, §413.005.

Applications and other relevant Medical Advisory Committee information may be viewed and downloaded from the Commission's website at *http://www.twcc.state.tx.us*. Click on 'Commission Meetings', then 'Medical Advisory Committee'. Applications may also be obtained by calling Jane McChesney, MAC Coordinator, at 512-804-4855 or Ruth Richardson, Manager of Monitoring, Analysis and Education, Medical Review Division at 512-804-4850. .

The qualifications as well as the terms of appointment for all positions are listed in the Procedures and Standards for the Medical Advisory Committee. These Procedures and Standards are as follows:

LEGAL AUTHORITY The Medical Advisory Committee for the Texas Workers' Compensation Commission, Medical Review Division is established under the Texas Workers' Compensation Act, (the Act) §413.005.

PURPOSE AND ROLE The purpose of the Medical Advisory Committee (MAC) is to bring together representatives of health care specialties and representatives of labor, business, insurance and the general public to advise the Medical Review Division in developing and administering the medical policies, fee guidelines, and the utilization guidelines established under §413.011 of the Act.

COMPOSITION Membership. The composition of the committee is governed by the Act, as it may be amended. Members of the committee are appointed by the Commissioners and must be knowledgeable and qualified regarding work-related injuries and diseases.

Members of the committee shall represent specific health care provider groups and other groups or interests as required by the Act, as it may be amended. As of September 1, 2001, these members include a public health care facility, a private health care facility, a doctor of medicine, a doctor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, and an acupuncturist. Appointees must have at least six (6) years of professional experience in the medical profession they are representing and engage in an active practice in their field.

The Commissioners shall also appoint the other members of the committee as required by the Act, as it may be amended. An insurance carrier representative may be employed by: an insurance company; a certified self-insurer for workers' compensation insurance; or a governmental entity that self-insures, either individually or collectively. An insurance carrier member may be a medical director for the carrier but may not be a utilization review agent or a third party administrator for the carrier.

A health care provider member, or a business the member is associated with, may not derive more than 40% of its revenues from workers compensation patients. This fact must be certified in their application to the MAC.

The representative of employers, representative of employees, and representatives of the general public shall not hold a license in the health care field and may not derive their income directly from the provision of health care services.

The Commissioners may appoint one alternate representative for each primary member appointed to the MAC, each of whom shall meet the qualifications of an appointed member.

Terms of Appointment: Members serve at the pleasure of the Commissioners, and individuals are required to submit the appropriate application form and documents for the position. The term of appointment for any primary or alternate member will be two years, except for unusual circumstances (such as a resignation, abandonment or removal from the position prior to the termination date) or unless otherwise directed by the Commissioners. A member may serve a maximum of two terms as a primary, alternate or a combination of primary and alternate member. Terms of appointment will terminate August 31 of the second year following appointment to the position, except for those positions that were initially created with a three-year term. For those members who are appointed to serve a part of a term that lasts six (6) months or less, this partial appointment will not count as a full term.

Abandonment will be deemed to occur if any primary member is absent from more than two (2) consecutive meetings without an excuse accepted by the Medical Review Division Director. Abandonment will be deemed to occur if any alternate member is absent from more than two (2) consecutive meetings which the alternate is required to attend because of the primary member's absence without an excuse accepted by the Medical Review Division Director.

The Commission will stagger the August 31st end dates of the terms of appointment between odd and even numbered years to provide sufficient continuity on the MAC.

In the case of a vacancy, the Commissioners will appoint an individual who meets the qualifications for the position to fill the vacancy. The Commissioners may re-appoint the same individual to fill either a primary or alternate position as long as the term limit is not exceeded. Due to the absence of other qualified, acceptable candidates, the Commissioners may grant an exception to its membership criteria, which are not required by statute.

RESPONSIBILITY OF MAC MEMBERS Primary Members. Make recommendations on medical issues as required by the Medical Review Division.

Attend the MAC meetings, subcommittee meetings, and work group meetings to which they are appointed.

Ensure attendance by the alternate member at meetings when the primary member cannot attend.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies.

Alternate Members. Attend the MAC meetings, subcommittee meetings, and work group meetings to which the primary member is appointed during the primary member's absence.

Maintain knowledge of MAC proceedings.

Make recommendations on medical issues as requested by the Medical Review Division when the primary member is absent at a MAC meeting.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies when the primary member is absent from a MAC meeting.

Committee Officers. The TWCC Commissioners designate the chairman of the MAC. The MAC will elect a vice chairman. A member shall be nominated and elected as vice chairman when he/she receives a majority of the votes from the membership in attendance at a meeting at which nine (9) or more primary or alternate members are present.

Responsibilities of the Chairman: Preside at MAC meetings and ensure the orderly and efficient consideration of matters requested by the Medical Review Division; prior to meetings, confer with the Medical Review Division Director, and when appropriate, the TWCC Executive Director to receive information and coordinate:

a. Preparation of a suitable agenda.

b. Planning MAC activities.

c. Establishing meeting dates and calling meetings.

d. Establishing subcommittees.

e. Recommending MAC members to serve on subcommittees.

If requested by the Commission, appear before the Commissioners to report on MAC meetings.

COMMITTEE SUPPORT STAFF The Director of Medical Review will provide coordination and reasonable support for all MAC activities. In addition, the Director will serve as a liaison between the MAC and the Medical Review Division staff of TWCC, and other Commission staff if necessary.

The Medical Review Director will coordinate and provide direction for the following activities of the MAC and its subcommittees and work groups:

Preparing agenda and support materials for each meeting.

Preparing and distributing information and materials for MAC use.

Maintaining MAC records.

Preparing minutes of meetings.

Arranging meetings and meeting sites.

Maintaining tracking reports of actions taken and issues addressed by the MAC.

Maintaining attendance records.

SUBCOMMITTEES The chairman shall appoint the members of a subcommittee from the membership of the MAC. If other expertise is needed to support subcommittees, the Commissioners or the Director of Medical Review may appoint appropriate individuals.

WORK GROUPS When deemed necessary by the Director of Medical Review or the Commissioners, work groups will be formed by the Director. At least one member of the work group must also be a member of the MAC.

WORK PRODUCT No member of the MAC, a subcommittee, or a work group may claim or is entitled to an intellectual property right in work performed by the MAC, a subcommittee, or a work group.

MEETINGS Frequency of Meetings. Regular meetings of the MAC shall be held at least quarterly each fiscal year during regular Commission working hours.

CONDUCT AS A MAC MEMBER Special trust has been placed in members of the Medical Advisory Committee. Members act and serve on behalf of the disciplines and segments of the community they represent and provide valuable advice to the Medical Review Division and the Commission. Members, including alternate members, shall observe the following conduct code and will be required to sign a statement attesting to that intent.

Comportment Requirements for MAC Members:

Learn their duties and perform them in a responsible manner;

Conduct themselves at all times in a manner that promotes cooperation and effective discussion of issues among MAC members;

Accurately represent their affiliations and notify the MAC chairman and Medical Review Director of changes in their affiliation status;

Not use their memberships on the MAC: a. in advertising to promote themselves or their business. b. to gain financial advantage either for themselves or for those they represent; however, members may list MAC membership in their resumes;

Provide accurate information to the Medical Review Division and the Commission;

Consider the goals and standards of the workers' compensation system as a whole in advising the Commission;

Explain, in concise and understandable terms, their positions and/or recommendations together with any supporting facts and the sources of those facts;

Strive to attend all meetings and provide as much advance notice to the Texas Workers' Compensation Commission staff, attn: Medical Review Director, as soon as possible if they will not be able to attend a meeting; and

Conduct themselves in accordance with the MAC Procedures and Standards, the standards of conduct required by their profession, and the guidance provided by the Commissioners, Medical Review Division or other TWCC staff.

TRD-200500823
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: February 23, 2005

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 29 (2004) is cited as follows: 29 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 16, April 9, July 9, and October 8, 2004). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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